

A BIBLICAL PERSPECTIVE: ABANDONING RETRIBUTION AS A DOCTRINE FOR LEGAL PUNISHMENT

Carl David Ceder

I. Introduction

The Old Testament is filled with different mandates regarding punishment for certain acts and crimes, a great deal of which includes the penalty of death. Conversely, the New Testament somewhat disregards the Old Testament idea of punishment, in that it became secondary to Jesus' message of love and redemption. In this respect, both reward and punishment are seen as taking place in eternity, rather than in this life. How do we reconcile these differing views? What are the reasons for the sharp shifts in these fundamental concepts? Moreover, to what extent should our system of criminal law incorporate these biblical models of justice?

Part II of this article examines the current legal concepts underlying the theories and goals of punishment in the United States. Part III explores the possible rationales for relying on scriptural references as justification for punishment, and to a certain degree challenges the popular association of the Mosaic Law with harsh retribution. Part IV details the historical impact of incarceration, and analyzes different aspects of imprisonment in the modern American prison system. Finally, Part V will more closely examine the underlying philosophies and themes associated with secular forms of crime and punishment. Part V also further analyzes the rationale for using incarceration within our penal system, while also exploring possible alternatives to imprisonment.

Thesis

Prison is the primary form of punishment for those who violate the laws of society in the United

States.¹ Originally, prison served as place where a person was sent to rehabilitate themselves in preparation for their return to society.² Around the 1970's, however, the goal of rehabilitation was largely displaced by principles of retribution which correlated with a dramatic increase in the severity of prison sentences.³ Most Americans would agree that our country is founded on "Judeo-Christian" values, and a common source to defend the current trend of retributive ideology is under the Mosaic Law. However, a deeper purview into the teaching of both the Old and New Testament might indicate that punishment based strictly on retribution and/or incapacitation does not reflect either of these values. Therefore, our society would surely benefit evaluating the underlying rationale for why we so heavily rely on prison as the ultimate form of punishment.

II. Criminal Law

Two broad theories of punishment exist which guide our current criminal justice system: utilitarianism and retribution.⁴ These theories guide lawmakers in developing general principles of criminal responsibility.

Utilitarianism

From a utilitarian perspective, punishment exists to ensure the continuance of society and to deter people from committing crimes.⁵ The primary utilitarianism objective is to augment the total happiness of the community by excluding everything that subtracts from that happiness.⁶ There are three distinct forms of utilitarianism:

¹ Charles J. Harary, *Incarceration as a Modality of Punishment*, available at http://jlaw.com/Articles/ch_incarceration.htm (last visited March 15, 2007).

² Hannah T.S. Long, *The "Inequability" of Incarceration*, 31 COLUM. J.L. & SOC. PROBS. 321, 324-325 (1998).

³ Harary, *supra* note 1.

⁴ JOSHUA DRESSLER, CRIMINAL LAW 118 (5th edition 2005).

⁵ *Id.*; See also JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE (The University of Michigan Press 1966).

⁶ *Id.*

A. Deterrence

The theory of deterrence suggests that the pain inflicted upon a person who has committed a crime will dissuade the offender (and others) from repeating the crime.⁷ Deterrence hinges around the idea that punishment has to be appropriate, prompt, and inevitable.⁸ Deterrence protects the social order by sending a message to the public at large.⁹ An English judge once defined the standard long ago when he remarked, “Men are not hanged for stealing horses, but that horses may not be stolen.”¹⁰

The general theory of deterrence is further divided into two categories. General deterrence describes the effect that punishment has when it serves as a public example that deters people other than the initial offender from committing similar crimes.¹¹ General deterrence illustrates punishment delivered in order to send a message to everyone that crime doesn’t pay.¹² Specific deterrence describes the punishment of an individual designed to prevent that individual person from committing future crimes.¹³ This idea generates from the concept that it is impossible for an individual to commit another crime while they’re in prison.¹⁴ Both forms of deterrence as punishment methods are meant to discourage individuals from recidivating.¹⁵

B. Incapacitation

Specific deterrence is very similar to and often takes the form of the notion of incapacitation.¹⁶

⁷ Robert Browning, *The History and Philosophy of Punishment and Penology*, available at <http://faculty.nwc.edu/toconnor/294/294lect02.htm> (last visited March 15, 2007).

⁸ *Id.*

⁹ ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS* 61 (Basic Books 1975).

¹⁰ *Id.*

¹¹ DRESSLER, *supra* note 4, at 118; *see also* FRANKLIN E. ZIMRING & GORDON HAWKINS, *DETERRENCE* 47 (The University of Chicago Press 1973).

¹² *Id.*

¹³ *Id.*

¹⁴ NIGEL WALKER, *WHY PUNISH?* 14 (Oxford University Press 1991).

¹⁵ *Id.*

¹⁶ Browning, *supra* note 7.

Incapacitating a known criminal makes it impossible for this individual to commit another crime.¹⁷ If a criminal is confined, executed, or otherwise incapacitated, such punishment will deny the criminal the ability or opportunity to commit further crimes which will harm society.¹⁸ The only total, irrevocable punishment is the death penalty.¹⁹ Other punishments, such as imprisonment, produce only partial and temporary incapacitation.²⁰ Incapacitation, however, does not decrease offenses of convicts who would have not committed additional offenses anyway.²¹ Examples of this would include generally law-abiding citizens who committed a “crime of passion” in a specific, non-recurring situation.²²

C. Rehabilitation

Advocates of the rehabilitative form of utilitarianism believe that punishment will prevent future crimes by reforming prisoners by providing them with skills and assets that could help them lead a productive life after their release.²³ Supporters of rehabilitation seek to prevent crime by providing offenders with the education and treatment necessary to eliminate criminal tendencies, as well as the skills to become productive members of society.²⁴ Rehabilitation seeks, by means of education or therapy, to “bring a criminal into a more normal state of mind and into an attitude which would be helpful to society.”²⁵ Rehabilitation is based on the notion that punishment is to be inflicted on an offender to reform them as to make their re-integration into society easier.²⁶ This theory is firmly grounded in the belief that one cannot inflict a severe term of imprisonment and expect the offender to

¹⁷ VAN DEN HAAG, *supra* note 9, at 52.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 53.

²¹ *Id.*

²² *Id.*

²³ DRESSLER, *supra* note 4, at 119.

²⁴ STANLEY GRUPP, THEORIES OF PUNISHMENT 253 (Indiana University Press 1971).

²⁵ *Id.* at 254.

²⁶ *Id.* at 253.

be reformed and to able to adjust into society upon his release without some form of help.²⁷

Retribution

The theory of retribution is grounded in the belief that punishment of a wrongdoer is justified as a deserved response to a wrongdoing.²⁸ Unlike utilitarianism, which punishes in order to prevent future harm, retributivists punish because of the wrongdoing.²⁹ Thus, the criminal gets his “just deserts” regardless of whether the punishment serves to prevent any future crime.³⁰ An assessment of desert will take into account “both the harm done and the offender’s culpability.”³¹ The focus on culpability is based on the “presupposition that people are morally responsible for their actions, and requires the court to take into account mitigating factors or excuses such as diminished capacity, duress, and provocation.”³² Under a retributive theory of penal law, a convicted defendant is punished simply because he deserves it and for no other purpose.³³ There is no exterior motive such as deterring others from crime or protecting society – the goal is simply to make the defendant suffer in order to pay for his wrongdoing.

Some scholars believe that it is entirely natural for an individual to seek revenge and retribution when injured or harmed by another.³⁴ Thus, one of the primary reasons for the existence of retribution as a doctrine recognizes the reality that people often need to be relieved of their need to retaliate against those who have wronged them.³⁵ In fact, it can be argued that it is potentially harmful to the state if it

²⁷ *Id.*

²⁸ DRESSLER, *supra* note 4, at 118.

²⁹ *Id.*

³⁰ *Id.*

³¹ Browning, *supra* note 7.

³² *Id.*

³³ DRESSLER, *supra* note 4, at 119.

³⁴ Peter Landry, *On the Theory of Punishment*, available at

<http://www.blupete.com/Literature/Essays/BluePete/PunishmentTheory.htm> (last visited March 18, 2007).

³⁵ *Id.*

does not satisfy these needs and urges.³⁶ If the people are not satisfied, as history has shown, then people will sometimes take the law into their own hands in the form of mobs and vigilantes.

III. Biblical Concepts of Punishment

The Old Testament is replete with references and examples of God punishing the Israelites for their transgressions. In Genesis God defines that punishment is based upon a belief in the sanctity of life.³⁷ God instructs the Israelites in several places within the Pentateuch that with respect to certain crimes, the penalty shall be an “eye for eye, tooth for tooth, hand for hand, foot for foot.”³⁸ A closer look at this historical tradition, however, seems to teach that this penalty was not to be interpreted literally. Instead, what the Biblical instruction really intended was for the victim of an assault or another crime to receive from the criminal the equivalent value of whatever was taken.³⁹ Regardless, the “eye for an eye, tooth for a tooth” axiom has become synonymous with harsh retribution and supporters of this theory sometimes justify their viewpoint based on this rationale.⁴⁰

As well, how do we properly reconcile the prevailing view under the Mosaic Law with the teaching of Jesus? The scriptures tell us that Jesus asked God to forgive his executioners and promised the repentant thief beside him that they would be together in paradise when being crucified.⁴¹ Jesus also told his followers that they were to forgive their enemies, turn the other cheek when assaulted, refrain from judging others, minister to crime victims, visit prisoners, proclaim release to captives and liberty to

³⁶ *Id.*

³⁷ See *Genesis* 9:6.

³⁸ See *Exodus* 21:23-25, *Leviticus* 24:19-20, *Deuteronomy* 19:18-21.

³⁹ STEPHEN NATHANSON, AN EYE FOR AN EYE: THE IMMORALITY OF PUNISHING BY DEATH 74 (Rowan and Littlefield 2nd ed. 2001 (1987)).

⁴⁰ Brent Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973-1994*, 1 TEX. F. ON C.L. & C.R. 1 2 (1994) (blaming Texas’ “shameful experience in implementing the death penalty in part on the of southern notions of Old Testament and western notions of frontier justice.”).

⁴¹ See *Luke* 23:34-43.

the oppressed.⁴² All of these concepts seem to be in direct contradiction to the punishment concepts laid out under the Mosaic Law, so analyzing the teaching of Jesus to develop our own theory of punishment would prove worthwhile.

Mosaic Law

According to Hebrew teachings, Moses led the Jews out of slavery in Egypt around 1250 B.C. and received the 10 Commandments from God.⁴³ The Hebrews then put the commandments and other principles into written form as a code of religious and moral laws known as the Mosaic Law.⁴⁴ The laws given were in the context of a treaty with the Israelites so they could live according to God's plan and engage in a meaningful relationship with Him.⁴⁵ The Hebrew word *law* when translated always has a positive meaning and is commonly identified as the term "instruction."⁴⁶ The law, therefore, was "like an outstretched finger pointing the direction a person should take in life."⁴⁷

The Mosaic Law was explicit in its teaching regarding punishment. The sixth commandment was, "thou shall not commit murder."⁴⁸ Accordingly, the punishment for murder was, "he who strikes a man so that he dies shall surely be put to death."⁴⁹ There are 36 eight capital offenses under the Mosaic system detailed in the Pentateuch which prescribed the death penalty.⁵⁰ The Mosaic Law even prescribed the death penalty for violating the Sabbath.⁵¹

⁴² See Luke 4: 18-19.

⁴³ See Exodus 20:1-17; Deuteronomy 5:1-22.

⁴⁴ See Jewish Learning Institute, *Timeline: The Development of the Oral Law*, available at <http://people.brandeis.edu/~rafrazer/> (last visited March 20, 2007) [hereinafter JLI].

⁴⁵ See NELSON STUDY BIBLE 98 (Thomas Nelson Publishers 4th ed. 1997 (1979)).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See Exodus 20:13.

⁴⁹ See Exodus 21:12.

⁵⁰ See Exodus 21:15-20.

⁵¹ See Exodus 31:14.

It would seem on first glance that the Mosaic era centered its system of punishment around principles of retribution. The phrase “an eye for an eye, tooth for a tooth” expressed a principle of justice also known as *lex talionis*, which in Latin translates to the “law of retaliation.”⁵² The literal meaning of this passage would undoubtedly lead one to presume that this calls for punishment very similar to retribution. Prosecutors have even used the phrase in closing arguments in trials to persuade jurors to return particularly harsh punishments, including the death penalty.⁵³ Accordingly, “an eye for an eye, tooth for a tooth” is widely understood to equate to harsh retribution pursuant to a mentality commonly referred to as “Old Testament justice.”

However, what the *lex talionis* actually called for was simply proportionate punishment commensurate with the crime.⁵⁴ If punishment was to be administered, the guilty man was to receive “the number of lashes his crime deserves.”⁵⁵ Another passage that disregards the literal interpretation of “an eye for an eye, tooth for a tooth” is illustrated by the decree in Exodus how a “person who injured their servant was to let them go free as compensation.”⁵⁶ In other words, a free mandate for mutilation was not given. Instead, “the aim was proportionate and not imitative retribution, often by way of compensation or restitution.”⁵⁷ From this, it appears that punishment should be imposed on an offender - normally and certainly no more than – in proportion to what their offense deserves.

New Testament

⁵² Christopher Townsend, *The Morality of Punishment*, available at <http://www.leaderu.com/humanites/moralityofpunishment.htm> (last visited March 22, 2007).

⁵³ See *White v. State*, WL 215186 (Tex.App.-San Antonio 2002) (the prosecutor's punishment phase closing and rebuttal arguments which focused on “Old Testament justice” were not improper); *State v. Rouse*, 451 S.E. 543, 562 (N.C. 1994) (upholding prosecutor’s statement to jury suggesting that “eye for an eye” was appropriate basis for infliction of death penalty).

⁵⁴ *Id.*

⁵⁵ See *Deuteronomy* 25:3.

⁵⁶ See *Exodus* 21:26-27.

⁵⁷ Townsend, *supra* note 52.

The Old Testament's "eye for an eye" is often contrasted with the "turn the other cheek" compassion of the New Testament. Jesus' teaching in the New Testament never directly concentrates on the subject of what method is best to punish criminals. In fact, it should be noted that Jesus' main teaching point focuses on the unseen, remarking, "My kingdom is not of this world."⁵⁸ One of the main scriptural references that is readily apparent, which accurately demonstrates this concept is the thief on the cross:

Then one of the criminals who were hanged blasphemed Him, saying, "If You are the Christ, save Yourself and us." But the other, answering, rebuked him, saying, "Do you not even fear God, seeing you are under the same condemnation? And we indeed justly, for we receive the due reward of our deeds; but this Man has done nothing wrong." Then he said to Jesus, "Lord, remember me when You come into Your kingdom." And Jesus said to him, "Assuredly, I say to you, today you will be with Me in Paradise."⁵⁹

It is pertinent to recognize that Jesus' assurance of salvation only came into effect after the thief died. It should be noted that Jesus did not restore the thief to his status on this earth, which would have thereby recognized his rehabilitation and repentance for his earthly sins.

As shown previously, the concepts of justice and proportionality were recognized under the Mosaic Law, while in the New Testament "the virtues of redemption and forgiveness are frequently extolled."⁶⁰ Therefore, what the Old Testament says has to be tempered by the examples of mercy shown by Jesus.⁶¹ Christian interpretation of the biblical passage regarding the "eye for an eye, tooth for a tooth" passage has been heavily influenced by Jesus' Sermon on the Mount.⁶² Jesus urges his

⁵⁸ See *John* 18:36.

⁵⁹ *Luke* 23:39-43.

⁶⁰ Steven Eisenstat, *Revenge, Justice, and Law: Recognizing the Victim's Desire for Revenge as Justification for Punishment*, WAYNE L. REV. 1115, 1159 (2004).

⁶¹ Jack Balwick, *Towards a Social Theology of Punishment*, available at <http://www.asa3.org/asa/PSCF/1989/PSCF12-89Balwick.html> (last visited March 15, 2007).

⁶² *Id.*

followers to turn the other cheek when confronted by violence:

“You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, offer no resistance to one who is evil. When someone strikes you on your right cheek, turn the other one to him as well. If anyone wants to go to law with you over your tunic, hand him your cloak as well. Should anyone press you into service for one mile, go with him two miles. Give to the one who asks of you, and do not turn your back on one who wants to borrow.”⁶³

Analyzing this passage would assuredly lead one to conclude that Jesus’ teaching does not promote a system of justice analogous to the retributive principles discussed previously.

Another New Testament passage that is relevant when analyzing how punishment should be considered is the story of the man and woman caught in adultery:

At dawn He appeared in the temple courts, where all the people gathered around Him, and he sat down to teach them. The teachers of the law and the Pharisees then brought in a woman caught in adultery. They made her stand before the group and said to Jesus, “Teacher, this woman was caught in the act of adultery. The Law of Moses commanded that such women be stoned. But what do you say?” This they said, testing Him, that they might have something of which to accuse Him. Jesus bent down and started to write on the ground with his finger, as though he did not hear. When they kept questioning Him, He straightened up and said to them, “If any one of you is without sin, let him be the first to throw a stone at her.” Again He stooped down and wrote on the ground. At this, those who heard began to go away one at a time, the older ones first even until the last. And Jesus was left alone with the woman standing in His midst. Jesus straightened up and asked her, “Woman, where are they? Has no one condemned you?” She said, “No one, sir.” Then Jesus said to her, “Then neither do I condemn you; go now and sin no more.”⁶⁴

This passage typifies Jesus’ message of forgiveness and redemption. It is hard to justify condemning a person for any offense in light of Jesus’ teaching here. This passage conveys that Jesus personified the message of hope and compassion to those who are perhaps undeserving. I

⁶³ *Matthew* 5:38-42.

⁶⁴ *John* 8:11.

personally believe that Jesus' teaching here was a message to the people that they had perhaps taken the Mosaic Law out of context over the years. Assuming this proposition to be true, it would be hard to rely on the Mosaic Law as a justification for any of the punishment methods in our current society.

An additional passage that could be interpreted with regards to those incarcerated is Jesus' teaching describing how He will separate the "sheep from the goats" based on how people treat others:

Then the King will say to those on his right, "Come, you who are blessed by my Father; take your inheritance, the kingdom prepared for you since the creation of the world. For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me." Then the righteous will answer him, "Lord, when did we see You hungry and feed You, or thirsty and give You something to drink? When did we see You a stranger and invite You in, or needing clothes and clothe You? When did we see You sick or in prison and go to visit You?" The King will reply, "I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for Me."⁶⁵

Jesus' teaching in this passage is in direct opposition to anything resembling an "out of sight, out of mind" approach to leaving prisoners detained for incapacitation or specific deterrent reasons. Instead, Jesus directly mentions the virtue of visiting prisoners while they are incarcerated and maintains that the righteous are those who remember to consider the individuals who society has forgotten.

Taken as a whole, it seems at the very least Jesus warns against not having compassion for those in prison. Jesus' entire message focused on love and forgiveness. When Christ was executed, he gave a model response to his enemies in His dying words: "Father, please forgive them."⁶⁶ Before God, all of us are accused and found guilty.⁶⁷ This alone stands for the assertion that all of us fall short of God's

⁶⁵ *Matthew* 25:31-46.

⁶⁶ *See Luke* 23:34.

⁶⁷ Balswick, *supra* note 61.

grace in many ways, yet Jesus through his divine love still finds the compassion to plead for our forgiveness. Given this, I believe it should be hard for any man to stand in judgment against another. Jesus imparted this knowledge in the Sermon on the Mount: “Judge not, or you will be judged. Condemn not, and you shall not be condemned. Forgive, and you will be forgiven.”⁶⁸ Based on this, it should be hard for Christians to justify punishment based on traditional retributive principles of letting those harmed seek retaliation in response to a wrongdoing.

Code of Hammurabi

The Code of Hammurabi was created around 1760 BC and is one of the earliest sets of laws.⁶⁹ The Code of Hammurabi is entirely based on the principle of equal and direct retribution and it encompasses the origin of retributive violence.⁷⁰ The Code was written on a “large stone monument and placed in a public place so that all could see it; thus, no man could plead ignorance of the law as an excuse.”⁷¹ The Code contained 282 laws written by scribes on twelve separate tablets.⁷²

The code regulates in “clear and definite strokes the organization of society.”⁷³ The judge who erred was to be expelled from their judgeship forever, and heavily fined.⁷⁴ The witness who testified falsely was to be slain.⁷⁵ All of the more serious crimes were strictly punishable with death. Even if a man built a house badly, and it fell and killed the owner, the builder was to be slain.⁷⁶ If the owner's son

⁶⁸ *Luke* 6:37.

⁶⁹ MARC VAN DE MICROOP, *KING HAMMURABI OF BABYLON: A BIOGRAPHY* (Blackwell Publishing 2005).

⁷⁰ *Id.*

⁷¹ *Id.* at 9.

⁷² *Id.*

⁷³ Charles F. Horne, *Ancient History Sourcebook: Code of Hammurabi, c 1780 BCE*, available at <http://www.fordham.edu/halsall/ancient/hamcode.htm> (last visited March 18, 2007).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

was killed, then the builder's son was slain.⁷⁷ The grim retaliatory nature of these punishments did not factor in the least excuses and/or or explanations for the harm committed.

The Code of Hammurabi is seemingly comparable to the "an eye for an eye" mentality, but in actuality it is completely different. I have included the Code of Hammurabi in this article to serve as a guideline as to how some people interpret the teaching under the Mosaic Law. It seems on first glance that the two systems of punishment are analogous. However, the Code of Hammurabi was a harsh and strict system of punishment that called for the literal interpretation of "an eye for an eye, tooth for a tooth."⁷⁸ Hammurabi's Code explicitly stated: "If a man put out the eye of another man, his eye shall be put out. If he break another man's bone, his bone shall be broken."⁷⁹ Therefore, the two systems could not be more dissimilar. The disparity lies in the fact that the Code of Hammurabi is not ambiguous in the least, and "leaves no doubt in at least some instances retaliation in kind is not only allowed but required."⁸⁰ However, the Pentateuch's recitation of "an eye for an eye, tooth for a tooth" is subject to interpretation and most scholars agree that its implication emphasized restitution, not retribution.⁸¹ Therefore, those who rely on the Mosaic Law to justify retributive punishment are misguided in a major respect.

Ancient Israel

When interpreting the Mosaic Law it is important to consider that their society was far different

⁷⁷ *Id.*

⁷⁸ See L.W. King, *Code of Hammurabi*, available at <http://www.yale.edu/lawweb/avalon/medieval/hamframe.htm> (last visited March 16, 2007).

⁷⁹ *Id.* at 199.

⁸⁰ Irene Rosenberg & Yale Rosenberg, *Lone Star Liberal Musings on "Eye for an Eye" and the Death Penalty*, 1998 UTAH L. REV. 514.

⁸¹ *Id.* at 505, 510.

from our own.⁸² Most religious scholars believe that God revealed to Moses the Torah around the thirteenth century B.C.⁸³ It was not until the fifth century B.C. that the Hebrews actually put the commandments and other legal principles into written form.⁸⁴ According to Jewish tradition, the written Torah was never meant to be read entirely by itself.⁸⁵ Rather, it was the starting point for learning the Oral Law, which supplemented the written text in many ways.⁸⁶ Considering this, scholars believe that most of the seemingly harsh criminal laws were never applied literally.⁸⁷ As such, an “eye for an eye” was never meant to include an actual maiming of an offender. Rather, it called for the monetary compensation for the value of the victim’s lost eye. Likewise, there were many significant evidentiary and procedural safeguards for criminal defendants that caused a court to rarely carry out the death penalty, believing God was better suited to “settle accounts.”⁸⁸

Restitution, rehabilitation, and atonement were paramount considerations regarding criminal punishment – not retribution – contrary to what would likely be assumed given the explicit meaning of “an eye for an eye.”⁸⁹ Moreover, prison as a method of punishment was virtually non-existent.⁹⁰ The use of prisons was limited primarily because the retributive aspect which is so prevalent in our system was not subscribed to as a reason for punishment.⁹¹ That being said, the idea of a violent criminal being

⁸² *Id.* at 509.

⁸³ *See* JLI, *supra* note 44.

⁸⁴ Rosenberg & Rosenberg, *supra* note 80, at 511.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 515.

⁸⁹ MOSES RAMBAM, MISHNAH TORAH (Dr. Fred Rosner trans., Jason Aronson Publications), *Laws of Murder* 15 (1994); *see also* Martin Pritikin, *Punishment, Prisons, and the Bible: Does “Old Testament Justice” Justify Our Retributive Culture?*, 28 CORDOZO L. REV. 715 (2006).

⁹⁰ Sholom Lipskar, *A Torah Perspective on Incarceration as a Modality of Punishment and Rehabilitation*, available at <http://jlaw.com/Articles/PrisonerRights.htm>.

⁹¹ *See* Rosenberg & Rosenberg, *supra* note 80.

able to roam free in the city while trying to make restitution is an absurd idea. It is for this reason why “cities of refuge” were implemented where manslayers were exiled.

Cities of Refuge

Cities of refuge were towns according to the Jewish law where anyone who had unintentionally slain another might flee and be protected and enjoy the right of asylum.⁹² This right to asylum was recognized in the Old Testament, but under conditions that were specifically laid out.⁹³ One who had intentionally killed another was allowed to find no refuge at the altar of God, however. “If a man acts with premeditation against his neighbor, to kill him by treachery, you shall take him from My altar, that he may die.”⁹⁴ Protection was only granted to those who had unintentionally taken the life of another:

Then the Lord spoke to Moses, saying, “Speak to the children of Israel, and say to them: When you cross the Jordan into the land of Canaan, then you shall appoint cities to be a refuge for you, that the manslayer who kills any person accidentally may flee there. They shall be cities of refuge for you from the avenger, that the manslayer may not die until he stands before the congregation in judgment.”⁹⁵

However, in order to justify his claim to immunity the fugitive had to prove to the authorities of the sanctuary or town that his deed was unpremeditated.⁹⁶ After submitting this required evidence he was allowed to remain within the prescribed confines of the precincts.⁹⁷ It should be noted that under no circumstances could he return to his old home, nor could he appease the avenger by money.⁹⁸ If he was found outside the city of refuge for any reason, the closest relative of the victim could kill him without

⁹² See *Numbers* 35:9; *Exodus* 21:12; *Deuteronomy* 4:41; *Joshua* 20:1-9.

⁹³ *Id.*

⁹⁴ *Exodus* 21:14.

⁹⁵ See *Numbers* 35:9-15.

⁹⁶ See RAMBAM *supra* note 89.

⁹⁷ *Id.*

⁹⁸ *Id.* at 502.

liability.⁹⁹ Thus he became virtually a prisoner within the boundaries of the city to which he fled, although technically no formal physical restraints were present.¹⁰⁰

There were six cities of refuge in all and they were spaced equally throughout the land, so that the individuals seeking refuge could reach them with relative ease.¹⁰¹ The roads leading to them were twice as large as normal roads, and they were constructed in direct paths free of all obstacles.¹⁰² The court was under strict instruction to pave them free of defects and were required to inspect the roads annually to ensure compliance with appropriate standards.¹⁰³ Signs stating “Refuge, Refuge” were placed periodically on the roads leading from major towns to ensure those seeking asylum were absolutely sure of the proper path.¹⁰⁴

An interesting aspect of the cities of refuge is that killers could not comprise a majority of the inhabitants.¹⁰⁵ All of the cities of refuge were composed of priests whose sole purpose was to help reform the prisoners.¹⁰⁶ A city could not properly classify itself as a city of refuge if it lacked elders who could help educate the town’s inhabitants.¹⁰⁷ Thus, the sole purpose of the cities of refuge were to provide an atmosphere suitable for atonement and rehabilitation for the inhabitants, and they constructed its features accordingly to promote this goal.

Involuntary Servitude

An alternate form of punishment in Ancient Israel provided that a thief was obligated to make

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 540.

¹⁰¹ *Id.* at 562.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 540.

¹⁰⁵ *Id.* at 564.

¹⁰⁶ *Id.* at 556.

¹⁰⁷ *Id.*

restitution in the amount stolen without the traditional penalty of confinement.¹⁰⁸ The amount owed became a debt which, if he could not pay, he was to be taken as a servant by the person he stole from and had to reside in his home for a period of six years.¹⁰⁹ The primary purpose for this was not only to work off the amount owed, but also to rehabilitate the offender.¹¹⁰ One of the most important goals was directed so that the thief would learn by positive influence by living in the home of a law-abiding family which would subsequently serve to hopefully reform his character.¹¹¹

The servants were not classified as slaves pursuant to our current terminology.¹¹² In fact, from a comparative standpoint the servants were treated far better than those in the U.S. penal systems today. The law made considerable efforts directed at the servitude, and imposed a variety of obligations upon the owner to preserve the dignity of the servant.¹¹³ The servant was not to be relegated to tasks that were debasing or ones in which were beyond their physical strength.¹¹⁴ Upon the completeness of the term of servitude, the master was to also impart a severance gift of animals and produce which would have a continuous benefit to the servant after their release.¹¹⁵ Doing this helped ensure that the thief would have adequate financial resources to begin a new life without the temptation to again engage into a life of crime.¹¹⁶

IV. Imprisonment as a Form of Punishment in the United States

What is the true aim of our prison system? Some would argue that it is to punish those who have

¹⁰⁸ RAMBAM, *supra* note 89, *Laws of Theft*, at 180; *See Exodus 22:8*.

¹⁰⁹ *See Exodus 22:2*; RAMBAM, *supra* note 108.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² RAMBAM, *supra* note 89, *Laws of Slaves*, at 644; *see also* Pritikin *supra* note 89.

¹¹³ *Id.* at 646.

¹¹⁴ *Id.* at 650.

¹¹⁵ *Id.* at 666-668.

¹¹⁶ *Id.*

committed wrongs asserting the theory of retribution as justification. However, the more important goal of prisons, arguably, should be in rehabilitating and reintegrating criminals to function in society.

John Braithwaite is a renowned scholar and proponent of the restorative justice movement. Braithwaite's hypothesizes in his book *Crime, Shame, and Reintegration* that fear of shame and having pride in being law-abiding should be the major social forces for preventing crime, but modern criminal justice has become "severely disconnected from those emotions."¹¹⁷ Instead, the criminal justice system often creates "anger and indignation at the state for offending citizens' dignity in response to the inhumane conditions of prison life."¹¹⁸ To further support his theory, he invokes the New Testament theory of "hating the sin but loving the sinner."¹¹⁹ In large part, this rationale is maintained by our increasing reliance on confining individuals within a penitentiary for wrongdoing while having virtually no alternate forms of punishment.

History of Imprisonment

When the penitentiary system in the United States was first designed it was specifically structured for the purpose of rehabilitating the prisoner.¹²⁰ Although rehabilitation remained the primary goal until recently, views about how inmates should be rehabilitated has shifted over time.¹²¹ Originally, the offender was separated from his former life and forced to reflect on his actions in solitude through isolation, work, fasting, and Bible study.¹²² The rehabilitative model came under increasing attack as professionals started to realize that some criminals were likely beyond rehabilitation and thus would

¹¹⁷ See generally JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* 18 (Cambridge Univ. Press 1989).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Long, *supra* note 2, at 347.

¹²¹ Edward Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343 (2001).

¹²² *Id.* at 347.

remain incarcerated indefinitely if not “cured.”¹²³ As a result of this, retribution and incapacitation gained ascendancy as the primary justification for utilizing imprisonment and policy towards offenders has been growing more punitive since the 1970’s.¹²⁴

Between 1925 and 1972 the U.S. prison population remained fairly stable.¹²⁵ However, from 1972 and 1997 the total number of inmates skyrocketed from 196,000 to 1,159,000.¹²⁶ Again, over the next decade the numbers increased exponentially and our current prison population now exceeds two million.¹²⁷ The American rate of incarceration is the highest in the world – approximately one in every 150 Americans – and is the highest in the world by a factor of five.¹²⁸ It is estimated that the United States contains around 25% of the entire world’s prison population.¹²⁹ This number is especially astounding considering the U.S. population is approximately 300 million compared to a world population of around six billion.¹³⁰ This calculates to a United States/World population ratio around 5%, which is grossly disproportionate to the aforementioned ratio of the United States housing 25% of the world’s prison population.

As imagined, the recent explosion in prison population has also meant a dramatic increase in prison facilities and prison costs.¹³¹ The government spending on corrections has grown at a rate of

¹²³ Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL L. REV. 1011 (1991).

¹²⁴ *Id.*; see *Developments in the Law: Alternative Punishments*, 111 HARV. L. REV. 1970 (1998) (“In the proretribution culture, incarceration is the punishment of choice.”).

¹²⁵ Albert Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 CHI. L. REV. 14 (2003).

¹²⁶ *Id.*

¹²⁷ U.S. Department of Justice Statistics, Criminal Offender Statistics, *available at* <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited April 4, 2007).

¹²⁸ Rubin, *supra* note 121, at 17.

¹²⁹ *Id.*

¹³⁰ United States Census Bureau, *available at* <http://www.census.gov/ipc/www/world.html> (last visited March 25, 2007).

¹³¹ Alschuler, *supra* note 125.

250% from 1983 to 1993, far surpassing most comparable growth rates.¹³² Reflecting the prevailing retributive principles of our current society, this growth was also accompanied by a reduction in the total amount of resources dedicated to rehabilitation.¹³³ Congress eliminated higher education grants for state and federal prisoners, and most states severely reduced vocational and technical training programs dedicated to inmates.¹³⁴ Most American citizens strictly subscribe to the notion that inmates are in prison to be punished, not to receive free education. The historical trend for politicians has been to use as a campaign technique how they plan to be “tough on crime.” In 1988, George Bush, Sr. ran for the U.S. presidency against Michael Dukakis and advocated what had become then the mandatory, retributive, “tough on crime” stance voiced in nearly all of his political speeches and campaign advertisements.¹³⁵ This mentality resonates throughout society causing an obsession with cracking down on criminals, despite evidence that rigid punishment policies within the penal system has no correlation with the amount of crime being committed.

In fact, evidence suggests that incarceration actually increases crime. The recidivism rate for inmates is staggering. The recidivism rate among released prisoners is approximately 65%, indicating that the existing penal system is “failing as a form of punishment.”¹³⁶ As such, studies have shown have indicated that each instance of incarceration in a person’s life renders a future occurrence significantly more likely.¹³⁷ This stands for the proposition that our current penal system makes little to no effort to

¹³² John Celichowski, *Bringing Penance Back to the Penitentiary: Using the Sacrament of Reconciliation as a Model for Restoring Rehabilitation as a Priority in the Criminal Justice System*, 40 CATH. LAW 239 (2001).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ DENNIS SULLIVAN & LARRY TIFFT, *RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES* 143 (Willow Tree Press 2001).

¹³⁶ Balswick, *supra* note 61.

¹³⁷ *Id.*

rehabilitate these criminals for integration back into society. Our increasing reliance on (and the worsening conditions within) prisons is justified if you view criminals as people who are undeserving of assistance. In fact, this mentality is only logical if this proposition is taken to be true. However, it is in direct contradiction to the fundamental tenets found in both the Old and New Testament. As we have seen, neither source views criminals as less than human, nor treats them as such.

The current retributive culture and the worsening of prison conditions reflects the attitude that criminals are undeserving of our help. By contrast, Jewish law in Ancient Israel viewed everyone (including criminals) as being human beings with the ultimate purpose of serving God.¹³⁸ When someone fell short of God's plan of service, they had to attempt to atone for their misgivings.¹³⁹ Therefore, locking someone up in a cell, without using the time of confinement for improving one's ability to serve God, would have defeated this objective in its entirety.

Theory of Incarceration

The overarching remedy in the United States is to punish people when they commit crimes through incarceration.¹⁴⁰ Restitution is sometimes included, although most often it is afforded as a civil remedy and is not considered in the criminal context. As Americans we pride ourselves in our freedom and our ability to freely engage in the "pursuit of happiness." Perhaps the reason we rely so heavily on threatening offenders with incarceration is because by doing this society is effectively taking away a fundamental privilege enjoyed by every American citizen. However, it would unquestionably be wise if legislators and policymakers would evaluate if incarceration is indeed the only way to achieve the objective of discouraging crime.

¹³⁸ See HAIM COHN, HUMAN RIGHTS IN JEWISH LAW 208 (Ktav Publishing 1984).

¹³⁹ *Id.*

¹⁴⁰ Harary, *supra* note 1.

A prevailing view among the law enforcement community reflects the attitude “if you commit the crime, you do the time.” Once a person willingly engages in an activity that is prohibited by law we feel that person has subjected itself to the absolute certainty of imprisonment if apprehended. Once incarcerated the prisoner will spend their sentence in the hostile environment of a penitentiary awaiting either parole or release, often subjected to violent crimes from other inmates which are sometimes ignored by prison officials.¹⁴¹ Our prisoners often face degrading living conditions, filled with overcrowding and a general atmosphere of brutality of physical and sexual violence.¹⁴² These conditions undoubtedly create stress, fear, and anger which promote dysfunctional behavior that is damaging and dangerous to society once the prisoner is released.¹⁴³ According to Michael Foucault, given the isolation, boredom, and violence prisoner’s face, “the prison cannot fail to produce delinquents.”¹⁴⁴

As noted previously prison was almost completely ignored in Ancient Israel as a method of punishment.¹⁴⁵ The Israelites did not see any objective to locking someone up in a cell without using this time to make them more productive members of society.¹⁴⁶ One flaw of our system that was recognized with the Ancient Israelites centuries ago was the benefit of segregating criminals within the cities of refuge based on the degree of offense.¹⁴⁷ Only negligent killers were allowed asylum in the cities of refuge, while intentional and reckless killers were not afforded this privilege.¹⁴⁸ In our current system violent criminals often are interspersed with other offenders who are confined for far less serious

¹⁴¹ See generally MICHAEL FOUCAULT, DISCIPLINE AND PUNISHMENT: THE BIRTH OF THE PRISON (Alan Sheridan trans., Pantheon Books 1977); Sheldon Ekland-Olson, *Crowding, Social Control, and Prison Violence: Evidence from the Post-Ruiz Years in Texas*, 20 LAW & SOC’Y REV. (1986).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 266.

¹⁴⁵ See Lipskar *supra* note 90.

¹⁴⁶ *Id.*

¹⁴⁷ RAMBAM, *supra* note 89, at 544.

¹⁴⁸ *Id.*

offenses. Empirical studies have shown that recidivism rates are far lower if low-risk offenders are segregated from more serious offenders.¹⁴⁹ John Martinson once argued that “nothing works” with regards to rehabilitation in his 1974 paper, *What Works? Questions and Answers About Prison Reform*,¹⁵⁰ but later refined his stance and argued that reforming criminals centers around distinguishing those who are susceptible to rehabilitation and those who are not.¹⁵¹

If we are to use prisons as a form of punishment perhaps the strategy for doing so should be revised. Prisons currently are institutions of depersonalization and dehumanization.¹⁵² Instead, a prison should assume all aspects of the prisoner’s life: their physical training, aptitude for work, everyday conduct, moral attitude, and overall state of mind. Basically, the prison should be a place where individuals go to improve themselves. This is not to say that people should go to prison to live better than they did in the outside environment. It should be the case instead that they use their time of confinement to learn how to act as productive members of society upon release. Right now when people go to prison they are thrown into a hellish environment fraught with aggression and a complete lack of sympathy.¹⁵³ If these people had a difficult time operating in an outside environment, it would seem they would be even more disillusioned with the reality of life than before they went in. As such, this is in direct opposition to the teaching of Jesus, as well as how the Ancient Israelites lived under the Mosaic Law.

V. Secular Philosophies of Crime and Punishment

¹⁴⁹ See Andrew R. Straus, *Losing Sight of the Utilitarian Forest For the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CORDOZO L. REV 13 (2002).

¹⁵⁰ Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, 35 PUB INT. 22 (1974).

¹⁵¹ See Vitiello, *supra* note 123.

¹⁵² FOUCAULT, *supra* note 141.

¹⁵³ See generally Vitiello, *supra* note 123.

Alternate Views of Retribution

Most scholars would agree that our society relies heavily on the philosophy of retribution as a justification in the context of criminal sentencing.¹⁵⁴ At the very least, we use retribution as a basic underlying rationale for punishment in criminal law.¹⁵⁵ However, some opponents of retributive justice believe that the concept is simply a disguised form of vengeance.¹⁵⁶ Thus, some scholars hold the viewpoint that retribution is simply “the doctrine of legal revenge, or punishment merely for the sake of punishment, wherefore the refinement and humanizing of society has been in the direction of dispelling from penology any such theory.”¹⁵⁷ Vengeance is a very powerful human emotion. It is only a natural reaction to want to “settle the score” against those who have wronged us.¹⁵⁸ However, should this seemingly natural human emotion be acceptable as a punishment method?

True retributivists deny any association with vengeance by strictly adhering to the theory that “wrongdoers should be punished because they deserve it.”¹⁵⁹ However, the fact that the two concepts mirror each other so closely might call for the abandonment of retribution as a notion for punishment altogether. Many scholars maintain the basic idea of retribution extends from a desire to revenge, which in turn seems to sanction state cruelty which should be morally unacceptable.¹⁶⁰ It is clearly written in scripture that vengeance belongs to God alone and warns against the perils of revenge. Paul gives the advice to his followers to only let God judge through His divine power: “Never take your own

¹⁵⁴ See Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV 17 (2003).

¹⁵⁵ See generally DRESSLER, *supra* note 4.

¹⁵⁶ VAN DEN HAAG, *supra* note 9, at 10.

¹⁵⁷ Jerome Hall, *Justice in the 20th century*, 59 CAL. L.R. 3 (1971).

¹⁵⁸ See Townsend, *supra* note 52.

¹⁵⁹ VAN DEN HAAG, *supra* note 9, at 11.

¹⁶⁰ *Id.*

vengeance, but leave room for the wrath of God, for it is written, ‘Vengeance is Mine, I will repay’, says the Lord.”¹⁶¹

Utilitarianism Past and Present

A. Jeremy Bentham

Bentham provided a blueprint for his version of model prison known as the Panopticon.¹⁶² He strongly believed that the only aim that should have any merit in the context of punishment is the utilitarian objective of deterrence. Accordingly, Bentham believed the only way you could achieve this objective through imprisonment called for inmates to be closely guarded and strictly monitored at all times. The rooted translation of the word Panopticon means “all-seeing eye.”¹⁶³

The model of the Panopticon places a tower at the center of the design which is “pierced with wide windows that open onto the inner side.”¹⁶⁴ The periphery of the building is divided into cells, each of which extends the whole width of the building.¹⁶⁵ A supervisor is placed in a central tower and has the power to view each prisoner at any given moment.¹⁶⁶ Each prisoner “should be securely confined to a cell from which they can be seen from the front by the supervisor.”¹⁶⁷ The side walls serve to keep the inmates from coming into contact with other prisoners.¹⁶⁸ The arrangement of the room, directly opposite the central tower, affords each prisoner some visibility, but the “divisions of the ring imply a complete lateral invisibility.”¹⁶⁹ This invisibility is vital to the design because it is the guarantee of

¹⁶¹ *Romans* 12:19.

¹⁶² FOUCAULT, *supra* note 141, at 201.

¹⁶³ Browning, *supra* note 7.

¹⁶⁴ FOUCAULT, *supra* note 141, at 202.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 201.

order.¹⁷⁰ Thus, there can be no danger of plots or collective escapes, planning of new crimes in the future, or bad reciprocal influences from other prisoners.

In essence, the major effect of the Panopticon is to induce in the inmate a state of conscious and permanent visibility that assures the “automatic functioning of power.”¹⁷¹ This power derives from how the inmate constantly eyes the tall outline of the central tower from which he can be spied upon.¹⁷² However, the inmate will “never know whether he is being looked upon at any moment, but is sure that it is always a possibility that he may be.”¹⁷³ The main idea of the Panopticon is to induce the feeling of “constant surveillance in the prisoner even if he is not presently surveyed.”¹⁷⁴ The captive will develop a “kind of paranoia and his mind will always stop him from breaking the rules before he ever has the chance to do so.”¹⁷⁵ The plan was purported to be somewhat rehabilitative in nature, in that the motivation for the prisoner for behaving draws from the fact that they know they can be watched at any given time.¹⁷⁶ The prisoner’s behavior is supposed to adjust gradually over time as a consequence because he is likely on his best behavior regularly, and thus he will rehabilitate in the natural sequence of time.

It should be noted that Bentham was deeply rooted in the utilitarian aims of helping society, and devoted a serious amount of time to his theory of incarceration.¹⁷⁷ Bentham’s primarily concern with the Panopticon was deterring offenders from reoffending, discouraging others from following their example,

¹⁷⁰ *Id.* at 202.

¹⁷¹ *Id.* at 201.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 202.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Browning, *supra* note 7.

and putting them in a place where they can offend no longer.¹⁷⁸ However, personally I found the design to be depersonalizing to the inmates and something similar to what might be found in George Orwell's *1984*.

B. C.S. Lewis

Another significant proponent to the utilitarian ideals was C.S. Lewis. Lewis published an article entitled *The Humanitarian Theory* which stresses the importance of human dignity that should be inherent with punishment.¹⁷⁹ Lewis' contention regarding his utilitarian ideals is summarized by the following passage:

“According to the humanitarian theory, to punish a man because he deserves it, and as much as he deserves, is mere revenge, and, therefore, barbarous and immoral. It is maintained that the only legitimate motives for punishing are the desire to deter others by example or to mend the criminal.”¹⁸⁰

Lewis is basically supporting here a system of punishment that only considers deterrence and rehabilitation. Any concept of retribution, therefore, is not aligned with acting in accordance with the humanitarian objective. Under Lewis' humanitarian system, punishment is not based on what is “deserved.” Punishment is only administered as long as it served to reform, or to deter others from committing similar behavior.

C. Chuck Colson

Charles Colson was described as Richard Nixon's “hatchet man” during the President's term of office.¹⁸¹ Colson once declared that he would “walk over my own grandmother” to get Richard Nixon

¹⁷⁸ FOUCAULT, *supra* note 141, at 202.

¹⁷⁹ C.S. Lewis, *The Humanitarian Theory of Punishment*, available at (last visited April 4, 2007).

<http://kzoo.edu/~petersen/teaching/lewis.html>

¹⁸⁰ *Id.*

¹⁸¹ See Prison Fellowship, available at <http://www.pfm.org/Bio.asp?ID=43>.

re-elected.¹⁸² In 1974, Colson entered a plea of guilty to Watergate-related charges; although not implicated in the Watergate burglary, he voluntarily pleaded guilty to obstruction of justice.¹⁸³ He entered Alabama's Maxwell Prison in 1974 as the first member of the Nixon administration to be incarcerated for Watergate-related charges serving seven months of a one-to-three year sentence.¹⁸⁴

Since his release, Colson has worked to promote prisoner rehabilitation and reform of the prison system in the United States.¹⁸⁵ He disdains the “lock ‘em and leave ‘em” approach to criminal justice.¹⁸⁶ Colson attributes his personal interest in prison reform to his own stint behind bars. Colson has stated, “What I experienced in seven months in prison was the total futility of the system.”¹⁸⁷ Colson still insists that his views regarding criminal justice are firmly rooted in his faith elaborating, “The biblical model indicates the way you deal with offenders is to redeem them.”¹⁸⁸

Colson has visited prisons throughout the U.S. and the world and has built a movement working with more than 40,000 prison ministry volunteers, with ministries in over 100 countries.¹⁸⁹ As a result of his prison experience he subsequently became deeply concerned with prison conditions and the need for better access to religious programs.¹⁹⁰ Colson founded the Prison Fellowship after his release from prison, which is a ministry that works with local churches to spread Christianity among prison inmates.

¹⁹¹ Later, he started a subsidiary, the Justice Fellowship, which lobbies to improve prison conditions,

¹⁸² CHUCK COLSON, BORN AGAIN 54 (Chosen Publishing 2004).

¹⁸³ See Prison Fellowship, *supra* note 180.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See Colson, *supra* note 182.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Prison Fellowship, *supra* note 181.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

reform criminal sentencing and help prepare prisoners for eventual re-entry to society.¹⁹² The Justice Fellowship opposes mandatory minimum sentences, and it supports expanded training and job opportunities behind bars, as well as more government spending to help newly released inmates.¹⁹³

“Colson's personal prison experience and his frequent visits to prisons has prompted new concerns about the efficacy of the American criminal justice system and made him one of the nation's influential voices for criminal justice reform.”¹⁹⁴ Colson made a promise that he would “never forget those behind bars” upon his release from prison over three decades ago and has remained fiercely devoted to this quest with loyal determination.¹⁹⁵ Colson is a strong advocate for restorative justice which stresses an approach based not on punishing criminals, but on transforming them.¹⁹⁶ Colson’s restorative justice approach believes that “crime is committed not against the state, but against the victim and against God.”¹⁹⁷

A Debt Owed to Society

It is often said that a criminal who has served a term of imprisonment has “paid his debt to society.” In almost every case, however, the crime usually involves the criminal offender and some victim. Notwithstanding, society as a third party intervenes and our concept of justice revolves around payment to, it as opposed to the victim. Victim participation, from arrest to sentencing, needs careful examination as to what extent the government should actually play in these roles.

The idea that the criminal pays a debt to society when punished assumes that “all members of

¹⁹² See Justice Fellowship, available at <http://www.justicefellowship.org/contentindex.asp?ID=167>.

¹⁹³ *Id.*

¹⁹⁴ Prison Fellowship, *supra* note 181.

¹⁹⁵ *Id.*

¹⁹⁶ David Plotz, *Chuck Colson: How a Watergate Crook Became America's Greatest Christian Conservative*, available at <http://www.slate.com/id/77067/>.

¹⁹⁷ *Id.*

society have made a tacit promise to obey its laws that they have broken.”¹⁹⁸ They then pays this debt when the “compensates society for their broken promises.”¹⁹⁹ This assumption presumes a membership that is not “voluntary which cannot be avoided and implies a promise made without assent.”²⁰⁰ So, if the criminal did not “technically promise to do anything, the lawbreaker had no promise to keep, and therefore no debt to pay.”²⁰¹ For this reason few offenders accept punishment and even fewer repent of their offenses.²⁰²

Our system has lost sight in many respects the role of the victim in most crimes. For instance, with most thefts monetary restitution is usually neglected in our present legal practices. Punishment is not concerned with the actual loss or damage caused by the prohibited act, but only with the integrity of preserving the legal order.²⁰³ The punishment threatened by society proclaims the wrongness of the act and seeks to deter potential offenders, rather than actually compensate individual victims. If society is to be compensated for anything it should be for the breach of its peace. Our criminal justice system knows no other remedy except imprisonment in order to punish for crimes which possibly could be satisfied by alternate means.

Restorative Justice

Restorative justice is a growing movement that involves an approach which strives to maximize forgiveness, hope, and a positive outcome for all parties.²⁰⁴ The Dalai Lama is a strong proponent of

¹⁹⁸ VAN DEN HAAG, *supra* note 9, at 16.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* (Oxford University Press 2002).

restorative justice, and has taught that “the more evil the crime, the greater opportunity for grace.”²⁰⁵ In the words of the Dalai Lama:

“Learning to forgive is much more useful than merely picking up a stone and throwing it at the object of one’s anger, the more so when provocation is extreme. For it is under the greatest adversity that there exists the greatest potential for doing good, both for oneself and for others.”²⁰⁶

Advocates of restorative justice see “crime as an opportunity to prevent greater evils, to confront crime with a grace that transforms human lives to paths of love and giving.”²⁰⁷

Current restorative justice philosophy centers around “bringing together all stakeholders to engage in neutral dialogue regarding the consequences of the injustice which has been done.”²⁰⁸ These stakeholders meet in a circle to discuss how they have been affected by the harm and come to some agreement as to what should be done to right any wrongs affected.²⁰⁹ The key component to restorative justice is that it is wholly distinguishable from punitive state justice.²¹⁰ Restorative justice is about healing rather than hurting.²¹¹ Responding to the hurt of crime with the hurt of punishment is rejected because the idea is that the “value of healing is the crucial dynamic.”²¹²

The restorative justice movement has been growing in strength, although there are different and conflicting conceptions of what exactly the concept entails.²¹³ The central theme is a process of reparation or restoration between offender, victim and other interested parties.²¹⁴ A restorative process

²⁰⁵ MALCOLM DAVID ECKEL, A BUDDHIST APPROACH TO REPENTANCE (Rowan and Littlefield 1997).

²⁰⁶ *Id.*

²⁰⁷ BRAITHWAITE, *supra* note 204, at 4.

²⁰⁸ *See generally* HEATHER STRANG & JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND CIVIL SOCIETY (Cambridge University Press 2001).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 3.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ STRANG & BRAITHWAITE, *supra* note 208, at 4.

that is to be appropriate to a given crime must therefore be one that seeks an adequate recognition, by the offender and by others, of the wrong done.²¹⁵ The recognition for the offender must be genuine and repentant, and ultimately one would seek an appropriate apologetic reparation for that wrong from the offender.²¹⁶ Howard Zehr in *Changing Lenses* encompasses the central theme of restorative justice in arguing that the biblical conception of justice calls for a paradigm shift from the current retributive scheme:

“Crime should be seen as a violation of people, not rules; social factors should be given greater weight in assessing individual responsibility; the administration of justice should focus not on inquiry into guilt, but on a search for solutions; sentencing should aim not at infliction of pain, but on making right; justice should be based not on desert, but on need; our aim should not be to maintain, but to transform.”²¹⁷

Rehabilitation

As a society we must help alienated people by reviving their dignity and giving them the skills and knowledge to help themselves. Through education and job training, criminals can have the power to take control of their own life and contribute to the community when they are released.²¹⁸ Once able to contribute to the community, a person will feel a sense of ownership to the community.²¹⁹ They will therefore want to protect the community, and uphold its laws.²²⁰ In short, a criminal with the right rehabilitation can be turned from a menace to society into a very valuable asset.²²¹

The primary goal optimally should be the reintegration of the suspended individual back into the

²¹⁵ *Id.* at 3

²¹⁶ *Id.*

²¹⁷ HOWARD ZEHR, *CHANGING LENSES* (Herald Press 1990).

²¹⁸ Celichowski, *supra* note 132 at 261 (stating “The majority of those imprisoned will be returned to society...it is important for those paroled to experience the desired cleansing of incarceration to have lasting effect.”).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

main stream of life, preferably at level greater than before. Many individuals after their stint in prison try to make it on the outside, but sometimes have to resort to committing more crime in order to survive. Most convicts have no money, education, or training and have a “stigma of being an ex-convict” which makes finding employment all the more difficult.²²² Most of those who are caught and convicted are released either free or on probation at some point. However, they rarely receive the benefit of treatment. A prisoner who is not given the chance to get an education, receive job training, and have healthy interactions with others is likely to walk out of prison in worse shape than when he went in.²²³ Conversely, after undergoing effective reform programs and treatment, he could hopefully have a positive impact on the community when he re-enters. The true aim of our prison system, therefore, should be to reform and rehabilitate criminals, not simply to punish them.

A Changing Tide?

In his 2004 State of the Union address, President Bush endorsed a \$300 million program "to expand job training and placement services, to provide transitional housing and to help newly released prisoners get mentoring."²²⁴ This bill is still pending in Congress but would provide funds to help integrate the nearly 650,000 men and women released every year back into society.²²⁵ These funds would help pay for projects to provide education, job training, housing assistance and other support to prisoners on their way back into society, many of whom now receive nothing more than a bus ticket and a pat on the back.²²⁶ The mere fact that President Bush recognizes a need for improvement is significant

²²² See Grupp, *supra* note 24.

²²³ See Celichowski, *supra* 132.

²²⁴ George W. Bush, *State of the Union Address* (2004), available at <http://www.americanrhetoric.com/speeches/stateoftheunion2004.htm>.

²²⁵ *Id.*

²²⁶ *Id.*

in helping to achieve the requisite change.

VI. Conclusion

Policy towards offenders has grown more punitive, and thus more retributive, over the last few decades.²²⁷ Most states and the federal government have instituted mandatory sentencing guidelines, the lengths of sentencing has grown tougher, and harsher penalties have been imposed reflecting this retributive shift. As a result, the prison population has exploded out of control and the rate of incarceration has increased exponentially. Considering the amount of individuals who have spent time in some form of a correctional facility within the United States, we must collectively assess what we realistically expect of these people after they are released.

This article is not advocating that we incorporate implicitly the techniques used by the Ancient Israelites such as the cities of refuge or involuntary servitude because these methods are likely outdated. Rather, it is suggesting that anyone using a conception of punishment based on strict principles of harsh retribution using “Old Testament justice” as justification are relying on a misguided view.²²⁸ Although popular perception might be that the Ancient Israelites used harsh retribution as the cornerstone for meting punishment, a closer examination indicates that rehabilitation and restitution were their primary goals. As such, while specifically incorporating their ideas such as the cities of refuge might be impracticable in our current society, their underlying ideas for their use may not be. Surrounding criminals with positive influences, preserving a humane environment for prisoners, protecting their physical safety, allowing for opportunities for education, and an increased reliance on intermediate forms of confinement are all factors that might serve to collectively improve the U.S. penal system.

²²⁷ See *Alternate Punishments*, *supra* note 124.

²²⁸ See Newton, *supra* note 40.

These are all utilitarian objectives aimed at improving society, so abandoning the notion of retribution as punishment might be required under a Biblical conception.

Moreover, while the teaching of Jesus focused on the eternal concepts of life, it is undeniable that His message included the virtues of exhibiting grace and mercy to those undeserving. Therefore, locking prisoners in an inhumane environment with absolutely no consideration for their well-being is in direct contradiction to the teachings of Jesus. Jesus taught that his grace and love is available for anyone who will receive Him. The scripture never indicates that there is anyone who is beyond the infinite love of the Savior of our world. Accordingly, anything akin to an “out of sight, out of mind” approach to warehousing criminals in a cruel and callous environment assuredly cannot be justified pursuant to the teachings of Jesus.

It is without question that taking verifiable steps to assist in a criminal’s transition back into society is a positive objective. Rehabilitation is important not only to change the nature of the offender, but to make society safer once they are free. So, it is worthwhile mentioning that those who do not see value in spending considerable resources in trying to reform criminals, should perhaps reevaluate their position in that it is inevitable that a major portion of the prison population will be released back into society. The ultimate purpose of rehabilitation, therefore, might not be aimed at the actual offender himself, but instead in the reduction of crime as to make society a safer place.

This article is not advocating for the total abandonment of the prison system altogether. Rather, there is certainly value in locking offenders up with the punishment of confinement. However, the value does not lie in the length of confinement itself, but in how society takes advantage of the impact on the person confined. Reliance on scripture certainly requires an adoption of measures which recognize the

dignity of prisoners and how they spend their lives. The Biblical view of punishment incorporates a high concern for the victim, offender, and society. As an examination of the research has suggested, therefore, punishment would be most effective for all parties if it would approximate some version of the Biblical structure. Indeed, the current spiraling cycle of imprisonment, additional crime, more imprisonment, and even more incarceration is not an effective means for addressing the concerns of society. Alternate forms of punishment exist which were employed by the Israelites under the Mosaic Law, and the teaching of Jesus denotes a concern for every individual regardless of their sin. Taken as a whole, this may indicate we discard our current philosophy of punishment stressing retribution, and incorporate some of the utilitarian aims focused on optimizing the harmony of every member of society.

Bentham's Panopticon:

