

INCARCERATION

Incarceration in Jewish Law: A Brief Overview

Based on sources compiled by Rabbi Jill Jacobs and Rabbi Jonathan Crane, PhD

The Torah describes a judicial system with several punishments at its disposal: fines, lashes, and the death penalty. Incarceration is not normally among them.

There are two instances in the Torah where a person has committed a crime whose punishment is not clear—the blasphemer in Lev. 24:10 and the man gathering wood on Shabbat in Num. 15:32. In both cases, he is put in “*mishmar*”—temporary custody—until Moses can ask God how to handle him. The closest modern analog seems to be “lockup,” the cell where an arrested person is held until s/he is brought before a judge or released.

A few biblical characters end up in prison after angering a powerful leader. In Egypt, Joseph’s master throws him into the dungeon on suspicion of having seduced the master’s wife.

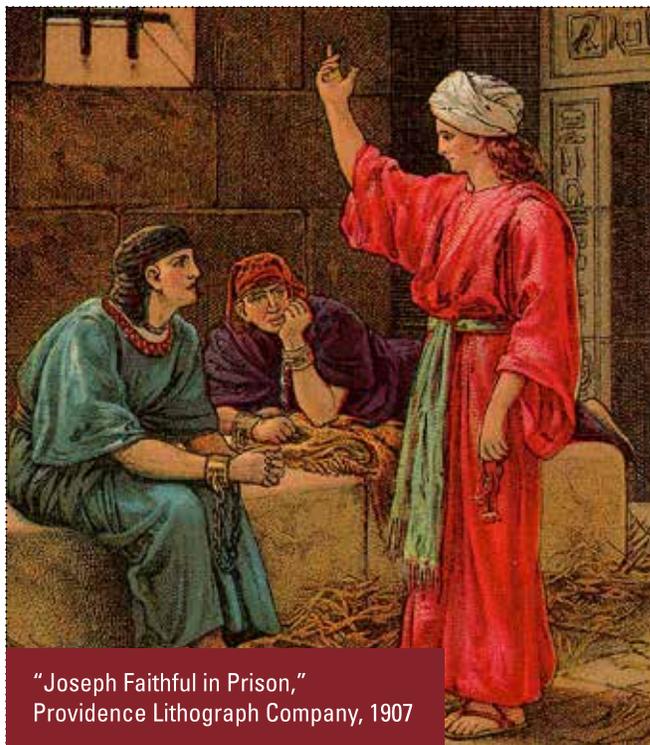
The prophets Jeremiah and Micaiah receive prison time for offering prophecies that the king dislikes. In all of these cases, it’s clear that the Bible sides with the prisoner.

Early rabbinic texts make only passing reference to prisons, which were not a mainstream part of the judicial system.

The Jerusalem Talmud (compiled by about the year 400 CE, roughly 100 years before the more frequently cited Babylonian Talmud) specifically mentions a Jew imprisoned by other Jews (*Mo’ed Katan* 81c), in a discussion of who may break the usual ban on shaving during a holiday. While

the circumstances of incarceration are not clear from this reference, it is obvious that those held in Jewish jails/prisons had finite sentences and could expect to be released. The three categories of people who say the *gomel* blessing, giving thanks for emerging from a life-threatening event, are those who have survived a serious illness, returned from a long

journey, and come home from prison. The latter probably assumes a prison run by non-Jews, from which a Jew could not necessarily expect to be released. One very specific case considers a situation in which a person is arrested for assault before it is clear whether the victim will live or die. The perpetrator remains in jail until the victim either dies or recovers, so that the court can determine whether it is judging a case of murder or of injury. The one form of imprisonment the rabbis do describe formally is called the *kippah* (*Tosefta Sanhedrin* 12:4, BT *Sanhedrin* 81b). This is a small cell in which certain



“Joseph Faithful in Prison,”
Providence Lithograph Company, 1907

people are confined and fed a harsh diet until they die. The Talmud restricts use of the *kippah* to murderers who can not be executed because of technicalities of judicial process, or to those who sin, are punished by a court with lashes, and then repeat the sin several times. Later commentaries further reduce the use of this punishment to murderers acquitted on the smallest of technicalities. Two elements of the *kippah* are significant: that it is used rarely, for a very particular set of extremely serious offenders, and that it is used with clear purpose—punishment to the point of death. No false claim is made here about rehabilitation. There is no evidence that the *kippah* was actually ever used.

In the centuries between the Talmud and the modern era, rabbinic authorities and practices varied, some allowing incarceration, others ruling against it⁴⁸⁸. This excerpt from a responsum by the 14th century Spanish rabbi known as the Riba”sh demonstrates this ambivalence. He first rules against incarcerating a Jew who could not pay off a debt and argues that the general principle of “*dina demalchuta dina*” (the law of the kingdom is the law) does not apply in this case, but then he writes:

The truth is, in my own city, the judges’ custom is to imprison a person who is liable in this manner, according to an act of the community. And they further enacted that even without being found guilty, any person can be held over a lawsuit, unless they pay collateral, and they call this a ruling of the court. I did not want to allow this act to stand, because it is not in accordance with our Torah’s law. And they said to me: this is in accordance with the “marketplace act” [a principle allowing new rules that make commerce smoother], because of swindlers, and so as not to bar the door in the face of borrowers. And I allowed their custom to stand. (484)



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society and operated a modern prison or judicial system; rather, they were exerting communal authority on a local level, usually in civil matters.

This brings us to the modern era, when Jews do once again control a judicial and carceral system in the State of Israel. Let us examine the response of two great rabbis addressing these questions. In a 1953 responsum, Rabbi Meshulam Rath (d. 1963) cites many of the types of imprisonment we have

covered, concluding:

In general, I am hesitant about the agreement of the rabbis regarding imprisonment of five or three years as punishment for sin, for nothing like this is present in our halacha—rather, we have only temporary imprisonment in order to force compliance... (Kol Mevasser 1:83)

Rabbi Haim David HaLevy, who died in 1998 while serving as Chief Rabbi of Tel Aviv-Yafo, seems even more strongly opposed to incarceration, writing at length on the subject. Here are some excerpts from his *teshuvah* (legal response) on the topic:

By all opinions, punishment is not a goal unto itself. Rather, it is intended to return the criminal to doing right or “so that they will listen and fear.” What benefit is prison from this perspective? The punishment of prison has existed in different forms forever. And experience proves that imprisonment does not rehabilitate the criminal...In addition to this, it also causes further harm after his release from prison...there is serious concern that additional crimes will become his way, in the absence of any other choice...

Although the Riba”sh recognizes imprisonment as alien to Judaism and strongly condemns it, he acknowledges other halachic principles that give a rabbinic court leeway. If they find incarceration to be an important tool for maintaining the community, he can’t forbid it outright. Whichever sources we look at from this period, we must be cautious in using them as precedents for understanding incarceration today. The Jews of the Middle Ages never controlled an entire

⁴⁸⁸ For a list of sources on either side of this debate, see note 23 in Lipskar, Rabbi Sholom D., “A Torah Perspective On Incarceration As a Modality of Punishment and Rehabilitation .” <http://www.jlaw.com/Articles/PrisonerRightsNotes.html#23>

But we have brought this to learn the foundation of the holy Torah's perspective on human freedom and the social nature of the human being, created in the image of God, that no other person has the right to confine the human spirit, or his freedom of movement, or his freedom, which are holy of holies among all creations in the image of God⁴⁸⁹, and in each generation, we must devise appropriate punishments for criminals that are consistent with the Torah's outlook and with the conditions of life.

One of the great legal minds of our generation said, "It is our obligation to be concerned about just law; more than that, it is our obligation to be concerned about the criminal himself; more than that, it is our obligation to be concerned with the dignity of humanity."

And we will add, in the spirit of our holy Torah: The greatest of our obligations is to be concerned with the tzelem Elohim [divine image] which is in humanity, "for in the image of God, God created humanity." (Aseh L'kha Rav 3:57)

In a slightly earlier responsum, however, HaLevy does allow short-term incarceration under select circumstances:

There is no question that in the case of a transgressor where there is a concern that he will be punished with capital punishment, that the court is obligated to hold the person and to imprison him in a jail⁴⁹⁰ until it is clear to them that there will not be capital punishment, but only monetary punishment. And we don't let him out on bail, for if the person sees that he will be sentenced to capital punishment, he will flee... And also, in the case of one who has committed a crime and there is a concern of capital punishment, it's not appropriate that this person should go walk around in the marketplace while the court deliberates about his sentence...

We learn from the words of the Riba"sh [not necessarily the text quoted above] that one who is arrested for a crime that is likely

to result in capital punishment, or any bodily crime, is not freed on bail until after his judgment is determined. From this we can learn that for all other crimes, for which the punishment is monetary, we let them go [on bail] until the determination of the sentence. (Aseh L'kha Rav 3:48)

In other words, people accused of crimes who are flight risks or a danger to the public may be detained during a trial, but otherwise, they should be free.

When our society does decide that it will incarcerate someone, against the grain of *halachic* argument (like the Riba"sh's community), what should that incarceration look like? The 19th century Turkish rabbi Chaim Palagi seems to address something resembling a modern prison system when he writes:

It seems that even so, the Torah did not give permission to place someone in a prison that is cramped, for prisons are only for keeping a person to ensure he doesn't escape. . . . Even more so, we should not place him in a prison that's soiled, where he will not be able to study Torah or to keep the mitzvot. For even if the Torah gave us permission, since even though he has sinned and must be imprisoned in a prison, he has not ceased to be a Jew⁴⁹¹. (Shu't Hik'kei Lev II: Hoshen Mishpat 5, published 1849)

We can learn three principles from Palagi's words. First of all, incarceration may be a permissible consequence for sin/crime. However, secondly, the purpose of incarceration is to keep a person from escaping, not as a form of punishment. (We are left to deduce whether the person is being held until trial is completed, as in the Torah's *mishmar*, or until restitution is made, as in the Riba"sh's community, or for some other purpose and length of time.) And finally, conditions inside a prison should enable an incarcerated person to live a life of dignity, meaning, and even holiness.

⁴⁸⁹ We can juxtapose Rabbi HaLevy's argument with these words penned by law professor Jane McAdam in 2011: "[T]he notion of freedom of movement ... [is] a fundamental element of personal liberty... The right to freedom of thought and expression, especially the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers', also depends on the right to free movement for its full realisation." "An Intellectual History of Freedom of Movement in International Law: The Right To Leave As A Personal Liberty" *Melbourne Journal of International Law*, Vol 12, 2011.

⁴⁹⁰ Rabbi HaLevy does not distinguish linguistically between "jail" and "prison," but in this context he must be referring to jail, where people are detained pre-trial or for short sentences.

⁴⁹¹ "a Jew"—which we, today, would understand as "a human being, a full member of society."