

Text study: Jews Incarcerating Other Jews - What Can We Learn?

In the Torah:

1a Leviticus 24:10-12

¹⁰There came out among the Israelites one whose mother was Israelite and whose father was Egyptian. And a fight broke out in the camp between that half-Israelite and a certain Israelite. ¹¹The son of the Israelite woman pronounced the Name in blasphemy, and he was brought to Moses — now his mother’s name was Shelomith daughter of Dibri of the tribe of Dan — ¹²and he was placed in custody, until the decision of the Lord should be made clear to them.

(י) וַיֵּצֵא בֶן-אִשָּׁה יִשְׂרָאֵלִית וְהוּא בֶן-אִישׁ מִצְרַיִם בְּתוֹךְ בְּנֵי יִשְׂרָאֵל; וַיִּנְצֹו בַּמַּחֲנֶה בֶן הַיִּשְׂרָאֵלִית וְאִישׁ הַיִּשְׂרָאֵלִי. (יא) וַיִּקַּב בֶּן-הָאִשָּׁה הַיִּשְׂרָאֵלִית אֶת-הַשֵּׁם וַיִּקְלַל וַיִּבְיֹאוּ אֹתוֹ אֶל-מֹשֶׁה; וְשֵׁם אִמּוֹ שְׁלֹמִית בַּת-דִּבְרִי לְמִטֵּה-דָן. (יב) וַיִּנְיְחוּהוּ בַּמִּשְׁמֶר לְפָרֶשׁ לָהֶם עַל-פִּי ה'.

1b Rashi on verse 12 (11th c. French commentator)

“He was placed”--alone; they did not confine the one gathering [wood on Shabbat] with him, for both of these incidents were at the same time. They knew that gathering [wood on Shabbat was punishable] by death, as it says (Ex. 31:14) “whoever violates [Shabbat] shall surely die,” but it had not been explained which form of capital punishment to apply. Therefore it says (Num. 15:34) “For it had not been explained what was to be done to him.” But regarding the blasphemer, [God] only said to separate from them, and they did not know if he required the death penalty or not.

ויניחוהו - לבדו, ולא הניחו מקושש עמו, ששניהם היו בפרק אחד. ויודעים היו שהמקושש במיתה, שנאמר (שמות לא יד) מחלליה מות יומת אבל לא פורש להם באיזו מיתה, לכך נאמר (במדבר טו לד) כי לא פורש מה יעשה לו. אבל במקלל הוא אומר לפרוש להם, שלא היו יודעים אם חייב מיתה אם לאו:

1c Exodus 21:12, 18-19

¹²He who fatally strikes a man shall be put to death...
¹⁸When men quarrel and one strikes the other with stone or fist, and he does not die but has to take to his bed —
¹⁹if he then gets up and walks outdoors upon his staff, the assailant shall go unpunished, except that he must pay for his idleness and his cure.

(יב) מִכָּה אִישׁ וָמוֹת מוֹת יוֹמֵת:
 (יח) וְכִי-יִרְיֹבּוּ אַנְשִׁים וְהִכָּה-אִישׁ אֶת-רֵעֵהוּ בְּאֶבֶן אוֹ בְּאֶגְרֹף וְלֹא יָמוּת וְנָפַל לְמִשְׁכָּב:
 (יט) אִם-יָקוּם וְהִתְהַלֵּךְ בַּחוּץ עַל-מִשְׁעָנָתוֹ וְנָקָה הַמִּכָּה רַק שְׂבֵתוֹ יִתֵּן וְרִפְאָ יִרְפָּא:

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1d

Rashi on verse 19

“Upon his staff” --under his own health and strength.
“The assailant shall go unpunished” --Lest you think that this one, who has not killed, should be killed. Rather, this teaches that we imprison him until we see if the victim recovers. This is the significance of “when he gets up and walks upon his staff” --then the assailant is cleared, but until the victim gets up the assailant is not cleared.

על משענתו - על בוריו וכחו:
ונקה המכה - וכי תעלה על דעתך שיהרג
זה שלא הרג, אלא למדך כאן שחובשים
אותו, עד שנראה אם יתרפא זה, וכן
משמעו כשקם זה והולך על משענתו אז
נקה המכה, אבל עד שלא יקום זה לא
נקה המכה:

Discussion Questions

1. What similarities and differences do you see between the first two texts and the second two? Can you think of any parallels between these texts and contemporary forms of incarceration?
2. What principles for when, how, and why to incarcerate do you learn from these passages?

2

In the Rabbinic Period:

Mishnah Moed Katan 3:1 (codified c. 200 CE)

These are the ones who may shave during *chol hamoed* [the intermediate days of the holiday]: one who returns from the [distant] lands of the sea, and from captivity, and one who leaves prison...

ואלו מגלחין במועד הבא ממדינת
הים ומבית השביה והיוצא מבית
האסורין...

Jerusalem Talmud Moed Katan 81c (codified c. 400 CE)

...and regarding the one who leaves prison, we would have surmised that it means when he was imprisoned by non-Jews [who would forbid shaving altogether as a luxury], but if he was imprisoned by Jews [who would ordinarily allow him to shave], he may not [shave during the holiday; he should have shaved before his release]. [The Mishnah therefore] comes to teach that, on the contrary, [he may shave during the holiday] even if he was imprisoned by Jews, because it is not appropriate for a man to shave in prison.

והיוצא מבית האסורין הוינן...
סברין מימר כשהיה חבוש אצל
הגויים אבל אם היה חבוש אצל
ישראל לא. אתא מימר לך ואפילו
חבוש אצל ישראל אינו ערב לאדם
לגלח בבית האסורין

Mishnah Berurah 731 (early 20th century Russia/Poland)

“by Jews” --he would not shave [in prison] because he was sorrowful.

ביד ישראל - דכיון שהיה בצער
לא גילח:

Background

Going unshaven is a sign of mourning, and so it is customary to shave before a holiday. The act of shaving itself, however, is considered a form of work and thus prohibited on the festival days themselves (*yom tov*). On the intermediate days of Pesach and Sukkot, many forms of work are permitted but not all. The underlying logic here is that a man ought to shave before the holiday starts. If he didn't because he was lazy or neglectful, he bears the burden, but under extenuating circumstances outside his control, he may shave during *chol hamoed*.

What do you learn from these sources about incarceration, and about being released from incarceration?

3

In the Middle Ages: Riba”sh 484 (14th century Spain/North Africa)

The Torah says, “A handmill or an upper millstone shall not be taken in pawn, for that would be taking someone’s life in pawn.” (Deut. 24:6) So how shall he be seized bodily, such that he will have to beg for bread in the markets and streets? What Shimon the lender [in this case] claims--that the law of the land is the law--has no bearing here whatsoever. **For there is no law of the land, nor even a law of the king, that a person should be imprisoned over borrowing...**

The truth is, in my own city, the judges’ custom is to imprison a person who is liable in this manner [not repaying a loan], 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.

אמרה תורה: לא יחבול רחים ורכב, כי נפש הוא חובל. ואיך ימשכננו בגופו, שצריך לבקש פרנסתו, בשוקים וברחובות? ומה שטען שמעון המלוה בזה: דדינא דמלכותא דינא; אינו ענין לזה כלל. שאין דינא דמלכותא, ואף לא דינא דמלכא: שיהיה אדם נתפס בעד הלואה...

והאמת, כי בעירנו זאת, נוהגין הדיינים לתפוש הלואה בגופו, כשנתחייב כן, והוא מצד תקנת הקהל. ועוד תקנו הקהל: שאף בלא חיוב, יתפש כל אדם, על כל תביעה שיתבעוהו; או יתן ערבים על התביעה, הנקרא: קיום ב”ד. ואני רציתי למחות בידם, על התקנה ההיא, באשר היא שלא כדין תורתנו. ואמרו לי: כי זו תקנת השוק, מפני הרמאין. ושלא לנעול דלת בפני לוויין. והנחתים על מנהגם.

Discussion Questions

1. Why does the Riba”sh oppose debt bondage?
2. Although he opposes debt bondage in principle, the Riba”sh ultimately allows his own city to continue their custom of imprisoning people who do not repay their loans. Why do you think he does so?
3. There has been increased attention over the past few years to instances of debt bondage in the U.S.—often people unable to pay an accumulation of fines and tickets who find themselves in jail or prison. How might the Riba”sh respond to this phenomenon? What is your response?

In the Modern State of Israel:

4a Meshulam Rath (*Kol Mevasser* 1:83) (1875-1962, Poland/Israel)

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 or guard/protect [the individual]...

ובדרך כלל לבי מהסס נגד חוק בהסכמת הרבנים למאסר קצוב של חמש או שלש שנים בתור עונש על חטא שעבר שלא נמצא כזה בחוקי ההלכה שלנו, רק מאסר זמני בתור אמצעי שלכפייה או שמירה.

4b Hayyim David Halevy *Aseh L'kha Rav* 3:48 (1924-1998; Sephardi Chief Rabbi of Tel Aviv, 1973-1998)

We learn from the words of the Riba"sh [responsum 236] that one who is arrested for a crime that is likely to result in capital punishment, or any bodily punishment [e.g., lashes], 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.

למדנו מדברי הריב"ש [סימן רל"ו] שהעצור בעבירה שעלול להתחייב עליה מיתה, או כל עונש גופני אחר, אין משחררים אותו בערבות עד לבירור דינו. ומכאן שבעד כל עבירה אחרת, שחייב עליה ממון משחררים אותו עד בירור הדין.

4c Rabbi Hayyim David Halevy, *Aseh L'kha Rav* 3:57

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?...

לדעת הכל אין העונש מטרה לעצמה, הוא בא להחזיר את הפושע למוטב, או "למען ישמעו וייראו" ומה תועלת המאסר מבחינות אלה?...

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 God, 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.

אבל הבאנו את זה כדי ללמוד את יסודות השקפת תורת ה' על חירותו האישית ומעמדו החברתי של האדם הנברא בצלם אלקים, שאין זכות בידי הזולת לכלוא את רוח האדם, את חופש תנועותיו וחירותו, שהם קודש קדשים של כל הנברא בצלם, ושיש לתאם בכל דור ותקופה את עונשי פושעי החברה ברוח השקפת תורת ה' בהתאם לתנאיה חיים.

Background

These texts are all written by modern rabbinic authorities in the State of Israel, in response to the challenge of creating a new and just state. Although Israeli civil law was based on British common law, not Jewish law, rabbis writing around the formation of the state and in the decades following grappled often with the question of how Jewish civil law might play out in a modern state.

1. How do these modern writers characterize incarceration? How do these views compare with your own?
2. What might a criminal justice system based on the principles articulated in these texts look like?