PATRICK EDWARD GUY, Plaintiff,

v.

MARGARET MIMS, et al., Defendants.

No. 1:11cv00721 AWI DLB PC.

United States District Court, E.D. California.

October 18, 2013.

FINDINGS AND RECOMMENDATIONS REGARDING DISMISSAL OF CERTAIN CLAIMS AND CERTAIN DEFENDANTS

THIRTY-DAY DEADLINE

DENNIS L. BECK, Magistrate Judge.

Plaintiff Patrick Edward Guy ("Plaintiff") is an inmate in the custody of the Fresno County Jail. Plaintiff is proceeding pro se and in forma pauperis in this civil rights action filed on May 5, 2011. On October 6, 2011, the Court screened Plaintiff's complaint and dismissed it with leave to amend for failure to state a claim.

On November 7, 2011, Plaintiff filed his First Amended Complaint. On January 4, 2013, the Court ordered Plaintiff to either file an amended complaint or notify the Court of his willingness to proceed on the cognizable claims. Specifically, the Court found that Plaintiff stated a claim under the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") against Defendants Terry Ashmore, Michele LeFors and Lieutenant Kurtz. Plaintiff did not state a claim against Fresno County Sheriff Margaret Mims, Officer Ruiz and Sergeant Ebguziem as Defendants.

On February 25, 2013, Plaintiff filed his Second Amended Complaint ("SAC"). He names Fresno County Sheriff Margaret Mims, Terry Ashmore, Michele LeFors and Lieutenant Kurtz as Defendants. He no longer alleges claims against Defendants Ruiz or Ebguziem and does not name them as Defendants.

A. LEGAL STANDARD

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual matter, accepted as true, to `state a claim that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are not. Id.

Section 1983 provides a cause of action for the violation of Plaintiff's constitutional or other federal rights by persons acting under color of state law. Nurre v. Whitehead, 580 F.3d 1087, 1092 (9th Cir 2009); Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff's allegations must link the actions or omissions of each named defendant to a violation of his rights; there is no respondeat superior liability under section 1983. Iqbal, 556 U.S. at 676-77; Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009); Jones, 297 F.3d at 934. Plaintiff must present factual allegations sufficient to state a plausible claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

B. SUMMARY OF PLAINTIFF'S ALLEGATIONS

Plaintiff is an inmate at the Fresno County Jail in Fresno, California. He alleges that he is an Orthodox Jew and was denied a kosher diet.

Plaintiff alleges that he requested a kosher diet on February 17, 2011. Defendant Ashmore, who is responsible for verifying an inmate's eligibility for a religious diet, refused to comply with the Fresno County Detention Division's Religious Diet Policy E-185. According to Plaintiff, Policy E-185 requires staff to contact a religious clergy member within the inmate's faith to verify the inmate's religious affiliation. Defendant Ashmore told Plaintiff that he would not ask a clergy member, and "wouldn't bother a Rabbi with [him]." Compl. at 4. Plaintiff contends that Defendant Ashmore did not contact a clergy member until June 28, 2011, when Captain Rick Hill received a letter from the ACLU written on Plaintiff's behalf.

On July 13, 2011, Defendant Ashmore brought Rabbi Zirkind to interview Plaintiff. The Rabbi declared that Plaintiff "is a Jew." Compl. at 5. On July 13, 2011, Plaintiff received a kosher diet, approximately 147 days after being booked into the Fresno County Jail.

Plaintiff contends that Defendant Ashmore did not follow established policies and procedures. He filed a grievance against him, which was denied by Defendants LeFors and Kurtze. Plaintiff contends that Defendants LeFors and Kurtze signed the grievance without interviewing Plaintiff or conducting any investigation as to whether Defendant Ashmore followed E-185.

Plaintiff alleges that "due to the negligent and illegal nature" of E-185, and the negligent behavior of Defendants, he sustained various injuries. Compl. 6.

Plaintiff requests monetary damages. He also requests that the Court order the Fresno County Sheriff's Department to "reform" E-185 and "bring this policy into compliance with all applicable Federal laws." Compl. 8.

C. ANALYSIS

1. *Religion Claims*

The protections of the Free Exercise Clause are triggered when prison officials substantially burden the practice of an inmate's religion by preventing him from engaging in conduct which he sincerely believes is consistent with his faith. Shakur v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008). Similarly, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") prohibits prison officials from substantially burdening a prisoner's "'religious exercise unless the burden furthers a compelling governmental interest and does so by the least restrictive means.'" Alvarez v. Hill, 518 F.3d 1152, 1156 (9th Cir. 2009) (quoting Warsoldier v. Woodford, 418 F.3d 989, 997-98 (9th Cir. 2005)).

As the Court found in the prior screening order, Plaintiff states a claim under the First Amendment and RLUIPA against Defendants Ashmore, LeFors and Kurtze.[1]

2. *Defendant Mims*

Under section 1983, Plaintiff must link the named defendants to participation in the violation at issue. Iqbal, 556 U.S. at 676-77; Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Liability may not be imposed on supervisory personnel under the theory of *respondeat superior,* Iqbal, 556 U.S. at 676-77; Ewing, 588 F.3d at 1235.

Therefore, as an administrator, Defendant Mims may only be held liable if she "participated in or directed the violations, or knew of the violations and failed to act to prevent them," Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); accord Starr v. Baca, 652 F.3d 1202, 1205-08 (9th Cir. 2011); Corales v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009); Preschooler II v. Clark County School Board of Trustees, 479 F.3d 1175, 1182 (9th Cir. 2007); Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997). Some culpable action or inaction must be attributable to Defendant and while the creation or

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nstitutional policy may support a claim, the policy must have been the [illegible] F.3d at 1205; Jeffers v. Gomez, 267 F.3d 895, 914-15 (9th Cir. 2001); Redman v. County of San Diego, 942 F.2d 1435, 1446-47 (9th Cir. 1991); Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989).

In the Court's prior screening order, the Court explained that Plaintiff's allegations that Defendant Mims established the policies and procedures that affect his rights, and that the other Defendants act under color of authority at her direction, were insufficient to state a claim against her. The Court further explained that insofar as Plaintiff pointed to the policy at issue, Plaintiff did not contend that the policy itself was unconstitutional, but rather that another Defendant failed to follow it.

In his SAC, Plaintiff now adds allegations that E-185 is illegal, "negligent" and/or violates RLUIPA and the First Amendment. Although Plaintiff has added this legal conclusion to his allegations, he fails to provide facts to explain his position. Plaintiff's factual allegations only allege that Defendants failed to follow E-185. Per Plaintiff's allegations, E-185 simply requires that a religious clergy member be contacted to validate an inmate's request for a religious diet. Plaintiff fails to allege any facts to explain his contention that E-185 is somehow unconstitutional. Therefore, Plaintiff's claim continues to be rooted in Defendants' alleged failure to follow E-185, notwithstanding his recent allegations that E-185 is somehow unconstitutional.

Plaintiff's conclusory, unsupported allegations against Defendant Mims continue to be insufficient to state a claim against her.

D. FINDINGS AND RECOMMENDATIONS

Based on the above, the Court finds that Plaintiff states an exercise of religion claim under the First Amendment and RLUIPA against Defendants Ashmore, LeFors and Kurtze.[2] He does not state a claim against Defendant Mims and the Court recommends that she be DISMISSED from this action. Plaintiff has been afforded two opportunities to correct the deficiencies as to Defendant Mims, but failed to do so. Akhtar v. Mesa, 698 F.3d 1202, 1212-13 (9th Cir. 2012) (internal quotation marks and citation omitted).

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after being served with these Findings and Recommendations, Plaintiff may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

[1] Defendants LeFors and Kurtze denied Plaintiff's grievance against Defendant Ashmore. While individuals who deny a prisoner's appeal generally do not cause or contribute to the underlying violation, a claim may be stated against them if they willfully turn a blind eye to constitutional violations being committed by subordinates. Jett v. Penner, 439 F.3d 1091, 1098 (9th Cir. 2006). Based on the Court's finding that Plaintiff stated a claim under the First Amendment and RLUIPA and his allegations that Defendant LeFors and Kurtze denied the grievance without investigation, the claim is sufficient at the screening level.

[2] Plaintiff will be instructed on service by separate order.

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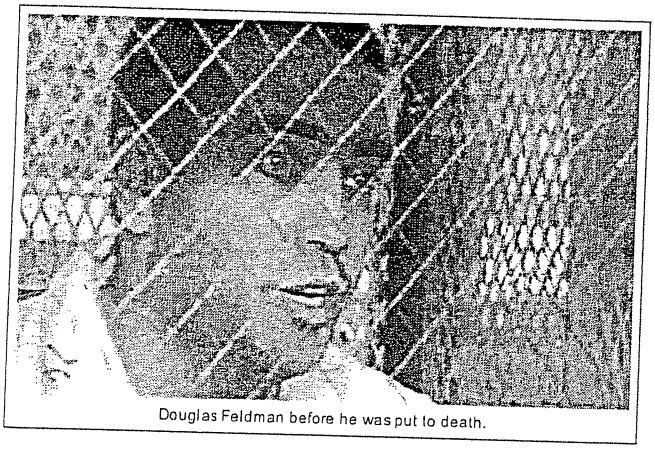
OCTOBER 30, 2013
RABBI MOSHE DAVIS

Houston, TX - High Profile Inmate Put To Death Gets Halachic Burial

Published on: August 10th, 2013 at 11:21 PM



Douglas Feldman before he was put to death.

Houston, TX - An unrepentant convicted double-murderer, who became the first-known Jew executed by lethal injection in the state of Texas when he was put to death July 31, was granted a halahkic burial due to the tireless efforts of a Houston rabbi and New York "practical Kabbalist' who became the inmate's "Jewish interface" through a series of letters.

JHVONLINE.com (http://bit.ly/1ey4n9O) reports that 55 year-old Douglas Feldman was executed after spending 15 years on death row for killing two truck drivers in two separate incidents of road rage in Dallas County in the summer of 1998.

Feldman, who acquaintances believed suffered fro mental illness, was a former financial analyst who, despite the fact that he was born into the Jewish faith, declined to identify as such when entering the Texas penal system, and even went as far as to plan his cremation after his execution.

But after a lengthy, sometimes contentious jailhouse meeting with Rabbi Dovid Goldstein a consulting rabbi for the Texas Department of Criminal Justice, and Rabbi Mendy Traxler, Goldstein's Chabad Outreach colleague prison chaplain associate, a mere seven days before his execution, Feldman laid tefillin and became a Bar Mitzvah.

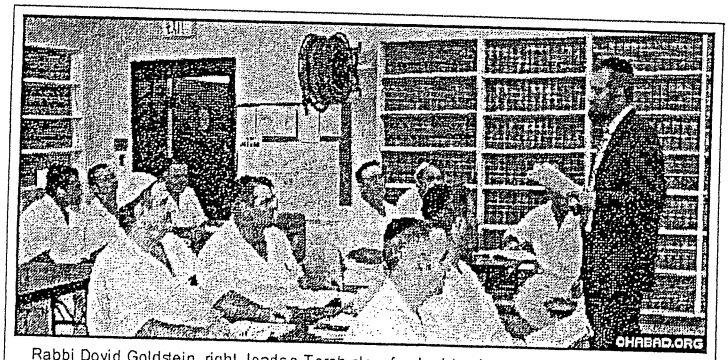
Rabbi Goldstein said he was first contacted about Feldman through a Houston-area law school non-profit opposed to the death penalty who put him touch with Feldman's mother, who told him she had only minimal contact with her son since he hit death row.

After lengthy discussion, Feldman's mother asked Goldstein to visit her son, telling him that no one from the Jewish faith had interacted with her son aside from "one man from New York."

James Irsay, an academic on "practical Kabbalah" and host of a classical radio program on New York public radio, had struck up a long-standing correspondence with Feldman after the inmate contacted him upon reading some of his writing on Jewish mystical art in a magazine.

"I wrote him back because he had been through a lot," said Irsay. "He appealed to me as a Jew. I couldn't turn him down. I felt a responsibility to respond."

Irsay said that, through their correspondence, he became aware that Feldman suffered from "spiritual distress," and subsequently painted and sent him a Kabbalistic amulet that "harnessed the force of light - a warrior force - which attacks and defends against the dark force."



Rabbi Dovid Goldstein, right, leads a Torah class for Jewish prisoners at Texas' Stringfellow

Irsay said the amulet became Feldman's most prized prison possession, and that the inmate was especially drawn to one of the names of God - spelled shin-daled-yud, included on the amulet.

On the day that Rabbis Goldstein and Traxler visited Feldman he was antagonistic, vehemently denouncing the Jewish faith with derogatory statements about Jews.

He bragged to the rabbis about how good it felt killing his victims and

at one point told Rabbi Goldstein, "If you piss me off, I would kill you, too."

After multiple rebukes to his suggestion of a Bar Mitzvah and a proper Jewish burial, Goldstein doubled-down, attempting one last time to reach Feldman---this time through spirituality.

Feldman let on his interest in Kabbalah, telling Goldstein about a picture he'd seen of a WWII-era Jew being ridiculed by Germans while wrapped in a tallit and tefillin.

Goldstein produced a similar photo, explaining to Feldman that the Hebrew letter "shin" is the "warrior letter" and the same letter that appears on the leather box bound around the head during prayer.

Goldstein asked Feldman if he "wanted to be a warrior," after which the rabbi said Feldman said "Yes" and broke down.

"Let's have a Bar Mitzvah," Goldstein said.

"I put the tefillin on him, made the blessings, and then he became emotional," Goldstein said. "He started to cry."

Upon leaving, Goldsteinasked for and received a hug from Feldman.

A week later Goldstein and Irsay met in Houston where they were ultimately successfull in convincing Feldman's mother to reconsider his burial plans on the day of his execution.

Feldman's mother said it was Goldstein hugging her son---the first time in 15 years that another human being had lovingly embraced her son--that changed her mind.

"I showed true care and concern for him [when he was still alive], so she knew I would show true care and concern for his burial," said Goldstein.

Incarceration as a Modality of Punishment

by Charles J. Harary, Esq.

Mr. Harary is associated with the law firm of Davis, Polk & Wardwell

Incarceration is a form punishment that is used contrastingly in Jewish and American law. While American law embraces incarceration and uses it as its most common form of punishment, Jewish law rejects it and almost never uses imprisonment as a form of punishment. This paper will first analyze the Jewish law approach to incarceration; when and how the courts used it. It will then analyze the American law approach to incarceration, the reasons for its predominance, and associated problems. By focusing on the reasons and the problems of incarceration in America, a hypothesis is made for the Jewish law rejection of incarceration as a mode of punishment.

I. THE APPROACH OF JEWISH LAW

Incarceration as a modality of punishment is generally not found in Jewish jurisprudence. Prisons are seldom found in the Torah, and when they are, it is not as the sole punishment. Prisons were primarily used (i) to detain offenders before trial and sentencing, and (ii) as a means of enforcement.

A. Prison as a holding cell before trial and sentencing

1. Prison before trial

Incarceration was used to detain alleged offenders before a capital trial. Where a capital crime was committed but a case against the offender had not been established yet, the offender could be imprisoned until the prosecution could determine if a case can be made.[1] The Gemara in Sanhedrin[2] discusses the source of this law. The Gemara cites a case in the Torah[3]where an assailant struck a victim, but it was uncertain if the victim would live or die. The Torah states that if the victim dies, the assailant gets capital punishment. If however, the victim lives, the assailant is only liable for monetary damages. The verse states, "If the victim gets up and goes outside under his own power, the assailant is absolved" and not executed. [4]Rabbi Nechemia states that the last clause "and the assailant is absolved" is superfluous because if the victim would live, then obviously the assailant would be absolved and not executed.[5] The Tanna Kama answers that the Torah uses the verse "and the assailant is absolved" to teach that the court imprisons the attacker until it is determined whether he is liable for execution.[6] If he is not liable for execution, then he is absolved and released from prison. The Rambam learns from this that if there is doubt whether the victim will live or not, the court places the assailant in jail so he won't flee as they determine his sentence.

2. In anticipation of a sentence

There are two cases found in the Torah where an offender is placed in prison to await a sentence. One takes place in Parshas Shlach.[7] The incident involves a man who was Mekoshes Aitzim, gathering wood in violation of Shabbos. The man was apprehended and placed in a "mishmar" until the court determined his sentence.[8] The Ibin Ezra explains that the place referred to was a prison. The Sifri in Shlach states that anytime a person commits a capital offense, the halacha is that he gets put in jail until Beis Din determines his fate.

The second case takes place in Parshas Emor.[9] The incident involves a man who was Mekalel, blasphemed, the Name of God. As with the Mekoshes, the Mekalel was apprehended and imprisoned until sentencing.[10] From these two cases we see a source for imprisonment in anticipation of sentencing. This would apply either when the court is uncertain whether an offender is liable for capital punishment, like the Mekalel, or is merely uncertain of the type of capital punishment, like the Mekoshes.[11]

3. Arresting an alleged offender

The Yerushalmi in Meseches Sanhedrin[12] discusses when a court can arrest and imprison an alleged offender. The Gemara rules that if witnesses come forth and accuse a man of a capital crime, the court can imprison the accused on the basis of those statements after only minimal interrogation of the witnesses. The court then fully interrogates the witnesses to determine his guilt or innocence. The reason for the ruling is that the accused is considered a flight risk.

4. Bail

Bail, although popular in American jurisprudence, is not found in Jewish law. The Tziz Eliezer[13] suggests that the reason behind the Torah's position to imprison an alleged offender before trial is not merely because he is a risk of flight, but because the Torah does not consider such a person worthy to be free before trial. He quotes the Mechilta in Mishpatim that states that if the reason to imprison alleged offenders is due to a risk of flight, then a bond or a security deposit could be a sufficient deterrent. However, the Torah specifically states "im yakum" to teach that an alleged offender should be imprisoned before trial. The Mechilta asks rhetorically, "yachol metayel beshuk," an alleged offender should be allowed to walk the streets? If one transgresses and there are witnesses that accuse him, he is imprisoned until trial.

B. Imprisonment as a means of enforcement

Incarceration was also used as a means of forcing someone to act in accordance with the court. The Gemara in Meseches Pesachim[14] discusses whether a person can sacrifice a korban pesach on behalf of a person who is in jail. The Gemara rules that one can sacrifice a korban pesach on behalf of an incarcerated person only if that person is in a Jewish prison. Rashi comments that such a person was in prison because the court was either trying to force him to divorce a woman to whom it was impermissible to marry or the court was trying to force him to pay a debt.

Commentators address both of Rashi's stated possibilities for imprisonment. The Tziz Eliezer comments on the power of the court to imprison someone to force him to divorce a woman. He states that court's power to use incarceration to force a person to adhere to a court decree is a derivative of the well known halacha "makin oto ad shetezey nafsho," the court is allowed to hit a man that refuses to properly divorce his wife, until he agrees to do it on his own. The court is able to use various methods, including incarceration, to get someone to act in accordance with a court ruling.

Imprisoning someone to pay off a debt is a point of controversy between the Rashba and the Rosh.[15] The Rashba claims that only a man's property can be used to pay off debt, not his person. A case involving a debtor who had defaulted on a loan was presented to the Rashba in which he ruled that the debtor cannot be placed in jail, nor sold as a servant. The only time one can attack a debtor's person is for theft; normal debtors are only obligated with their property. The Rosh disagrees and allows the use of incarceration of debtors in limiting situations. The Rosh states if debtor owes money and there is reason to believe that he has sufficient capital to pay the debt, the court may imprison him to force him to compensate his

creditors. However, if he does not have the funds to compensate his creditors then he cannot be imprisoned. The Rosh's view is that you may use prison only if it will serve a purpose, like provide an incentive for a debtor to admit possessing sufficient funds to compensate his creditors.[16] Using prison as a punishment for a debtor is not permissible.

There is a similar machlokes between the Mechaber and the Rama in Shulchan Aruch Choshen Mishpat.[17] The Mechaber, like the Rashba, rules that if a debtor defaults, his creditors have no right to sell him or insist that he be imprisoned. The Rama, like the Rosh, rules that incarceration may be utilized if it can help the creditors get paid, like in the case where the debtor fraudulently claims insolvency to avoid payment.

During the times of the Ribash, his city created a takanas hakahal, a community ordinance that permits incarceration of a debtor that fails to pay his creditors. This ordinance applies whether the debtor was legitimately insolvent or not. The reason for the takana was to make people more amenable to lending money to others. The community reasoned that if a person can merely claim insolvency and default on a loan without consequence, people will be too hesitant to lend money to others. The Ribash[18] stated that although he believed incarceration should not be imposed on debtors, since the community created this takana he will support it to further the goal of creating an incentive for lending money. The Maharash dam[19] agreed but limited the takana to debtors that did not have good credit beforehand. He claimed that an honest businessman with good credit that fell on hard times and defaulted on a loan should not be imprisoned.

We see from the above analysis that prison can be used (i) to hold an alleged offender before trial; (ii) when a person commits a capital crime and the sentence has not been determined; and (iii) as a means of forcing someone to act in accordance with a court decision, either in marital or monetary cases. Incarceration as a type of capital punishment or as a form of punishment was rarely used.

1.Incarceration as type of capital punishment

The Gemara in Sanhedrin[20] discusses a case where incarceration was used as a type of capital punishment. This type of capital punishment was referred to as "machnisin oto lekippa." The punishment relates to the following hypothetical. If person commits a crime for which he is liable kares,[21] his punishment is felt to be that of a spiritual nature. However, the court has the power to give such a person lashes.[22] The gemara in Sanhedrin deals with a case where a person was flogged twice for having committed on two separate occasions a transgression whose penalty is kares, and later transgressed a third time.[23] The halacha[24] states that as punishment for the third transgression,[25] instead of lashes, the court administers the capital punishment of "machnisin oto lekippa." The court places the offender in a cramped cell that has no room for him to either to stretch or lie down.[26] They then feed him minimal amounts of bread and water until his stomach shrinks. Afterwards he is fed barley and water until his stomach bursts and he dies. Incarceration, although used by the courts, was used as a form of capital punishment; it was not used as a punishment in itself.

2.Incarceration as a modality of punishment

In a very limited circumstance, incarceration was used as the punishment. The Gemara in Sanhedrin[27] discusses a case where a person knowledgeable in criminal law was committing capital crimes in a way that resulted in him going unpunished. For example, in order to be liable for capital punishment the crime must be committed in the presence of two witnesses who fully see he event and adequately warn the offender beforehand. Such a person who is sophisticated in criminal laws can easily

avoid capital punishment by committing the crime outside the presence of two witnesses or refusing to accept the warning from the witnesses during the commission of the crime. Although such a person is culpable for the crime, the court cannot give him a capital punishment. In such a circumstance, the court can give the offender life imprisonment. This is the only situation where incarceration is used as a modality of punishment.

3.Airey Miklat

A common misconception is that the Airey Miklat, the Cities of Refuge, were a form of incarceration. The Airey Miklat were cities of refuge where persons guilty of unpremeditated murder escaped to, to avoid revenge from the victim's family. Moshe established three of these cities before the Jews entered Israel and Joshua established three afterward.[28] Although these cities restricted the liberty of those that entered, they are very different than present day incarceration. For one, the offender had the choice to enter the city, and he was permitted to bring his family with him. In addition, the Rambam maintains that he was able to bring his Rabbi and teacher with him as well. The Rambam learns from the verse "and he should run to one of these cities and live,"[29] that a person exiled to one of these cities takes his teacher with him so he should live.[30] Also, the city was designed to provide a proper habitat for its inhabitants. The Rambam states that the Airey Miklat were built near towns with water and fresh food.[31] The offender had the choice to enter such a city. As a result, the city's function served more as a protective environment to facilitate atonement as opposed to isolation for punishment.[32] Such cities further the idea that the Torah doesn't have prisons as a form of sentencing because that goes against the policy of the Torah to facilitate rehabilitation rather than isolation from the community.

II. THE APPROACH OF U.S. LAW

This section will show the predominance of incarceration as a form of punishment in the United States, the reason for such predominance and the problems with incarceration. The paper will then explain why the Jewish law approach to incarceration differs from the American one.

A. Incarceration in America

Incarceration is the cornerstone of the American criminal justice system. It is the most common punishment for serious offenses.[33] The U.S. has over two million adult citizens incarcerated,[34] twenty-five percent of the world's prison population.[35] The U.S. also has the highest per capita incarceration rate in the world,[36] a rate five times higher than the next highest Western nation.[37] In addition, the past decade was a decade that has incarcerated more people than in any other decade. The amount of people added to prisons in the 1990s was 25% higher than in the 80s, and is nearly 16 times as many as the average number added during the five decades before 1970 in which the incarcerated population increased.[38]

B. The reasons for incarceration

There are four major goals of punishment in the American criminal justice system: retribution, deterrence, incapacitation and rehabilitation.[39]

Although there is agreement as to these broad objectives, controversy exists as to the emphasis placed on each objective when punishment is invoked. For the greater part of this century, rehabilitation was the dominant strain in penological thought.[40] In the past two to three decades though, the philosophy behind punishment has shifted from rehabilitating the offender to prevention of future crimes through control and detention of dangerous persons.[41] As a result, incarceration has become the most dominant form of

punishment. Three examples show how prevention through incarceration is the dominant objective. The first example is the "three strike" laws that authorize life sentences for repeat offenders.[42] The rationale behind these laws is clear from the legislative history of the federal three strikes statute. After citing the problem of a significant percentage of crimes committed by people who previously have committed crimes and concluding that the response to both violent crime and recidivism has been inadequate, the Report of the House of Representatives states that the purpose of the legislation is "to take the Nation's most dangerous recidivist criminals off the streets and imprison them for life."[43] Former Senate Majority Leader Trent Lott explained the need for the federal legislation by noting that "there is no doubt that a small hardened group of criminals commit most of the violent crimes in this country" and that "many of the people involved in these crimes are released again and again because of the "revolving door' of the prison system."[44] The goal is clear, to incapacitate, not to rehabilitate but to protect society from "the Nation's most dangerous recidivist criminals."[45]

The second example of the objective of punishment in society is the decreasing of the age of juvenile offenders to be tried and sentenced as adults.[46] Like the three strike laws, the legislative history can clarify the rationale behind these reforms. The Congressional Research Service summarizes the rationale for such state legislation: "locking up dangerous kids so that they will not commit further crimes."[47]

The last example is the new sentencing guidelines that increase the sentences of past offenders.[48] The rationale behind increasing the sentence of an offender with a criminal history is to protect society from the possibility of such an offender committing another crime. As the Guidelines Manual of the United States Sentencing Commission explains, "the specific factors included are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior."[49]

C.Incarceration is a poor form of punishment

By focusing on the flaws of incarceration we can begin to appreciate why Jewish law does not entertain incarceration as a modality of punishment. First, not only is incarceration not a deterrent, it may actually cause offenders to commit additional crimes.[50] A Department of Justice study revealed that an overwhelming percent of prisoners were again arrested for felonies or serious misdemeanors within three years of their release.[51] Another Department of Justice study discovered that imprisonment actually increases the rate of recidivism among felons.[52] Felons sentenced to imprisonment were matched with felons sentenced to probation, according to characteristics of crime and criminal thought to correlate with recidivism.[53]Seventy-two percent of the prison group was rearrested during the two years following release, compared to only sixty-three percent of the probation group.[54] Another researcher obtained corroborating results: Each experience of incarceration rendered the next more likely.[55] The authors of the studies suggest that either the experience of imprisonment increased criminality or being labeled as an ex-prisoner reduced chances of finding legitimate employment after release.[56] This argument is sound since a person sent to jail is most probably outcasted from his friends, family and community. When he is released from prison it is very difficult to find a job and become a productive member of society. As a result, there is a increased chance that he becomes part of the criminal element where he is accepted.

Another flaw in incarceration as a mode of punishment is that it fails to rehabilitate the offender. Michael Foucault in his study on incarceration concludes that "the prison cannot fail to produce delinquents" with the isolation, useless work, violent constraints and arbitrary power that it imposes.[57] The few rehabilitative successes realized in American criminal justice stem not from the prison experience per se, but from unrelated training and treatment programs administered while offenders happen to be in custody or after they are released.[58]

III. PRISON CONTRARY TO JUDAISM

Incarceration as a mode of punishment violates the basic tenets of the Jewish faith. First, Judaism believes in the intrinsic value of every individual. Everyone is seen to be created in the image of God and is equally given the task of making the world a "dwelling place" for God.[59] Man is given the task to use his life to accomplish this by serving God.[60] Incarceration prevents a person from fulfilling his purpose in the world by limiting his ability to function in society.[61] Secondly, Judaism believes in the ability of man to repent and atone for his sins. For the criminal, the consequential punishment of crime brings penance, atonement, rehabilitation and ultimate purging.[62] After being punished, one starts with a fresh slate; Jewish law dictates that the community must accept the wrongdoer as before and he regains a place in the World to Come.[63] Incarceration frustrates this as well. It does not serve to rehabilitate the offender. It leaves the offender embarrassed, ostracized and less likely to atone and start anew. Prison inhibits and limits man's potential, destroys families and breeds bitterness, anger, insensitivity and eventual recidivism.[64] The goal behind incarceration in America is prevention of future crimes, not rehabilitation. This lack of faith in people is contrary to Jewish thought. Judaism believes in the value of the person, Judaism believes that punishment could rehabilitate the offender. Incarceration does not. Incarceration as a form of punishment lacks the ideals that Judaism prides itself on.

IV. DINA DEMALCHUTA DINA

It is important to end with a note that the above analysis is a theoretical one. Although there are many prominent Jewish communities with competent halachik authorities, the law remains as long as the Jews are in exile, many of the Jewish laws are inapplicable and are supplemented by the law of the land in which the Jews reside. This principle is known as "dina demalchuta dina," the law of the land is the law.[65] In today's time the Torah requires American Jews to follow the law of the land; since incarceration is the law in America, then it applies to the Jews that live in America at this time regardless of the approach taken by the Torah.

Footnotes

1. See Sanhedrin 78b; See also Kesubos 33b.
2. 78b; See also Kesubos 33b.
3. Shmos 21:18-19.
4. Shmos 21:19
5. Sanhedrin 78b
6. Sanhedrin 78b; See Rashi there
7. Bamidbar 15: 32-36.
8. Bamidbar 15:34, the court "placed him in custody for it had not been clarified what should be done to him."
9. Vayikra 24: 10-16.
10. See Vayikra 24:12, In response the court "placed him under guard to clarify for themselves through Hashem."
11. It is interesting to note that R' Nechamia claimed to learn imprisonment before sentencing from the case of the mekoshes aitzim. The Rabbis rejected that as a source since in that case, the court was certain that the mekoshes would get a capital punishment, they were just uncertain which type. R' Nechemia then claimed to learn imprisonment from the Mekalel, since in that case the Mekalel was detained even when the court was uncertain if he would receive capital punishment at all. The Rabbis rejected that as a source reasoning that the case of the Mekalel lacks precedential value since it was an adhoc decision by Moshe,

since the punishment for curses God's name had not yet been revealed. This was a special situation where Hashem judged the offender. See Peshachim 78b and Rashi there.

12. Perek 7 Halacha 8
13. Hilchos Medina
14. 90a
15. Based on a lecture given by Rabbi Yissocher Frand, Parshas Shlach 1993.
16. See Responsa Rosh No. 78:3
17. 97:15
18. See Responsa Ribash No. 484.
19. Responsa Meharash dam, Choshen Mishpat No. 390
20. Sanhedrin 81b; See also Rambam Chapter 18, Hilchos Sanhedrin, Halacha 4,5.
21. Kares is a form of heavenly retribution that entails the premature death of the violator. See Moed Kattan 28a.
22. See Makos 23a.
23. See Rashi in Sanhedrin 81b
24. See Rambam, Chapter 18, Hilchos Sanhedrin Halacha 4.
25. The Tanna Kamma of the Braisa agrees with Rebbi and the Mishna that the offender's wickedness is established after two transgressions. In contrast Abba Shaul agrees with Rabban Shimon's view that four transgressions is needed before the offender gets incarcerated. See Sanhedrin 81b.
26. See Rambam, Chapter 18, Hilchos Sanhedrin Halacha 4.
27. Sanhedrin 81b; See also Rambam Chapter 18, Hilchos Sanhedrin, Halacha 5.
28. Bamidbar 35: 9-34.
29. Devarim 4:42.
30. Rambam, Hilchos Rotzeach U'Shmiras Nefesh, Ch.7:1.
31. Rambam, Hilchos Rotzeach U'Shmiras Nefesh, Ch. 6.
32. Makos 2:2; Encyclopedia Talmudit 123.
33. See Hannah T. S. Long, 31 Colum. J.L. & Soc. Probs. 321, Spring 1998
34. Jason Ziedenberg & Vincent Schiraldi, Justice Policy Institute, The Punishing Decade: Prison and Jail Estimates at the Millennium (1999), at http://www.cjcj.org/ punishingdecade. (last visited July 31, 2001).
35. The world prison population is estimated at 8 million in 1999. See Walmsley, Roy (1999) World Population List: Research Findings No. 88. London, United Kingdom: Home Office Research, Development and Statistics Directorate.
36. Based on results from the Justice Policy Institute, Washington D.C. See Sentencing Project, U.S. Surpasses Russia as World Leader in Rate of Incarceration, at http:// www.sentencingproject.org/pubs/tsppubs/intdata.pdf (last visited July 31, 2001).
37. See Mauer, supra note 3, at 21-23 tbl.2-1, fig.2-3 (indicating a U.S. incarceration rate of 600 per 100,000 in 1995). (Penn)
38. Jason Ziedenberg & Vincent Schiraldi, Justice Policy Institute, The Punishing Decade: Prison and Jail Estimates at the Millennium (1999), at http://www.cjcj.org/ punishingdecade. (last visited July 31, 2000).
39. See United States v. LaBonte, 117 S.Ct. 1673, 1687 (1997) (invoking "the basic goals of punishment (deterrence, incapacitation, just deserts, rehabilitation)"); See also Harmelin v. Michigan, 501 U.S. 957, 999 (1991). In the Sentencing Reform Act of 1984, Congress explained that sentencing must reflect penological purposes of just punishment, deterrence, protection of the public, and treatment of the offender.
40. See 111 Harv. L. Rev. 1967 (May 1998).
41. See 114 Harv. L. Rev. 1429 (Mar. 2001).
42. See, e.g., 18 U.S.C. 3559 (1994) (requiring life imprisonment on a third serious violent felony conviction); Nat'l Conference of State Legislators, "Three Strikes" Sentencing Laws 24 (1999) (noting that between 1993 and 1999, twenty-four states and the federal government enacted "three strikes" laws and that nearly all states have some type of sentence enhancement applicable to habitual offenders).
43. H.R. Rep. No. 103-463, reprinted in H.R. 3981, 103d Cong., at 3-4 (codified at 18 U.S.C. 3559 (1994)).
44. 139 Cong. Rec. 27, 822-23 (1993).

45. Id.
46. Between 1992 and 1995, forty-one states passed laws making it easier to try juveniles as adults. See Melissa Sickmund, Howard N. Snyder & Eileen Poe-Yamagata, Nat'l Ctr. for Juvenile Justice, Juvenile Offenders and Victims: 1997 Update on Violence 30 (1997). According to a recent Justice Department report, "every state now has at least one provision to transfer juveniles to adult courts." Kevin J. Strom, Profile of State Prisoners Under Age 18, 1985-97, at 1 (Bureau of Justice: Special Report, NCJ 176989, 2000). As of 1997, twenty-eight states had statutes that automatically excluded certain types of offenders from juvenile court jurisdiction, fifteen states permitted prosecutors to file some juvenile cases in adult criminal courts directly, and forty-six states allowed juvenile court judges to send cases to adult courts at their discretion. Id. at 2. As a result of such changes, the number of young people sent to prison rose from 18 per 1000 violent crime arrestees under age eighteen in 1985 to 33 per 1000 arrestees in 1997. Id. at 5 tbl.4.
47. Cong. Research Serv., Pub. No. 95-1152 GOV, Juveniles in the Adult Criminal Justice System: An Overview 5 (1995).
48. See, e.g., U.S. Sentencing Guidelines Manual ch. 4, pt. A (1998-99);
49. U.S. Sentencing Guidelines Manual 289 (1999).
50. Hannah T. S. Long, 31 Colum. J.L. & Soc. Probs. 321, Spring 1998
51. See Allen J. Beck & Bernard E. Shipley, U.S. Department of Justice, Recidivism of Prisoners Released in 1983, at 1 (1989). See also Miles D. Harer, Federal Bureau of Prisons, Recidivism Among Federal Prison Releases in 1987 (1994).
52. See Joan Petersilia et al., Practicing Law Inst., Prison Versus Probation in California -- Implications for Crime and Offender Recidivism, 150 PLI/Crim. 105 (1989).
53. See id. at 107-08.
54. See id. at 108-09.
55. See also Joan Petersilia et al., Practicing Law Inst., Prison Versus Probation in California -- Implications for Crime and Offender Recidivism, 150 PLI/Crim. 105, 108-09 (1989).
56. See Joan Petersilia et al., Practicing Law Inst., Prison Versus Probation in California -- Implications for Crime and Offender Recidivism, 150 PLI/Crim. 105, 109 (1989).
57. See Michel Foucault, Discipline and Punish: The Birth of the Prison 266 (1977).
58. See Elliot Currie, Crime and Punishment in America: Why the Solutions to America's Most Stubborn Social Crisis Have Not Worked -- and What Will 12, 162-84 (1998).
59. Tanchuma Naso 7, Likutei Amarim Tanya, ch. 36;
60. Devarim 11,13; id ch. 37.
61. See Avodah Zara 3a
62. Sanhedrin 23a
63. See Likutei Amarim Tanya, Igeret Hatsuvah ch.2; See A Torah Perspective on Incarceration As a Modality of Punishment and Rehabilitation, Rabbi Sholom D. Lipskar (1985).
64. See A Torah Perspective on Incarceration As a Modality of Punishment and Rehabilitation, Rabbi Sholom D. Lipskar (1985)
65. See Talmud Nedarim 28a; Talmud Baba Basra 54b; Talmud Gittin 106; Talmud Baba Kamma 113a.

Rambam, Hilchot Rotzeach ushmirat hanefesh
Chapter Seven

Halacha 1: When a Torah scholar is exiled to a city of refuge, his teacher is exiled together with him. This is derived from Deuteronomy 19:5, which states: "He shall flee to one of these cities, and he shall live." Implied, is that everything necessary for his life must be provided for him. Therefore, a scholar must be provided with his teacher, for the life of one who possesses knowledge without Torah study is considered to be death. Similarly, if a teacher is exiled, his academy is exiled with him.

Halacha 2: When a servant is exiled to a city of refuge, his master is not obligated to provide for his sustenance. The income from his labor, however, belongs to his master.

When a woman is exiled to a city of refuge, her husband is obligated to provide for her sustenance. For he cannot tell her: "Take the fruits of your labor in exchange for your sustenance," unless the woman is capable of earning a sufficient amount to provide for herself.

Halacha 3: When a killer was sentenced to exile and died before the sentence was implemented, his bones should be taken to a city of refuge and buried there.

When a killer dies in his city of refuge, he should be buried there. When theHigh Priest dies, the bones of the killer may be taken to his ancestral plot.

Halacha 4: When any of the other Levites who live in the city of refuge dies, he should not be buried within the city or within its Sabbath boundary. As Numbers 35:3 states: "Their open space will be for their animals, for their property and for all their life." Implied is that these cities were given for life, and not for burial.

Halacha 5: When a killer kills accidentally in a city of refuge, he should be exiled from one neighborhood to another. He should not depart from the city.

Similarly, when a Levite kills in one of his own cities, he should be exiled to another one of the cities of the Levites. For they all serve as a haven, as will be explained. If he killed outside the cities of the Levites and fled to his own city, that city serves as a haven for him.

Halacha 6: When the majority of the inhabitants of a city of refuge are killers, it no longer serves as a haven. This is derived from Joshua 20:4, which speaks of the designation of the cities of refuge and states: "And the killer will speak his words in the ears of the elders of the city." Implied is that there is a distinction between their words and his words.

Similarly, a city that does not have elders does not serve as a haven, for it is written: "The elders of that city."

Halacha 7: When a killer was exiled to a city of refuge, and the inhabitants of the city desire to show him honor, he should tell them: "I am a killer."

If they say, "We desire to honor you regardless," he may accept the honor from them.

Halacha 8: A person who was exiled to a city of refuge should never leave his city of refuge, not even to perform a mitzvah or to deliver testimony - neither testimony involving monetary matters, nor testimony involving a capital case. He should not leave even if he can save a life by delivering testimony, or he can save a person from gentiles, from a river, from a fire or from an avalanche. This applies even if he is a person like Yoav ben Tz'ruyah, upon whom the salvation of the entire Jewish people may depend. He should never leave the city of refuge until the death of the High Priest. If he departs, he has allowed for his death, as explained.

Halacha 9: When it is said that a killer may return after the death of the High Priest, the intent is a High Priest anointed with the anointing oil, one who assumed his office through wearing his vestments, one

who performs the service of a High Priest, and one who was removed from his office. When any of these four die, a killer may return from his city of refuge.

When, by contrast, a priest anointed to lead the nation in war dies, a killer may not return, for this priest is considered to be an ordinary priest.

Halacha 10: The following individuals are exiled and never return from their exile:

a) a person who was sentenced to exile at a time when the office of High Priest was not filled;

b) a person who killed a High Priest unintentionally and there was no other High Priest; or

c) a High Priest who killed unintentionally and there was no other High Priest.

Halacha 11: If, however, the killer was sentenced, but the High Priest died before the killer was actually exiled, he is not required to go into exile.

If before the killer was sentenced, the High Priest dies, and another High Priest was appointed in his stead, and then the sentence of exile was delivered, the killer returns after the death of the second High Priest, the one in whose term of office he was sentenced.

Halacha 12: If a killer was sentenced and it was discovered that the High Priest was the son of a divorcee or the son of a woman who underwent *chalitzah*, the High Priesthood is negated. It is as if he were sentenced without there having been a High Priest; he may never leave his city of refuge.

Halacha 13: When a killer returns to his city after the death of the High Priest, he is considered to be an ordinary citizen. If the blood redeemer slays him, the blood redeemer should be executed, for the killer has already gained atonement through exile.

Halacha 14: Although the killer has gained atonement, he should never return to a position of authority that he previously held. Instead, he should be diminished in stature for his entire life, because of this great calamity that he caused.

Halacha 15: Although a person who intentionally injures his father is liable to be executed by the court just like a person who kills another person, if a person unintentionally injured his parents, he is not liable for exile. For the Torah prescribed exile only for a person who unintentionally killed another man, as we have stated.