

Judaism and Solitary Confinement

The question here is whether Judaism endorses the penitential practice of confining inmates into solitary quarters. If it does, the next issue to consider is the nature of that solitary confinement in both its physical features and temporal dimensions. What sorts of limits, if any, does the textual tradition place upon this seemingly now ubiquitous practice?

On the other hand, what if Judaism cannot countenance solitary confinement at all? Some might argue – and have done so – that Judaism cannot endorse solitary confinement from the get go; the issue is moot and the practice must be abolished.¹ Such arguments usually include invoking grand, sweeping principles to justify blanket condemnations of the practice. For example, the biblical claim that human beings are created in the image of God (*betzelem elohim*, Genesis 1:26-28) is deployed to claim that even the most hardened of criminals are no less and no more divine than the most innocent of non-criminals and thus merit being kept out of solitary confinement. Or these arguments point to God who suffers when humans suffer, as if this connection mandates

¹ For example, see Kahn-Troster (2012); RA (2012); Cooper (2012); <http://www.rhr-na.org/issuescampaigns/torture/292-backgroundsolitaryconfinementinamericanprisons.html>.

manumission from solitary confinement to more normal imprisonment. And some arguments invoke the rabbinic insistence that redeeming captives is the most important halakhic obligation, which apparently means Jews should labor to liberate all inmates. This last tack is problematic, however. The rule to redeem captives refers to innocents wrongly taken by hostile forces; it does not refer to criminals who rightfully merit some forms of punishment, and it ignores the much debated rules about prisons (*batei isurin*) as rightful institutions within the Jewish policing and punitive system. Nevertheless, such arguments hold that inmates should not be held in solitary confinement.

While somewhat attractive for their theological claims of human ontology, God's empathy and legal analogy, these kinds of arguments avoid wrestling with the Judaic tradition's ongoing deliberation of criminality and punishment. Despite the good such arguments intend, lamentably they gloss over vast swaths of legal, ethical and narrative texts. It is as if thousands of years of Jewish meditations on just punishment do not matter today. A more robust and candid approach takes such texts seriously precisely because prior generations—no less than today's—also worried about the quality and quantity of sequestering the guilty away from society.

Examining the Judaic textual tradition's meditations on how best to confine the guilty is our central task here. We leave for others to make arguments for and against solitary confinement based on sociological, criminological, economic, political, and other sorts of evidence. It is easily shown, for example, that recidivism among those who have experienced solitary confinement is surprisingly high, which suggests that to the degree its purpose is to convert inmates away from criminality, the practice on average fails. Certainly such evidence needs to be gathered and compellingly proposed for public

debate. The question here, however, is what Judaism and not statistics has to say on this subject without predetermining what – if any – ultimate conclusion can be extracted therefrom.

The Nature of Confinement

Incarceration exists among the many techniques Judaism endorses within its toolbox for civic control.² Yet not all incarcerations—the detention of people into particular spaces—are the same. Some occur outside society whereas others exist inside. Both have roots in the Judaic textual tradition.

Extra-urban or outside societal incarceration was used primarily for health – the health of the individual as well as of the society. The most famous example regards the sufferer of temporary *tzara'at* who, after examination by the high priest, is quarantined outside the camp for periods of 7 days, and, if further examination demonstrates ongoing affliction, the quarantine may extend another 7 days.³ That this quarantine takes place outside the camp is stressed by the fact that the examining high priest must exit the camp to go investigate the infected individual.⁴ One rationale for this exclusion from the camp is to protect the rest of the population from defilement.⁵ That is, quarantine is purposive for both the infected individual and the society as a whole. Yet the biblical text is vague about the precise nature of that extra-urban situation, whether the infected individual is

² See, for example, Lipskar (1996); Elon.

³ Leviticus 13:2-8. Chronic *tzara'at* (*tzara'at noshenet*), by contrast, does not merit isolation (Leviticus 13:11). Other temporary ailments merit quarantining (Leviticus 13:18-21, 24-26, 29-33). Infected clothing must also be isolated for 7 days (Leviticus 13:50).

⁴ Leviticus 14:3. Leviticus 13:45-46 insists that the person suffering *tzara'at* shall dwell apart outside the camp.

⁵ Numbers 5:2-4.

confined to a specific space or is free to roam about nearby the camp's outskirts. Either way, expulsion from the community was understood to be a legitimate treatment of those who could potentially endanger the otherwise healthy population.

Another famous example of extra-urban incarceration is found in the practice of exiling unwitting killers to cities of refuge.⁶ The bible enjoins the Israelites to identify six cities (replete with ample water and markets) to serve as asylums into which unwitting killers may go and escape their victims' blood avengers. This proves the acceptability of removing from society people who have harmed others, albeit through negligence. It should be noted, however, that such people are not isolated per se but taken out of one social environment and confined into a different one in which they are free to move about but from which they are not free to remove themselves lest they expose themselves to lethal retribution. Inasmuch as the rabbis stipulate that someone sent to a city of refuge may and perhaps should bring along his or her family as well as his or her rabbinic teacher suggests that such incarceration is meant to keep such individuals socialized. To this end, the rules allow for such individuals to return to their original cities after the demise of the high priest during whose leadership the incident occurred.⁷

Another kind of exclusion from society is the practice of banishment. *Cherem* and *nidui* are two forms of ostracism for unrepentant troublemakers, criminals, apostates, crooks, or inciters to rebellion. These were applied post-facto, as forms of punishment to such wayward individuals, so as to provide them time and social space to reflect and

⁶ Exodus 21:13; Numbers 35; Deuteronomy 19

⁷ See Exodus 21:13; Numbers 35:9-32; Deuteronomy 19; Joshua 21; Deuteronomy 4:42; BT *Makkot* 10a; YT *Makkot* 6; MT *Nezikin* 5.11, 6.8; MT *Rotzeach U'Shmirat Nefesh* 5.7, 5.14.

perhaps repent. Indeed, were they able to demonstrate candid contrition, they would be readmitted into society. That is, bans were not permanent, only temporary – either arbitrarily for a period of time set by the adjudicating authorities, or organically depending on an individual's *teshuvah* (repentance). Such bans did not require the physical relocation of the offending individual, but an alteration of how that individual was treated by society generally and its institutions.⁸ An argument can thus be made that bans were not extra-urban forms of incarceration but inner-urban ones.

From the time of the bible on, people were often confined within society.⁹ When, for example, it was unclear what to do with a particular individual, they were taken into custody.¹⁰ Incarceration in these instances was meant as a holding strategy until the individual could be brought to trial in the proper court.¹¹ Persons were also imprisoned as an administrative measure.¹² All these confinement practices were pre-emptive, enacted before an individual's guilt had been thoroughly proven. As such, they were only temporary measures. The rabbis decreed that separate prisons should be established for different populations, one for Jews and one for gentiles.¹³

The treatment of inmates within prisons varied, of course. Most, like Joseph, were imprisoned with other inmates.¹⁴ Some were forced into labor, as was Samson.¹⁵ A

⁸ See for example, CCAR (1988).

⁹ See I Kings 22:27; II Chronicles 16:10, 18:26; II Kings 17:4, 25:27; Isaiah 42:7, 22; Jeremiah 37:15; Isaiah 42:22; Genesis 42:19; Judges 16:21, among other places.

¹⁰ Leviticus 24:12; Numbers 15:34.

¹¹ BT *Ketubot* 33b; Rashi at Numbers 15:34.

¹² I Kings 22:27; II Chronicles 16:10, 18:26; Jeremiah 37:11-21, 38:4-14.

¹³ BT *Pesachim* 91a; BT *Yoma* 11a; YT *Pesachim* 36a; YT *Mo'ed Katan* 81c.

¹⁴ Genesis 39-42.

¹⁵ Judges 16:21.

few were fed only sparingly.¹⁶ Prison clothes were common and were to be changed upon release.¹⁷

Again, people were usually imprisoned pre-emptively or for detention purposes while proper adjudication could be assembled; that is, prison generally was not meant to be punitive. Only in rare situations was prison used as a form of punishment for disobedience of both religious and civic laws.¹⁸ During the medieval period, some Jewish legists ruled that it was acceptable to rely upon punishments foreign to Jewish law (such as punitive imprisonment) and they based this upon the biblical injunction to eradicate evil from Israel's midst or upon the rabbinic principle that the law of the land is the law (*dina d'malchuta dina*). Other sages demurred, holding that it was unacceptable for Jews to jail fellow Jews for punitive purposes.¹⁹

Solitary Confinement

One individual in the bible was placed into solitary confinement: the prophet Jeremiah. A close examination of his experience, while admittedly not a foundation for subsequent halakhic rulings, offers ample material for ethical analysis, support for and critique of this practice.

Now when the Kasdim army withdrew from Jerusalem due to Pharaoh's army, Jeremiah set out from Jerusalem to go to the land of Benjamin to secure a share

¹⁶ I Kings 22:27; II Chronicles 18:26. See also BT *Sanhedrin* 81b.

¹⁷ II Kings 25:29; Genesis 41:14; Jeremiah 52:33.

¹⁸ Ezra 7:26. The fiery furnace into which Shadrach, Meshach and Abednego were thrown could also be understood as a kind of prison for transgressing the idolatrous theocratic law of the land (Daniel 3) – yet it proved impotent either to compel contrition or kill the prisoners, except it successfully burned to death the soldiers who escorted the convicted into it. Put succinctly, this (fiery) prison backfired. See also Jacob (1999):49.

¹⁹ Lipskar (1996). See note 23 there for references to these medieval authorities.

there among the people. He reached the Gate of Benjamin when a guard, named Yiriyah son of Shelemyah son of Chananyah, seized Jeremiah the prophet saying, “You are deserting to the Kasdim!” Jeremiah responded, “That is a lie. I am not deserting to the Kasdim.” But he did not listen to him. Yiriyah seized Jeremiah and brought him to the officials. The officials were furious with Jeremiah and beat him. They put him in the prison house – the house of Jonathan the scribe – for it was made into a house of restraint. So Jeremiah came into the cistern in the dungeon, and Jeremiah remained there a long time. King Zedekiah sent for him and took him and the King asked him secretly in his house, saying, “Is there a word from Adonai?” To which Jeremiah responded, “There is, which says, you will be handed over to the King of Babylon.” Jeremiah said to King Zedekiah, “What wrong did I do to you or your attendants or to this people that you should put me into prison? [Where are] your prophets who prophesied for you saying, the King of Babylon will not come against you and against this land? Now, please hearken my lord King, I beg you, do not return me to the house of Jonathan the scribe, or I will die there.” King Zedekiah ordered and they committed Jeremiah to the court of the guardhouse²⁰, and they gave him a loaf of bread daily from the street bakers until all the bread in the city was gone. So Jeremiah remained in the court of the guardhouse.²¹

Jeremiah’s confinement into an isolated cell was the result of a wrongful conviction.

This cell, it should be noted, existed in a retro-fitted home. Such a cell, according to the rabbis, would have been no more than a full-body height high, and only as long as a

²⁰ See also Jeremiah 32:2, 33:1, 38:28.

²¹ Jeremiah 37:11-21. Translation mine.

human body.²² The detail that he was fed fresh bread daily once he was ‘released’ to the court of the guardhouse suggests that his victuals within the solitary cell was considerably constrained, comparatively.

Jeremiah was again put into solitary confinement. It was told around town that Jeremiah was encouraging people to abandon Jerusalem and desert to Kasdim and live, for the city would be captured by the king of Babylon.

The officials said to the King, “This man should be killed, for he is discouraging the soldiers who are left in the city, as well as the people, by what he is saying to them. For this man does not seek the people’s good but ruin. King Zedekiah said, “Behold, he is in your power, for the King cannot do anything to you on this matter.” They took Jeremiah and threw him into the cistern of Malkiyahu, the King’s son, which was in the courtyard of the guardhouse. They lowered Jeremiah by ropes. And in the cistern there was no water, only mud, and Jeremiah sank into the mud. Aved-Melech the Cushite, an official in the royal palace, heard that they had put Jeremiah into the cistern; the King sat at the gate of Benjamin. Aved-Melech went out from the royal house and spoke to the king saying, “My lord King, all that those men did to Jeremiah the prophet was evil. They lowered him into the cistern. He will die therein from hunger when there is no longer bread in the city.” The King ordered Aved-Melech the Cushite, saying, “Take with you thirty men and lift Jeremiah the prophet from the well before he dies.” Aved-Melech took the men in his power and went to a room beneath the royal treasury and took from there old rags and worn clothes, and sent them down

²² BT *Sanhedrin* 81b; M *Sanhedrin* 9.3, 9.5; T *Sanhedrin* 12.7-8; Kehati on M *Sanhedrin* 93.

to Jeremiah in the cistern with ropes. Aved-Melech the Cushite said to Jeremiah, “Please tie these old rags and clothes under your arms to pad the ropes.” Jeremiah did so. They pulled him up with the ropes and raised him from the cistern.

Jeremiah remained in the court of the guardhouse.²³

Like the first time, Jeremiah is put into solitary confinement (i.e., “in the hole”) for reasons that the king ultimately finds dubious and releases him into more comfortable quarters.

Perhaps taking their cue from these biblical stories, the rabbis stipulate that solitary confinement is to be used for only certain reasons. Only those persons who have committed three or more times an offense for which divine punishment (*karet*) is appropriate, and those who have committed murder but the court is unable to convict the accused for procedural or formal defects in the case, may be placed into solitary confinement.²⁴ That is, only recidivist criminals of the most egregious of crimes warrant this kind of treatment. Still, such confinement does not mean total segregation: conjugal visits were considered appropriate even for the imprisoned.²⁵

Excessive Punishment

Insofar as solitary confinement is at least conceivable according to the Judaic textual tradition, the next question to consider is whether there is any aspect of the treatment that would be considered excessive. Before we can answer this we must first query whether excessive punishment in general exists and how it might be defined.

²³ Jeremiah 38:4-13.

²⁴ M *Sanhedrin* 9.5; T *Sanhedrin* 12:7-8.

²⁵ This derives from the capture of King Johaiachim: II Kings 24:15; *Vayikra Rabbah* 19.6; BT *Sanhedrin* 37b-38a.

Physical punishment can be excessive. Moses rules that when parties have a conflict they are to bring their issue before a court. That court is obliged to discern the guilty party and have that person lay down for flogging commensurate to the crime. “Forty lashes may be given him. Lest beating him more than these many lashes would degrade your kin in your eyes (*v’niklah achichah l’einechah*).”²⁶ In this way the notion of excessive physical punishment reinforces the concept of appropriate levels of corporal punishment: different crimes merit different amounts of physical punishment, and this – but no more – should be meted out by the proper authorities. The rationale for avoiding excessively punishing the guilty is because it inherently degrades the one receiving it. Medical reasons are another reason to avoid imposing excessive corporal punishment.²⁷

Given that the very concept of excessiveness exists and is applied to corporal punishments for the guilty, is it applicable to those who merit imprisonment and specifically to solitary confinement? As already seen, limiting the food given to prisoners seems to be a reasonable practice, though the Jeremiah texts critique this. But what about time? How much time should a person be kept in solitary confinement? Is there such a thing as too much time?

Again, those who are ill are quarantined for a week at a time. Their reincorporation back to society is expected and welcomed, yet it depends on their overall health as determined by the investigating priests. Miriam, who is quarantined outside the camp perhaps for health reasons or perhaps for being uppity toward Moses, is also reinstated after a week. Regarding banishment (*nidui* in particular), thirty days seems to be the most common duration. Asylum seekers in the cities of refuge are to remain there

²⁶ Deuteronomy 25:3.

²⁷ M *Makkot* 3.6, and gemara thereon. See also BT *Sanhedrin* 10a-b.

for as long as the high priest lives. All these are considered appropriate durations for confining people away from society.

Jeremiah remains within solitary confinement for “many days” (*yamim rabim*).²⁸ It is unclear precisely how long this is, but we can surmise that it is no less than two days. Yet he is perfectly clear when he asks the king not to return him to that cell lest he die there – and the king acquiesces to this plea.²⁹ From the prisoner’s perspective an endless or life sentence in solitary confinement is unreasonable, and from the authority’s perspective this argument suffices to manumit him to more comfortable quarters. He is not set free, to be sure; his freedom of movement continues to be restricted. Nonetheless this modest rehabilitation enables the prisoner to resume his occupation as a prophet: now within the confines of the courtyard of the guardhouse, Jeremiah can receive divine instructions.³⁰ Limitless, whether unspecified or until death, solitary confinement is construed as excessive and should be avoided.

Principled Critiques

Jewish critiques of solitary confinement take ontological, analogical and evidentiary forms. (Non-Jewish critiques are mentioned below.) The most common ontological critique points not to the first story of creation wherein humans are ethereal beings created “in God’s image” (Genesis 1:26). Rather, this critique turns to the second creation story in which humans emerge from the fusing of dust and divine breath (Genesis 2:7), that is, it looks to the genesis of humans as material and thus mortal

²⁸ Jeremiah 37:16.

²⁹ Jeremiah 37:20-21, 38:10-13, 26.

³⁰ Jeremiah 37:11-21, 38:13, 28; 39:15.

beings. This story laments the imperfection of creation when God admits that “it is not good for humans to be alone” (Genesis 2:18a). A more perfect rendition of the cosmos is one in which humans exist in some form of societal context, a circumstance in which relationships can exist in theory if not in fact. Insofar as it is unconscionable to God for humans to be kept in isolation in the cosmos, it should be no less troubling to we humans. Or so the argument goes.

This argument struggles, however, insofar as we humans are not engaged in the same kind of business as God. Unlike God, we do not seek to create the cosmos as such; we labor only to police the population clamoring about within it. Such arguments invoking this ontological claim distract from the more important side of the verse, the bit in which God commits to making a fitting helpmeet for the primordial human (Genesis 2:18b). There God publicly announces that the solution to the problem of existential human isolation requires fashioning a helpmeet appropriate to the peculiarities of the entity of concern, that is, the helpmeet should attend to the idiosyncrasies of this primordial human – and not what God preconceives this being needs. Only this particular helpmeet will adequately solve the ontological problem.

The fact that God also fails in this task should not be glossed over. God forms animals and birds and brings them before the primordial human who, in turn, examines each and ascribes to each a special name – but no fitting helpmeet is found among them.³¹ God fails to forge afresh a creature adequate to the challenge. That is, generic responses to the peculiarities of the person insufficiently attend to the needs of that person. Something more specialized is necessary. So God resorts to surgery, extracting

³¹ Genesis 2:19-20.

vital materials from within the primordial human so to fashion another creature out of that same stuff. Finally it is this derivative creature who meets the idiosyncratic needs of the primordial human.³² The rabbis pick up on this theme to stress that the individual as such is the best judge of who and what will meet personal needs; generic options externally (even divinely!) imposed cannot and will not suffice.³³

Taking both sides of the verse (Genesis 2:18) seriously offers a twofold critique of solitary confinement and its generic treatment of inmates. It suggests both that isolation itself is contrary to divine intentionality for human existence, and that each person merits idiosyncratic attention necessary for providing meaningful sociality. Insofar as *imitatio dei* is to be a meaningful theological motivator, ensuring that each inmate receives personalized attention and meaningful socialization is the least that should be done. Lest perfectionism inhibit such endeavors, recall that God's failures in this regard leave open the possibility that human imperfections and failures may be anticipated. On the other hand, neither imperfect systems nor personalized responses are theologically sufficient – more and different must be done: just as God ultimately finds a reasonable solution for the first human, so should humans continuously struggle to forge a reasonable solution for even the most difficult among us.

Three analogical arguments similarly critique the practice of solitary confinement. As already indicated above, cities of refuge were created as bastions of asylum for unwitting committers of lethal injury. These accidental killers were to remain outside their usual societies as long as the high priest under whose leadership the crime occurred remained alive. Once that priest dies, however, the accidental killer – as well as

³² Genesis 2:21-25.

³³ BT *Yevamot* 63a.

his kinfolk and teacher – may return to their original societies, and is no longer vulnerable to retribution by the victim’s family. Such confinement, replete with its own idiosyncratic socialization, is temporary and restitution to the original society is the ultimate goal.

Slavery is another analogical example wherein manumission can – indeed, must – be involved. Those individuals who rightfully or wrongfully enter slavery are nonetheless guaranteed that their servitude – that is, their curtailed freedom – would never be longer than six years. For in the seventh year, all slaves are to be manumitted: they are returned to the vagaries of their own recognizance in society. No matter how much debt (economic or social) one may have accrued, indenture is not meant to be indefinite.

A third common analogy claims that solitary confinement is torture. Here is a brief synopsis of this argument: “If torture is illegal, and if solitary confinement is torture, then solitary confinement is a form of impermissible imprisonment.”³⁴ This syllogism assumes that all forms of torture are illegal and that all forms of solitary confinement are torture. Both assumptions are dubious, however: the first depends on jurisdiction and the second on definition and who makes that definition. On the other hand, the argument does carry some force.

Both torture and solitary confinement are meant to keep captives alive: neither seeks death as such. And both torture and solitary confinement are used to induce capitulation. The twists of this analogy become convoluted, however, when torture’s other goals are taken into consideration. Torture is also used to seek confession of past

³⁴ <http://rhrna.org/issuescampaigns/torture/resources/271-solitary-confinement-as-torture-one-jewish-view.html>

crimes and contrition thereto, conversion to what authorities deem as reasonable faith or worldview, and confirmation or corroboration of information already gathered from other sources. It can be reasonably argued Judaicly that torture is a non-option for states to impose upon its captives.³⁵

Solitary confinement also looks backward and forward but for different reasons. It is a tool of punishment for what has already happened (e.g., for improper behavior within the prison) and it desires attitudinal and behavioral adjustment. Regarding the former, it can be said solitary confinement is one of the ways a state enacts retribution. Retribution, Judaicly speaking, is a common refrain. But we should note that it was taken out on whole enemy populations and rarely on individuals already captured and confined. So the only remaining aspect of solitary confinement that perhaps could receive some Judaic imprimatur is its desire to induce attitudinal and behavioral reform. The textual evidence adduced above does not show that solitary confinement alters attitudes or behaviors, except in the case of the wayward or rebellious who are excluded from society by means of *cherem* or *nidui*. In those instances, sincere *teshuvah* or repentance indicate a person's reform and commitment to live according to the rules and mores of society. Those people are then readmitted into the folds of the community, and their records are considered clean. Were solitary confinement to be likened to these forms of exclusion, sincere contrition should suffice to be released therefrom; indefinite confinement that ends only by the whim of some authority is not tenable.

A few non-Jewish critiques of solitary confinement add to these more internal Jewish ones. Evidence demonstrates solitary confinement's failure on multiple fronts.

³⁵ See Crane (2010-11). This conclusion is not universally held among modern Jewish ethicists, however. See discussion within that article for the competing positions.

Inasmuch as penitentiaries were originally meant to provide time and space for inmates to repent – to think again – their criminal ways, evidence must show that today’s solitary confinement systems actually do this. If they fail to demonstrate that inmates of solitary confinement actually engage in meaningful self-critique and alter their attitudes and behaviors, then the systems are founded on false pretenses. Furthermore, to buttress the efficacy of solitary confinement, supporters will need to show that rates of recidivism are no higher and indeed much lower than those populations exiting other kinds of imprisonment. Otherwise, it is difficult to use the consequential argument that the ends justify the means.

Conclusion

Imprisonment is both reasonable and just, according to the Judaic textual tradition, when it is reasonably and justly applied to those who are found guilty. Solitary confinement could, in theory at least, be one form of imprisonment within a particular institution. But sending an inmate into solitary confinement cannot be done for arbitrary or unproven reasons, as Jeremiah had been. The rabbis specify that only two categories of criminals could potentially merit such treatment: those who have repeatedly committed the most egregious of crimes and who under normal circumstances would merit the death penalty. Nor can confinement be indefinite: “many days” would be lethal and thus impermissible. The maximum time would thus be two days; anything beyond that would be excessive and degrading. It thus seems that Judaism endorses solitary confinement only as a temporary intense restraint for recidivist criminals; and it rejects the use of

solitary confinement of any length of time for those who, for example, manifest unruly behavior within prisons.

But again, Judaism's ongoing and ultimate concern about the justness of confinement is based upon the rehabilitation of the confined. Just as those who endanger the public through illness are quarantined yet heartily readmitted, and those who have been rebellious are eventually reinstated – so too should the prison system be geared toward the ongoing socialization (as are the cities of refuge) and rehabilitation of criminals. Insofar as solitary confinement continues to demonstrate its inability to either socialize or rehabilitate, its inclusion within the repertoire of reasonable imprisonment is rightfully held suspect and perhaps should be discontinued.

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