A "CLEAN AND EASY PROFESSION?" JEWISH LAW AND THE 21ST CENTURY PROSECUTOR

Daniel Passon[*]

ABSTRACT

Whether Jewish law permits its observers to pursue careers as criminal prosecutors is a live question largely ignored by the American legal literature. It has been twenty years since the question was last addressed by American legal academia, and even then, the answer was inconclusive. Yet, the question is more urgent than ever, as district attorney candidates running on reform-driven platforms take races across the United States, transforming what it means to be an American prosecutor.

This article contributes to the literature by, for the first time, locating the question of whether Jewish law permits the pursuit of a career as a prosecutor in the lived, evolving reality of modern prosecutors' offices. Although it ultimately answers that question in the affirmative, it does not do so without caveats or without Jewish legal guidance on choosing an office the practices of which are as halakhically compliant as possible.

This paper first demonstrates that Jewish law is compatible with a broad vision of retributive justice in accord with which the secular state may punish for the sake of proportionate retribution. It also clarifies that Jews may prosecute other Jewish people in secular courts as agents of the executive, regardless of whether the alleged crimes of the accused violate Jewish law. These contentions support the conclusion that Jews are not halakhically prohibited from pursuing careers as prosecutors *per se*.

The article next inquires as to whether the practices of modern prosecutors' offices
are compatible with a lifestyle that attempts to be observant of Jewish law. It primarily interrogates two practices still dominant in American criminal law: the use of money bail and the employment of incarceration as the criminal justice system's primary sentencing

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tool. Although money bail, incarceration itself, and punishment that largely fails to rehabilitate people convicted of crimes generally are all disfavored under Jewish law, the article concludes, it may be possible to identify individual prosecutors' offices that, in granting their young attorneys the discretion to "pursue justice," allow them, in turn, to pursue a life of halakhic observance.

I. INTRODUCTION

"A person should always teach his son a clean and easy profession."[1] The *Mishnah* teaches that one's choice of a profession should avoid occasion for sin or scandal, just as one would avoid sin or scandal by refusing to sleep under the same garment or to be alone with someone who is not one's spouse.[2] Many Jews today confront the live question of whether lawyering, in particular, is a clean and easy profession, or an occasion for sin and scandal: lawyers are largely absent from the *Talmud*, Jews are nominally forbidden from suing other Jews in secular courts,[3] some rabbis have cautioned against pursuing a legal career at all,[4] and yet Jews are 3.3 times more likely to become lawyers than other Americans.[5]

Many young Jewish people, then, face the difficult decision of whether to devote their lives to the American legal profession, and the decision is already complicated. The choice of whether to become a criminal prosecutor is especially so. The G-d of the *Torah* and *Halakkah* is a G-d who sides with the gleaning poor,[6] the slave,[7]

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[1] *Kiddushin* 4:14. Unless otherwise noted, all references to the *Mishnah* in this paper will be to Sefaria's translation, available at https://www.sefaria.org/texts/Mishnah.

[2] *See id*. This interpretation is borne out by the *Talmud*. *See Kiddushin* 82a–82b. Unless otherwise noted, all references to the Babylonian *Talmud* in this paper will be to Sefaria's William Davidson *Talmud*, available at https://www.sefaria.org/texts/Talmud.

[3] *Sh. Ar. HM* 26:1. Unless otherwise noted, all references to the *Shulchan Arukh* in this paper will be to Sefaria's translation, available at https://www.sefaria.org/texts/Halakhah/Shulchan%20Arukh.

[4] Mordecai Biser, *Can an Observant Jew Practice Law?: A Look at Some Halakhic Problems*, 11 JEWISH L. ANN. 101, 135 (1994).

[5] Donald Templer & Kimberly Tangen, *Jewish Population Percentage in the U.S. States: An Index of Opportunity*, 3 COMPREHENSIVE PSYCH. 1 (2014).

[6] *See Leviticus* 19:9, 23:22. Unless otherwise noted, all references to the *Torah* in this paper will be to Sefaria's translation, available at https://www.sefaria.org/texts/Tanakh.

[7] *See Deuteronomy* 15:12–15.

and the stranger.[8] He is a G-d of the vulnerable and the dispossessed. Yet, American criminal prosecution has often disproportionately harmed the vulnerable and dispossessed. Prosecutors are more likely to charge people of color with offenses that carry mandatory minimum sentences.[9] They are more likely to pursue the death penalty for people of color and the mentally ill.[10] People of color are more likely to be detained pretrial, [11] and that means that lower-income people for whom money bail is an especially heavy burden are more likely to be pulled out of their communities and lose their jobs for crimes they may not have committed. In short, the intuition that expensive, high-stakes, adversarial court proceedings are not friendly to the poor is borne out by the social science. To ask young Jews to spend their days responding to private violence with state violence in office cultures that often prioritize winning convictions over convicting the right person and that can incentivize punitiveness[12] may be to ask too much for Jewish law to bear.

It is difficult, then, to think of a profession more ripe for halakhic inquiry than prosecution, especially in an era in which what it means to be a prosecutor is being interrogated and transformed by progressive district attorneys across the United States. As practices like the imposition of money bail, the primacy of incarceration over diversion, and charging juveniles as adults become less dominant,[13] and as prosecution attracts young

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[8] *See Deuteronomy* 14:27–29.

[9] EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 140 (2019).

[10] *Id*. at 390 n.333.

[11] *Id*. at 44.

[12] *See* Ken White, *Confessions of an Ex-Prosecutor*, REASON (June 23, 2016, 10:00 AM), https://reason.com/2016/06/23/ confessions-of-an-ex-prosecutor.

[13] *See generally* BAZELON, *supra* note 9; *see also* FAIR & JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018), available at https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf. Fair and Just Prosecution ("FJP") is a non-profit organization that connects and supports elected prosecutors committed to making American criminal justice more equitable and fiscally responsible. FJP also encourages young people newly interested in pursuing careers as prosecutors because of the recent trend toward "progressive prosecution" to do so through a summer fellowship program.

progressives who previously avoided the field,[14] prosecution may come to present itself as a career option to some young lawyers for the first time. Jewish people who take halakhic principles into consideration when discerning a potential career, however, must still searchingly interrogate the question of whether prosecution is a "clean and easy profession," and this article seeks to aid that discernment, inquiring as to whether the changing professional environment of contemporary D.A. offices is compatible with the precepts of Jewish law.

II. OVERVIEW

It has been twenty years since American legal academia last addressed the issue of whether prosecution is permissible under Jewish law. Michael J. Broyde's 1998 survey of the halakhic literature, *Practicing Criminal Law: A Jewish Law Analysis of Being a Prosecutor or Defense Attorney*,[15] focused on the prosecution of Jews by other Jews and produced two possible answers. While some sources suggested that the American mode of criminal prosecution is generally "truly proper conduct," [16] others suggested that one ought not prosecute other Jews unless their conduct presents a "profound danger to health and welfare."[17]

Although thoroughly sourced and vigorously argued, Broyde's analysis is open to especial criticism in two respects. First, it is not self-evident that secular authorities have the authority under Jewish law to impose retributive sanctions at all, even for the violation of those crimes which are also prohibited by Jewish law. This raises two questions. First, is retributive justice, or a system of justice that affirms that state-imposed, proportionate punishment for wrongdoing is a public moral good, compatible with Jewish law? Second, even if retributive justice is so compatible, does the secular state possess the authority to impose punishment when the punished act is permissible under Jewish law? If either of those questions elicits a negative answer, the imposition of retributive

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[14] *See Fair and Just Prosecution Summer Fellow Program*, FAIR AND JUST PROSECUTION (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/10/2019-FJP-Summer-Fellows-Program-Two-Pager_FINAL.pdf.

[15] Michael J. Broyde, *Practicing Criminal Law: A Jewish Law Analysis of Being a Prosecutor or Defense Attorney*, 66 FORDHAM L. REV. 1141 (1998).

[16] *Id.* at 1152.

[17] *Id.*

punishments by way of secular criminal prosecution may be incompatible with *Halakkah*.

Additionally, Broyde's argument fails to consider whether Jews can both adhere to their faith and professionally flourish, once they become prosecutors, in an environment that may encourage practices inconsistent with Jewish law. Many prosecutors' offices, for example, frequently impose money bail and employ incarceration as their primary sentencing tool. It may be possible for Jews to *become* prosecutors, but if their vocation requires the employment of litigation strategies the use of which is inconsistent with Jewish law, obedience to conscience may lead to professional stagnation, an inability to fulfill whatever ends of secular prosecution are permitted by Jewish law, and even unemployment. The day-to-day work of a prosecutor must itself be interrogated before one decides whether that career path is compatible with Jewish law.

This paper addresses these concerns in the context of a general inquiry into the question of Jewish law's compatibility with criminal prosecution. I fill an analytical gap by both restricting and expanding the analysis first conducted by Michael Broyde. In the first place, this paper only addresses the ethics of Jews serving as prosecutors, not the ethics of their serving as criminal defense attorneys. Additionally, this work seeks to locate its primary inquiry in the context of the lived daily routine of American prosecutors, inquiring as to whether litigators ought to employ money bail and non-rehabilitative incarceration as tools to promote those ends of secular prosecution permitted by Jewish law.

My first investigation explores the role of retributive justice within the Jewish legal tradition, asking, as suggested above, whether retributive justice is conceptually, ethically compatible with Jewish law and whether secular authorities have the authority to impose retributive punishments on Jews for acts permitted within Judaism. Although I contend that several biblical and Talmudic passages frequently cited to support retributive justice have historically been mis-interpreted or read out of context, I also contend that Jewish law is largely compatible with a criminal justice system that imposes proportionate punishment as a public moral good. I further argue that secular governments are authorized to punish acts that are not prohibited by *Halakah*. In any case, such governments are "authorized to punish and penalize

above and beyond the law," inclusive of imposing penalties beyond those permitted by Jewish authorities, to maintain law and order.[18]

Given that, "Jewish law recognizes, without any doubt, the validity of secular law and its criminal justice system in the persecution of gentiles for violation of secular law[s],"[19] most of the scholarship in this area has focused on questions of jurisdiction. In other words, "Does Jewish law recognize that the secular system has jurisdiction to criminally punish those who are duty-bound to have fidelity to Jewish law, or not[?]"[20] Even then, I find, the answer is usually yes, and this is even the case when the acts of the accused are permitted under Jewish law.

I ultimately conclude that, although Jewish law is conceptually compatible with retributive criminal prosecution, one may not thrive as a prosecutor because of ethical conflicts between Jewish teaching and several prominent aspects of American criminal legal practice. In practice, prosecutors often succeed in winning convictions because of the leverage in negotiation afforded by money bail and the possibility of prolonged incarceration. At first glance, then, it seems that, because of halakhic authority inconsistent with the use of money bail and incarceration, Jewish attorneys may wish to pursue other careers. The use of money bail, for instance, is categorically halachically disfavored, although defendants in cases that carry a possibility of corporal punishment may be held without the possibility of any bail at all, regardless of the amount of bond or the reliability of one's sureties. Additionally, there is a robust halakhic preference in favor of rehabilitative punishment that restores a wrongdoer to their prior status within a community and against both incarceration as such and other forms of non-rehabilitative punishment.

There is hope, however, that work as a prosecutor will quickly become more favorable to halakhic observance. Leaders like Karl Racine of Washington, D.C., Kim Foxx of Chicago, and Larry Krasner of Philadelphia are, among other reforms, reducing their offices' reliance on money bail and reducing their reliance on incarceration as their primary sentencing tool. I conclude that only time and individual discernment will tell whether criminal prosecution constitutes a halachically appropriate career for the

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[18] R. Hershel Schacter, *"Dina Di'Malchusa Dina": Secular Law as a Religion Obligation*, 1 J. HALACHA & CONTEMP. SOC. 103, 118 (1981).
[19] Michael J. Broyde, THE PURSUIT OF JUSTICE AND JEWISH LAW: HALAKHIC PERSPECTIVES ON THE LEGAL PROFESSION 87 n.18 (1996).
[20] *Id.*

21st-century lawyer. Many reform-driven D.A. offices may offer opportunities to flourish, while others are, undoubtedly, halakhic minefields. Still, *Halakkah* and prosecution are becoming ever more compatible, and if young attorneys can find the opportunities and discretion to do justice as prosecutors, Jewish law is no categorical bar to their so doing.

III. IS SECULAR CRIMINAL PROSECUTION FOR THE SAKE OF RETRIBUTIVE JUSTICE COMPATIBLE WITH JUDAISM?

American criminal justice is retributive justice. That is, it "aims to impose punishment or deprivation proportionate to the offense which was committed."[21] The states profess as much in the law establishing the purposes of criminal sentencing: proportionate punishment is an explicit goal in many such statutes and regulations,[22] and courts have held that retribution is a sufficient justification for the punishment of crimes even when punishment serves no rehabilitative purpose.[23] It is not self-evident, however, that the desire to punish can serve as a legitimate motivation for criminal sanction in the Jewish legal tradition. The development of retributive systems of justice is not natural or inevitable, and the alternative of restorative justice, a model in which retribution is not an independent motivating locus of community action, has been operative in societies from New Zealand to North America for hundreds of years.[24] The first question to be confronted, then, is whether proportionate punishment is an appropriate response to criminal behavior in Jewish law. Even if it is, is it compatible with

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[21] Donald H.J. Hermann, *Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice?*, 16 SEATTLE J. FOR SOC. JUST. 71 (2017).

[22] *See, e.g.*, OHIO REV. CODE ANN. § 2929.11(A) (LexisNexis 2019); Fla. R. Crim. P. 3.701 ("The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role."); MINN. SENTENCING GUIDELINES & COMMENTARY § 1(A)(3) (MINN. SENT'G GUIDELINES COMM'N 2018) ("The severity of the sanction should increase in direct proportion to an increase in offense severity or the convicted felon's criminal history, or both.").

[23] *See* People v. Borrero, 227 N.E.2d 18 (N.Y. 1967).

[24] *See* Allan MacRae & Howard Zehr, *Righting Wrongs the Maori Way*, YES! (July 11, 2011), https://www.yesmagazine.org/issues/beyond-prisons/righting-wrongs-the-maori-way; *see generally* Howard Zehr, THE LITTLE BOOK OF RESTORATIVE JUSTICE (2002).

Jewish law to prosecute other Jews for offenses that are permissible under Jewish law? If one's answer to either question is negative, then the pursuit of a career as a prosecutor may run into halakhic difficulty. As to the second point, in particular, one cannot ascertain the religious identity of every person one prosecutes, and it is not always clear which acts are themselves halakhically permissible. Indeed, if one wishes to avoid one's career becoming a halakhic minefield, one must discern in advance whether retributive prosecution is permitted and whether it is permitted against other Jews when Jewish law would not prohibit their actions.

A. IS RETRIBUTIVE JUSTICE COMPATIBLE WITH JEWISH LAW?

The Hebrew Bible, at first glance, seems to endorse retributive justice wholeheartedly. In condoning and establishing the procedure for capital punishment, the *Torah* first requires the testimony of two witnesses for a person to be put to death[25] before continuing, "Let the hands of the witnesses be the first against him to put him to death, and the hands of the rest of the people thereafter. Thus you will sweep out evil from your midst."[26] Leviticus continues the endorsement—"If anyone maims his fellow, as he has done so shall it be done to him"[27]— and Deuteronomy reinforces it further, with the explicit support of proportionality in punishment: "[An offender] may be given up to forty lashes, but not more, lest being flogged further, to excess, your brother be degraded before your eyes."[28] And then there is the *lex talionis*, frequently cited as a biblical coup de grâce in arguments for retributive justice when it comes to punishment for false testimony:[29] "Nor must you show pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot."[30]

The Talmud, however, restricts the scope of this last verse, and there are perhaps as many verses in the tradition decrying vengeance as an independent basis for punishment or extolling repentance and reconciliation as there are normalizing

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[25] *Deuteronomy* 17:6.
[26] *Deuteronomy* 17:7.
[27] *Leviticus* 24:19.
[28] *Deuteronomy* 25:3.
[29] Art Swift, *Americans: "Eye for an Eye" Top Reason for Death Penalty*, GALLUP (Oct. 23, 2014), http://news.gallup.com/poll/178799/americans-eye-eye-top-reason-death-penalty.aspx.
[30] *Deuteronomy* 19:21.

punishment.[31] The *lex talionis*, in particular, has been interpreted to demand only fair monetary restitution from those who testify falsely against their fellows,[32] and this and other supposedly retribution-endorsing verses are restrained again by the *Talmud*: "[W]hy do I require the Torah to state: 'As one who places a blemish upon a man, so shall be placed [yinnaten] upon him (Leviticus 24:20)?'[33] This teaches that this is referring to an item that involves giving[. A]nd what is that item? It is money."[34] A life's value, a tooth's value, a hand's value, and a foot's value, then, are to paid back in money, not always in corporal punishment or incarceration.

These restraints, however, do not undermine Jewish law's broader acceptance of proportionate retribution. Those condemned to death are given procedural protections to ensure as dignified a death as possible, for instance, but they are still condemned to die.[35] If a condemned person is likely to be "debased with excrement" upon being flogged, they are to be spared the punishment.[36] Yet, the punishment, calculated by the stroke to match the severity of the crime, endures. And the sophisticated halakhic machinery of imposing punishment, as a whole, makes it clear that Jewish authorities, at least, may punish, and that they may punish harshly.

They may even punish if punishment does not deter, incapacitate, or rehabilitate. Even, in fact, for the sake of retribution itself. This does not mean, as shall be argued later, that Jews *should* seek to punish for punishment's sake, only that *halakha* is not *incompatible* with a retribution that is proportionate to harm done. Consider that, of the four traditional purposes of punishment—deterrence, incapacitation, rehabilitation, and

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[31] *See, e.g., Leviticus* 19:18 ("You shall not take vengeance or bear a grudge against your countrymen. Love your fellow as yourself: I am the LORD."); *Bava Kamma* 8:2 (And whence is it deduced that if the defendant does not forgive he is considered cruel?."); *Repentance* 2:5 ("It is highly praiseworthy in a penitent to make public confession, openly avow his transgressions and discover to others his sins against his fellow-men . . . ."). Unless otherwise noted, all references to the *Mishneh Torah* in this paper will be to Sefaria's translation, available at https://www.sefaria.org/texts/Halakhah/Mishneh%20Torah.

[32] *See Bava Kamma* 84a:2.

[33] *Ketubot* 32b:7–8.

[34] *Id*.

[35] *See Bava Kamma* 51(a):3–4.

[36] *Makkhot* 23a:18–19.

retribution[37]—only the last is fully compatible with Jewish law's approach to the death penalty. First, the death penalty does not reliably deter prospective offenders other than the accused,[38] but it is true that ancient Israel would not have been familiar with the social science. What ancient Israel would have known is that a dead man need no longer be deterred. Moreover, if deterrence was the primary motivator behind the halakhic approach to capital punishment, why were there so many procedural protections, so few executions, and such a concern with proportionality?[39] Why not make deaths as violent and as frequent as was plausible and sustainable? Second, it is true that capital punishment is the purest form of incapacitation. Yet, incapacitation also could have been achieved through the civic death of banishment.[40] Finally, capital punishment offers no possibility of rehabilitation. The role of retribution as a sustaining policy ethic behind Jewish capital punishment, then, presents itself as an out-sized motivating force.

Retributive justice appears, at the highest level of halakhic abstraction, to be mostly compatible with Jewish law. Jewish authorities may punish. They may even sentence to death. Is, however, taking it upon oneself to advocate for secular criminal punishment as the agent of a secular king compatible with *Halakah*? American prosecutors, as representatives of the executive branch of government and the chief law enforcement officers in their respective jurisdictions, necessarily act as agents of some executive,

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[37] *See* MODEL PENAL CODE § 1.02(2) (AM. LAW. INST. 2019); *see generally* PAUL H. ROBINSON ET AL., THEORIES OF PUNISHMENT, IN CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES (4th ed. 2016); *but see* Paul H. Robinson, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 956–57 (2003).

[38] *See generally* Michael Radelet & Ronald Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1 (1996).

[39] *See* STEVEN H. RESNICOFF, UNDERSTANDING JEWISH LAW 89–91 (2012) (laying out the traditional prerequisites for capital punishment in Jewish courts); *see also Makkot* 1:10 ("A Sanhedrin . . . that would execute somebody once in seven years would be considered destructive. Rabbi Elazar Ben Azariah says: 'Once in seventy years.' Rabbi Tarfon and Rabbi Akiva said: 'If we were on the Sanhedrin, nobody would have ever been executed.' ").

[40] The ancient Jews were undoubtedly familiar with the practice of banishment. In *Numbers* 9:13, it is offered as a punishment for failing to keep Passover, and *Numbers* 5:2 mandates the banishment of lepers. Being "cut off in the sight of the people," or "cut off from [one's] people," is, in fact, a punishment referenced frequently in the *Torah*. The *Torah* also, in *Deuteronomy* 19:6–9, establishes the Cities of Refuge, where Israelites convicted of manslaughter could seek asylum.

some conceptual descendant of the law-enforcing king.[41] Analysis of this question often begins with a narrative from the Talmud:[42]

> R. Eleazar, son of R. Simeon, once met an officer of the Government who had been sent to arrest thieves, "How can you detect them?" he said. "Are they not compared to wild beasts, of whom it is written, 'Therein [in the darkness] all the beasts of the forest creep forth?' . . . Maybe you take the innocent and allow the guilty to escape?" The officer answered, "What shall I do? It is the King's command." Said the Rabbi, "Let me tell you what to do . . . [After he had told him what to do, a] report [of this conversation] was brought to the Court, and the order was given: "Let the reader of the letter become the messenger." R. Eleazar . . . was accordingly sent for, and he proceeded to arrest the thieves. Thereupon R. Joshua, son of Karhah, sent word to him, "Vinegar, son of wine! How long will you deliver up the people of our G-d for slaughter!" Back came the reply: "I weed out thorns from the vineyard." Whereupon R. Joshua retorted: "Let the owner of the vineyard himself come and weed out the thorns . . . ." A similar thing befell R. Ishmael son of R. Jose. Elijah met him and remonstrated with him: "How long will you deliver the people of our G-d to execution!" "What can I do," he replied[.] "It is the royal decree." "Your father fled to Asia," [Elijah] retorted, "[and] you flee to Laodicea!"[43]

To summarize, a rabbi, concerned that a government official is arresting both the guilty and the innocent, instructs him on how best to identify and arrest the criminals he seeks. When the secular government hears about it, they order Rabbi Eleazar to conduct the arrests himself. He is then rebuked: G-d, the owner of the vineyard, is to tend to the justice of His dominion.

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[41] Additionally, Jewish law principles "that apply to monarchies apply to democratic governments as well." Steven H. Resnicoff, *Jewish Law and the Tragedy of Sexual Abuse of Children – The Dilemma within the Orthodox Jewish Community*, 13 RUTGERS J. L. & RELIGION 281, 327 (2012).

[42] *See, e.g,* Broyde, *supra* note 15, at 1142; Resnicoff, *supra* note 41, at 321.

[43] *Socino Talmud*, *Bava Metzia* 83b–84a (quoted in Resnicoff, *supra* note 41, at 322).

Critically, Rabbi Eleazar may have transgressed the halakhic prohibition on informing on other Jews to secular authorities.[44] A similar rebuke is offered to another rabbi who does the same: he is fleeing to secular ways just as his ancestors have. Note also several other characteristics of these passages. First, every party involved is a rabbi or, in the case of Elijah, a revered prophet come down to Earth.[45] There is the potential not only for sin, but also for especial scandal, should they err. Second, it seems that the "officer of the Government" is arresting people almost at random, possibly "tak[ing] the innocent and allow[ing] the guilty to escape."[46] This is inconsistent with notions of proportionate retributivism that demand the correct person be punished. Third, Rabbi Eleazar acts on an order from the Court, on the basis of a royal decree: as an agent of the Executive.

This last is perhaps the most important distinction of all. Thirteenth-century Rabbi Yom Tov Ishbili, or "Ritva," argues that, when a Jew acts as an agent of a secular government, she may assist in the apprehension or prosecution of criminals.[47] In fact, secular governments may go as far as imposing criminal punishment against Jews without the extensive procedural protections of Jewish law to maintain law and order, even if the punished acts are not prohibited by Jewish law.[48] A chain of subsequent commentators reinforced this interpretation, focusing their commentary only on whether Rabbi Eleazar's conduct was "the 'proper' conduct for extremely pious people, especially given that the thieves who were apprehended were to be executed."[49] This reading is also favored by

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[44] *See* Kenneth H. Ryesky, *A Jewish Ethical Perspective to American Taxation*, 10 RUTGERS J. L. & RELIGION 8, 34 (2009). Ryesky notes that "more often than not throughout history, Jews have lived under regimes which, at best, were unable or unwilling to control violence against the Jewish community, and which at worst were actually complicit in such violence. Accordingly, various rabbinical enactments prohibited the practice of one Jew informing the authorities of the transgressions of another Jew, for such was tantamount to informing robbers of someone else's possession of wealth, and thus exposing such persons to loss of liberty and worse." (citing Michael J. Broyde, *Informing on Others for Violating American Law: A Jewish Law View*, 43 J. HALACHA & CONTEMP. SOC'Y 5 (2002)).

[45] *See* Resnicoff, *supra* note 41, at 322.

[46] *See id.*

[47] *Id*. at 323.

[48] *Id*.

[49] *Id*. Specifically, "Rabbi Shlomo ben Aderet (1235-1310), known as Rashba, explains this passage similarly. His view is favorably cited by the Fifteenth Century scholar Rav Yosef Karo, author of *Shulhan Arukh*, the most central codex of Jewish law, along with many others."

modern commentators like R. Moshe Feinstein, who used this logic to argue that Jewish people may perform tax audits on other Jews even if doing so could lead to criminal penalties.[50]

Additionally, Steven Resnicoff finds that "Surrendering a Jew to the duly authorized agents of a fundamentally fair justice system may never have been proscribed."[51] The concern of the *Talmud* and its commentators, instead, was with turning over Jews to violent and unjust rulers.[52] Further, the law concerning turning over other Jews to secular authorities "may only apply where the person surrendered might be executed."[53] Both of these principles may have applied to the tale of Rabbi Eleazar. In the first place, it seems that Eleazar's concerns with the justice system of his time had to do with policing, not adjudication. In other words, he was merely concerned that a government official might have been locking up innocent people, and he was otherwise unafraid to turn offenders over to secular adjudicatory processes.[54] Second, Eleazar draws criticism precisely *because* the people he turns over are subject to "slaughter," to capital punishment, without halakhic procedural protections.[55] Additionally, these two principles apply regardless of whether a Jew is formally acting as the agent of the secular king. For those uncomfortable with mere agency justifying collaboration with secular authorities, then, *Halakkah* offers a fallback: they can always collaborate with *just* secular authorities that *do not perform capital punishment*.

This view, however, is not universally held. Another stream of interpretation holds that Rabbi Joshua's rebuke of Rabbi Eleazar is normative and that the "the only time it would be permitted to assist the secular government in criminal prosecutions is where a criminal poses a threat to the community through his conduct."[56] Such esteemed authorities as Moshe Isserles ("Rema"), of sixteenth-century Poland, and Shmuel de Medina, of sixteenth-century Spain, share this view.[57] Yet, Rema himself held that "The requirement of a threat does not mean only that the criminal may actually harm another, but includes such threats as the possibility that in

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[50] *See Iggerot Moshe*, *Hoshen Mishpat* 1:92 (cited in Broyde, *supra* note 15).
[51] Resnicoff, *supra* note 41, at 315.
[52] *Id*.
[53] *Id*.
[54] *Bava Metzia* 83b.
[55] *See id*.
[56] Broyde, *supra* note 15.
[57] *See id*. nn.11–12.

response to a Jew being apprehended for committing a crime, other Jews will be injured or anti-Semitism will be promoted."[58] The threat to the community that the Jewish prosecutor may permissibly protect against, then, may be construed at such a high level of abstraction that even future dignitary or moral harm—harm to the inner life of the anti-Semite, for example—can justify collaboration with secular authorities.

And what modern prosecution could not be found to protect against "harm" so construed? The first example that comes to mind is that of drug possession. Some modern authorities, however, have found that the harms of drug use are so grave as to render those who sell drugs "pursuers," or *rodeif*, against whose crimes individual Jews must intervene to prevent the "passive murder" of drug consumption.[59] Undoubtedly, the same logic applies to the sale and possession of firearms, which fall more clearly within the logic of the *rodeif* jurisprudence's focus on physical harm.[60]

Rema and Shmuel de Medina's line of interpretation, then, has mostly been rendered moot by circumstance. Secular governments largely no longer prosecute Jews for crimes that could not be construed as effecting some "harm," as that word is interpreted within the law. That would admittedly change if religious practice itself was to become a target of secular prosecution. As things stand now, however, Jews may apply the reasoning of Steven Resnicoff's long line of esteemed authorities to be at ease knowing that the prosecution of other Jews for offenses permitted by Jewish law is compatible with *Halakah*.

In summation, retribution is an acceptable justification for criminal punishment under Jewish law. Even if punishment serves no rehabilitative, deterrent, or incapacitate purpose, and even if it has no such effects, it may still be permissible. The secular state can impose retributive punishment not only on non-Jews, but also on Jews, and even for offenses that are not prohibited under Jewish law or in situations that do not offer Jewish law's procedural protections. Even more, Jewish people may act as the agents of the secular executive in assisting in the prosecution of their fellow Jews. Doing so may be improper for especially pious people, or for religious leaders, but it is not for most Jews.

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[58] *Id.* at 86

[59] Israel Greisman, *The Jewish Criminal Lawyer's Dilemma*, 29 FORDHAM URB. L.J. 2413, 2430, nn.148–49 (2002).

[60] *See Sh. Ar. HM* 425:1.

Further, even if Jews do not act as the formal agents of the secular king, or if Jews are uncomfortable with the theory that mere agency justifies collaboration, they may still collaborate with just secular authorities that do not impose the death penalty. If one wishes to become a prosecutor, then, one could do so under one of two theories: one could either collaborate with secular authorities as an agent of the king, or one could work for a prosecutor's office that one finds acts justly under other tenets of Jewish law and that does not pursue the death penalty. In either case, facilitating the secular work of retributive justice is compatible with Jewish law.

IV. ARE JEWISH PROSECUTORS LIMITED IN THE COURTROOM STRATEGIES THEY CAN EMPLOY?

Even if Jewish law is broadly compatible with the pursuit of a prosecutorial career, however, that does not mean that halakhic observance is compatible with professionally flourishing in such a role. There may be restrictions on the methods that one can use in her prosecutorial practice that stand in the way of advancement or that lead to professional tension or to the necessity of recusals from individual cases. This paper, therefore, next interrogates two potential stumbling blocks to Jewish prosecutorial success: halakhic challenges to the use of money bail and the employment of incarceration as criminal justice's primary sentencing tool. Although neither is ultimately fatal to pursuing a career as a prosecutor *somewhere*, one may wish to exercise greater discernment in one's choice of a particular employer, avoiding offices that over-rely on money bail or that rely on incarceration in situations where diversionary alternatives are effective.

A. THE ROLE OF MONEY BAIL IN PRE-TRIAL DETENTION

Although it generally endorses pre-trial detention, Jewish law does not favor the use of money bail. "Money bail," here, refers to situations in which a prosecutor recommends to a judge early in the criminal justice process that a defendant pay the court a given amount of money that the defendant would then receive back once her case is adjudicated so as to secure her return to future proceedings. She may also, if she cannot afford the whole sum, pay a bail agency a certain percentage of the prescribed amount of bail up front, after which the agency guarantees her return to court.

"Bail companies," however, "may be allowed to impose fees and interest at the steep rate of pay-day lenders, straining families to the breaking point," including such charges as "a $1,000 courier's fee to walk a bail payment a few blocks to the courthouse."[61] Although the Supreme Court has stated that, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,"[62] approximately 740,000 people are now held in local jails on any given day, two-thirds of them because they cannot afford to make bail.[63]

The practice of frequently asking for money bail is not universal, as prosecutors like Cook County's Kim Foxx have begun "releasing people on their own recognizance when they have no violent criminal history, the current offense is a misdemeanor or low-level felony, and no other risk factors suggest that they are a danger to the community or will fail to appear in court."[64] Kentucky even "banned for-profit bail and established a pretrial services agency to analyze defendants' risk of flight and reoffending," which it has operated since 1976.[65] This is consistent with the social science suggesting that the use of money bail is criminogenic and that it usually takes no money bail at all to bring someone back to court.[66]

With approaches to money bail and pre-trial detention proliferating, what are prospective prosecutors to do? The law, at first glance, appears to be ambiguous. The *Talmud* offers a first perspective:

> R. Yose said, "Is a human being to be seized in the street and thus suffer humiliation? This is the rule: [after it is alleged that] so-and-so killed a man, and there are witnesses that he killed a man, he shall be detained until he presents his own witnesses."[67]

Detention, in the time of the *Talmud*, was the norm, and there is no indication that money need, or could, be offered as collateral to

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[61] Bazelon, *supra* note 9, at 44–45.
[62] United States v. Salerno, 481 U.S. 739, 755 (1987).
[63] Bazelon, *supra* note 9, at 40.
[64] *See* FAIR & JUST PROSECUTION, *supra* note 13; *see also* Bazelon, *supra* note 9, at 315, 318.
[65] *Id*.
[66] *See id*. at 41. ("In 1992, Washington, D.C., effectively got rid of money bail . . . [,and] eighty-eight percent of those who are released make every court appearance.")
[67] *Sanhedrin* 7:8.

secure a defendant's release and return. This is consistent with the spirit of the *Torah*'s restrictions on lending and collection.[68]

The Supreme Court of Israel authored another helpful resource for evaluating the merits of pre-trial detention in the form of its opinion in *State of Israel v. Abukasis*, in which the court dismissed the government's appeal of a trial court's order to release a suspect from pre-trial detention.[69] The court, in so doing, distilled a responsum by Isaac b. Sheshet Perfet ("Ribash") into several straightforward rules and adapted those rules into law.[70] Those rules, however, are less favorable to defendants than American systems of money bail, allowing defendants in cases that carry a possible sentence of incarceration to be held without the possibility of bail, regardless of the amount of bond or the reliability of one's sureties.[71]

The court's first distilled rule was that defendants may not be detained unless there is a possibility of capital punishment or incarceration.[72] This is distinct from the American jurisprudence on this issue, which allows for the detention of those suspected of

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[68] *See, e.g.*, *Exodus* 22:24–26 ("If you lend money to My people, to the poor among you, do not act toward them as a creditor; exact no interest from them. If you take your neighbor's garment in pledge, you must return it to him before the sun sets; it is his only clothing, the sole covering for his skin. In what else shall he sleep? Therefore, if he cries out to Me, I will pay heed, for I am compassionate."); *Deuteronomy* 24:6 ("A handmill or an upper millstone shall not be taken in pawn, for that would be taking someone's life in pawn."); *Deuteronomy* 24:10–13 ("When you make a loan of any sort to your countryman, you must not enter his house to seize his pledge. You must remain outside, while the man to whom you made the loan brings the pledge out to you. If he is a needy man, you shall not go to sleep in his pledge; you must return the pledge to him at sundown, that he may sleep in his cloth and bless you; and it will be to your merit before the LORD your G-d."); *Deuteronomy* 24:16 ("You shall not subvert the rights of the stranger or the fatherless; you shall not take a widow's garment in pawn.").
Pre-trial detention without the possibility of bail appears to be inconsistent, however, with the Talmud's exhortation that ransoming captives "is a great Mitzva." *Bava Batra* 8b. Perhaps the distinction is that, while the verses discussing the nature of pre-trial detention contemplate detention by generally equitable Jewish authorities, the verses contemplating ransom necessarily address situations in which captors are unjust. In the *Talmud*, to leave one to be detained as a hostage without ransom is to leave them "to death; . . . to the sword." *Id*.

[69] *See* State of Israel v. Abukasis, 32(ii) PD 240 (1978) (Isr.), *in* JEWISH LAW (MISHPAT IVRI): CASES AND MATERIALS 476, 476 at ¶ 1 (Menachem Elon et al. eds., 1999).

[70] *See id*. at 479 at ¶ 16.

[71] *See id* at ¶ 15.

[72] *Id*. at ¶ 16

committing any crime with any potential sentence.[73] The court then finds that a defendant may not be detained unless "there is merit in what the complainant says."[74] Israel construes this criterion to demand only reasonable suspicion,[75] but the United States requires probable cause.[76] The court also finds that the halakhic purposes of detention are, first, "to ensure that the defendant will stand trial," and, second, "to ensure that the defendant, if found guilty, will be punished."[77] This is consistent with the purposes of bail in the United States.[78]

When, then, is Jewish law compatible with money bail? The primary answer appears to be never: if the reasons supporting a person's pre-trial detention are so grave that restricting their freedom is necessary, the authority seems to suggest, then she may be held without the possibility of bail. Yet, pre-trial detention, regardless of the presence of bail, should itself be avoided unless there is a potential for later incarceration or capital punishment. Offenses which carry no possibility of jail time should never imply a possibility of detention. Finally, pre-trial detention should only be recommended if it serves the proper halakhic purposes of ensuring that a defendant will stand trial and face punishment if convicted. This last point demands that prosecutors carefully discern whether a given defendant is likely to flee. Given the social science on this point, detention should likely be rare.[79]

The authority, however, presents a counter-point to this analysis that, while it has been rendered moot by circumstance, should nevertheless be addressed. The revered Nissim of Gerona, or "Ran," of fourteenth-century Spain, demanded that witnesses be brought forward to give testimony before a person could be detained: "The Jerusalem Talmud indicates that once witnesses have appeared and given their statement to the court[,] . . . although they have not formally testified, [the defendant is detained]. But if witnesses have not come before us, it is not right to detain him and needlessly cause him humiliation."[80] Witnesses, according to Ran,

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[73] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).
[74] *Abukasis*, 32(ii) PD at ¶ 16 (Isr.), *in* "Jewish Law," *supra* note 70, at 479.
[75] *Id.*
[76] *See* Maryland v. Pringle, 540 U.S. 366, 369–70 (2003).
[77] *Abukasis*, 32(ii) PD at ¶ 16 (Isr.), *in* "Jewish Law," *supra* note 70, at 479.
[78] *See* Reynolds v. United States, 80 S. Ct. 30, 32 (1959).
[79] *See* Bazelon, *supra* note 9, at 41.
[80] On *B'chol Yom* 56a (quoted in *Abukasis*, 32(ii) PD at ¶ 14 (Isr.), *in* "Jewish Law," *supra* note 70, at 478).

must actually appear and give testimony, even if they are not subject to cross-examination, as they would be at trial, before a person is detained.[81] This differs from what a strict textualist reading of the *Talmud* would suggest, as the *Talmud* only seems to require that witnesses *exist*, not that they actually *testify*.[82]

Ran's opinion, however, has been rendered circumstantially moot by the procedure of initiating criminal cases in the United States, where no one may be incarcerated before trial without a judicial finding that the detention is meritorious. In the first place, if a defendant is arrested without an arrest warrant, the Fourth Amendment "requires a timely judicial determination of probable cause as a prerequisite to [further] detention."[83] The Supreme Court has clarified that holding a probable cause (or "*Gerstein*") hearing within 48 hours of an arrest satisfies the timeliness requirement.[84] In other words, it is likely that the state will have 48 hours after a warrantless arrest to make a showing that its seizure of the defendant was supported by probable cause that the defendant engaged in illegal activity. Admittedly, such a hearing does not have to adversarial in nature: that is, for example, defendants need not be able to summon witnesses by way of compulsory process or to cross-examine witnesses.[85] Yet, a court will still hear the evidence against the defendant and make an initial determination as to the merit of the defendant's arrest. Even if an arrest warrant was issued beforehand, and a *Gerstein* hearing is therefore unnecessary, a neutral and detached judicial official has, in issuing the warrant, already examined the prosecution's evidence and found there to be probable cause of criminal activity.[86]

Just as importantly, an initial finding of probable cause as to the seizure of the defendant opens the door to a future proceeding more closely resembling Ran's testimonial ideal. After a defendant is arrested and a judicial official finds that there was probable cause for the *arrest*, there must be a subsequent finding that the *prosecution itself* is meritorious. The prosecutor can pursue this finding one of two ways. First, the prosecutor can file what is called

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[81] *Abukasis*, 32(ii) PD at ¶ 14 (Isr.), *in* "Jewish Law," *supra* note 70, at 478.
[82] *See Sanhedrin* 7:8 ("This is the rule: [after it is alleged that] so-and-so killed a man, and *there are* witnesses that he killed a man, he shall be detained until he presents his own witnesses.") (emphasis added).
[83] Gerstein v. Pugh, 420 U.S. 103, 126 (1975).
[84] County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).
[85] *Gerstein*, 420 U.S. at 119–20.
[86] *Id.* at 117.

an "information" with the court, a document which names the charges against the defendant and the factual basis for them.[87] If the prosecutor does so, however, the case proceeds to an adversarial preliminary hearing to determine the merits of the state's case, at which the defendant's attorney will have the right to present and cross-examine witnesses.[88] The court, in other words, will hear evidence, and Ran will be satisfied.

The state can also get around the procedural protections of a preliminary hearing by presenting its case to a grand jury rather than filing an information. A citizen grand jury is largely self-governing, and a judicial official does not preside over it.[89] Yet, it is still a body that will hear evidence and issue, one way or another, a determination as to the merits of the case against a defendant.[90] Although a prosecutor may present the state's evidence to a grand jury, the grand jury itself has broad and independent subpoena powers to gather almost any information it deems pertinent.[91] Admittedly, because Sixth Amendment protections like the right to counsel and the right to confront witnesses only apply to "criminal proceedings," and because the convening of a grand jury is not one such, defendants do not have the right to be present at grand jury proceedings, to present evidence to the grand jury, or to have counsel present when the grand jury meets.[92] Witnesses, however, will almost certainly appear before the grand jury and give testimony, just as they would at an adversarial preliminary hearing, and there is no requirement in Ran's opinion that the proceeding at which the case against a defendant is found to be meritorious be adversarial in nature.

Both a preliminary hearing and a grand jury meet the halakhic requirements for the ongoing detention of defendants pre-

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[87] *See* Lem Woon v. Oregon, 229 U.S. 586, 590 (1913) (holding that a murder charge could be initiated by a prosecutor's filing of a similar document because the Constitution does not require that the states use grand juries).

[88] *See* Coleman v. Alabama, 399 U.S. 1, 9–10 (1970) ("The inability of the indigent accused on his own to realize [the] advantages of a lawyer's assistance compels the conclusion that the . . . preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid [of counsel] . . . as at the trial itself.' " (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932))).

[89] *See* Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1172 (2008).

[90] *Id.* at 1172–73.

[91] *Id.* at 1172.

[92] *See* United States v. Mandujano, 425 U.S. 564, 581 (1976) (citing Kirby v. Illinois, 406 U.S. 682 (1972)).

trial. It is likely that a *Gerstein* hearing, at which the merit of an *arrest* is evaluated, does so as well. In any case, and regardless of whether an arrest warrant was issued or the defendant was arrested without one, the substance of Ran's commentary is moot. Because there will necessarily be proceedings at which the merit of the case against a defendant is evaluated and evidence is offered against a defendant, Jewish law is compatible with the detention of incarcerated persons pre-trial so long as prosecutors do not ask for money bail, the relevant offense carries a possible sentence of imprisonment or death, and detention serves the appropriate halakhic purpose of ensuring that a defendant will return to court.

B. THE ROLE OF INCARCERATION AS A PRIMARY SENTENCING TOOL

Incarceration, or community supervision that carries the threat of incarceration, is still the sentencing norm in the United States.[93] If one becomes a prosecutor, one is likely going to have to play an active role in the sentencing of hundreds or thousands of people to some time in jail or prison. Yet, prisons largely fail to encourage the rehabilitation of those who pass through their gates or their reintegration into their original communities. Studies chronicling the three-year re-arrest rate of formerly incarcerated people place the three-year recidivism rate at anywhere from 40 to 67.5 percent,[94] and the collateral consequences of incarceration encourage stigma formation, make it difficult to find work and housing, and hinder re-integration into one's original community.[95]

Jewish law strongly favors the kind of reintegrative punishment that incarceration is not, and incarceration itself is explicitly disfavored in the authority. Twentieth-century authority R. Yaakov Yeshaya Blau of Jerusalem, for instance, found that, "the punishment of imprisonment is analogous to endangering a person's

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[93] *See* Wendy Sawyer & Peter Wagner, MASS INCARCERATION: THE WHOLE PIE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html (establishing that there are "2.3 million people . . . confined nationwide"); *see also* Danielle Kaeble, PROBATION AND PAROLE IN THE UNITED STATES (Apr. 2018), https://www.bjs.gov/content/pub/pdf/ppus16.pdf (establishing that there were 4.5 million people under some form of court-ordered supervision in 2016).

[94] Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1077 (2008).

[95] *See* Pritikin, *supra* note 95 at 1094–95; *see generally*, Danya E. Keene et al., *Stigma, Housing and Identity After Prison*, 66 AM. SOCIO. REV. 799 (2018).

life by informing on them in a way that endangers their life, since imprisonment poses a possibility of life-threatening conditions."[96] "Rashba," the great thirteenth-century "Rabbi of Spain," found likewise in holding that imprisonment of any length possesses the character of a prohibited indeterminate sentence due to its imposition of physical duress.[97]

Nor does Jewish law's distaste for incarceration end at the prison gates. The authority places restraints on how convicted people may be treated for the sake of encouraging reconciliation and the restoration of people convicted of a crime to their former places in the community. In the context of discussing ancient Israel's preference for corporal punishment over incarceration and the rarity of imprisonment in ancient Israel, for instance, Max May notes that "The desire to rehabilitate the punished offender went so far as to place under ban any one who reproached the former for his deed. This is worthy of notice today when rehabilitation of prisoners is still meeting with considerable resistance."[98] The *Mishnah*, additionally, finds that people convicted of manslaughter should accept honors in the Cities of Refuge, and that when one returns to his city of origin, "he returns to the status that he had [possessed before]."[99]

Maimonides, the revered twelfth-century codifier, philosopher, and physician, builds on this tradition: "Whenever a person sins and is lashed, he returns to his original state of acceptability, as implied by the verse: 'And your brother will be degraded before your eyes.' Once he is lashed, he is 'your brother.' "[100] Maimonides also finds that those who transgress and repent should be celebrated in the community:

> Let not a penitent man imagine that he is removed at a distance from the degree of the righteous on account of the iniquities and sins which he had committed. It is not so, forsooth, but the Creator considers him beloved and desirable, as if he had [never known of sin.] Moreover, his reward is great; for, after having

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[96] *Pitchai Choshen* 7:4 (quoted in Michael J. Broyde, *Informing on Others for Violating American Law: A Jewish Law View*, https://www.jlaw.com/Articles/mesiralaw2.html#b54 (last visited Apr. 16, 2019)).
[97] *See* Broyde, *supra* note 97, at n.54.
[98] *Jewish Criminal Law and Legal Procedure,* 31 J. CRIM. L. & CRIMINOLOGY 438, 441 (1940).
[99] *Makkot* 2:8.
[100] *Sanhedrin* 17:7.

> partaken of the taste of sin, he separated himself therefrom and conquered his passion. The sages said: "The place whereon the penitent stand the wholly righteous could not stand," as if saying: "their degree is above the degree of those who ever did not sin, because it is more difficult for them to subdue their passion . . . ."[101]

The appropriate halakhic disposition toward those convicted of a crime, then, is one that encourages repentance and restoration, rather than return to marginality and criminality.

Although Jewish law legitimizes secular punishment, it also celebrates the potential for rehabilitation. Prospective prosecutors should therefore be encouraged to seek out offices that prioritize diversionary programs over incarceration at sentencing and that give young attorneys the discretion to give defendants second chances. Diversion has the potential to change the lives of offenders in ways fully compatible with Jewish law. One program offered by the Brooklyn District Attorney's Office, for example, Youth and Congregations in Partnership, has had great success mandating that young people convicted of gun crimes abide by its strict rules in the community to earn the eventual dismissal and sealing of their convictions.[102] Jewish prosecutors, preaching through their actions the halakhic message of second chances, can create countless such opportunities.

V. CONCLUSION

If a Roman Catholic had concerns about whether becoming a prosecutor was compatible with the tenets of her faith, she would likely bring her concerns to a priest. Likewise, the best answer to "Can I, as a Jew, become a prosecutor?" is probably, "Ask your rabbi." The discernment of one's profession is ultimately a deeply personal expression of one's priorities and values that is irreducible to strictly academic interrogation.

Yet, halakhic study produces several real and active concerns with the American model of criminal prosecution. Although retributive justice is not itself incompatible with Jewish law, even if one prosecutors other Jews for crimes not prohibited by

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[101] *Teshuvah* 7:4.
[102] *See* Bazelon, *supra* notes 9, 30, 145.

Jewish law, the use of money bail is so incompatible. Additionally, punishment should be reintegrative and rehabilitative, and there is little evidence that incarceration, the primary tool of American criminal sentencing, is either reintegrative or rehabilitative. In some ways, the work of a prosecutor is a halakhic minefield.

At the same time, the G-d of the *Torah* has commanded, "Justice, justice shall you pursue, that you may thrive and occupy the land the Lord your G-d is giving you."[103] G-d had ordered Israel to "appoint magistrates and officials," who were to "govern the people with due justice."[104] Those officials were to pursue both "judgment and compromise" (hence the repetition of "justice").[105] And prosecutors are undoubtedly the "magistrates and officials" of today.

With the discretion to offer plea deals above or below either end of state sentencing guidelines,[106] to charge crimes with mandatory minimum sentences,[107] and to recommend and administer the diversionary programs that allow offenders to stay in school or a job,[108] prosecutors pursue justice not only in the courtroom, but also in the hallway, in the office, and over the phone. Their decisions can bind even the judges before whom they appear.[109] Their decisions, in fact, are essentially a form of adjudication in themselves. In particular, prosecutors have the power, at the very beginning of a suspect's engagement with the justice system, to imprison them or set them free. If prosecutors' capacity to harm is immense, so too is their power to pursue justice.[110]

If Jewish people who worship a G-d Who sides with the gleaning poor, the slave, and the stranger wish to do justice as the "officials" of today, there may be no better time to do so. Never have the halakhic concerns with criminal prosecution been less

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[103] *Deuteronomy* 16:20.
[104] *Deuteronomy* 16:18.
[105] *Sanhedrin* 32b.
[106] *See* Bazelon, *supra* note 9, at 168.
[107] *See id.* at 142.
[108] *See id.* at 30.
[109] *See id.* at 142 (recounting one federal judge's resignation from the bench and his subsequent citation of the necessary imposition of mandatory minimums "as a chief reason" for doing so).
[110] *See generally* Ariana H. Aboulafia, *Great Power, Greater Responsibility–The Importance of Socially Conscious Prosecutors in Combating "Tough on Crime" Policies*, 122 PENN ST. L. REV. PENN STATIM 24 (2018).

pronounced or the pathways to an office with equitable leadership more numerous. Jewish people may encounter halakhic challenges in their practice, but whom is better situated to undermine the use of money bail or to steer more people convicted of a crime into diversionary programs than prosecutors themselves? To bring one's religious convictions to bear on any career is to risk that there will come a point when they can be brought to bear no longer, when one will have to risk one's reputation or one's very profession, or even resign. Taking that risk is part of the responsibility one bears for one's own life.