

## Ethical Speech and the Release of the Convicted Offender

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*Moreover, if the wicked one repents of all the sins that he committed and keeps all My laws and does what is just and right, he shall live; he shall not die. None of the transgressions he committed shall be remembered against him; because of the righteousness he has practiced, he shall live. Is it my desire that a wicked person shall die? – says the Lord God. It is rather that he shall turn back from his ways and live. (Ezekiel 18:21-23)*

### Introduction

In the Mishnah we learn that just as there is fraud, wrongdoing, or overreaching (ona'ah אונאה) in the context of business, that is buying and selling, so also is there hurting, oppressing or shaming another person with words, verbal ona'ah (אונאה דברים). In the Gemara, the sages indicate that verbal ona'ah is a greater sin than monetary ona'ah. Verbal ona'ah includes a wide variety of activities from intentionally disappointing to outright insulting.

The Mishnah provides three specific examples of verbal ona'ah: inquiring about the cost of an item from a merchant when you have no intention of purchasing; reminding a repentant sinner of their earlier deeds, and reminding a convert of their parents' deeds. The latter two examples may be characterized as hurtful or inappropriate remembering. In this paper I will focus on the Mishnah's admonition against reminding a sinner of their earlier deeds in the context of a person who has been convicted of a serious crime, who has been sentenced, and who has finished serving their sentence.

Why do our sages consider that verbal ona'ah is so serious? Would the sages consider that a convicted offender who has served their sentence has repented for their sin?

What does repentance mean in this context? Is such a person entitled to live the rest of their life without society reminding them of the crime of which they were convicted?

In contemplating these questions I will first examine why our sages consider that verbal ona'ah is such a serious offence. I will then explore what our sages mean by

repentance. Next I will provide some background regarding the Canadian sentencing system. Finally, I will suggest answers for the questions I have posed.

## Verbal Ona'ah and Ethical Speech

The Mishnah (Baba Metzia 4:10) states:

Just as there is [fraud by] overreaching in buying and selling, so there is wrong done by words. ... If a man had repented, one must not say to him, 'Remember thy former deeds!' ...<sup>1</sup>

In the Gemara (Baba Metzia 58B), the sages begin their analysis of this Mishnah with a Baraita interpreting verse 25:17 in Leviticus (ויקרא): "Do not wrong one another, but fear your God: for I the Lord am your God."<sup>2</sup> This Baraita is from the Tosefta (Baba Metzia 3:25-29) which was based on the Sifra midrash collection (Behar Sinai 4:1-2).<sup>3</sup> The Baraita gives several more examples than in the Mishnah. It concludes by acknowledging the impossibility of enforcing this precept "[F]or the matter is entrusted to the heart, and concerning any matter that is entrusted to the heart it was said: 'And you shall fear your God.'"<sup>4</sup> Only God knows what is in the heart, someone's innermost thoughts and intentions, and thus only God can judge the matter. Therefore only God is to be feared in matters of verbal ona'ah.

Verbal ona'ah is a greater sin than monetary ona'ah because it concerns the person, not their money. Causing anguish to people is disrespect for God. Money can be restored, but the anguish caused by verbal ona'ah never can be fully undone.<sup>5</sup> The sages consider public shaming akin to murder: "Anyone who shames (lit. 'whitens the face of') his fellow in public is as if he sheds blood."<sup>6</sup> It is so serious that such a sinner is never able to leave Gehinnom: "It is better for a man to cast himself into a fiery

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<sup>1</sup> Philip Blackman's translation of the *Mishnah* (משנה): Mishnah Press, London 1954.

<sup>2</sup> The Jewish Publication Society new translation of the *TaNaKh* (תנ"ך): Philadelphia 1999.

<sup>3</sup> *A Beginner's Guide to the Steinsaltz Talmud*, Rabbi Judith Z. Abrams: Jason Aronson, Northvale 1999, p. 51.

<sup>4</sup> Rabbi Adin Steinsaltz's translation of the *Talmud, Baba Metzia*: Random House, New York 1990, 58B

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

furnace and not to put his fellow to shame in public.”<sup>7</sup> There are only two other types of sin that the sages consider to be in this category: sleeping with a married woman and calling someone a derogatory name.<sup>8</sup>

There are dire consequences for ona’ah, both monetary and verbal. God takes a special interest in avenging these sins. “Do not wrong one another, but fear your God: for I the Lord am your God.” Even though other prayers may be intercepted by the angels on their way to God, the prayers of those who have been wronged by ona’ah go directly to God who promptly answers them. Ona’ah together with robbery and idolatry are three sins that are immediately redressed.<sup>9</sup>

The story of the oven of Akhnai dramatically illustrates the destructive power of words that cause hurt feelings. The actual object of the story (the oven itself) although significant, quickly becomes irrelevant to the events that subsequently unfold. Rabbi Eliezer publically disagrees with the majority of the sages over the question and they excommunicate him. His hurt feelings are so profound that great destruction results, including chaos in the academy, destruction in the countryside, storms at sea, the near drowning and, ultimately, the death of Rabban Gamliel. This destruction is occasioned by Rabbi Eliezer’s extraordinary ability to invoke supernatural forces.<sup>10</sup>

The powerful and foundational lesson of this story is that process must be fair and must take feelings into account. A process that does not is verbal ona’ah. The correctness of the substance of a particular majority position cannot take precedence over the process followed to reach that position and the respect with which the minority view is heard. Justice must not only be done, it must be seen to be done.<sup>11</sup> Here the sages publically wronged one of their own, as a consequence of which his life was ruined and the nourishment of all of Israel was affected. Verbal ona’ah and the hurt feelings that

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<sup>7</sup> *Ibid.* 59A

<sup>8</sup> *Ibid.* 58B

<sup>9</sup> *Ibid.* 59A

<sup>10</sup> *Ibid.* 59A-59B

<sup>11</sup> A maxim of the common law judicial tradition first coined by Lord Gordon Hewart in *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233).

resulted had disastrous consequences. In Genesis 1-3 we first learned about the power of words, of speech, to create – God spoke and the world came into being. The story of the oven of Akhnai reveals the power of language to destroy that which is human within us.

The sages apply the prohibition against verbal ona'ah only to those who observe the Torah and the commandments, that is, observant Jews. Only those who observe the Torah and keep the commandments are worthy of honour and only they are honoured.<sup>12</sup>

## Repentance

Rabbinic sources teach us that sin is a volitional act which can only be overcome by repentance, teshuvah (תשובה), another volitional act. When it is sincere, repentance shows a true change of character and the desire to enter into a renewed relationship with God.<sup>13</sup> Teshuvah is also understood to mean returning to God. It is considered to be “one of the ultimate spiritual realities at the core of Jewish faith”.<sup>14</sup> Some sages valued teshuvah so much that they considered it to be one of the entities created before the world was created; God wanted to ensure that the very fabric of reality contained a means of reconciliation between people and God. “In this ... sense repentance is the highest expression of man’s capacity to choose freely – it is a manifestation of the divine in man.”<sup>15</sup>

Repentance can cause real change in the world:

Every human action elicits certain inevitable results that extend beyond their immediate context, passing from one level of existence to another, from one aspect of reality to another. The act of repentance is, in the first place, a

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<sup>12</sup> *Op. cit. Talmud, Baba Metzia, 59A.*

<sup>13</sup> Steven T. Katz, “Man, Sin, and Redemption in Rabbinic Judaism”, in *The Cambridge History of Judaism, Volume Four, The Late Roman-Rabbinic Period*, Steven T. Katz, editor: Cambridge University Press, Cambridge 2006, p. 938.

<sup>14</sup> *The Thirteen Petalled Rose: A Discourse on the Essence of Jewish Existence and Belief*, Adin Steinsaltz: Basic Books, New York, p. 125.

<sup>15</sup> *Ibid.*

severance of the chain of cause and effect in which one transgression follows inevitably upon another. Beyond this, it is an attempt to nullify and even to alter the past. This can be achieved only when man, subjectively, shatters the order of his own existence.<sup>16</sup>

For our sages, four elements are required for the process of teshuvah: recognition of the sin, sincere inner turning (returning) to God, confession of the sin before God and, where possible, redress or restitution, including paying an appropriate penalty.<sup>17</sup>

Repentance is not an outward act. It is an inner cleansing of the heart which must be true contrition coupled with shame and self-reproach that leads to a frank and sincere confession, and a change of heart and conduct.<sup>18</sup>

Repentance is a return to Judaism:

but not to the external framework, not to the religious norms that man seeks to understand or to integrate into, with their clear-cut formulae, directives, actions rituals; it is a return to one's own paradigm, to the prototype of the Jewish person. ... [T]his paradigm ... is the memory of the essential archetype that is a part of the soul structure of the individual Jew.<sup>19</sup>

Is it possible to repent one of the most serious of all sins, the sin/crime of murder?

Clearly the answer is yes. Cain confessed to killing his brother Abel and “forsook” his evil ways. He was made “a sign” for repentant sinners.<sup>20</sup> In the Midrash we read that after Cain confessed his sin to God he returned to his father, Adam, who asked him how his case went. Cain replied that he had repented and was reconciled. Adam beat his face and cried “So great is the power of repentance, and I did not know”.<sup>21</sup> In his *Laws of Repentance* Maimonides lists 24 transgressions that make repentance difficult - but

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<sup>16</sup> Steinsaltz, *op. cit.* p. 133.

<sup>17</sup> Katz, *op. cit.* p. 939.

<sup>18</sup> Kaufmann Kohler and Max Schlesinger, “Repentance”, *Jewish Encyclopedia*: Jewish Encyclopedia.com, 2002.

<sup>19</sup> Steinsaltz, *op. cit.* p. 127.

<sup>20</sup> *Genesis* 4:13-16.

<sup>21</sup> *Genesis Rabbah* 22:13.

not impossible. Murder is not on that list (4:1). Maimonides explicitly writes that there are transgressions worse than murder (4:9).

This view is not universally accepted however. In the Talmud, our sages say that repentance is not complete until the person wronged has forgiven the sinner for his sin (Yoma 85B). This teaching is founded in the Mishnah (Yoma 8:9): "... but for transgressions between a man and his fellow man the Day of Atonement does not affect atonement until he shall first have appeased his fellow man."<sup>22</sup> In the case of murder, it is impossible for the victim to forgive the sinner. It is difficult to reconcile these seemingly contradictory teachings. Fortunately such reconciliation is unnecessary for the purposes of this paper.

### **Sentencing in Canada**

There is no death penalty in Canada. It was abolished in 1976. Reasons for its abolition included (and continue to include) the possibility of wrongful convictions, concerns about the state taking life, and uncertainty regarding the effectiveness of the death penalty as a deterrent.<sup>23</sup> The Canadian Parliament replaced the death penalty for first degree murder with a mandatory life sentence with no eligibility for parole (supervised release with or without conditions) for 25 years, and between 10 and 25 years in the case of second degree murder.<sup>24</sup> The penalty for other serious offences, including manslaughter, may be imprisonment for life, but with normal eligibility for parole.

A convicted offender may apply for parole after serving one-third of their sentence. Parole is mandatory after two-thirds of the sentence except in the case of offenders who

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<sup>22</sup> Blackman, *op. cit.*

<sup>23</sup> *The Last Dance: Murder in Canada*, Neil Boyd: Prentice Hall Canada, Scarborough, Ontario, 1988.

<sup>24</sup> Section 231 of the *Criminal Code of Canada*, R.S.C, 1985 c. C-34 (the *Code*) distinguishes first and second degree murder on the basis of whether the murder was "planned and deliberate". Regardless of whether it was planned and deliberate, first degree murder also includes the murder of a police officer, and the murder of a victim during the commission of certain other offences such as sexual assault, hijacking, kidnapping, and hostage taking. Section 232 of the *Code* provides that murder committed in the "heat of passion caused by sudden provocation" is manslaughter.

are considered to be dangerous or long term offenders.<sup>25</sup> An offender who has been sentenced to life imprisonment for their crime does not complete serving their sentence so long as they remain alive, whether or not parole is granted. They remain under supervision and parole may be revoked at any time for specified violations following an appropriate process.<sup>26</sup> For purposes of parole, a life sentence is nine years.

Section 718 of the *Criminal Code of Canada* sets out the purpose and principles of sentencing in Canada:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Where a crime involves the abuse of a minor, an offence against a police officer or other member of the criminal justice system, the primary considerations are denunciation and deterrence.<sup>27</sup>

The primary sentencing principle is that it must be proportionate to the gravity of the offence and to the degree of responsibility of the offender.<sup>28</sup> Secondary sentencing

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<sup>25</sup> Sections 752-761 of the *Code* define and set out a complicated regime for determining an offender to be a dangerous offender and thus subject to an indeterminate sentence, or a long-term offender and thus subject to a much more serious sentencing and parole process.

<sup>26</sup> *Ibid.* section 745.

<sup>27</sup> *Ibid.* sections 718.01 and 718.02.

<sup>28</sup> *Ibid.* section 781.1.

principles are to be considered when determining a just and appropriate sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.<sup>29</sup>

Although Parliament has codified the purpose, policies and principles of sentencing, it is judges in the Courts who apply them and sentence convicted offenders. Sentencing is an individualized process, imposed on a case by case basis in the discretion of the sentencing court. This discretion is subject to only two limitations – where Parliament has prescribed a minimum sentence or a mandatory one.

## **Discussion**

The policy statement in section 718 of the *Code* serves as a powerful reminder that the criminal law in Canada, by affirming and reinforcing collective values, protects not only individuals but society as a whole. At their most fundamental core, Parliament and the Courts together are the sages of our day. (How well they perform that function may be the subject of debate and thus of another paper.)

Can serving a sentence be presumed to be repentance, thereby entitling the convicted offender to be protected from verbal *ona'ah*, that is, not to be reminded of their sin/crime? It seems obvious that committing a serious crime such as murder, robbery, or sexual assault in our society would be considered a sin by our sages. Of course, there are modern crimes such as identity theft and drunk driving which the sages could not have contemplated and therefore may not have specifically mentioned. They did not have bank accounts or motor vehicles during their time. I am confident, however, that there are Talmudic principles that could be applied, such as the value of a person's name and reputation, and the importance of maintaining control when wielding powerful items respectively. I have limited my analysis to serious crimes, however, because there are many actions that now have penalties which may be classified as criminal or

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<sup>29</sup> These other principles include increasing or reducing the sentence based on aggravating or mitigating circumstances in section 718.2(1), the parity principle in section 718.2(b), the totality principle in section 718.2(c) and the restraint principle in sections 718.2(d) and (e).

quasi-criminal offences, but it is unlikely that the sages would call them sins. Two examples are failing to file an income tax return on time, or parking a car within six meters of a corner.

What would our Talmudic sages say? I consider it useful to view the Talmudic concepts of repentance and the prohibition against verbal *ona'ah* where a sinner has repented for their sins by using Plato's allegory of the cave.<sup>30</sup> There is a perfection that we can barely imagine and of which we occasionally catch glimmers, but can never hope to attain. Such is true repentance. True repentance is very difficult to achieve. Still, that truth, that perfection, provides the ideal to which we as a society aspire. As individuals we may never achieve it. What lower level is "good enough"?

Does the concept of repentance and the prohibition against *ona'ah* apply at all outside a Jewish context? Whether or not the sages would apply these principles to non-Jews or non-observant Jews, I am assuming that they do. I consider that these are important ethical values to live by, and to bring from our sages, in an effort to achieve a civil and just society in our modern secular world.

Given my assumption that our sages would be deeply interested in bringing their ethical consciousness to our modern secular world, would they require something more than "merely" serving the sentence however long? Or would that be sufficient to conclude that the offender has repented? For example, would they require that the offender plead guilty rather than put the state and the victim and/or the victim's family through the grueling process of a trial? Would they require an apology? Given that sentencing is an individualized process, would they want to examine each case on the basis of its own facts? Or would they want to provide us with general principles to apply?

It is easy to tell when a convicted offender has finished serving their sentence. It is impossible to know whether they have repented, that is, satisfied all four of the required elements or actions of repentance identified by our sages. Since repentance is not an

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<sup>30</sup> *The Republic, Book VII.*

outward act, does that mean that a convicted offender is unlikely to be considered to be a repentant sinner entitled to the protection against verbal *ona'ah*? Before exploring that question, it is useful to analyze whether any of the elements of repentance are objectively observable.

Did the convicted offender recognize their sin? If they pled guilty, it is likely that they recognized their sin and accepted responsibility for it. If they were found guilty following a trial, it is not possible to know if they recognized their sin unless: they made a public statement in court acknowledging their guilt, or did so in an interview with a probation officer charged with preparing a pre-sentence report; and/or they publicly apologized in court to the victim and/or the victim's family. However, since one of the principles of sentencing in Canada is "to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community", I would argue that simply serving the sentence ought to be sufficient to presume that the convicted offender has repented.

Did the convicted offender undergo a sincere inner turning (returning) to God? Only God (and the offender) can know whether this condition has been fulfilled. In our secular society, an offender's relationship with their deity is not a purpose of sentencing; completion of the sentence is temporal in all senses of the word.

Did the convicted offender confess their sin before God? Here too, only God (and the offender) can know whether this condition has been fulfilled.

Did the convicted offender provide redress or restitution, including paying an appropriate penalty? Like the first element, this is relatively easy to assess objectively. If the offender served their sentence, they paid the incarceration portion of an appropriate penalty. Sentencing courts may also order restitution and the offender does not complete their sentence until the restitution is been paid.<sup>31</sup>

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<sup>31</sup> *The Code, op. cit.* sections 738-741.

The question of whether a murderer can ever provide complete redress or restitution to the victim who is dead does not arise in the Canadian sentencing regime because a life sentence is exactly that. It does not end until the offender themselves dies. It is arguable that the Canadian system of sentencing prevents a murderer from ever repenting for their sin. Thus, reminding them of their sin would not be considered under the rubric of verbal ona'ah. This accords with the Talmudic assertion that a murderer cannot repent their sin.

What about the paroled offender? Someone who has been paroled is still, technically, serving their sentence. Accordingly, I would argue that they cannot be presumed to have repented until their sentence is complete. Further, many convicted offenders are given non-custodial sentences. Just because an offender is not incarcerated does not mean that they are not serving a sentence. The same principle I have suggested above would apply – they ought to be presumed to have repented when they complete their sentence.

What I am suggesting here is not an individualized process of determining whether a convicted offender has repented. That would be far too cumbersome and difficult to enforce. Rather, if we, as a civil and just society believe that once an offender has completed their sentence, they have “paid their debt to society”, then I believe that such a society could also invoke a principle of presuming that the offender has repented. Thus the offender must not be reminded of their sin. Whoever does so engages in verbal ona'ah.

## **Conclusion**

In the Introduction I asked several questions: Why do our sages consider that verbal ona'ah is so serious? Would the sages consider that a convicted offender who has served their sentence has repented for their sin? What does repentance mean in this context? Is such a person entitled to live the rest of their life without society reminding them of the crime of which they were convicted?

Our sages liken verbal ona'ah, shaming someone in public, to murder. Whitening someone's face, causing them to blanch, is akin to shedding their blood. The sages recognized the incredibly destructive power of words and prohibited such behaviour in several specific situations. Whether or not the sages would have considered that a convicted offender who served their sentence has repented for their sin, I have concluded that we should. Such a person is entitled to return to society and live out the rest of their days without being reminded of their sin, that is, the crime they committed.

I recognize that the sages' principle may not be specifically applicable. Most offenders are not Jewish. Even fewer are observant Jews. And repentance is an inward and not an outwardly observable process, although two of its elements are objectively observable. Do these facts entitle a civil and just society to treat offenders who have finished serving their sentences badly or unethically? What is ethical speech in this situation? Can we use some of the sages' concept to formulate our response? Our response says much about our society.

I consider that it is appropriate to broaden the question to society's appropriate behaviour/response. This is an ethical question. Given the philosophical underpinnings of the Canadian sentencing system, in my view, our society ought to presume that those who have finished serving their sentences have repented the sin of the crime they committed.