

THE IMMORALITY OF INCARCERATION:
BETWEEN JĀVĒD AḤMAD GHĀMIDĪ
AND ANGELA Y. DAVIS

Adnan A. Zulfiqar
Rutgers Law School

Abstract

The carceral nature of America's criminal system has become a subject of fierce debate over the past few years as the extent of incarceration has gained notoriety. As a result, the decades-old argument for the abolition of prison has received its greatest reception to date, becoming the subject of popular conversation and a plethora of scholarly articles. Much of this discussion has centered on diagnosing the causes of mass incarceration. Empirical and historical studies have offered a strong case for the pervasive role of racial animus and discrimination in expanding the carceral state, which in turn has produced an abolitionist response as remedy to a broken system. At the same time, contexts far removed from America's racial paradigm have also produced fierce critiques of incarceration. The introduction of prisons by European colonial powers met with native resistance across the Global South and, in the period since, a range of scholarly writing has continued to challenge prisons. Among the Global South's most prominent examples of this abolitionist response has been those from scholars of Islamic law. These jurists have offered critiques that argue for both a doctrinal incongruence between incarceration and the Islamic legal tradition, as well as a moral chastisement of the carceral state. This Essay seeks to explore one such critique that represents a strand of abolitionist thinking in the Islamic legal tradition. While the American discourse has been preoccupied with abolition as a remedy for

mass incarceration, the Islamic discourse is largely devoid of this concern; it critiques the institution of prison itself. The Essay's overarching aim is to show how perspectives from the Global South, in this case Islamic law, might inform new approaches to abolition in other contexts. To accomplish this, the piece uses the thought of Muslim jurist and intellectual, Jāwēd Aḥmad Ghāmidī, examining both his ideas on imprisonment and broader approach to questions of law and morality. It then brings this discourse into conversation with key ideas in the work of American scholar-activist Angela Yvonne Davis. The animating inquiry will center on the moral arguments made in support of prison abolition and how Ghāmidī's ideas, and by extension Islamic law, offer a unique perspective on this timely matter.

I. INTRODUCTION

On February 4, 1969, Nelson Mandela wrote a letter from prison to two of his children, Zindzi and Zenani. In it, he mentioned a prior correspondence with Zindzi where she described her heart as “sore” because of her father’s absence and inquired about his return. Mandela responded that he did not know when he would return and instead reassured his young children that he was “full of strength and hope,” only longing to be with them.¹ In July 1969, Mandela faced another painful reminder of the estrangement incarceration produces when prison authorities denied him permission to attend the funeral of his eldest son, Thembi, who died in a tragic car accident.² A year later, in August 1970, after learning his family was being harassed by authorities, Mandela described his anguish as being “soaked in gall, every part of me, my flesh, bloodstream, bone and soul, so bitter am I to be completely powerless to help you in the rough and fierce ordeals you are going through.”³

1 “Hope is a Powerful Weapon”: Unpublished Mandela Prison Letters, N.Y. TIMES, July 6, 2018, <http://www.nytimes.com/2018/07/06/opinion/sunday/nelson-mandela-unpublished-prison-letters-excerpts.html>.

2 PETER HAIN, MANDELA: HIS ESSENTIAL LIFE 91–92 (2018). Almost a year prior, in September 1968, Mandela’s mother passed away and he was denied permission to attend her funeral as well (Id.).

3 Nelson Mandela’s Letters Reveal South Africa Jail Agony, BBC NEWS, Oct. 10, 2010, <http://www.bbc.com/news/world-africa-11509771>.

These snippets of Mandela's prison correspondence capture experiences common to the incarcerated, regardless of their station in life. To be confined for prolonged periods means enduring features, such as familial estrangement, inherent to the institution of prison wherever it is located.⁴ The trauma—psychological, emotional, and physical—associated with confinement is implicitly, if not explicitly, accepted as a tortuous, but reasonable element of punishing every jail-worthy crime.⁵ In the centuries since its introduction, modern prison has become ubiquitous with criminal punishment everywhere and the enterprise is presented as not simply a more “humane” alternative to corporal punishment, but as the only available option. The original rehabilitative objective of imprisonment, inspired by its Quaker origins, is effectively obsolete now, only offered to justify a prisoner's reentry into society, but expected to occur *despite* prison, not because of it.⁶ Since its origins though, the modern prison has been subject to widespread criticism. Even the English writer Charles Dickens registered his distaste for prison after a visit in 1842 to Philadelphia's recently established Eastern State Penitentiary, observing that “rigid, strict and hopeless solitary confinement” was “cruel and wrong.”⁷ More recently, arguably

4 One commentator refers to this as a type of violence that occurs through prison's isolation, noting that “every incarcerated human is stripped of family.” Tayari Jones, *What Nelson Mandela Lost*, N.Y. TIMES, July 6, 2018, <http://www.nytimes.com/2018/07/06/opinion/sunday/nelson-mandela-tayari-jones-prison-letters.html>. In his initial years of incarceration, Mandela was allowed only “one visitor and one letter (up to 500 words) every six months” (PETER LIMB, NELSON MANDELA: A BIOGRAPHY 86 (2008)).

5 According to the U.S. Department of Justice's Bureau of Justice Statistics report from 2007, nearly one in twenty prisoners report being raped or sexually abused behind bars, more than 70,000 prisoners per year. See Allen J. Beck and Paige M. Harrison, *Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (Apr. 9, 2008), available at <http://bjs.ojp.gov/content/pub/pdf/svsfpri07.pdf>.

6 In fact, one might argue that a retributivist justification for long-term confinement is also flawed because prison's collateral consequences distort the moral desert calculation. Of course, this is not the position of all retributivist thinkers, some of whom argue that there are many “desert-based reasons to withhold liability and lessen punishment.” See Doug Husak, *Retributivism and Over-Punishment*, 41 L. & PHIL. 169–73 (2022).

7 CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 1:238 (reissue ed. 2009). He went on to describe the punishment of prison as “torture” and

stemming from increased awareness of problems with American “criminal justice,” a renewed interest has emerged in reimagining punishment for a future world without prisons.⁸

The prevailing critique of prisons today tends to be American-centric, where prison is seen as a continuation of the United States’ unique history of racial violence. Arguments against incarceration are responsive to systemic factors underlying America’s prison crisis; abolitionist ideas from other parts of the world rarely inform this critique.⁹ The operating assumption is that anti-carceral thinking is only produced in the United States or Europe; other populations are presumed to be less critical of the idea of prison or simply reconciled to its inevitability.¹⁰ In actual fact, the Global South contains its own discourse on abolition, independent of any Anglo-European influence, and offers valuable insights for anti-carceral thinking generally. The discourse is anchored by a belief that long-term confinement is unethical, and prison is an immoral institution; there is comparatively less interest in the systemic shortcomings of any particular

“agony,” noting that the “daily tampering with the mysteries of the brain” are “immeasurably worse than any torture of the body” (Id. at 239).

8 With approximately 2.2 million American citizens behind bars, not to mention those in immigrant detention, there has been “a 943 percent increase over the past half century” in the number of prisoners. The rate of incarceration in the United States is “five to ten times higher” than comparable nations and it imprisons 25% of the world’s prison population. See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 5 (2016).

9 Broader critiques of prison, such as those offered by Michel Foucault, also prove influential in abolitionist thought but draw primarily from the Anglo-European context. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (trans. Alan Sheridan, 1977). For example, even in the work of Angela Y. Davis, there is mention of various abolitionist thinkers including Foucault, Thomas Matheison, Willem de Haan, Herman Bianchi, Nils Christie, etc. but an absence of any discussion of theories from the Global South (ANGELA Y. DAVIS, *THE ANGELA Y. DAVIS READER* 102 (1998)).

10 It is important to note that being “reconciled to its inevitability” has a lot to do with the fact that prison is both a feature of how criminality is punished in the modern period and a remnant of the colonial occupations that defined much of the Global South’s current governing systems and institutions. See generally FRANK DIKÖTTER AND IAN BROWN, EDs., *CULTURES OF CONFINEMENT: A HISTORY OF PRISON IN AFRICA, ASIA AND LATIN AMERICA* (2007); Babacar Bâ, *La Prison Coloniale au Sénégal, 1790–1960: Carcéral de Conquête et Défiances Locales*, 8 *FRENCH COLONIAL HIST.* 81 (2007).

criminal justice system.¹¹ Among the most prominent voices in the Global South critiquing prisons are scholars of Islamic law. Their approach interrogates long-term imprisonment with arguments grounded in religious scripture or inspired by values derived therefrom. Their critique is both moral and legal, because the two concepts are inextricably linked for Islamic law—a law sourced from religious texts and elucidated by jurists trained in religious sciences. Put simply, hardly anything can be both immoral and legal in a system that at once punishes criminality as well as sinfulness.¹²

These two types of moral critique, circumstantial and conceptual, described above and elaborated below, include strong arguments for why confinement as punishment is problematic. Yet they are rarely considered alongside each other. The purpose of this essay is to explore the abolitionist views of one contemporary Muslim thinker, Jāwēd Aḥmad Ghāmīdī, then consider them in light of arguments made in the American context, specifically by the scholar-activist Angela Y. Davis.¹³

11 In some respects, this echoes a similar distinction in the contemporary West, specifically the United States and continental Europe, between two “contrasting ideas on how to build a just system of criminal justice” (James Q. Whitman, *Presumption of Innocence or Presumption of Mercy? Weighing Two Western Modes of Justice*, 94 TEX. L. REV. 933 (2016)). As Whitman points out, both approaches seek a more humane criminal justice system, but emphasize different stages in the process. The American approach is premised on a “libertarian fear” that considers state actors as the primary threat to justice, where “rogue government officers will target innocent persons” (Id. at 981). Hence, the American system includes robust procedural safeguards that might allow even the guilty to go free, but presumably prevent the punishment of innocents. The American approach seems less concerned with the cruelty that might ensue once someone is labeled as guilty. On the other hand, the continental European approach is far more deferential to authority, but “determined to keep the practice of punishment within decent, civilized limits” (Id.). The “tendency” in continental Europe is to “announce a stern nominal sentence,” which allows for public condemnation, but then leave “room for mercy” for the individual offender (Id. at 980).

12 The immorality of prisons has featured in Western abolitionist thinking as well, but typically in relation to the circumstances that produce individuals to be incarcerated. It is the biases and unethical motives behind the rise of prisons, along with the harrowing conditions inside prisons, which make prison immoral for Western abolitionists. For thinkers from the Islamic tradition, long-term imprisonment by its very nature is immoral regardless of any other consideration.

13 Having endured time in prison because of her political activism, Davis’s work provides a multi-faceted examination of imprisonment in her argument for abolition. For my purposes here, her book, ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003), provides an especially useful anchor for discussing her main arguments on the

Unlike Davis, abolition is not a primary focus for Ghāmidī; it is, rather, a rare departure from most of his other writings discussing traditional topics in Islamic jurisprudence. The fact that he chose to write on the subject conveys the legal significance he attaches to the moral shortcomings of using long-term imprisonment as criminal punishment.

Prior to examining the moral critique of imprisonment, a cursory introduction to the history of prison is useful. As noted earlier, the modern institution of prison came about as a more civilized alternative, at least in theory, to the system of corporal punishment that existed in Europe. The severity of corporal punishment was akin to torture; between 1780 and 1820, Europe and the New World developed penitentiaries built on the idea of strict discipline and regiment as an avenue for rehabilitation.¹⁴ The penitentiary as a place for both retribution and rehabilitation was a novel approach to punishment, first appearing in the United States around the time of the American revolution.¹⁵ Prior to this, prisons were largely places of detention for those awaiting the administration of corporal punishment; prison itself had not been punishment.¹⁶ This changed by the eighteenth century in Europe and nineteenth century in the United States: imprisonment became the “principal mode of punishment.”¹⁷ In the United States, the new system

subject. For a description of her time in prison, see ANGELA Y. DAVIS, *ANGELA DAVIS: AN AUTOBIOGRAPHY* 15–30 (1988).

14 Roger-Pol Droit, *Michel Foucault, on the Role of Prisons*, N.Y. TIMES, Aug. 5, 1975, <http://archive.nytimes.com/www.nytimes.com/books/00/12/17/specials/foucault-prisons.html?r=1>.

15 DAVIS, OBSOLETE, *supra* note 13 at 26.

16 *Id.* at 26. Mary Gibson notes that the “paradigm” originally developed by Foucault and others argued that the birth of prisons occurred “between 1760 and 1840, when the rising middle class abolished public rituals of corporal punishment as incompatible with its new aspirations to build a modern liberal and industrial society” (Mary Gibson, *Review Essay: Global Perspectives on the Birth of Prison*, 116 no. 4 AM. HIST. REV. 1040 (2011)).

17 DAVIS, OBSOLETE, *supra* note 13 at 42. Two rival models of imprisonment were developed in this early era: the Auburn and the Pennsylvania systems. The difference between the two was not significant as both had the same philosophical basis. The Eastern State Penitentiary, mentioned above, was an example of the Pennsylvania model and emphasized “total isolation, silence and solitude” (*Id.* at 47). This was an extension of the Walnut Street Jail, arguably the first penitentiary in the United States (JEN MANION, *LIBERTY’S PRISONERS: CARCERAL CULTURE IN EARLY AMERICA* 34

of long-term imprisonment eventually led to an exponential growth in the prisoner population, a phenomenon now known as “mass incarceration.”¹⁸

Elsewhere, colonial rule introduced criminal justice systems with prison as a form of punishment into Asia and Africa.¹⁹ Prior to that, imprisonment was used in a more limited manner, but not as a form of punishment. In the premodern Islamic legal context, confinement was strictly limited by jurists as a means of temporary detention.²⁰ Generally speaking, Islamic legal treatises contain both punitive and non-punitive response to crimes. For the former, the focus is largely on corporal punishment utilized in three main categories of punishment: *hudūd* (explicitly delineated in Islam’s core sources), retaliatory (*qiṣāṣ*)

(2015)). Walnut Street required total isolation of prisoners in single cells where they lived, ate, worked, read the Bible, and found an opportunity to reflect and repent (DAVIS, OBSOLETE, *supra* note 13 at 47). The Auburn model also incorporated the idea of solitude but included labor as part of the regimen (Id.).

18 As of 2019, the Federal Bureau of Prisons reported a total of 2,068,800 prisoners, a rate of 629 imprisoned per 100,000 population and there were 4,455 prisons across the country with a 95.6% occupancy rate. In comparison, the number of prisoners in 1940 was 264,834, by 1970 this was 328,020, and 15 years later, in 1985, it had more than doubled to 744,208. The number doubled again in the next decade, so that by 1995 the prison population was 1,585,586 and by 2000 it was over 2 million. *United States of America*, WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/united-states-america> (last visited Feb. 12, 2022). In about thirty years, the prison population in the U.S. grew by a staggering 1.7 million. The most obvious explanation for this rise in prison population would be a massive explosion in criminality during this period. However, the statistics seem to suggest otherwise. According to Federal Bureau of Investigation (FBI) data, violent crime fell by almost 50% and property crime 55% from 1993 to 2019, while the Bureau of Justice Statistics (BJS) recorded an overall 74% decline in violent crime and property crime in the same period. John Gramlich, *What the Data Says (And Doesn’t Say) about Crime in the United States*, PEW RESEARCH CENTER (Nov. 20, 2020), <http://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/>.

19 Non-Western societies began their experience with prisons about a hundred years after Europe and the United States; unsurprising since “prison was an export of the late-nineteenth-century colonial project” that was subsequently “reinterpreted by local rulers to serve their interests” (Gibson, *Review*, *supra* note 16 at 1057). For instance, in India, the English prison system was introduced in the late eighteenth century in Calcutta and Madras (DAVIS, OBSOLETE, *supra* note 13 at 42).

20 See generally Irene Schneider, “Imprisonment in Pre-Classical and Classical Islamic Law,” 2 ISL. L. & SOC. no. 2 (1995) at 157. For a discussion of imprisonment under the Saljūqs of Iraq and Persia (fifth/eleventh and sixth/twelfth centuries), see CHRISTIAN LANGE, JUSTICE, PUNISHMENT AND THE MEDIEVAL MUSLIM IMAGINATION 89–94 (2008).

and discretionary (*ta'zīr*). Non-punitive responses include payment of financial compensation (*diyya*) to the victim or their next of kin.²¹ Historically, the writing of premodern Muslim jurists demonstrates a reluctance to utilize prison as punishment in any sense.²² Unlike in the United States, the Islamic legal tradition's criticism of long-term imprisonment does not arise out of a response to particular social conditions that disproportionately impact certain groups. Since prison was not the norm, it was often not significant enough a topic to receive much treatment in medieval Islamic legal treatises. When it was discussed, there was typically a critique along with an explanation of the distinction between permissible temporary detention and objectionable long-term imprisonment.

II. THE CONCEPTUAL MORAL CRITIQUE: JĀVĒD AḤMAD GHĀMIDĪ

Building on this background, the views of contemporary jurists of Islamic law on long-term imprisonment might be divided into three broad viewpoints. First is a view that permits long prison sentences as a type of discretionary punishment (*ta'zīr*). These jurists recognize that long-term imprisonment is generally absent from the Islamic historical record but utilize other jurisprudential ideas to empower political authorities with the discretion to legislate prison as punishment.²³ Second

21 For more on these punishments, see INTISAR A. RABB, DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION, AND ISLAMIC CRIMINAL LAW 30–37 (2014); see also Rudolph Peters, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 30–38, 53–68 (2005).

22 This is not to say that jurists had no conception of long-term imprisonment. In fact, some even allow the guilty to “be confined until death” (*takhlīd fī al-ḥabs ilā al-mawt*) as a discretionary punishment (*ta'zīr*). See 'IZZ AL-DĪN 'ABD AL-'AZĪZ B. 'ABD AL-SALĀM, AL-QAWĀ'ID AL-KUBRĀ 1:161 (eds. Nazīh Kamāl Ḥammād and 'Uthmān Jum'a Ḍamīriyya, 2000). Of course, despite permitting long-term imprisonment, Ibn 'Abd al-Sālam expresses his personal reservations about it (Id. at 160). I am grateful to Mariam Sheibani for this reference.

23 See, e.g., ḤASAN 'ABD AL-GHANĪ ABŪ GHUDDA, AḤKĀM AL-SIJN WA-MU'ĀMALĀT AL-SUJANĀ' (“Legal Guidelines on Prison and the Treatment of Prisoners”) 34–35 (1986); see also 'Abd al-Ḥayy Yūsuf, *Ḥukm al-sijin fī 'l-Islām* (“Ruling on Prison in Islam”), MAKTABAT FATĀWĀ AL-SHAYKH 'ABD AL-ḤAYY YŪSUF, YouTube video, June 15, 2020, <http://www.youtube.com/watch?v=miRj3Hn5Ts8>.

is the view that incarceration is impermissible because it subverts Islamic law by replacing scripturally prescribed, corporal punishment with long-term confinement. This position does not critique prison per se, but laments how imprisonment is used to bypass scripturally prescribed punishments.²⁴ The final viewpoint rejects the entire idea of long-term imprisonment as a form of punishment because it is fundamentally immoral and, since it is immoral, it is also effectively impermissible under Islamic law. This in effect is the “abolitionist” position within Islamic legal discourse. In the contemporary period, one prominent voice representing this position is the Pakistani religious scholar and public intellectual Jāwēd Aḥmad Ghāmīdī (b. 1951).

Born to a peasant family in the Punjab region (Pakistan), Ghāmīdī trained in both traditional Islamic sciences and at secular universities: his early education included secular subjects, Arabic, Persian and the *Dars-e Nizāmī* curriculum (1959–66).²⁵ He then studied philosophy, English literature, and Islamic studies at Government College in Lahore (1968–73). During this period, Ghāmīdī began associating with the famous theologian and political theorist, Abū ’l-’Alā’ Mawdūdī (d. 1979), and briefly joined *Jamā’at-e Islāmī*. From 1973 to 1983, he actively studied under his most influential teacher, Amīn Aḥsan Iṣḥāhī (d. 1997).²⁶ Ghāmīdī is the author of a number of books, including his magnum opus, *Mīzān* (“Balance”), on theology, legal theory, ethics, and substantive law.²⁷ His main ideas on prison abolition appear in a short piece, in Urdu, entitled “Qayd

24 See, e.g., Aḥmad al-Naqīb, *Hal ‘uqūbat al-sijīn laḥā aṣl fī dīn al-Islām?* (“Does Prison Punishment Have a Basis in the Islamic faith?”), AL-BAṢIRAH NET, YouTube video, Nov. 3, 2010, <http://www.youtube.com/watch?v=yXEtaYnZljo>.

25 Muhammad Khalid Masud, *Rethinking Sharī’a: Jāwēd Aḥmad Ghāmīdī*, 47 DIE WELT DES ISLAMIS 357–60 (2007).

26 Ghāmīdī’s thought is heavily influenced by his teacher, Amīn Aḥsan Iṣḥāhī (1904–97), author of the nine-volume Qur’ānic exegesis, *Taddabur-i-Qur’ān* (“Reflection on the Qur’ān”) (AMĪN AḤSAN IṢLĀHĪ, TADDABUR-I QUR’ĀN (“Reflection on the Qur’ān”) (2004). See also MUSTANSIR MIR, COHERENCE IN THE QUR’ĀN (1986).

27 JĀWĒD AḤMAD GHĀMĪDĪ, MĪZĀN (“Balance”) (11th ed., 2018). The first edition of *Mīzān* was published in 1985. He is also the author of a five-volume Qur’ānic exegesis, AL-BAYĀN (“The Exposition”) (2018). In addition, he has published works of poetry and essay collections and is a regular contributor to the monthly Urdu-language journal *Ishrāq*.

kī Sazā” (“Prison as Punishment”), published in July 1989.²⁸ His abolitionist ideas can also be found in another piece from 1993: “Hudūd va Ta’zīrāt: Chand ahamm Mabāḥith” (“*Hudūd* and Discretionary Punishment: A Few Important Points”).²⁹

To properly situate Ghāmidī’s article on “Prison as Punishment,” it is important to understand the context in which it was written. While Angela Davis’s work, discussed later, emerges out of a history of racial violence and discrimination in her context, Ghāmidī’s piece seems to take advantage of a particular moment in Pakistan’s legal history to offer a conceptual critique of confinement. When Ghāmidī wrote his article Pakistan was enduring a decade-long debate over Islamic reforms in the country including to its legal system.³⁰ Prison was not the only reform-related topic that Ghāmidī commented on, but it proved to be the least controversial: anti-carceral ideas resonated with the traditional approach to punishment under Islamic law.³¹

The immorality of incarceration is fundamental to Ghāmidī’s entire argument for abolition. While Ghāmidī’s context is one of a state still grappling with the legacy of colonialism, his abolitionist reasoning focuses on prison in the abstract and not simply as a product of that imperial history. In other words, his argument does not rest on demonstrating the immorality of circumstances that produce prisons but rather attacks the very concept of prison itself. In contrast to Davis, Ghāmidī’s critique might be characterized as a “conceptual moral critique.” His first step is to immediately engage the specter of

28 Jāvēd Aḥmad Ghāmidī, *Qayd kī Sazā* (“Prison as Punishment”), ISH-RĀQ no. 11, 37–42 (July 1989).

29 Jāvēd Aḥmad Ghāmidī, *Hudūd va Ta’zīrāt: Chand ahamm mabāḥith* (“*Hudūd* and Discretionary Punishment: A few Important Points”), in BURHĀN (“Proof”) 143–46 (7th ed., 2009).

30 A Hudūd Ordinance had been introduced in 1979 and by 1990 an ordinance on *qisās* and *diyat* was also put forward. For a brief history of this period, see Moeen H. Cheema, *Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan’s Law*, 60 AM. J. COMP. L. 875, 878–900 (2012). This process also had corollaries around the world. See generally Rudolph Peters, *The Islamization of Criminal Law: A Comparative Analysis*, 34 DIE WELTS DES ISLAMIS no. 2 (1994).

31 Telephone conversation with Jāvēd Aḥmad Ghāmidī, Sept. 9, 2020. Ghāmidī’s piece reflects this since the language is geared towards Pakistan’s secular elite who considered prison an important sign of being modern.

morality by disassociating incarceration from the sacred, arguing that prison is an institution “human beings have devised for themselves” not one that is part of a “divine” plan. Since prison has no celestial mandate, it can claim no sacred sanctity and criticism of the institution can propose abolition without contravening religious sentiments. Having situated prison outside the sacred, Ghāmidī issues a scathing moral assessment, calling prison among the “enormities” humans have created that represent “the worst forms of oppression” (*badtarīn ḡulm*).³² In fact, he goes further and categorizes incarceration as among “the worst crimes” (*badtarīn juram*) against humanity.³³ While acknowledging the historic presence of prisons, Ghāmidī distinguishes between the temporary nature of confinement in the past as compared to today.³⁴ He considers long-term imprisonment a practice inherited from Western countries as a result of their global hegemony.³⁵ This is the final part of his framing: having placed prison outside the sacred, Ghāmidī now makes it foreign to his context. These rhetorical moves allow moral criticism of prison to be more easily received since they threaten neither religious nor national identity.

Building on this framework, then, Ghāmidī structures his argument for the immorality of incarceration around three primary ideas: harm to the individual, harm to the community, and implausible rehabilitation.

a. Harm to the Individual

Ghāmidī initiates his critique by arguing that long-term imprisonment is the cause of psychological and emotional harm to the individual which should be considered immoral for several reasons. He highlights a distinct feature of incarceration that contributes to its immorality: the idea of “perpetual” harm. The idea is simply that because imprisonment persists for an extended period of time its harms are revisited

³² Ghāmidī, *Prison*, *supra* note 28 at 37.

³³ *Id.* at 38.

³⁴ *Id.* at 37. People were either confined awaiting trial or waiting for the administration of punishment.

³⁵ *Id.*

daily.³⁶ As Ghāmidī notes, this recurring and persistent harm torments the “hidden recesses of a person’s core personality” (*andar chupī huwī us kī aṣl shakhṣiyyat*).³⁷ The very nature of prison itself becomes a source of this torment, especially because an individual forfeits control over their body and are left completely at the mercy of others. Ghāmidī bemoans the fact that a person’s “rising, sitting, eating, drinking, sleeping, waking, and even . . . relieving themselves” are out of their control. For Ghāmidī, this state of being leads to a loss of dignity (‘*izzat-i-naḥs*) followed by an overwhelming need for the individual to find a way to liberate themselves and recover their “complete self” (*apnī wujūd kī takmīl*).³⁸

Alongside the psychological, Ghāmidī also argues that imprisonment inflicts serious emotional harm on the imprisoned by depriving them of any connection to their closest kin. This is further evidence of how imprisonment leaves an individual incomplete, withdrawing them from sources of affection and treating them as devoid of emotion. Echoing the sentiments in Mandela’s prison correspondence, Ghāmidī suggests that prison forces an individual to suppress their innate desire for emotional connection to their kin, a hardship that, he says with reference to Muslim scripture, even God never demands.³⁹

36 Id. at 38. He juxtaposes this against even severe corporal punishment which he says is momentary and does not have the deleterious effects of a perpetual punishment.

37 Id. at 38.

38 Id. at 38. While Ghāmidī offers a stinging critique of even the mundane controls over the prisoner’s body, Davis addresses the severe harm that comes from physical abuse, specifically sexual abuse, that is endured in prison. As she notes, “prison is a space in which the threat of sexualized violence that looms in the larger society is effectively sanctioned as a routine aspect of the landscape of punishment behind prison walls” (DAVIS, OBSOLETE, *supra* note 13 at 77–78). She mentions studies that show how sexual abuse in female prisons is an “abiding . . . form of punishment” and is indicative of the fact that “ideas and practices” shunned in larger society “retain all their ghastly vitality behind prison walls” (Id. at 80). Elsewhere Davis recounts another jarring image of how prison robs you of dignity, describing the pregnant prisoner lying on a hospital cart, close to delivering her child and left unattended in a corner of a room (DAVIS, AUTOBIOGRAPHY, *supra* note 13 at 21–22).

39 He specifically mentions Ramadan as illustrative of the fact that God asks human beings to restrict their core desires for food, drink, and even physical intimacy, but never restricts your emotional connections (Ghāmidī, “Prison,” *supra* note 28 at 38).

The subtext is clear: this human institution is not only inhumane, but ungodly. Reverting to scripture, Ghāmidī describes the harm prison causes the individual as one that leaves them in a state of “neither dying nor living” (*lā yamūtu fīhā wa lā yahyā*): words that the Qur’ān uses to describe hell (Q 87:13).⁴⁰ Ghāmidī seems to be saying that prison’s psychological harm negates the individual self, while its emotional harm negates the relational self.

b. Harm to the Community

For Ghāmidī, the second argument for the immorality of incarceration is prison’s harm to the community; what we might think of as collateral punishment.⁴¹ He notes that prison is not simply punishment for the criminal; it becomes a punishment for close relations who committed no wrong. This harm is most devastatingly experienced by the prisoner’s family, especially the spouse who suffers “psychologically,” “socially,” “financially,” and “ethically” while trying to survive the absence of their marital partner.⁴² Similarly, Ghāmidī notes the harm caused to children left with the damaging choice of either avoiding any contact with their imprisoned parent or suffering the trauma of visiting them in prison, locked in a cage. Neither option is acceptable to Ghāmidī and he returns to the idea of perpetual harm, noting how the child who visits their parent in prison must cope with the renewal of their trauma during each visit; a process with destructive consequences for their personality.⁴³ He asks how society can reasonably expect any child to develop a stable (*tawāzan*) personality that is not hostage to raw emotions (*jazbāt*) stirred by this sustained

⁴⁰ Id.

⁴¹ In the American criminal law discourse this might be referred to as “hidden victims,” who are family members of the incarcerated and rarely acknowledged by the system. See generally Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT’L INST. JUST. J. no. 278 (May 2017), available at: <http://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children>.

⁴² Ghāmidī, *Prison*, *supra* note 28 at 38.

⁴³ Id.

trauma.⁴⁴ Furthermore, he rhetorically wonders “what precise justification can the classical works on ethics present to these children” to explain why they must be punished with this type of estrangement? He seems to be probing a deeper philosophical question about the application of our theories of punishment beyond the individual and to the community. In this way, Ghāmidī is placing the imprisoned individual in a larger ecosystem of human connections and challenging the idea that long-term incapacitation is narrow in its impact. It is a concern expressed in personal terms by Davis, when she recounts how during her imprisonment she thought of her mother and father and “hoped they would make it through this ordeal.”⁴⁵

c. Implausible Rehabilitation

The final argument Ghāmidī makes critiquing prison arises from his skepticism of the utilitarian “goals” this form of punishment is supposed to achieve. While deterrence and incapacitation are most often presented as objectives for imprisonment, rehabilitation remains an important underlying rationale for prisons, despite having fallen out of favor.⁴⁶ From the origin of prisons as a Quaker project for individual redemption through self-reflection to the very function of parole boards, rehabilitation has been instrumental in rationalizing incarceration.⁴⁷ One

44 *Id.* Studies suggest that the impact of incarcerated children is quite severe with many exhibiting “low self-esteem, depression, emotional withdrawal from friends and family, and inappropriate or disruptive behavior at home and in school.” Nearly half the prisoners in state prisons are parents and an estimated 1.7 million minor parents have an incarcerated parent. Lois M. Davis et al., *Understanding the Public Health Implications of Prisoner Reentry in California: State-of-the-State Report*, RAND CORP. 117–18 (2011).

45 DAVIS, AUTOBIOGRAPHY, *supra* note 13 at 23. Elsewhere she describes prison as a dreadful place “designed to separate them [prisoners] from their communities and families” (DAVIS, OBSOLETE, *supra* note 13 at 10).

46 Michael M. O’Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 47 AM. CRIM. L. REV. 1247, 1249–50 (2011). As O’Hear notes, parole is “making a comeback” and since 2000, “at least thirty-six states have enhanced release opportunities for prison inmates” (*Id.* at 1248).

47 ASHLEY T. RUBIN, *THE DEVIANT PRISON: PHILADELPHIA’S EASTERN STATE PENITENTIARY AND THE ORIGINS OF AMERICA’S MODERN PENAL SYSTEM 1829–1913*, 180, 353 (2021).

might even argue that without the possibility of rehabilitation, no matter how implausible, prison as an institution seems especially inhumane. For his part, Ghāmidī considers the objective of prison rehabilitation as necessary for any morally “reasonable society.” As he notes, alongside disciplining (*tādīb*) and deterring (*tanbīh*) criminality, any reasonable society should want its criminal actors to be rehabilitated (*iṣlāh*). And, if this is the goal, imprisonment as an avenue to achieve this rehabilitation is patently absurd (*ṭurfah-yitamāshā*) given the very nature of prison.⁴⁸

In Ghāmidī’s view, it is self-evident that effective reform of any individual will be heavily influenced by the company (*ṣuḥbat*) they keep. Hence, he is perplexed by carceral states that seek to reform criminals by either isolating them or separating them from the most likely sources for positive intervention in their lives: community, family, and kinfolk.⁴⁹ He asks quite incredulously: what rehabilitation can we reasonably expect will result from prolonged confinement in the company of other criminals? Ghāmidī argues that common sense requires any society truly interested in transforming criminals into productive members of the community to create opportunities consistently and constantly for that to happen.⁵⁰ In addition, he creates a greater moral responsibility to address societal factors producing criminal behavior.

Let me conclude with a few broad thoughts on Ghāmidī’s ideas on abolition. First, they represent a rare instance where an Islamic scholar steps outside purely religious arguments and offers a moral critique in the capacity of a public intellectual.⁵¹

48 Ghāmidī, *Prison*, *supra* note 28 at 39.

49 Id. Of course, one might argue that these sources are not always positive, but Ghāmidī would likely contend that more often than not the impact is positive.

50 Id. Davis points out that the opposite tends to be true as prisons increasingly lack educational opportunities that were previously present and this is indicative of the “official disregard for rehabilitative strategies” especially those encouraging “autonomy of the mind” (DAVIS, OBSOLETE, *supra* note 13 at 57). For her, much of this is due to “corporate involvement” in prisons leading to the displacement of rehabilitation with incapacitation as the “major objective of imprisonment” (Id. at 73).

51 There are occasions where scholars will provide a moral critique as an extension of their religious one, but unlike Ghāmidī, they are not advocating the abolishment of prison on the basis of this critique. They either simply point out its flaws or suggest ways for reform. See, e.g., ‘Abd al- ‘Azīz al-Ṭarīfī, *Lā tūjad ‘uqūbat al-sijin fi*

Ghāmidī focuses on the carceral system's ethical travesties, philosophical shortcomings, and the incongruence between its goals and realities. This is not to say that he avoids discussing religion; Islam is always operating in the background as the core value system upon which his critique is based. Although he does not classify prison with religiously and legally loaded terms like "forbidden" (haram), he implies as much by stating unequivocally that there is "no conception in Islamic law's core sources of confining people to prison cells for years on end."⁵² The implication seems to be that any government that uses prison as punishment diminishes its claims to being "Islamic."

Second, unlike others who are willing to accommodate the idea of prison or even advocate ways in which it can be made morally acceptable through reform, for Ghāmidī, prison appears virtually irredeemable. In his view, prison inflicts harm disproportionate to any criminal act and is generally unable to rehabilitate. It should be noted though that Ghāmidī does not eschew the idea of punishment itself; he is simply arguing against *this* type of punishment.⁵³ Finally, Ghāmidī wrote his piece when American "tough on crime" rhetoric was peaking, culminating in the now infamous Violent Crime Control and Law Enforcement Act of 1994. Not surprisingly, he makes no reference to this or any other Western discourse in his writing. He speaks of similar challenges in his own context but uses moral arguments with universal application. It is indicative of the fact that the Global South has its own discourses on areas of shared concern, with unique insights that might provide helpful perspectives beyond its borders.

al-Islām ("There is No Prison Punishment in Islam"), KALIMAT HAQQ, YouTube video, Dec. 28, 2017, <http://www.youtube.com/watch?v=gK1dCoBLkMI>. For a perspective on reform, see Zāhid al-Rāshidī, *Jaylon ke Nizām mein Islāh kī Durūrat* ("The Need for the Prison System to be Reformed"), TARJUMĀN AL-ISLĀM, Nov. 12, 1976, <http://zahidrashdi.org/1267>.

⁵² Ghāmidī, *Prison*, *supra* note 28 at 39.

⁵³ In some respects this is quite different from what Davis believes needs to be done to advance the abolitionist argument. For her, a "major theoretical and practical challenge of penal abolitionism is to disarticulate crime and punishment" (DAVIS, READER, *supra* note 9 at 103).

III. THE APPLIED MORAL CRITIQUE: ANGELA Y. DAVIS

Having discussed Ghāmidī's ideas above, let me briefly juxtapose them to the approach of Angela Y. Davis (b. 1944), among the most prominent thinkers in the Anglo-American abolitionist discourse.⁵⁴ Prison has consistently remained a focal point in Davis's writing and activism, both informed by her own experience as a prisoner and her scholarship. In Davis's assessment, the "gravity" of the growth in the American prison population is even more pronounced if we consider the fact that the U.S. population is less than 5% of the world's total population but makes up "more than 20% of the world's combined prison population."⁵⁵ For some critics of American criminal justice, mass incarceration is the by-product of over-criminalization and the proliferation of new criminal laws by politicians seeking to burnish their "law and order" credentials with voting publics.⁵⁶ Davis's scholarship suggests more insidious reasons for the dramatic growth of the U.S. prison population: historic racism and the prison-industrial complex. She considers both indicative of

⁵⁴ Born in Birmingham, Alabama, she was educated in French literature at Brandeis University, went on to study at the University of California, San Diego, and eventually completed a doctorate in philosophy from Humboldt University in Germany. In addition to playing leadership roles in the Communist Party, the Student Nonviolent Coordinating Committee (SNCC), and Critical Resistance, she has also been a university professor at UCLA, San Francisco State University, and the University of California, Santa Cruz (SHARON LYNETTE JONES, ED., *CONVERSATIONS WITH ANGELA DAVIS* (2021) at ix). She gained some notoriety in the early 1970s when she was charged with three capital offenses in connection to a failed inmate escape from Soledad prison and landed on the FBI's Ten Most Wanted Fugitive List (Nelson George, *Angela Davis*, N.Y. TIMES, Oct. 19, 2020, <http://www.nytimes.com/interactive/2020/10/19/t-magazine/angela-davis.html>). After being captured, she spent eighteen months in jail before being acquitted in 1972. Davis's charges stemmed from the fact that one of the inmate's brothers, Jonathan Jackson, used firearms registered to Davis to take over a Marin County Courthouse leading to the death of four people. Prior to her trial she had been a "noted scholar" but afterwards she became "an international symbol of resistance," her iconic image gracing revolutionary posters worldwide (Id.).

⁵⁵ DAVIS, OBSOLETE, *supra* note 13 at 11.

⁵⁶ See generally ANTHONY B. BRADLEY, *ENDING OVERCRIMINALIZATION AND MASS INCARCERATION: HOPE FROM CIVIL SOCIETY* (2018); see also Charles G. Koch and Mark V. Holden, *The Danger of Putting So Many People in Prison*, CHI. TRIB., Jan. 28, 2015, <http://www.chicagotribune.com/opinion/commentary/ct-overcriminalization-koch-congress-laws-perspec-01286-20150127-story.html>.

a general indictment of American criminal justice and demonstrative of the immorality of incarceration. These reasons behind the growth of prison populations supply what I term an “applied moral critique” of prison in Davis’s thought.⁵⁷

a. Historic Racism

For Davis, there is an obvious connection between the historic experience of race in America and the current prison crisis. Statistics show that by the end of 2011, the imprisonment rate for African American males was 6.3 times that of white males.⁵⁸ This connection is not a recent phenomenon and Davis forthrightly suggests a correlation between the abolition of slavery and the authorization of slavery as punishment. Emancipation and authorizing of penal servitude created an “immense black presence within southern prisons” and essentially transformed prison into a punishment to manage former slaves.⁵⁹ To this end, Davis notes the development of “Slave Codes” and “Black Codes” that were meant to police Black populations for relatively minor behavior such as “vagrancy, breach of job contracts, absence from work, the possession of firearms, insulting gestures or acts.”⁶⁰ In her view, once freed, Black people simply moved from a situation where their relationship with the state was mediated by a master to one where it was unmediated; they moved from a status of slave to that of criminal.⁶¹ Her concern, then, is specifically with the way “the prison system in the US took up and was bolstered by historical forms of racism and how it continues to play a critical role in the racialization of

57 Davis explicitly acknowledges that she became an antiprison activist during the late 1960s, implying that her abolitionist ideas were very much a byproduct of this activism. It is unsurprising then that her approach to the question of abolition would be firmly rooted in how prisons functioned in practice and what circumstances surrounded those placed in prison (DAVIS, OBSOLETE, *supra* note 13 at 11).

58 JOSHUA DRESSLER AND STEPHEN GARVEY, CRIMINAL LAW: CASES AND MATERIALS 32 (7th ed., 2016).

59 DAVIS, READER, *supra* note 9 at 99.

60 *Id.* at 100. For a more comprehensive discussion of Slave Codes, see generally SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2003).

61 DAVIS, READER, *supra* note 9 at 100.

punishment.”⁶² In that sense, for Davis, prison has come to occupy a similar place to slavery and lynching, in that it is a racist institution that “many, if not most, could not foresee” would ever decline and collapse.⁶³ As she notes:

If we are already persuaded that racism should not be allowed to define the planet’s future and if we can successfully argue that prisons are racist institutions, this may lead us to take seriously the prospect of declaring prisons obsolete.⁶⁴

The immorality of incarceration, in Davis’s eyes, is connected to the immorality of racism. Prison as an institution is infused with racism—from its origins to the manner in which it is perpetuated—and thus must necessarily be immoral.

b. Prison–Industrial Complex

The second component of Davis’s moral critique of incarceration is her interrogation of prison as a product of the prison–industrial complex. Here, her argument turns from race to class, and she offers a distinctly Marxist analysis of the connection between prisons and the profit-making motives of corporations. She notes that the “drive to produce more prisons” and fill them with prisoners came in the 1980s under the political banner of getting “tough on crime.” Incarceration performed the task of incapacitation, removing criminal elements from communities in order to make them safer. Yet, Davis points out that the “practice of mass incarceration” during this period “had little or no effect on official crime rates.” The result was not safer communities but just “larger prison populations.”⁶⁵

Hence, “imprisoned bodies,” the majority of which were those of people of color, became “sources of profit” that “devour public funds” that could otherwise be channeled into

62 Id. at 105.

63 Id. at 24.

64 Id. at 25.

65 Id. at 11.

social programs.⁶⁶ This use of the prisoner as a source of profit is nothing new, as she explains. The prison–industrial complex has historically used prisoners as subjects in medical research, the results of which have served private corporations.⁶⁷ For instance, she mentions the career of Albert Kligman, a research dermatologist at the University of Pennsylvania who conducted “hundreds of experiments” on prisoners in what were later recognized as “unethical research methods.”⁶⁸ The trend of privatizing prisons is indicative of the rising presence of corporations in the “prison economy.”⁶⁹

For Davis, the privileging of profit over people is indicative of the moral bankruptcy within global capitalism. The very capitalist-driven process that fuels the prison–industrial complex is also the source of destruction for communities which subsequently produce the prisoners. Corporations migrate around the world in search of the cheapest labor pools. The departure of these corporations usually undercuts the economic base of communities, affecting other social programs and services. Communities are left damaged and from them emerge “perfect candidates for prison.”⁷⁰ As Davis notes, “mass imprisonment generates profits as it devours social wealth, and thus it tends to reproduce the very conditions that lead people to prison.”⁷¹ In this way then, it exposes another aspect of the immorality of incarceration.

IV. CONCLUSION

The above discussion offers an opportunity for us to expand our thinking on prison abolition by engaging discourses outside the Anglo-European tradition. The staggering growth of our prison populations in the United States in this era of mass incarceration have brought anti-carceral ideas into the mainstream. At the same time, the state of our society and its criminal justice

⁶⁶ Id. at 88.

⁶⁷ Id. at 89.

⁶⁸ Id.

⁶⁹ Id. at 92–93.

⁷⁰ Id. at 16.

⁷¹ Id. at 17.

system dominates the types of arguments made to challenge imprisonment. The moral critique lingers in the shadows, ever-present but of secondary importance. For non-Western traditions, unencumbered by this unique historical experience of mass incarceration and its precursors, the argument for abolition is often strictly a moral one. This is especially true for the Islamic legal tradition with its religious orientation inherently engaging questions of morality. Placing anti-carceral arguments from Islamic thought alongside American ones offers an opportunity to investigate points of alignment and avenues to learn from the differences. The ideas of Davis and Ghāmidī serve that purpose here. Their approaches to the immorality of incarceration are distinct, with Davis relying on the experience of prison and its inexorable connection with grave historical wrongs to formulate her stance while Ghāmidī considers prison as fundamentally flawed regardless of context. These two types of moral critique, straddling the applied and the conceptual, not only demonstrate the basic immorality of incarceration, but that this sentiment is shared across geographies and traditions.