

COMMENTS ON PROPOSAL FOR STRUCTURING JUDICIAL DISCRETION IN SENTENCING

PAUL H. ROBINSON

In this essay, Professor Robinson supports the current proposal for structuring judicial discretion in sentencing, in particular its reliance upon desert as the guiding principle for the distribution of punishment, its reliance upon benchmarks, or “starting-points,” to be adjusted in individual cases by reference to articulated mitigating and aggravating circumstances, and the proposal’s suggestion to use of an expert committee to draft the original guidelines.

POSITION PAPER ON THE PROPOSAL FOR PENAL LAW
(AMENDMENT NO. 92) (STRUCTURING JUDICIAL
DISCRETION IN SENTENCING), 2006

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This position paper was written by a group of researchers from the Hebrew University of Jerusalem who are interested in different aspects of the criminal justice system, and raises a series of theoretical and practical problems associated with the Proposal for Penal Law (Amendment no. 92) (Structuring Judicial Discretion in Sentencing), 2006. In light of this position paper, the group calls on the Knesset to seriously consider whether the proposed law should be sustained in its present form.

THE IMPLICATIONS OF STARTING-POINT SENTENCES

OREN GAZAL-AYAL AND RUTHY LAZAR

The Israeli Proposal for Structuring Judicial Discretion in Sentencing proposes a substantial amendment of the Israeli sentencing law. According to the Bill, a new public committee will establish starting-point sentences for various offences, indicating which sentence the courts should hand down when an offence is committed under typical circumstances. Like many sentencing reforms worldwide, this reform intends to promote consistency, uniformity, and equality in sentencing. It is feared, however, that the shift from a decentralized sentencing system, where the judiciary plays the key role in sentencing, to a more centralized sentencing regime might lead to harsher sentences, which conflicts with the original intention of the Bill authors. The reform will open the door for direct political influence on sentencing policy, and will restrict the influence of idiosyncratic mitigating circumstances. As a result, it might lead to severer sentences, particularly to the imposition of longer prison terms. Such results have already materialized in jurisdictions that adopted similar policies, and Israel's political discourse gives little hope for a different outcome. Contrary to popular perception, severe sentences rarely contribute to deterrence and are thus unlikely to reduce crime rates. More importantly, harsher sentences will not promote consistency and uniformity in sentencing. Judicial sentencing disparity may be reduced but, at the same time, the prosecution's power in sentencing will increase. Since controlling prosecutorial charging and bargaining discretion is virtually impossible, transferring power to the prosecution is likely to increase inconsistency and disparity in sentencing. The article reviews studies conducted in Israel and in other countries that confirm this conclusion.

To minimize the negative implications of starting-point sentences, the article suggests ways of coping with the reservations presented, including depoliticizing the work of the sentencing committee, instructing the committee to consider prisons' capacity in its decisions, and instructing the courts to hand down prison sentences only as a last resort.

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SENTENCING SCALES IN SEARCH OF A PRINCIPLE

LESLIE SEBBA WITH IRYS WAJNRYB

The sentencing proposal currently before the Knesset is based upon desert principles, reflecting the sentencing ideology that dominates most contemporary writing and many penal codes in Western countries. This ideology requires that the severity of the sentence should reflect the seriousness of the offence. However, while the literature offers sophisticated guidance on the manner in which the relative seriousness of different offences may be determined, it has been reticent as to how to translate offence seriousness into sanctions – i.e., how to “make the punishment fit the crime.” Proposals have been diverse, while often seemingly arbitrary – or based upon non-desert principles.

Considering the reasons for this phenomenon, this article notes the non-monolithic character of desert philosophy and its implications in the context of the development of sentencing tariffs. It reviews and critiques various formulas which have been proposed by philosophers and legislators for developing such tariffs. Finally, after a discussion of the role of public opinion in this context, the adoption of deliberative democracy as a deontological principle on the basis of which a desert tariff might be developed is considered.

HOW SHOULD STARTING-POINT SENTENCES BE DETERMINED?

OREN GAZAL-AYAL AND RUTH KANNAI

This Article is based on a study that the authors prepared for the Ministry of Justice, and which by the ministry submitted to the Knesset Constitution, Law, and Justice Committee . The Article proposes a methodology for determining “Starting-Point Sentences,” which is a type of guideline proposed in the new bill, and an example of to implement this methodology in breaking & entry cases. The first part of the article discusses the factors relevant in determining starting-point sentences, the role of current sentencing practices in determining starting-point sentences, and the methodological difficulties of determining current sentencing practices. The first part of the Article also discusses the relevance of sentencing guidelines in other countries as a tool for determining starting-point sentences in Israel; the relative weight which should be given to culpability and the damage caused while determining the seriousness of the offence; criteria for using gradual starting-point sentences; unique difficulties in determining initial starting-point sentences (before other starting-point sentences have been determined); the determination of a “typical case” for an offence, for which the starting-point sentence is the commensurate sentence; and the ratio between the starting-point sentence and the average sentence for the same offence. In the second part, these principles are implemented on the offence of breaking & entry, and a proposal for a starting-point sentence for this offence is presented.

IF IT AIN'T [COMPLETELY] BROKE, DON'T FIX IT:
DETERMINING PATERNITY ACCORDING TO THE GENETIC
INFORMATION LAW (AMENDMENT NO. 3), 2008

RUTH ZAFRAN

Amendment no. 3 to the Genetic Information Act, which was introduced in 2008, deals with regulating tests held to determine family ties. The amendment resolved two matters that until then were regulated only by case law. One pertained to the courts' authority to compel an unwilling litigant to undergo a paternity test. The other dealt with paternity testing (without regard to the litigant's willingness to submit to it) in cases where the outcome might render the child a *mamzer*. (In Jewish law, a *mamzer* [bastard] is the result of a forbidden – that is, adulterous or incestuous – union between a married woman and anyone other than her husband. Being found a *mamzer* precludes marriage under Jewish law, except to another *mamzer*.)

The statute authorized the court to compel paternity tests and to impose sanctions in the event of a refusal to submit. Where the test might result in a child being found a *mamzer*, however, it required the court, before ordering the test (or even allowing it where the litigants consent), to obtain the opinion of the president of the High Rabbinical Court. This note will discuss the changes made by the Amendment against the background of the pre-existing law, considering the pros and cons of the Amendment's legislative policy. It will uncover the tension in Israeli Law between the right to know one's genetic origins and the traditional view of the child's "best interests" – that is, the interest of not being branded a *mamzer*. It will additionally consider the potential clash between "blood relations," which dictate recognition of genetic paternity, and psychological parenthood, grounded in caregiving. In examining the legislative treatment of these issues, this note will argue that, at least with respect to the regulation of paternity testing in cases of potential *mamzerut*, the amendment neither improved the legal situation nor eased the child's distress; if anything, it made matters worse. After presenting that

critique, the note concludes suggesting two ways to resolve the difficulties created by the Amendment.

HAS THE LAW FOR REDUCING GREENHOUSE GAS EMISSIONS ALREADY BEEN ENACTED?

DAVID SCHORR

The article examines the applicability of Israel's Clear Air Law, 2008 to greenhouse gas emissions. Despite conventional wisdom to the contrary, the Act turns out to be widely applicable to the issue, thus requiring various steps to control and mitigate emissions. The article outlines the implications of this conclusion with regard to various provisions of the Act, as well as some other legal obligations.