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### Bad Role Models? American Influence on Israeli Criminal Justice Policy

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**BAD ROLE MODELS?  
AMERICAN INFLUENCE ON ISRAELI CRIMINAL JUSTICE POLICY**

*By Hadar Aviram\**

**ABSTRACT**

*In this Article I rely on the public policy concept of "policy transfer" to examine the impact of U.S. legislation, litigation, and politics on the Israeli criminal justice landscape. The Article identifies four eras: 1. The Great Light from the West - the ascent of U.S. criminal justice as British influence fades; 2. The Decade of Rights - a misperception of America as a paragon of criminal justice rights and protections that results in influences on Israeli jurisprudence; 3. The Law-and-Order Enchantment Period - a time at which Israeli scholars and policymakers import punitive trends from the U.S., particularly in the area of innovation in policing and victims' rights; and 4. The Era of Contention - a time at which Israeli scholars and policymakers bring with them critical perspectives on the U.S. and Israeli policy begins to question, and deviate from, its American counterpart. I conclude that changing patterns of elite networking can explain why Israel, initially in thrall to what it perceived as a paragon of civil rights, eventually parted ways with the U.S. as a source of influence: the emergence of a class of academics, public defenders, and policymakers educated in the U.S. and conversant in American criminological literature critical of the punitive turn and mass incarceration brought about informed critiques of the American model and led to a "sobering up" of the Israeli policymaking world. The Article proceeds to explain the relationship between the two countries through the framework of American Political Development. Following Malcolm Feeley's analysis, the Article finds that both countries - self-defining as "developed" - actually*

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*exhibit features of developing countries in the context of criminal justice: high levels of interpersonal violence and intolerance, a constant problem of police overreach, a legacy of racism and exclusion, high availability of weapons, and political corruption. This might explain Israel's fascination with American criminal justice not as an inspiration, but as cultural recognition of the similarities between the countries.*

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Gangs of savages in the streets,  
 their eyes gazing and stupid.  
 Their father watches TV and screams,  
 "Kill everyone!"  
 America is near.  
 Our eyes are glued to the sun  
 Because that is where our great hope comes from  
 After the next war,  
 The next war.<sup>1</sup>  
 The issue is not whether we draw lessons from  
 experience, but whether we do so well or badly.<sup>2</sup>

#### INTRODUCTION

After almost five decades of soaring incarceration rates, in 2014, the National Research Council's Committee on Causes and Consequences of High Rates of Incarceration issued a comprehensive report on mass incarceration in the United States.<sup>3</sup> The report identifies the usual culprits: aggressive law enforcement and prosecution policies, private interests and investments in the criminal justice system, the escalation of the war on drugs and its racial undertones, and urban economic distress. The report also stresses the traumatic physical, economic, and psychological consequences of mass incarceration, for inmates and for their families.

A year later, in August 2015, the Committee's Israeli counterpart--the Public Committee for Examining Sentencing Policy and the Treatment of Offenders, chaired by retired Israel Supreme Court Judge Dalia Dorner published its own report.<sup>4</sup> The report stressed the harms of incarceration and the need to find non-custodial

<sup>1</sup> Eifo HaYeled, "America Krovah" (America Is Near) (1993).

<sup>2</sup> Richard Rose, *Lesson-Drawing in Public Policy: A Guide to Learning Across Time and Place* (Chatham: Chatham House Publishers 1993).

<sup>3</sup> NATIONAL RESEARCH COUNCIL COMMITTEE ON LAW AND JUSTICE, Division of Behavioral and Social Sciences and Education, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, available at <https://www.nap.edu/read/18613/chapter/1>.

<sup>4</sup> The Public Committee Examining the Punishment and Treatment of Offenders, *Report to the Minister of Justice*, available at <http://www.justice.gov.il/Units/SanegoriaZiborit/News/Documents/dorner%20report.pdf>.

alternatives. Surprisingly, the Dorner Committee's report decries problems in Israel which closely echo the causes of incarceration identified by the American committee: an increased reliance on law enforcement, disproportionate policing and prosecution of people from disadvantaged backgrounds and communities, a growth in fear of crime, difficult dilemmas involving the victim's role in the criminal process, and the creep of the market into the punishment field.

How, and why, had Israel come to walk in the United States' criminal justice footsteps, and how did it come to recant that at an era many American scholars characterize as "late mass incarceration"?<sup>5</sup> To what extent are these similar conclusions about the perverseness of mass incarceration the consequence of similar criminal justice policies? And if they are, how did Israel, a state whose independence from the British Mandate was characterized by a strong dominance of European-inspired welfare socialism,<sup>6</sup> come to look to the United States, a larger, more fragmented, and much more market-based state, for criminal justice inspiration?

This article examines a number of crucial actions affecting criminal justice law and policies in Israel from the early 1980s to the late 2010s, tracing the ebb and flow of American (and other) influences. My point of departure is the robust body of public policy literature on the concept of transnational "policy transfer." Colin Bennett identifies four modes of policy transfer,<sup>7</sup> ranging from the least to the most coercive. Emulation, or as Richard Rose refers to it, "lesson drawing,"<sup>8</sup> involves the voluntary and deliberate reliance on another country's policy experience to create a domestic version of it. Elite-networking involves policy transfers through transnational groups of actors sharing expertise and information about a common problem, often outside the realm of formal domestic politics, and in the context of an evolving international policy culture. Harmonization refers to

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<sup>5</sup> For one representative example, see Christopher Seeds, *Bifurcation Nation: American Penal Policy in Late Mass Incarceration*, 19 *SOCIAL JUSTICE* 590 (2016).

<sup>6</sup> Ben-Zion Zilberfarb, *From Socialism to Free Market – The Israeli Economy, 1948–2003*, 11 *ISRAEL AFFAIRS* 12 (2006).

<sup>7</sup> Colin J. Bennett, *What is policy convergence and what causes it*, 21 *BRITISH J. OF POL. SCI.* 215 (1991).

<sup>8</sup> Richard Rose, *Lesson-Drawing in Public Policy: A Guide to Learning Across Time and Place* (Chatham: Chatham House Publishers 1993).

formally adopted policy changes deliberately structured to globalize approaches for common problems through the work of intergovernmental organizations and structures. Finally, penetration is a coercive form of policy transfer, in which nation states have to comply with policy directives from other nations or from transnational organizations.

Relying on Bennett's framework, Trevor Jones and Tim Newburn<sup>9</sup> find that some criminal justice trends in the United Kingdom, such as privatized corrections, zero tolerance policing, and 'two' and 'three strikes sentencing', evince considerable U.S. influence, and are the consequence of emulation and, to some extent, elite networking. Jones and Newburn remind us that policy transfer can involve various aspects of policy, including goals, structure and content; policy instruments and administrative techniques; institutions; ideology; ideas, attitudes and concepts; and negative as well as positive lessons.<sup>10</sup> They also find that transnational influence can have deep and lasting impact even if it occurs through voluntary adoption rather than coercive means.<sup>11</sup>

Jones and Newburn's observations can be easily applied to Israel, which is particularly amenable to relying on U.S. law. In his analysis of foreign law usage among domestic courts, Andrea Lollini identifies Israel as one of the countries that explicitly mentions comparative law as an authorized source for judicial decisions.<sup>12</sup> One of Israel's Supreme Court Justices has even written academically about the importance of foreign law, highlighting the role of U.S. Law.<sup>13</sup>

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<sup>9</sup> Trevor Jones and Tim Newburn, *Learning from Uncle Sam? Exploring U.S. Influences on British Crime Control Policy*, 15 GOVERNANCE 99 (2002).

<sup>10</sup> David Dolowitz & David Marsh, *Who Learns What from Whom: A Review of the Policy Transfer Literature*, 44 POL. STUD. 343, 349-50 (1996).

<sup>11</sup> See Laura Nader, *Human Rights and Moral Imperialism*, Anthropology News, September 2006, at 6 (Indeed, some methods of coercion, such as imposing the constitution on Iraq, were not found to be effective); See generally Ugo Mattei & Laura Nader, *Plunder: When the Rule of Law is Illegal* (2008).

<sup>12</sup> Andrea Lollini, *The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law*, 8 Utrecht Law Review 55 (2012); see generally Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of Rehnquist Court*, 34 Tulsa L.J. 15 (1998).

<sup>13</sup> Eliezer Rivlin, *Thoughts on Referral to Foreign Law*, *Global Chain-Novel, and Novelty*, 21 FLA. J. INT'L L. 1 (2009).

Much of the writing on global influences has focused on the constitutional arena, which sometimes dovetails with criminal justice policy.

As I argue in this article, Israeli criminal justice policy has been influenced by its American counterpart in various ways, mostly through emulation and unique forms of elite networking. I identify four schemas through which Israeli criminal justice policy relates to its American counterpart. While there is a rough chronological logic to the presentation of the schemas, there are big overlaps in time, and it makes more sense to relate to the schemas as different strands in the Israeli policymaking community than as easily distinguishable periods. Within these schemas, it is also important to keep in mind that criminal justice policies and practices in Israel, as in every other country, are made by a variety of players in the legal field – politicians, government lawyers, public interest and nonprofit lawyers, prominent academics – and those have different ways of relating to the U.S. experience, which manifest in policies that latch onto different schemas.

The first schema, which I refer to in Part I as The Great New Light from the West, identifies the early days of U.S. influence as a direct continuation of Israeli use of British common law. In the early 1980s, as Israel officially severed its legal ties with its former British rulers, U.S. law was poised to take the place of British precedent as a main form of influence on Israeli law. I explain why, before the large-scale reform of Israeli substantive criminal law, the U.S. was a natural source of inspiration for Israeli jurists; I then juxtapose the rise in prominence of U.S. law in the Israeli legal psyche with American isolationism and exceptionalism, establishing an obvious one-way path for policy transfer.

The second schema, which I examine in Part II, is the Decade of Rights. The 1990s were characterized by an intriguing dichotomy between substantive criminal law, whose massive overhaul 1994 evinces distinct German impression, and criminal procedure, which shows a clear imprint of how Israeli scholars at the time perceived U.S. criminal procedure. The latter changes are reflected in three important developments in Israel: The enactment of the Basic Law of Human Dignity and Freedom in 1992, the enactment of the new arrest law in 1996, and the emergence of Israel's Public Defender's Office. As a

consequence of these moves, Israeli enthusiasm about U.S. law was mostly in the areas of formal due process and displays particular fascination with the exclusionary rule.

The third schema, which I examine in Part III, is the Heyday of Law and Order. During this era, between the late 1990s and the mid-2000s, Israeli legislators, policymakers, and academics seem to perceive U.S. criminal justice as it is: a punitive law and order system emphasizing aggressive law enforcement against street crime and a clear effort to prioritize victim rights and advocacy. Israeli developments along these lines are decidedly American, though they stop shy of some of the worst developments in the United States (such as opening sex offender registration to public viewing).

Finally, the fourth schema, portrayed in Part IV, is the Era of Contention. From the mid-2000s onward, Israeli policymaking in criminal justice reflects a sophisticated conversation about the appropriateness of using the United States as a source of inspiration. The growing awareness of mass incarceration and its discontents, the impact of the financial crisis, the Obama era of reform, and the increasing dominance of U.S.-educated criminal justice scholars in the policy arena led to disillusionment with the U.S. among many influential players in the Israeli policymaking field. This period is characterized by a rejection of prison privatization, successful litigation against prison overcrowding, and the search for new inspiration in other countries, such as the Swedish model of addressing sex work.

Part V discusses these developments in light of the policy literature. First, I observe that, in the first and second schemas, the emulation was limited for the most part to “law in the books,” reflecting unexamined assumptions about how the United States’ Warren Court’s constitutional framework played out in the legal field. In the third and fourth schemas, two modes of policy transfer are evident: policy emulation through lesson drawing—both positive and negative—and elite networking through the participation of Israeli academics and policymakers in the academic conversation about American criminal justice. These different currents reflect multiple voices within both countries whose opinions about criminal justice reform run the political gamut. I then attempt to make sense of the particular relationship between Israel and the United States by relying



on Malcolm Feeley's recent application of a political science framework, American Political Development (APD), to the criminal justice field.<sup>14</sup> As I argue here, the United States and Israel share numerous characteristics of developing countries, by contrast to their usual perception as highly developed nations. These characteristics, despite the different context and difference in size, imply that the two nations face similar challenges in criminal justice: deep-seated institutional and cultural racism and nationalism, a culture of violence, and high levels of political corruption. These challenges mean that, just as the United States would be better advised to abandon its isolationist policies and look comparatively at criminal justice, Israel would be better advised to deepen the nuance of its relationship with the United States and look for inspiration elsewhere.

#### I. THE GREAT NEW LIGHT FROM THE WEST

##### A. Israel as a British Colony

Israeli law students reading old criminal law cases are often struck by how foreign their reasoning and references feel. Cases from the 1950s in particular retain a foreign flavor, part of which can be attributed to the foreign legal education of the first Supreme Court Justices.<sup>15</sup> However, much of the "foreignness" of these cases comes from the multiple and dense references to British caselaw to illuminate the Criminal Law Ordinance of 1936,<sup>16</sup> a relic of Mandatory Britain that remained in effect well into the late 1970s.

The Ordinance was not a carbon copy of British criminal law. Rather, it was a version of it, adapting British principles, to be used in British colonies, which were deemed to be unsuitable for some or all of British Law.<sup>17</sup> Indeed, the practice of criminal justice in Mandatory Palestine was tailored to the realities of the colonies; as Binyamin Blum

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<sup>14</sup> Malcolm Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. Rev. 673 (2018).

<sup>15</sup> Fania Oz-Salzberger & Eli Salzberger, *The Secret German Sources of the Israeli Supreme Court*, 3 Ind. U. Press 159, 159-60 (1998).

<sup>16</sup> Criminal Law Ordinance 1936 (Isr.)

<sup>17</sup> See Binyamin Blum, *The Hounds of Empire: Forensic Dog Tracking in Britain and its Colonies, 1888-1953*, 35 LAW & HIST. REV. 621 (2017).

explains, several forensic practices, such as the use of sniffing dogs<sup>18</sup> or establishing age on the basis of bone measurements,<sup>19</sup> were endemic to the realities of the colonies and to their perception by the colonizers, which was Orientalist at best and racist at worst.

Even assuming these limitations, the Ordinance did not even come close to capturing the theory and logic of criminal law in a common law system with centuries of caselaw. Judges and lawyers in Mandatory Palestine had to keep up with British precedent to provide interpretation and to fill the gaps in the statutory framework. This was not mere custom; it was required by The King's Speech at Council for Eretz Israel, 1922-1947, which stated in Section 46 that British law was to be mandatory precedent in the colony.<sup>20</sup>

This dependence on British precedent remained in place after Israel gained its independence. In the Ordinance of Government and Legal Orders of 1949, put in place just as Israel became an independent country, continuity and good order were guaranteed by preserving legal institutions as they had been under British rule. Indeed, Section 11 reads: "The law that was in order in Eretz Israel on 14 of May 1948 shall remain in place, to the extent that it does not contradict this ordinance or other laws given by the Temporary State Council or according to it and with the appropriate changes."<sup>21</sup> As a consequence, and in order to maintain continuity, Israeli law continued to refer back to British law for decades.

The strong British flavor of these decisions, however, faded some over time. First, as the Supreme Court of Israel began issuing criminal law precedents, it created its own case law, gradually "Israelizing" subsequent decisions to build on these precedents. And second, throughout the decades that followed, British law continued to develop independently, and as legal doctrines began diverging, British law became less and less relevant. Its relevance to criminal and tort law, however, endured longer than in other legal disciplines: during the 1960s, Israeli business law shifted away from British doctrine and looked to the French and German codes for statutory

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Dvar Ha'Melech BaMoatza 46.

<sup>21</sup> Law & Administration Ordinance, 5708-1948, 1 LSI 7 (1948) (Isr.).

inspiration.<sup>22</sup> Even when an Israeli penal code was finally enacted in 1977, it retained the cumbersome structures of British law, while prominent Israeli jurists, Schneor-Zalman Feller and Mordechai Kremnitzer, severely critiqued it and pointed to the advantages of following continental legal principles, which they considered clearer and more comprehensive.<sup>23</sup>

### B. The Fall of British Law

The late 1970s saw a pull away from British law, which was partly inspired by the political upheaval of the 1977 election. The election brought the Likud party, for the first time in the country's history, to political power; this move shook many of the old hegemonies to the core. This political transformation, coupled with the already undermined connection to British law, were the driving force behind the enactment of the Foundations of Law Act of 1981.<sup>24</sup> The new statute struck down Section 46 of the King's Council, thus severing Israeli law from its British counterpart, but keeping in place the precedents that had been established based on this legal dependency prior to 1981. In lieu of the recurrence to British law, the sources of legal influence were listed in a hierarchical order provided in Section 1 of the new statute: "If the court is faced with a legal question that requires a decision and cannot find an answer in legislation, case law, or by analogy, it shall decide in light of the principles of freedom, justice, rectitude, and peace of Israeli Legacy."<sup>25</sup>

While connections to British law were now officially dismantled, and comparative law was not explicitly mentioned, Israeli case law continued to look outside its borders for influence. As mentioned above, continental influence was already deeply evident in

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<sup>22</sup> Contract Law, 5727-1967 (Isr.).

<sup>23</sup> Schneor Zalman Feller and Mordechai Kremnitzer, *Proposal for a Preamble and a General Part for the Penal Law – Changes Proposed by the Authors*, 17 MISHPATIM 392 (1988).

<sup>24</sup> Foundations of Law Act, 5740-1980, 34 LSI 181 (1980) (Isr.).

<sup>25</sup> Section 1 of the Foundations of Law Act was amended in 2018 to explicitly reference Hebrew law, generally understood to encompass Mishnaic and Talmudic law, as a residual source of influence. The impact of religious Jewish law on modern Israeli law had been a serious bone of contention in the Supreme Court in the 1980s and 1990s, but elaboration on this topic exceeds the framework of this paper. *Id.*

the structure of new business legislature, in particular contracts. But a new light would emerge in the West as a strong source of influence – American law.

### C. United States Law Emerges

It is difficult to provide a definite explanation for the strong appeal of U.S. law as a source of inspiration for Israeli jurists. In terms of substantive attractiveness, one important feature is the existence of a robust written constitution, which both British and Israeli law lack. In Israel, the traditional explanation for the decision to make do with “Basic Laws” in lieu of a constitution was the concern that the heterogeneity of the population would make it difficult to agree on a constitution,<sup>26</sup> though newer accounts attribute the hesitation to the demographic threat.<sup>27</sup> But the United States features not only a constitution that encompasses individual rights and governmental structure, but also one that is regularly used and interpreted by the Supreme Court in ways that are useful for a nation that purports to value fundamental rights even when they are unwritten.

It is no coincidence that Israel turned to U.S. law. Pnina Lahav dates the “American moment” in Israeli scholarship to 1967, when two friends, Aharon Barak and Itzhak Zamir, returned to Jerusalem from studying at Harvard.<sup>28</sup> The two academics were to become influential figures in Israeli law, both in government and at the Supreme Court. By the 1980s, Lahav argues, the academic enchantment with American scholarship was such that “old school” academics, who valued British and European models, warned against an Americanization of Israeli academia. The younger Tel Aviv University was more keen on adopting American educational reforms than the established Hebrew University of Jerusalem, which was structured after the German model, but even the latter would see changes in its scholarship, doctrinal influences, and pedagogy in later years.

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<sup>26</sup> Harari Resolution, 5 Knesset Protocols 1743 (1950) (Isr.).

<sup>27</sup> Aviram Shachal, “Protecting the Majority: The Constitution as a Blocking Mechanism,” lecture at the 15<sup>th</sup> Annual Conference of the Israeli Law and History Association, Nov. 26, 2019, [https://www.youtube.com/watch?v=IvUC86\\_Avno](https://www.youtube.com/watch?v=IvUC86_Avno).

<sup>28</sup> Pnina Lahav, *American Moment(s): When, How, and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools*, 10 THEORETICAL INQ. L. 653 (2009).

What made the U.S. constitution especially attractive in the criminal justice context was the Warren Court's revolution of fundamental rights, and particularly the incorporation of the exclusionary rule against the states, which impressed Israeli academics (who inaccurately identified it as Fruit of the Poisonous Tree doctrine) as a paragon of civil rights. Even after the Burger Court began to reverse course and limit the reach of the Fourth, Fifth, and Sixth Amendments, other countries were fascinated by the ability to educate and deter law enforcement through the admissibility of evidence.<sup>29</sup> The impact of the exclusionary rule, the Miranda warnings, and the right to counsel, would be even more evident during the following decade.

Another important factor was the rise in prominence of the American legal system in popular culture. From the 1970s, as films and television shows featuring American courtroom dramas appeared more and more on Israeli screens,<sup>30</sup> the drama and excitement of dramatic trials with juries (which are foreign to the Israeli context) might have had something to do with the rise of U.S. law as an inspiration.

Finally, there was the matter of convenience. U.S. law became increasingly accessible due to the library system of cases, which included methods of cross-referencing and Shepherdizing. Law students in Israel were taught these systems as part of their university library tours and were increasingly educated by faculty who did their doctorates, or post-doctorates, in the United States – a quicker and less onerous course of study than the one in Israel.

Proof of the rise of U.S. law during this era is hard, but citation studies can provide a hint. In 1995, Yoram Shachar, Ron Harris, and

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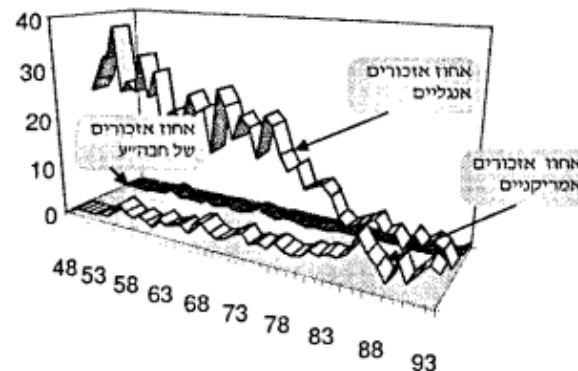
<sup>29</sup> For more on these factors, see Part II.

<sup>30</sup> Zionist leaders resisted importing series from the United States out of fear that the nation's idealistic spirit would be corrupted; in the 1960s, before the emergence of cable channels, Israeli viewers had access to American television only by capturing Jordanian television using their antennae. The struggle for more varied programming content went hand in hand with the struggle to allow Israelis to purchase television sets that could broadcast in color, which ended only in the late 1970s. *See generally* Tasha Oren, *Demon in the Box: Jews, Arabs, Politics, and Culture in the Making of Israeli Television* (2004); Shayna Weiss, *Israeli Television: A history of a nation through the small screen*, My Jewish Learning, <https://www.myjewishlearning.com/article/israeli-television/>.

Meron Gross conducted a study of Israeli Supreme Court citations between 1948 and 1994.<sup>31</sup> In 1948, Israeli opinions referred to British sources 24.4% of the time and did not refer to any American sources. By 1994, only 2.3% of citations were British sources, and the number of American citations rose to 5.1%. Between 1982-1983, American sources eclipsed British sources in terms of their relative frequency in the decisions.<sup>32</sup>

### תרשים 11

#### אזכורי משפט מקובל



הנתונים בתרשים מבטאים אחוזים מתוך כלל האזכורים (מכל מוצא) בפסיקה בשנה

A notable record in American citations occurred during the years 1992 and 1993, which saw American sources cited 11.4% and 12.0% in Israeli decisions, respectively.<sup>33</sup> A possible explanation of this trend follows in Part II. But before examining the role of the early- to mid-nineties in solidifying the eminence of U.S. law in decisions, it is necessary to add a note about the extent to which the United States itself sought influence in other areas.

<sup>31</sup> Yoram Shachar et al., *Citation Practices of Israel's Supreme Court, Quantitative Analysis*, 27 HEBREW U. L. REV. 119 (1996).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

#### D. A One-Way Trend

The United States was also, of course, a British colony. Nonetheless, one would be hard pressed to find references to British law – or, for that matter, any foreign law – in American jurisprudence. As Rebecca Lefler notes, “American courts have always been reluctant to employ foreign decisions other than the historic English cases used to explain common law roots.” Indeed, American isolationism is not unique to the court:

[A]s Mathias Reimann has pointed out, “[i]n the United States today, [international] comparative law does not play nearly as prominent a role in teaching, scholarship, and practice as one would expect in our allegedly cosmopolitan age.” Bruce Ackerman has noted that in a world where technology is making worldwide information available at our fingertips, “the global transformation has not yet had the slightest impact on American constitutional thought. The typical American judge would not think of learning from an opinion by the German or French constitutional court.” Instead, foreign law is treated as inherently suspicious. John H. Langbein has commented, “American legal dialogue starts from the premise that no relevant insights are to be found beyond the water’s edge.” Indeed, the works of the U.S. Supreme Court confirm such observations.<sup>34</sup>

American exceptionalism is not limited to scorn of foreign authorities; it manifests itself clearly in criminal justice policies that set the United States apart from other developed nations. The United States is the only developed nation to retain the death penalty, *de jure* and *de facto*; to offer lax gun control; and to incarcerate 1 of 100 of its

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<sup>34</sup> Rebecca Lefler, *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 111 SOUTHERN CALIFORNIA INTERDISC. L. J. 165, 166 (2001).

inhabitants, a rate that puts it far above both developed and developing nations.

Despite the problematic nature of the American criminal justice system, the United States became embedded in Israeli consciousness as an extremely pro-defendant, pro-due-process jurisdiction. This explains its influence on litigation and legislation during the Decade of Rights.

## II. THE DECADE OF RIGHTS

The early 1990s were characterized by a fundamental bifurcation between American and European-inspired legislative and policy developments. In the area of criminal procedure, the perception of the United States as a pro-defendant jurisdiction led to its imprint on some monumental Israeli legal occurrences, the most significant of which was the enactment of the Basic Law of Human Dignity and Liberty,<sup>35</sup> followed by a decision by the High Court of Justice that ordinary statutes could be declared void if they contradicted a principle in said Basic Law.<sup>36</sup> The novelty of the new Basic Law was that, by contrast to its predecessors from the 1950s, it addressed fundamental rights, rather than the structure of government. In that respect, this Basic Law was the equivalent of the United States' Bill of Rights, which was brought up in its legislative process.<sup>37</sup>

The new Basic Law's most relevant section to criminal justice was Section 5, which reads: "it is prohibited to take away or limit a person's freedom through arrest, imprisonment, or in any other way." Like other sections in the Basic Law, violations of this section require Knesset legislation enacted for a worthy cause and avoiding disproportionate impact.<sup>38</sup> These requirements guaranteed judicial review that monitored not only the values behind a limiting law, but also its reach.

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<sup>35</sup> Basic Law: Human Dignity and Liberty (1992).

<sup>36</sup> Civil Appeal 6821/93 *Bank HaMizrachi HaMeuchad, Inc. v. Migdal, a Cooperative Village*, PD 49(4) 221 (1993).

<sup>37</sup> Knesset Remarks, Basic Law: Human Dignity and Liberty, at <https://main.knesset.gov.il/Activity/plenum/Pages/SessionItem.aspx?itemID=160519>

<sup>38</sup> Basic Law: Human Dignity and Liberty, at § 9 (Isr.).



It is no coincidence that Section 5 somewhat resembles the U.S. Fourth Amendment. In the years preceding and surrounding the enactment of the Basic Law, the leading academic authorities in Israeli criminal justice, such as Ya'acov Kedmy and Eliyahu Harnon, tended to portray U.S. search and seizure law as being extremely pro-defendant. This was particularly evident in the Israeli conversation around the exclusionary rule, which was regarded by Israelis much as it was regarded by the Nixon administration: as an extremely formalistic pro-defendant rule that might allow people to get off on technicalities.

Israeli criminal justice textbooks of the era, both academic<sup>39</sup> and popular,<sup>40</sup> tended to confound the exclusionary rule with its U.S. extension, the Fruit of the Poisonous Tree exception.<sup>41</sup> The distinction in the United States is that the former refers to any evidence obtained by unconstitutional means, whereas the latter refers to evidence obtained through legal means, but whose roots can be attributed to an unconstitutional action earlier in the chain of the police's evidence-gathering work. Israeli scholars of the 1980s and 1990s tended to merge the two terms and refer to the American exclusionary rule as the "fruit of the poisonous tree" doctrine.

But more importantly, as Binyamin Blum highlights in his work on the exclusionary rule, Israeli academics and policymakers tended to misperceive the American rule as having vast reach and no exceptions.<sup>42</sup> At the time that these proclamations were made and this sort of criminal procedure was taught in Israel, this had already been untrue in the United States for at least a decade.

Nixon's appointees to the Supreme Court had changed the Supreme Court's makeup enough to start eating away at criminal procedure guarantees in general and at Fourth Amendment protections in particular. The Court ruled that any disclosures to third

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<sup>39</sup> MOSHE SHALGI AND ZVI COHEN, CRIMINAL PROCEDURE (1981); Ya'acov Kedmy, *On Criminal Procedure – the Law in Light of Cases* (1992).

<sup>40</sup> SASSI GEZ AND MOSHE RONEN, CRIMINAL LAW – A GUIDE TO CRIMINAL LAW IN ISRAEL (2001).

<sup>41</sup> *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne v. United States*, 251 U.S. 385 (1920).

<sup>42</sup> Binyamin Blum, *Exclude Evidence, You Exclude Justice? A Critical Evaluation of Israel's Exclusionary Rule After Issacharov*, 16 SW. J. OF INT'L. L. 385, 413 (2010).

parties – friends, phone companies, and the like – were tantamount to a relinquishment of the reasonable expectation of privacy protected by the Fourth Amendment.<sup>43</sup> Broad exceptions to the warrant requirement, in cases of search incident to arrest,<sup>44</sup> automobiles,<sup>45</sup> public arrests,<sup>46</sup> etc., were put in place. Even during the Warren Court's golden years, Earl Warren himself authorized a decision that allowed warrantless stops and frisks based on considerably less suspicion than the probable cause standard in the Fourth Amendment,<sup>47</sup> which were expanded to car frisks<sup>48</sup> and home frisks<sup>49</sup> well before the Israeli codification of search and seizure rights. By the 1980s, U.S. academia had widely recognized the conservative shift in policing and held conferences about it.<sup>50</sup> Even as early as 1972, Herbert Packer himself—who had identified and hailed the Due Process revolution in his famous book *The Limits of the Criminal Sanction*<sup>51</sup>--expressed his despair over the failure of the due process model.<sup>52</sup>

Israeli textbooks and policy documentation from the 1980s and 1990s were oblivious to this turn in policy. Those who supported suspect and defendants' rights hailed the U.S. system (as they imagined it) as the way to guarantee proper police behavior, and detractors highlighted concerns over guilty people walking free. This controversy, with the idealized American comparator, characterized another criminal justice debate: the fight over the validity of confessions extracted through coercive means. Several years prior to

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<sup>43</sup> *United States v. Jones*, 565 U.S. 400 (2012); *Smith v. Maryland*, 442 U.S. 735 (1979) (requiring warrants for a GPS tracking device); *United States v. White*, 401 U.S. 745 (1971).

<sup>44</sup> *Chimel v. California*, 395 U.S. 752 (1969).

<sup>45</sup> *California v. Carney*, 471 U.S. 386 (1985).

<sup>46</sup> *United States v. Watson*, 423 U.S. 411 (1976).

<sup>47</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>48</sup> *Michigan v. Long*, 463 U.S. 1032 (1983).

<sup>49</sup> *Maryland v. Buie*, 494 U.S. 325, 333 (1990).

<sup>50</sup> Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L. J. 185, 186 (1983); Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 L. & SOC. INQUIRY 237, 244 (2011).

<sup>51</sup> HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, 245 (1968).

<sup>52</sup> Aviram, *supra* note 50 at 244 n.1

the High Court of Justice's decision on torture,<sup>53</sup> Israeli courts followed a pragmatic standard: confessions would be excluded only if the judge thought that the method of obtaining them raised serious doubts as to their truthfulness.<sup>54</sup> Importantly, the Israeli system relied not on jurors, but on professional judges, whose discretion and ability to take into account the context and value of the evidence was considered better than that of laypeople. Therefore, the evidentiary system relied on "weight": judges would exclude confessions that they deemed unreliable due to the circumstances of their provenance. With regard to other types of unreliable evidence—statements from accomplices, for example—evidence law required that they be supplemented by other pieces of evidence, albeit minor in persuasive weight, from an independent source.<sup>55</sup>

One such independent piece of evidence would be a defendant's silence at the police station. Here, too, Israel diverted from its perceived notion of U.S. law. Police officers in Israel were required to give Miranda-like warnings to suspects, but their content was slightly different: suspects in Israel would be warned that their silence at interrogation could also carry negative repercussions. In comparative discussions, Israeli scholars and lawyers would explain that, while different from the U.S. solution to the problem of police interrogations, this was an acceptable solution to the "trilemma" faced by criminal suspects: while still risky, a suspect's silence carried less negative repercussions than a full or partial confession because it was merely a "piece" of evidence that would be weighed together with

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<sup>53</sup> See HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel 2 Isr LR 459, 459-460 (2006) (Isr.).

<sup>54</sup> This doctrine was crystallized in a public report, chaired by Supreme Court Judge Moshe Landoy in 1987, which examined the admissibility of confessions extracted through torture. STATE INQUIRY COMMITTEE, LANDAU COMMISSION REPORT: INVESTIGATIVE COMMITTEE ON INVESTIGATION METHODS OF THE GENERAL SECURITY SERVICE ON SUSPICIOUS HOSTILE ACTIVITIES 1 (1987), <http://www.hamoked.org.il/Document.aspx?dID=Documents1643>.

<sup>55</sup> Israeli evidence law defines three such additional pieces of evidence: hizuk ("bolster"), siua ("assistance") and dvar mah ("something"). See Evidence Ordinance, New Version – 1971, § 54a for an explanation on which of these additions is required for each type of testimony in a criminal case.

other evidence, and thus would have a lesser contribution toward a conviction.<sup>56</sup>

The Israeli choice not to exclude confessions continued to be deeply contested. In 2006, a case that had begun in military courts, *Issacharov v. the Military Prosecutor*, finally found its way to the Israeli Supreme Court. There, a Court operating four years after the new Basic Law was in place decided to change legal doctrine and introduce a rule that took a step toward an exclusionary rule. Under the *Issacharov* rule, courts would have the discretion to exclude evidence obtained using “interrogation methods that violate instructions or unlawfully violate a protected civil right”, even if there is no concern about the authenticity or validity of the evidence itself.<sup>57</sup>

*Issacharov* was hailed by some defendant rights’ advocates—importantly, practicing public defenders—as a major victory for civil rights, in that it came closer to the shining American example of fairness and police deterrence.<sup>58</sup> But the decision was also the subject of considerable academic critique which, interestingly, revolved around the perception that the Israeli Supreme Court did not go far enough, and rather than adopting a discretionary standard akin to the one in Canadian law, should have gone the full-exclusionary-rule route, as in the United States.<sup>59</sup> Reading these critical opinions side by side, especially through the lens of Yoav Sapir (later to become Israel’s

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<sup>56</sup> Blum, *supra* note 42, at 397.

<sup>57</sup> CrimA 5121/98 *Issacharov v. The Chief Military Prosecutor*, PD 61(1) 461 (2006).

<sup>58</sup> Inbal Rubinstein, *The Revolution is Complete*, 18 THE LAWYER 44 (January 2013). Ofer Sitbon, *An Interview with Dr. Yoav Sapir, the Incoming Public Defender*, 4 MA’ASEI MISHPAT 39 (“In a situation of uncertainty, it seems to me easier and fairer to align oneself with the side that says ‘don’t convict’ than with the side that asks for a conviction”). Yoav Sapir, *The Means Must be Justified, Too*, 16 THE LAWYER 80 (January 2012). Yoav Sapir, *A Tradition of Protecting Rights in the Criminal Process—Past, Present, and Future*, 39 THE LAWYER 45 (April 2018).

<sup>59</sup> Keren Shapira-Ettinger & Ron Shapira, *The Israeli Exclusion Rule at the Margins of Issacharov*. 3 Din U’Dvarim 427 (2007). Boaz Sengero, *The Exclusionary Rule for Evidence Obtained via Wrong Means Develops, But Still Without Willingness to Pay a Price (and Acquit a Guilty Defendant Who Is Still Alive)*, 4 Mishpat Al Atar 25 (2012). Yuval Marin & Rinat Kitai-Sengero, *Collins, Miranda, and Issacharov—on the Gap Between the Is and the Ought in the Issacharov Decision*, 37 MISHPATIM 427 (2012). Binyamin Blum, *Exclude Evidence, You Exclude Justice? A Critical Evaluation of Israel’s Exclusionary Rules after Issacharov*, 16 Sw. J. Int’l L. 385, 415-16 (2010).

National Public Defender) and Guy Rubinstein,<sup>60</sup> appears to be a debate not about the merits of the Israeli decision, but about what the U.S. exclusionary rule actually entailed. Sapir and Rubinstein argue that the academic critique saw the U.S. rule through rosy eyes, ignoring the post-Warren Courts' contemptuous treatment of the exclusionary rule and its diminishing contribution to defendants' rights.

While Israeli solutions to these conundrums differed somewhat from the American ones, their adoption reflects a deep dialogue with the U.S. criminal justice system. This is even more evident in the new arrest law adopted in Israel in 1996.<sup>61</sup> The new law, inspired by U.S. reliance on warrants, expressed a strong preference for judicial warrants for arrest, with only few exceptions for emergency (coming close to the imagined U.S. doctrine, but in fact being considerably more pro-defendant than that doctrine operated in practice.) The law also considerably shortened the period of time during which a suspect could be held before seeing a judge, requiring that the Israeli equivalent of a *Gerstein* hearing be held 24 hours after the initial arrest (with some allowances for Shabbat and holidays.)<sup>62</sup> The law's rigidity had led to some perverse effects: rather than shortening the period of pretrial detention, it led to its lengthening, as officers who were unable to complete the investigation in 24 hours repeatedly sought, and invariably received, dispensation for judges to lengthen the detention.<sup>63</sup>

Importantly, the reform in arrest law closely followed another U.S.-inspired shift: the establishment of Israel's Public Defender's Office. Prior to 1996, legal representation for indigent defendants in Israel was provided through a legal aid model, similar to the one in the

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<sup>60</sup> Yoav Sapir & Guy Rubinstein, *Issacharov's Story: Issacharov in Action – On the Relative Exclusion Doctrine and Its Contribution to Privacy Rights*, 10 *Ma'asei Mishpat* 333 (2019).

<sup>61</sup> Criminal Procedure Act (Powers of Enforcement – Arrest) (Isr.).

<sup>62</sup> *Id.* at § 29.

<sup>63</sup> Hagit Lernau, *A Recipe for Inefficient Legislation: The Case of the Arrest Law*, Public Defender's Office, 2007, <https://www.justice.gov.il/Units/SanegoriaZiborit/Pirsumim/LernauHakika.pdf>; Oren Gazal-Ayal & Dvir Yogev, *Grim Thoughts on Unnecessary Arrests*, 234 *HaSanegor* 21 (2016); Oren Gazal-Ayal, Ra'anah Siciliano Keinan, Gal Einav & Atallah Shubash, *Arabs and Jews in Initial Arrest Proceedings*, 38 *Mishpatim* 627, 2009.

UK. Throughout the 1980s and 1990s, this system was savagely criticized both by a Ministry of Justice committee<sup>64</sup> and by the Israeli Supreme Court.<sup>65</sup> In 1993, a legislative effort to create a public defense office started, spearheaded by then-Minister of Justice David Libai and by Professor Kenneth Mann of Tel Aviv University. Mann, an immigrant from the United States educated at Berkeley and Yale, earned renown as an academic for his work on plea bargains (an area studied extensively in the United States at the time, but not in Israel),<sup>66</sup> and brought other U.S. innovations into Israeli legal education, such as legal clinics.<sup>67</sup> After the establishment of the public defense in 1995,<sup>68</sup> Mann was appointed its first National Public Defender. The structure of establishing indigence, and the relationship between a pared-down “insider” staff, consisting of 100 lawyers and 160 non-lawyer employees, and a larger, supervised cadre of “external” attorneys, were also U.S.-inspired.<sup>69</sup>

These U.S.-inspired reforms were, however, limited to the areas of criminal procedure and criminal practice. By contrast, the area of substantive criminal law, more doctrinal and theoretical by nature, deliberately deviated from the fascination with U.S. law, and retained the more traditional European influences. Israel’s original penal code was derived from a British Mandate ordinance and substantive criminal law decisions frequently cited British precedents well into the 1970s. A considerably overhauled new penal code was introduced in 1994,<sup>70</sup> and was inspired by German law rather than by U.S. law. It was

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<sup>64</sup> The Public Defense: A History, Ministry of Law Website, <https://www.justice.gov.il/UNITS/SANEGORIAZIBORIT/ODOT/Pages/History.aspx>.

<sup>65</sup> In Criminal Motion 353/87 *State of Israel v. Ifargan et al.* (1987) Judge Goldberg wrote that the state “did not think to create, alongside the court’s duty to appoint defense attorneys for Respondents, also tools that would enable it to comply with said duty.” Even more explicitly, in Criminal Appeal 134/89 *Abargil v. the State of Israel* (1989), Judge Dov Levin wrote that “if only it were possible to establish, side by side with the general prosecution that represents the state, also a general-public defense at the defendants’ service, that would be the desired solution that would be useful to the defendants but also to the law and justice apparatus.”

<sup>66</sup> ELIYAHU HARNON AND KENNETH MANN, *PLEA BARGAINS IN ISRAEL* (1976).

<sup>67</sup> Efrat Rosental, Social Responsibility: The Work of the Legal Clinics, *Megafon* (Jan. 12, 2014), <http://megafon-news.co.il/asys/archives/196100>.

<sup>68</sup> Public Defense Act, 5756-1995 (Isr.).

<sup>69</sup> *The Public Defense: A History*, *supra* note 64.

<sup>70</sup> *Penal Law, 5754-1994* (Isr.).

drafted by two academics that had consistently expressed admiration for the orderliness and clarity of German criminal law, and abhorrence toward the “gaming season” that characterized the plea-bargaining trade in the United States.<sup>71</sup>

One possible reason for the distinction between substantive criminal law (influenced by the German code) and criminal procedure (influenced by the perception of U.S. law) might be the strong doctrinal orientation of Israeli legal scholars at the time. The law and society field, active in the United States since the late 1960s, was still nascent in Israel; empirical studies were mostly conducted by sociologists and criminologists who had little influence on the Israeli legislative field. Legal scholars, by contrast, were invested in normative conversations about civil rights, and might have been captivated by the Warren era rhetoric, rather than by the post-Warren courts’ interpretation of the Bill of Rights. Notably, despite the German nature of the penal code, references to U.S. law in substantive criminal law cases, and in other areas, continued to characterize much of Israeli litigation and judicial decision making. These would increasingly look to the West for punitive innovations in criminal justice, adopting them as soon as they became known in Israel, and often after empirical evidence in the United States already undermined their promise. We turn to these next.

### III: THE HEYDAY OF LAW AND ORDER

During the late 1990s and the 2000s, Israeli policymakers, academics, and lawyers made multiple propositions for criminal justice reform which leaned heavily on the U.S. penchant for punitive reforms. As during the Rights Decade, this phase also evinces enthusiasm about everything American, but it is qualitatively different from the previous schema. While the Decade of Rights saw fascination with a formal, inaccurate perception of U.S. law based on an outdated and naïve reading of the Warren Court’s work and ignorance of its subsequent undoing by the Burger and Rehnquist Courts, the Heyday of Law and Order saw fascination with actual practices in the United States, seeing these reforms for what they were. These policies tended

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<sup>71</sup> Mordechai Kremnitzer, *Making Criminal Procedure Suitable to the Goal of Truth Finding, or Is It Not Time Yet to End the Gaming Season*, 17 MISPHATIM 475 (1988).

to be more practice-oriented, and they also tended to lean in the opposite direction than the exclusionary rule: they were law and order reforms designed to increase law enforcement efficiency, restrict post-conviction remedies, and award crime victims more punitive power.

A micro-analysis here is necessary: often, innovations would emerge in Israeli law enforcement as “imported goods” by academics with strong American connections. In the case of Israeli policing, such an academic was David Weisburd of the Hebrew University’s Institute of Criminology, who worked closely with police departments in the United States on reform based on situational crime prevention. Weisburd consulted with Israeli police on the implementation of community policing, COMPSTAT, and “hot spot” responsiveness. The osmosis of these reforms into Israeli police culture were quicker than their implementation in the United States because, by contrast to the United States’ 40,000 police departments, Israel employs a national police force. While some of these policing techniques, particularly the various forms of community policing, held some promise,<sup>72</sup> some of them, such as COMPSTAT, had already garnered mixed reviews in the United States when they were implemented in Israel, and the resources and infrastructure they required were not available in Israel.<sup>73</sup>

A more complicated story involves the introduction of victim rights advocacy into the Israeli scene. Victims were always at the forefront of the Israeli conversation regarding the Israeli-Palestinian conflict, with military widows and orphans occupying center stage as symbolic representations of the sacrifices involved in the conflict.<sup>74</sup> Moreover, the Institute of Criminology at Hebrew University regularly taught a victimology course, based on a considerable heritage of scholarly interest: Menachem Amir’s *Patterns of Forcible Rape*,<sup>75</sup> published in 1971, which examined victim-offender relations and provoked controversy in identifying risk behaviors for victims

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<sup>72</sup> Danny Gimshi, *A Basic Plan For Strategic Implementation of Community Policing in Israel* (1995).

<sup>73</sup> Maya Goldschlag and Ofer Shabtai, *The COMPSTAT Program at the NYPD and Its Implementation in Israel, 1999-2000*, 6 POLICE AND SOCIETY 135 (2002).

<sup>74</sup> Victor Florian, Asa Kasher and Ruth Malkinson, *Public and media perception of bereaved families in Israel: A national survey*, 2 MEGAMOT 280 (2000); Edna Lomsky-Feder, *From Agent of National Memory to Local Mnemonic Community: The School Memorial Ceremony for Fallen Soldiers*, 3 MEGAMOT 353 (2003).

<sup>75</sup> Menachem Amir, *Patterns of Forcible Rape* (1971).



and defining “victim-precipitated rape”, a concept which feminist critics interpreted, understandably, as victim blaming and a form of absolving sexual assailants.<sup>76</sup> More understanding of victims’ perspectives was Leslie Sebba’s *Third Parties*,<sup>77</sup> which was already attentive to the increased American attention to the topic: victim bills-of-rights, victim consultation obligations at various steps of the criminal process, and the difference between the prosecutors’ public duties and the victims’ interests. But victims of domestic crime came to occupy a prominent role in the criminal justice conversation only in 2001, with the enactment of the Rights of Crime Victims Law.<sup>78</sup> Uri Yanay and Tali Gal attribute this important development to the formation of a coalition of victims’ rights organizations, which focused particularly on women and children.<sup>79</sup> These organizations reached out to academics in the field, organized Israel’s first conference on victims’ rights, and lobbied the Public Attorney’s Office to support a legal enshrinement of victims’ rights in the criminal process.

A further development was the establishment of the Noga Center for Victims’ Rights at the legal college in Kiriath Ono in 2004.<sup>80</sup> Dr. Dana Pugach, the founder of the Center, was educated in the UK, where she witnessed little to no exposure to issues of victims’ rights and no engagement with the American literature on the topic.<sup>81</sup> Transitioning to advocacy from academia, Pugach shaped the Center as a legal-therapeutic hub of services for victims, the first of which was a call-in emergency number. In addition, the Center operated two legal clinics, one for representing victims in serious criminal trials and one for operating a helpdesk for other victims at a lower court. But the Noga Center would soon become an important player on the national

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<sup>76</sup> *Id.* For an example of how Amir’s terminology continues to fuel feminist discourse today, see Lilia M. Cortina et al., *Beyond Blaming the Victim: Toward a More Progressive Understanding of Workplace Mistreatment*, 11 *Indus. and Organizational Psychol.* 81 (2018).

<sup>77</sup> LESLIE SEBBA, *THIRD PARTIES: VICTIMS IN THE CRIMINAL JUSTICE SYSTEM* (1996).

<sup>78</sup> Rights of Crime Victims Law (2001) (Isr.).

<sup>79</sup> Uri Yanay & Tali Gal, *Lobbying for Rights: Crime Victims in Israel*, in *INTERNATIONAL HANDBOOK OF VICTIMOLOGY* 373, 379 (Paul Knepper et al., eds.) (2010).

<sup>80</sup> Noga Center for Victims’ Rights, <https://www.ono.ac.il/academy/social-agenda/noga-center/> (last visited Oct. 19, 2019).

<sup>81</sup> Email from Dr. Dana Pugach (August 13, 2019, 2:08pm EST) (on file with author).

stage, submitting proposals to the Knesset and offering legal opinions on initiatives pertaining to victims.

Many of the Noga Center's legal achievements echoed developments in the United States. In 2007, they succeeded in lobbying for a legislative amendment to the Criminal Procedure Code that would allow victims to submit a statement for sentencing (prior to the amendment, this option was available only for victims of sex offenders).<sup>82</sup> The Center also contributed, as *amicus curiae*, to a Supreme Court decision to allow crime victims in certain cases to appear physically before the parole board.<sup>83</sup> Both of these accomplishments for victims echoed U.S. developments in the prior two decades. In 1982, President Reagan convened a Task Force on Victims of Crime, which recommended over a hundred reforms aimed at making the victim heard at all critical stages of the criminal process. In the same year, California voters approved Proposition 8, known as the Victim's Bill of Rights, which required reaching out to the victim for an impact statement prior to sentencing and at parole hearings. This was not the first time that victims' perspectives were allowed in court and at a hearing. Since the 1920s, various jurisdictions introduced victims' statements through probation officers' reports, and some California counties, such as Fresno, allowed victims to speak even before victim allocution became part of the state's penal code.

By the time these developments were implemented in Israel, the U.S. criminal justice field was already divided as to their value. Some writers, such as Douglas Beloof, were strong supporters of a voice for victims in the process; Beloof, inspired by Herbert Packer's classic two models, posited a "third model" of the criminal process.<sup>84</sup> By contrast, Kent Roach's Four Models of the Criminal Process, written in 1999 as a variation on Herbert Packer's 1968 classic,<sup>85</sup> posited two

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<sup>82</sup> Amendment 187 *Criminal Procedure Code* (Isr.).

<sup>83</sup> Permission for Criminal Appeal 10439/08 *State of Israel v. Samir Ganameh et al.*

<sup>84</sup> Douglas E. Beloof, *The Third Model of the Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999). Many years later, Beloof would coauthor a piece with Pugach comparing American and Israeli victims' rights "packages" and arguing that the latter need more remedies: Douglas E. Beloof & Dana Pugach, *Comparing Modern Victims' Rights in Israel*, 8 INTERNATIONAL PERSPECTIVES IN VICTIMOLOGY 11 (2014).

<sup>85</sup> Herbert L. Packer, *The Limits of Criminal Sanction*, 36 L. & SOC. INQUIRY 237, 245 (1968).

models of victims' rights: a punitive model that "affirms the retributive and expressive importance of punishment and the need for the rights of victims to be considered along with the rights of the accused" and a non-punitive model that "attempts to minimize the pain of both victimization and punishment by stressing crime prevention and restorative justice."<sup>86</sup> While both models, Roach explained, were aimed at increasing respect for victims, "the punitive model focuses all of its energy on the criminal justice system and the administration of punishment while the non-punitive model branches out into other areas of social development and integration."<sup>87</sup> The victims' rights movement had opted for the former model rather than the latter, which prompted praise from some<sup>88</sup> and deep concern from others.<sup>89</sup>

Perhaps the best achievement of punitive victims' rights advocates was the passage of a series of bills involving restrictions on, and the registration of, sex offenders. The first bill to pass, in 2001, required public employers in settings involving minors or people with disabilities to request any prospective employees to bring an approval from the Israeli police department that they have not been convicted of a sex offense.<sup>90</sup> Even though the Knesset approved a framework for implementing the law,<sup>91</sup> the law was not effectively implemented; two years after its passage, the Commission for Child Safety found out that none of the summer camps in Jerusalem ever asked their prospective employers for police certification.<sup>92</sup> The procedure for obtaining a

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<sup>86</sup> Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 676-82 (1999).

<sup>87</sup> *Id.* at 673.

<sup>88</sup> Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1, 4-10 (1984).

<sup>89</sup> Austin Sarat, *Vengeance, Victims and the Identities of Law*, 6(2) SOC. & LEGAL STUD. 163, 181 (1997); Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. OF CRIM. JUST. 19, 28 (1990); Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STANFORD L. REV. 937, 1020-21 (1985).

<sup>90</sup> Law Preventing Employment of Sex Offenders in Particular Institutions, 5771-2011, HH (Knesset) Amend. 7 (Isr.).

<sup>91</sup> Zen Read, *Law: Sex Offenders Will Not Work with Minors*, HA'ARETZ (Apr. 2, 2003).

<sup>92</sup> Ruthie Sinai, *The Law to Prevent Employments of Pedophiles Is Not Being Implemented*, HA'ARETZ, July 9, 2003.

clearance certificate was delineated only in 2013,<sup>93</sup> including a list of institutions that would present an employment challenge that ranged from schools and hospitals to zoos, playgrounds, and swimming pools. In 2010, the law was amended to include a vaguely defined residual category.<sup>94</sup>

In 2004, a second bill allowed criminal courts, upon conviction of a sex offender, to forbid the convict from residing, working, and/or studying in the area where the victim resides.<sup>95</sup> This, as Pugach explains, was a practical measure in addressing the plight of particular victims.<sup>96</sup> However, under the bill, the court can place such restrictions in response not only to a prosecutor's request, but a victim or a victim representative—reflecting the growing importance of the Noga Center and other organized victim advocacy initiatives. This bill, as well, drew ire because of the lags in its implementation, leading some neighborhoods to inquire about the possibility of advertising photos of convicted sex offenders around the neighborhood to prevent the “wave of pedophilic attacks.”<sup>97</sup> After a two-year drafting process, in 2006, the Law for Defending the Public from Sex Crime Perpetrators, was enacted<sup>98</sup>--a comprehensive bill that created a “risk assessor” position, and required that courts, prisons, parole boards, psychiatric release boards and other decisionmakers receive a risk assessment about a person convicted of a sex offense before making decisions about their sentence, placement, or release. More importantly, the bill required the Minister of Internal Security to establish a “supervision unit” that would make recommendations to the court as to the need

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<sup>93</sup> Law Preventing Employment of Sex Offenders in Particular Institutions, 5771-2011, HH (Knesset) Amend. 7 (Isr.).

<sup>94</sup> Ministry of Educ., Dir.'s Memo no. 3.7-65, Guidelines for Implementing the Law Preventing Emp't of Sex Offenders in Particular Inst., 2011. The proposal also prevented sex offenders from accessing porn and using Viagra: Ruth Sinai, *The Law Seeks Ways to Inhibit Evil Sexual Inclinations*, HA'ARETZ (Aug. 1, 2002), <https://www.haaretz.com/1.5158523>.

<sup>95</sup> *Law Limiting Sex Offenders from Returning to the Vicinity of the Victim*, 2004.

<sup>96</sup> Dana Pugach, “*The Day After*”- *New Approaches in the Legal System for Risk Management of Sexual Assault – From Punishment Only to Supervision and Prevention*, 51 HAPRAKLIT 89 (2011).

<sup>97</sup> Roni Zinger, *Sex Offenders Return to the Street with No Supervision, and Attack Again*, HA'ARETZ (Feb. 18, 2004).

<sup>98</sup> *Act on Defending the Public from Sex Crime Perpetrators*, 2006.

for supervision of particular sex offenders. Courts, in turn, can issue an order requiring sex offenders to comply, which involves entering their names into a registry. The registry, for a maximum, but renewable, period of five years, would be open to law enforcement, risk assessors, and military authorities, but not to the public.

The natural comparison made in the discussion of these bills was the U.S. sex offender registry, which is open to the public through Megan's Law.<sup>99</sup> The Israeli registry deliberately deviated from the U.S. model,<sup>100</sup> because, as explained in Ha'aretz newspaper –

Sources in the Ministry of Justice say that the system in the United States and in the United Kingdom has utterly failed, and according to [these sources] led to harassment of sex offenders. They explain that public information sends a message to the public that they can take the law into their own hands, and that led to the commission of crimes, such as arson, against the sex offenders. The message, the sources explain, should be that the state takes care of the public and does not abandon the public to take care of itself. Therefore, there should be a confidential governmental registry, which will enable surveillance and control of the pedophiles and grant the state the authority to search the offender's home and other limitations.<sup>101</sup>

Indeed, other journalistic reports about the U.S. registry highlighted its negative aspects, concluding that online access to the whereabouts of sex offenders "has ended in murderous crusades."<sup>102</sup> The story shows a cautionary tale and highlights the deliberate aspect of the Israeli divergence:

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<sup>99</sup> Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 L. & SOC. INQUIRY 1111 (2000).

<sup>100</sup> Zen Read, *Online Information about Sex Offenders – Not in Israel*, HA'ARETZ (Nov. 10, 2006).

<sup>101</sup> Yuval Yoaz & Yuval Dror, *Israel Learns Lessons from U.S.: A Pedophile Registry Will Be Established, But Not Publicized*, HA'ARETZ (Aug. 6, 2004).

<sup>102</sup> Yanay Goz, *A New American Website Warns of Sex Offenders' Place of Residence*, THE MARKER (Nov. 10, 2006).

Less than a month ago, a new unit of the prison authority devoted for supervising released sex offenders started operating in Israel . . . . In the first step . . . the unit will register 130-150 released offender. In the next step, all sex offenders that hurt minors, about 700 people, will be registered. So far, no one is discussing notifying the public, and certainly not establishing a website.<sup>103</sup>

Additional stories highlighted difficult clashes about values and policies in the context of U.S. litigation regarding the constitutionality of various aspects of Megan's Law: "Is the status of sex offenders different from that of other criminals in a way that justifies their separation from society for life, even after they complete serving their sentences?"<sup>104</sup>

But not everyone agreed that disclosing the names was a bad idea. In a different journalistic story, which preceded the 2004 bill, Professor Immanuel Gross was quoted saying that "in balancing the individual's interest in rehabilitation and privacy with the community's right to be protected from him, the community's interest prevails." The complexity of drafting the bill led Itzhak Kadman, the Director of the Child Safety Commission, to comment, "true, it is a complicated subject, but we've lost three precious years, and in the meantime, every year, at least 5,000 children are sexually hurt."<sup>105</sup>

The public debate about the registry intensified as the public became aware of the problems in implementing the modest Israeli law. In May 2007, Ha'aretz newspaper reported serious lags in the identification and registration of sex offenders. The story relied on information from the Ministry of Health, according to which the delays occurred both at the clinical risk assessment level and at the court order level.<sup>106</sup> It also reported an unpleasant exchange at the

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<sup>103</sup> *Id.*

<sup>104</sup> Nathan Guttman, *Once a Sex Offender, Always a Sex Offender?* HA'ARETZ (November 10, 2002).

<sup>105</sup> Ruthie Sinai, *Punishment Has Increased to Protect the Public*, HA'ARETZ (May 20, 2002).

<sup>106</sup> Shachar Ilan, *No Supervision of Dozens of Dangerous Sex Offenders in the Process of Release*, HA'ARETZ (May 28, 2007).

Knesset Committee for Legislation, in which the Chair chided the prison mental health authorities for the delays. A further scathing critique of the government's failure to properly protect the public ensued when Ha'aretz reported that the government asked the Knesset to delay the starting time for the supervision legislation.<sup>107</sup> Kadman accused the relevant governmental offices, who "had almost two years to prepare for the law's implementation and failed", of "serious misdeeds." The delayed proposal met with harsh opposition across the political spectrum and was canceled a day later.<sup>108</sup>

Against this backdrop of calls for improved public safety, KM Eli Aflalo proposed a Bill for Fighting Pedophiles,<sup>109</sup> which was endorsed by the government.<sup>110</sup> The proposal was a much more Americanized approach to sex offender supervision in two major ways: it advocated for a public registry, accessible online a-la Megan's Law, and for court-ordered medical treatment of sex offenders using chemicals such as testosterone blockers.<sup>111</sup> Under the proposal, the treatment would be mandated, in addition to a prison sentence, and would require the convict's consent. Consenting convicts would receive a two-year sentencing discount, in addition to their parole.

The proposal was not without its detractors: KM Shelly Yechimovich argued that "there is a clear boundary in punishment in an enlightened country and it passes right where you don't maim a person as punishment or as means of prevention." Yechimovich compared the incentives for chemical castration to the custom of amputating thieves' hands in Saudi Arabia.<sup>112</sup>

Detraction came from outside the Knesset, too. Shortly after the preliminary approval of the bill, the Israel Bar published its opinion, in which it stressed the need to consider "the public need –

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<sup>107</sup> Ruthie Sinai, *The Government Is Trying to Delay Supervision of Sex Offenders Who Attacked Children*, HA'ARETZ (July 18, 2007).

<sup>108</sup> Ruthie Sinai, *The Government Has Recanted Its Effort to Delay Sex Offender Supervision*, HA'ARETZ (July 19, 2007).

<sup>109</sup> Public Protection of Sex Offenders Act, 3 Tevet 5766–2006, [https://fs.knesset.gov.il/16/law/16\\_lsr\\_299947.pdf](https://fs.knesset.gov.il/16/law/16_lsr_299947.pdf) p. 234 (Isr.).

<sup>110</sup> Shachar Ilan, *The Government Supports a Bill, Approved Preliminarily, for Chemical Castration of Pedophiles*, HA'ARETZ (October 17, 2007).

<sup>111</sup> Public Protection of Sex Offenders Act, *supra* note 109.

<sup>112</sup> Ilan, *supra* note 110.

on one hand, and the potential harm to offenders who finished serving their sentence — on the other.”<sup>113</sup> The Bar offered its support for

arranging the rehabilitative process of sex offenders and returning them to society, [insofar as it is] conditioned on the consent of the offender”, but offered strong opposition to a public registry, arguing that it “violate[d] the spirit and aim of the Criminal Record and Expungement Law of 1981, to limit access to criminal records so as to minimize the expected harm to rehabilitated offenders.”<sup>114</sup>

They expressed concern about a “slippery slope . . . an increased demand to expose criminal records of other offenders”<sup>115</sup> and, importantly, pointed out that “against the real, harsh consequence of an eternal Mark of Cain . . . the practical experience of similar registries in other countries shows that their efficacy in neutralizing the public risk of sex offenders is marginal.”<sup>116</sup>

The National Public Defense was even more resolute: in their written opinion they “vehemently oppose[d] the proposed law”<sup>117</sup> which, they argued was “legislation influenced by social anxiety.” They explicitly identified the new law as an “effort to import the American ‘Megan’s Law’” and stated that, since its enactment in the United States,

there has been enough research evidence to enable us to critically examine the bill. The conclusions from the studies are unambiguous: there is no place for the proposed registry in legislation, both because the

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<sup>113</sup> Ravit Zilberfarb, *The Israel Bar’s Position on the Bill to Fight Pedophiles—2006, and the Bill for Preventive Rehabilitation—2006*, ISRAEL BAR, CRIMINAL JUSTICE FORUM.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 2.

<sup>116</sup> *Id.* at 3.

<sup>117</sup> National Public Defender’s Office, *The National Public Defender’s Position Regarding the Bill for Fighting Pedophiles*, 2007.



registry is ineffective and because of its severe violation of human rights.<sup>118</sup>

After its preliminary approval by the Knesset by a majority of 24 to 4, the bill shifted to the Legislative Committee,<sup>119</sup> where it led an erratic life. The Committee discussion in 2008 featured the following endorsement from the bill's proposer, KM Eli Aflalo:

In research that we've done we found that most enlightened countries in the world have such a registry. There are some countries where it is even more extreme, like the Netherlands and other countries, where a pedophile has to fly a flag over the house where he lives. I don't suggest adopting this extreme path and I don't want to say this is the final solution . . . but I argue that we have to take all measures.<sup>120</sup>

Not everyone agreed with KM Aflalo's perception of comparative law. The Committee's legal advisor, Efrat Rosen, said: "We must examine whether this is an issue in which it is appropriate to follow the United States." She added that research done in the last few years showed various problems, such as a false sense of security among the public and ineffectiveness in preventing repeat sex offending in the community.<sup>121</sup> Aflalo then clarified:

I want to say that my impression is – and if it isn't so, I apologize – that it is all over the world. I did say at the beginning that there are surveys that said there are some things that are maybe not alright, but it's a fact

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<sup>118</sup> *Id.* at 3.

<sup>119</sup> The 156<sup>th</sup> Meeting of the 17<sup>th</sup> Knesset, p. 80 (Isr.).

<sup>120</sup> Transcript no. 435 of the *Session of the Legislative Committee*, January 29, 2008 (Isr.).

<sup>121</sup> *Id.* at 16.

that in all the places it continues to operate and it operates.<sup>122</sup>

By 2010, the proposal had been bifurcated into two new bills: a chemical castration bill from 2009 and an open registry bill in 2010.<sup>123</sup> At the Committee's discussion of the new version, the chair, KM David Rotem, opened by explaining that a third aspect of sex offender policy—rehabilitation—was not included in the bills. KM Moshe Matalon replied that the bills had come up before the Knesset several times, “made headlines”, and then the proposing legislators were regularly “accused of populism.”<sup>124</sup> In the discussion, the proponents stressed that medical treatment would be voluntary, albeit resulting in lighter sentences, and that treatment options could range from chemical treatment in prison to therapeutic options in the community. What provoked considerable discussion was whether it was appropriate to open the registry to the public. The Ministry of Justice representative, Amit Marari, stated the Ministry's position against opening the registry:

[T]he responsibility to prevent sex offenses is [on] the state and not the private citizen. We would not want a private citizen to feel obligated to enforce the law. We are aware that people would want to know who their neighbor is and whether he committed a sex offense, but in the balance of interests we think this is the right balance. I also have to say that the open registry, and that is the lesson from places that have an open registry, can increase the dangerousness of sex offenders in that it prevents them to rehabilitate, it leads them underground and raises their level of dangerousness.<sup>125</sup>

To which KM Aflalo interjected: “according to a survey that was done it actually triggers them to come and get the treatment. It's

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<sup>122</sup> *Id.* at 17.

<sup>123</sup> Transcript no. 192 of the *Session of the Legislation Committee*, May 10, 2010 (Isr.)

<sup>124</sup> *Id.* at 4.

<sup>125</sup> *Id.* at 12.

the opposite.” And KM Matalon added: “this is something worth discussing.”<sup>126</sup>

Kadman offered critique of the breadth of the existing registry. He said that “our registry, as opposed to other countries, is not open to the public, but at least for those who need to know, the registry has to also include low risk sex offenders.” Marari interjected that “they can get this information from the [general] criminal registry. There are, after all, two registries.”<sup>127</sup>

Dr. David Cohen from the Health Ministry explained that

there is enough documentation that these registries can trigger other offenses. One thing they do is that sex offenders who return to established neighborhood, when the neighborhood is very organized and there are resources to put pressure on them, move to weak neighborhoods, where they can disappear into the population unnoticed.<sup>128</sup>

Following the committee discussion, the Attorney General’s office compiled a memorandum with policy questions regarding access to the registry.<sup>129</sup> Among the questions raised was the rank of police officers that could access the registry<sup>130</sup> and questions regarding the possibility of notifying schools and community centers of a nearby residence of a sex offender in special cases.<sup>131</sup>

The latest version of the proposal was submitted for an early reading in 2016.<sup>132</sup> This last version would entrust the registry to the Courts Administration and declared it open to the public. Offenders willing to accept chemical treatment would be removed from the registry.<sup>133</sup> The registry categories would include a physical description, the offender’s address, identification number and drivers’

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<sup>126</sup> *Id.* at 13.

<sup>127</sup> *Id.* at 29.

<sup>128</sup> *Id.* at 32.

<sup>129</sup> Attorney General’s Office, *Key Points for the 13<sup>th</sup> Discussion of the Law to Protect the Public from Sex Offenders* (March 1, 2011).

<sup>130</sup> *Id.* at 2.

<sup>131</sup> *Id.* at 3.

<sup>132</sup> *Bill for Fighting Pedophiles*, 2016 (Isr.).

<sup>133</sup> *Id.* at § 2(b).

license number, a description of the offense, including the age and sex of the victim, and in special cases, the offender's workplace address.<sup>134</sup> The proposal is still awaiting discussion by the Knesset.

The conflict among policymakers over the power of the U.S. example—whether it is an argument for adopting the public registry simply because it is done in the United States, or for abandoning it because it is ineffective there—was reflected in litigation as well. In 2012, the Haifa District Court heard a lawsuit in which a convicted sex offender who returned to reside in his kibbutz after release asked for an injunction against a TV channel that was going to broadcast a story about his crimes.<sup>135</sup> Judge Ron Sokol found for the defendants, arguing that the newspaper articles about the plaintiff made his complaint about additional publicity moot; but he “found it appropriate to remark that the issue of publicizing identifying features about a sex offender who finished serving his sentence is a complicated question, which has not yet been answered in Israel.”<sup>136</sup> The judge recounts the history of Megan's Law legislation in the United States, offers an analysis of the public interest in publication, and then briefly summarizes the research that critiques open registries, citing an article by Dana Pugach, cofounder of the Noga Center.<sup>137</sup>

The sex offender registry example is illustrative in several ways. First, it shows how law-and-order heyday policies tend to focus on the fact that a particular policy exists in the United States and are vaguer about how the policy fares in its country of origin. Second, it demonstrates that, in this period, legislators know that their proposals are (to them, unjustly) perceived as populist. Third, and most importantly, it shows that even during the heyday of law and order, the extreme U.S. versions of victim advocacy were not uniformly embraced by Israeli policymakers. We see academic supporters and advocates for victims' rights finding nuances, including support for victims whose opinions about the criminal process are nonpunitive.<sup>138</sup>

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<sup>134</sup> *Id.* at 1.

<sup>135</sup> CC (HI) 45296-05-12 Ofer Carmi v. Channel 10 and Immanuel Rozen, PM 5772 (2012).

<sup>136</sup> *Id.* at 4.

<sup>137</sup> *See id.*

<sup>138</sup> For one such example, expressing empathy for domestic violence victims who do not want their spouses/assailants prosecuted, *see* Hadar Dancig-Rosenberg and Dana

We see strong opposition by legal officials—not only the public defense and private attorneys, but government advisors—that extensively rely on critical research conducted in the United States. This opposition, fueled by policymakers educated in, and influenced by, U.S. academic institutions, is a counterintuitive “policy transfer”: the transfer of negative perspectives on U.S. policy via elite networking of academics and policymakers. The influence of this group of stakeholders on Israeli criminal justice would increase in the following decade, blooming into an “era of contention” and retreat from the United States as a role model.

#### IV: THE ERA OF CONTENTION

The declining infatuation with criminal justice in the United States is evident in four ways: First, there is a decline of fascination with U.S. law and order policies and a tendency to view the United States as more of a cautionary tale. As a consequence, both in committee hearings and in academic texts there is much reliance on the U.S. mass incarceration literature. The best example of this is the rejection of privatization of prisons, which rightly or unjustly, is perceived as contributing to the crisis. Second, and related, the United States-inspired reforms that get adopted are trends that the U.S. adopted to curb its incarceration appetite, such as community courts. Third, there is inspiration in anti-incarceration litigation, which can be seen in the recent successful case against prison overcrowding. The litigation techniques here are an impressive mix of United States-inspired arguments and fresh new angles (square area per prisoner versus number of prisoners). Fourth, there is an increased appetite to look away from the U.S. and toward other countries, such as Scandinavian nations, as inspiration for policy, such as with prostitution.

One example of the Israeli divestment from the U.S. example occurred in the course of the legislative project to introduce determinate sentencing. The original determinate sentencing bill from 2006 included a proposal for establishing a committee that would set an “initial sentence” for each offense, akin to the limited ranges created

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Pugach, *Pain, Love, and Voice: The Role of Domestic Violence Victims in Sentencing*, 18 Mich. J. Gender & L. 423 (2012).

by sentencing commissions in many U.S. states and by the U.S. federal government.<sup>139</sup> On December 5, 2011, the Knesset discussed a proposal by the Constitution, Legislation, and Law committee to sever the sentencing commission issue from the remainder of the bill. The Knesset approved the proposal and future versions of the bill did not include it.<sup>140</sup> Judge Ami Kobo, in recounting the history of the law, explained that “this part provoked the lion share of critique of the bill, as critics argued that ‘initial sentences’ would narrow judicial discretion in sentencing, contradict the principle of individualized punishment, and shift[] the decision-making power away from the courts and toward plea bargaining negotiation.”<sup>141</sup> Notably, these concerns were compounded by the concern that “initial sentences” would lead to “improper ‘punishment tariffs’, and simultaneously to a considerable and improper increase in sentencing severity as with the sentencing guidelines in the United States.”<sup>142</sup>

In lieu of “initial sentences,” the final bill<sup>143</sup> left sentencing discretion in the hands of the judge, but required judges to justify the imposed sentence using the following structure: first, the judge would establish the “appropriate range” of sentencing based on a retributivist logic; then, he or she would consider whether it is appropriate to depart from this range for rehabilitation reasons (downwards) or for protecting the public (upwards); if such departures were not available, the judge would then justify the length of the sentence within the appropriate range; and finally, situations involving multiple offenses or offenders would be considered. The limitations on judicial decision making in each of these steps were fairly minimal; a “public protection” upward departure from the self-imposed “appropriate range” would require a showing of the defendant’s considerable

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<sup>139</sup> In some U.S. states, the appropriate range is set by a professional sentencing commission, and calculated using the defendant’s criminal history and the severity of the offense. In other states, the mandatory sentences or ranges are set by the legislature, sometimes via voter initiatives. For a good primer, see Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conference of State Legislatures (2015), <https://www.ncsl.org/documents/cj/sentencing.pdf>.

<sup>140</sup> *Divrei HaKnesset*, December 12, 2011.

<sup>141</sup> Ami Kobo, *Explaining Amendment no. 113 to the Penal Code regarding Determinate Sentencing*, 183 HASANEGOR 4 (2012).

<sup>142</sup> *Id.*

<sup>143</sup> Penal Law, 5772–2012, SH No. 2330 p. 102 (Isr.).

criminal history, or other criteria as set up in a professional report (which could include the probation report).

This watered-down version of determinate sentencing is a clear departure from the various types of determinate sentencing adopted in the United States in the late 1970s and 1980s. Much of the U.S. literature on determinate sentencing describes it as the outcome of a bipartisan push, a description that dovetails with recent literature highlighting the share of liberals and professionals in mass incarceration<sup>144</sup>. But at least in California, the bill generated considerable—and prescient—opposition from the left and even from within the system. Numerous organizations predicted that determinate sentencing would lead to harsher sentencing across the board, and submitted letters to Governor Jerry Brown, then on his first term, urging him not to sign these changes into law. Some examples of prescient commentators include California Attorneys for Criminal Justice (“[t]he inescapable reality of this change is the absolute certainty of never-ending effort to increase terms”)<sup>145</sup> and the ACLU of Northern California (“sentence escalation will become a popular legislative pastime”).<sup>146</sup> Indeed, the proponents and opponents of the Determinate Sentencing Act reflected a dichotomy between politicians and prosecutors, elected officials who felt accountable and vulnerable to the public on public safety matters, and professional parole officers, therapeutic professionals, and other employees in the gigantic California rehabilitation machine, who until then could toil in relative obscurity and opaqueness, relying on their professional legitimacy and immunity from critique. In the United States, the shift toward determinate sentencing represented a triumph of the political-emotional paradigm over the professionalized one; the Israeli version represents a conscious decision not to go that far.

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<sup>144</sup> Naomi Murakawa, *First Civil Right: How Liberals Built Prison America* (Oxford University Press, 2014); Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Harvard University Press, 2016).

<sup>145</sup> Letter from California Attorneys for Criminal Justice to Edmund G. Brown, September 15, 1976.

<sup>146</sup> Letter from the ACLU of Northern California to Edmund G. Brown, August 30, 1976.

Another successful marshalling of the U.S. experience as a cautionary tale was the failed effort to introduce prison privatization. Talks on prison privatization in Israel started in the early 2000s, already prompting critique and warnings from academics and civil rights organizations. Political scientist Yoav Peled invoked the American experience as a cautionary tale pointing out that “serious studies” conducted in the United States concluded that “there is no proof that prison privatization yields significant savings for the state.”<sup>147</sup> He also mentions that “in the United States, the sentencing increase that led to the doubling of the number of prisoners between the mid-80s and the mid-90s was partly the outcome of overt lobbying efforts by private prison companies” and that “in the United States, in many cases it has been heard that the prison authorities took unjustified disciplinary measures against inmates to prevent the opportunity for their early release for good behavior.”<sup>148</sup>

However, the Interior Committee meeting that yielded the initial bill was full of praise for the United States experience. Shmuel Hershkovitz, Director of the Internal Security Ministry, said,

I personally visited two prisons in the United States, and I have to say that if that’s a prison, I don’t know what a prison means. They weren’t putting on a show for me, because I toured there alone with the staff. The impression is that it’s an approach that focuses on preserving the dignity of the prisoner and saving the state’s budget.<sup>149</sup>

Knesset Member Hemi Doron was less optimistic: “We can see lots of journalistic articles and exposés about horrible things that happen in private prisons in the United States.”<sup>150</sup> Aviv Vasserman, an attorney working civil rights cases at a legal clinic, was incensed:

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<sup>147</sup> Yoav Peled, *Crime Pays: What Can Be Learned from the American Experience in Prison Privatization*, ADVA CENTER FOR EQUALITY AND SOCIAL JUSTICE, 2001, <http://www.adva.org/ivrit/prisonsPrivatization.htm>.

<sup>148</sup> *Id.*

<sup>149</sup> Protocol. No. 118 of the Meeting of the Interior and Environmental Committee, Dec. 29, 2003, 3-4.

<sup>150</sup> *Id.* at 7.



There are papers by the American Department of Justice and leading research institutions in the United States which wrote in 1999, after 15 years of experience in the field, that this business doesn't save the state costs, it brings about a decline in the quality of guards, both in terms of personal quality and of salaries, and it leads to more turnover among the staff.<sup>151</sup>

It is telling that the discussion then turned to the question of differentiating the Israeli proposal from the U.S. model. Herzl Yusuv said,

everyone is talking about the American model, in America, as in America, they always go to the extreme and we're not there at all. We know the American model, it is much broader, gives broad authority to the contractor, and we need the British model that incorporates strict state supervision of what happens in the prison.<sup>152</sup>

Judge Telgam responds, "the American study is a comparative work of dozens of studies that were conducted, and it provides the Comparison."<sup>153</sup> Yusuv replies, "I studied the American model. Everyone who argued that the shift was justified, they claimed he represented the private corporations. Everyone who argued against it, they claimed he was ideologically motivated."<sup>154</sup>

In 2004, the full Knesset was presented with a bill to allow privatization of prisons.<sup>155</sup> The Knesset assembly to discuss the bill was extremely contentious. KM Muhammad Barakah of the left-wing party Hadash argued that "some things cannot be subject to competition and capitalization."<sup>156</sup> Avraham "Bayga" Shohat objects:

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<sup>151</sup> *Id.* at 20-1.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 45.

<sup>155</sup> Draft Bill for Privatization of Prisons, 5764-2004, HH (Knesset) No. 28 (Isr.).

<sup>156</sup> Divrei HaKnesset, 123 meeting of the 16<sup>th</sup> Knesset, 41.

“[Then] why is it good in England? I saw it in England.”<sup>157</sup> Zahava Gal’on retorts: “The fact that you saw this in England doesn’t mean it works. I’m going to say something in a minute about the British and the Americans.”<sup>158</sup>

She proceeds:

There is prison privatization in England and prison privatization in the United States. But despite this popularity . . . no country has been able to establish whether privatization was a good idea. And why they haven’t been able to establish—and th[ese] are things I read from experts on the subject—is because there is a very, very big difficulty in isolating and critiquing the many variables that influence the economic and social outcomes involved in such privatization . . . it is not at all clear . . . in the United States whether prison privatization led, in the long run, to considerable savings for the state.<sup>159</sup>

She proceeds to explicitly repudiate the American reliance on prison privatization:

In the United States the private prison industry has been operating for the last 20 years. Because of their lobbying, which aims to guarantee them a steady supply of inmates—I want the Knesset to know this—in California today minors are serving life without parole for stealing a hat or a videotape, in an adult facility.

So I suggest we don’t deceive ourselves. First you introduce private companies and allow them to operate private prisons . . . and later we’ll find ourselves standing here in the Knesset an[d] asking how we caused this. We privatized prisons, because there’s a cost benefit thing and the country is in

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<sup>157</sup> *Id.* at 43.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 45.

financial distress, but what's going to happen in the end? Who is going to be put in there? Will they now put minors who stole a videotape into a prison with adults? Is that the situation we want to bring about?

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Another thing I want to bring to the Knesset's attention: Even though officially the Internal Security Office, who appeared before the committee, refused to disclose the details on the American companies that are in the running [to operate the private prisons], in a journalistic interview two of the three companies were exposed. I want you to know that these corporations have a history with the prisons they operate in the United States . . . there have been massive rape cases within prisons, both for female inmates and for female guards, in the same prisons they run; there's been a mass escape of 500 inmates from one prison; and they established prisons that were regarded drug dens. Suddenly this has become much worse. We have here prisons that the state runs. I haven't heard . . . and I hope I won't hear of such cases of rape of inmates, of guards, in prisons.<sup>160</sup>

Despite these efforts, the amendment passed.<sup>161</sup> The new law drew ire from civil rights organizations, which sued the Ministry of Justice. Their attorney, Effi Michaeli of the Israel Institute of Democracy, pointed out that the new law was "a meaningful step reflecting a right-wing economic policy."<sup>162</sup> He, too, expressed concerns about the inappropriateness of correctional authorities for privatization. Importantly, he points out that

many studies in the Western world reflect harsh phenomena of rights violations of inmates held in private prisons around the world, because of lack of

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<sup>160</sup> *Id.* at 45-6.

<sup>161</sup> *Id.* at 91.

<sup>162</sup> Effi Michaeli, *Privatization of Prisons: The Path to a Corporate Regime*, Isr. Democracy Inst, January 9, 2008, <https://en.idi.org.il/articles/6116>.

capabilities of the private profiteer's employees, their lack of experience, and the economic considerations that accompany the decision making of the authority that operates the privatized prison.<sup>163</sup>

Similarly pessimistic was journalist Arye Dayan, who extensively invoked the negative experiences in the United States,<sup>164</sup> and attorney Aviv Vasserman, who wrote for Yediot Aharonot:

Even assuming that full privatization is a reasonable solution, the Israeli bill allows for all the familiar problems from the similar move in the United States. It enables, not to say incentivizes, the negative phenomena that were found in the international experience, and to the extent that any caveats were accepted they were marginal.<sup>165</sup>

On November 19<sup>th</sup>, the Israeli Supreme Court ruled not to allow the private prisons to operate.<sup>166</sup> The Court relied on constitutional arguments, finding that the amendment violated the freedom of movement, guaranteed in Article Five of Basic Law: Human Dignity and Freedom.<sup>167</sup> The decision reflects a quasi-European sensibility for rights discourse, which was absent from the U.S. policymaking debate about prison privatization. Importantly, the effort to present the court with policy evaluation studies from the United States failed. Chief Justice Beinisch found that "even though concerns raised by petitioners are not baseless, they concern a future human rights violation, the potential of which is uncertain; and therefore it is doubtful whether it can serve as constitutional

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<sup>163</sup> *Id.*

<sup>164</sup> Arye Dayan, *Sovereign Levayev Promises to Treat His Prisoners Well*, HA'ARETZ, Nov. 28, 2005

<sup>165</sup> Aviv Vasserman, *Prison Privatization as a Test Case*, YEDIOT AHARONOT, November 29, 2006.

<sup>166</sup> *See generally* HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD 27 (2009) (Isr.).

<sup>167</sup> *Id.* at 55.

foundation for striking down a Knesset law.”<sup>168</sup> More specifically, the Chief Justice observed that

the petitioners’ argument about the impact of prison privatization in other countries (and especially in the United States) is insufficient for an apriori decisive finding of this court, according to which the mode of operating prisons through private management will necessarily lead to a more significant violation of human rights than in public prisons . . . partly because the legislative arrangement in Israel differs from those in other countries . . . and partly because the comparative data itself is indecisive.<sup>169</sup>

By contrast, the decision relies on the notion that the very transfer of correctional power from the state to private hands is a violation of basic state obligations, and in so deciding, the Court relies on U.S. scholarship, particularly on John DiIulio’s assertion that “It is not unreasonable to suggest that employing the force of the Community via private penal management undermines the moral writ of the community itself.”<sup>170</sup> But this is philosophical scholarship about the nature of privatization, and the Court is careful to point out that “American courts have not established, so far, which of the different legislative agreements in the United States that pertain to prison privatization is unconstitutional”<sup>171</sup> even though privatization itself is “hotly debated.”<sup>172</sup>

The Minister of Treasury, Yuval Steinitz, aggressively criticized the decision at the Israel Business Convention, arguing that the Court exhibited “budgetary abandon.”<sup>173</sup> But he found himself almost singlehandedly attacking the decision. The Ministry of Justice was not required to respond and even Netanyahu, in meeting Chief

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<sup>168</sup> *Id.* at 56-7.

<sup>169</sup> *Id.* at 57.

<sup>170</sup> *Id.* at 62.

<sup>171</sup> *Id.* at 97.

<sup>172</sup> *Id.* at 99.

<sup>173</sup> Adi Ben-Israel, *Steinitz accuses courts of “economic anarchy” - “The Knesset is authorized to set economic policy, not the courts,” the finance minister declared*, Globes (Dec. 19, 2009) <https://en.globes.co.il/en/article-1000522516>.

Justice Beinisch, repudiated Steinitz's critique.<sup>174</sup> Pinhas Rubin, a business lawyer writing for the business newspaper Globes, said that

this is appropriate for a country that seeks basic rights . . . in the competition between the budget and fundamental freedoms, the freedoms prevailed, and their violation was found to be disproportionate and unconstitutional. This is the enlightened governance we chose and wanted to live in.<sup>175</sup>

Steinitz's critiques pointed out that the state, which explicitly asked the Court not to issue a temporary injunction, took a risk by allowing the private company to build the first prison on speculation, and was therefore liable for the outcome.<sup>176</sup>

The Knesset committee meeting to discuss the ramifications of the Court decision was heavily protested by the employees hired by the private contractor, who had left their places of employment to join the new venture. The contractor himself attended the meeting, expressing bitterness that "the Supreme Court murdered my dream for prisoner rehabilitation . . . this prison had adopted as its motto the issue of prisoner rehabilitation." He also reportedly asked "why does this system succeed in most prisons in the world and in Israel it is thought that it will fail."<sup>177</sup> Eventually, the Prison Service purchased the private prison from the entrepreneur and started operating it in 2010.<sup>178</sup>

Another development repudiating the U.S. legacy of incarceration was the 2015 report by the Dorner Commission on Punishment Policy and Offender Treatment, which, ironically, was

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<sup>174</sup> *Id.*

<sup>175</sup> Pinhas Rubin, *If Fire Caught the Trees*, GLOBES, Dec. 17, 2009.

<sup>176</sup> David Shimron, *Wrong Address*, GLOBES, Dec. 17, 2009.

<sup>177</sup> Globes Correspondent, *Leviev, Kuznitsky to sue over private prison cancellation*, GLOBES (Nov. 22, 2009) <https://en.globes.co.il/en/article-1000515714>.

<sup>178</sup> Tomer Avital, *The Private Prison will Move Into the Prison Service's Hands: Levayev Makes 279 Million Shekels*, KALKALIST (March 28, 2010) <https://www.calcalist.co.il/articles/0,7340,L-3400132,00.html>.

convened because of public outcry about the leniency of sentences.<sup>179</sup> Established by Minister of Justice Ya'acov Ne'eman and chaired by retired Supreme Court Justice Dalia Dorner, the Commission was comprised of a variety of professional stakeholders: representatives of the prosecution, defense, correctional authorities, police, and several academics. Several of the participants—academics Oren Gazal-Ayal and Kenneth Mann and public defender Yoav Sapir—attended graduate school in the United States. Another key participant, deputy public defender Hagit Lernau, an experienced academic and policymaker, had written a criminology textbook titled *Crime and Law Enforcement*,<sup>180</sup> which devoted an entire section to the United States mass incarceration crisis, not only because of its centrality to the penological literature, but because she saw it as an important cautionary tale for Israeli lawmakers, professionals, and policymakers.

The story told by the Dorner Commission echoed the story told by the National Research Council (“NRC”) commission of 2014.<sup>181</sup> The Dorner commission was not exactly the Israeli counterpart of the NRC committee, which was comprised of academics piecing together the history of mass incarceration. The conclusions, however, were remarkably similar. Committee Chair Jeremy Travis expressed concern that “the United States is past the point where the number of people in prison can be justified by social benefits” and urged to consider “a criminal justice system that makes less use of incarceration’ and more use of “common sense, practical steps . . . in that direction.”<sup>182</sup> The committee report recommended reexamining mandatory and long-term sentences, at both the federal and state levels, and a reconsideration of the punitive war on drugs. The reform principles recommended by the NRC report were very similar to the

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<sup>179</sup> Sharon Pulwer, *Israeli Panel Calls for Shorter Jail Terms, Improved Rehab for Offenders*, HA'ARETZ (Nov. 3, 2015 8:48AM), <https://www.haaretz.com/israel-news/premium-panel-calls-to-shorten-jail-terms-improve-rehab-1.5416699>.

<sup>180</sup> HAGIT LERNAU, *CRIME AND LAW ENFORCEMENT* (2016).

<sup>181</sup> National Research Council, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (Jeremy Travis, Bruce Western, and Steve Redburn eds. 2014).

<sup>182</sup> *U.S. Should Significantly Reduce Rate of Incarceration; Unprecedented Rise in Prison Population 'Not Serving the Country Well,' Says New Report*, NEWS FROM THE NATIONAL ACADEMIES (Apr. 30, 2014), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=18613>.

Dorner commission's recommendations: Chief among the sentencing considerations would be proportionality, supported by parsimony (the minimal sentence necessary to achieve sentencing goals), citizenship (leaving an opening to restore one's civic status) and social justice (equity and fairness in punishment.)<sup>183</sup> The report highlighted the uneven distribution of incarceration, and its adverse impact on already disadvantaged communities.

Even though the Dorner commission report does not cite the NRC report, its recommendations are remarkably similar. As its chief recommendation, it touts a principle of proportionality between severity and punishment and finds that "increasing the statutory penalties does not advance the war on crime and in general is not recommended as a means for that end."<sup>184</sup> But importantly, from the onset, the report singles out the U.S. correctional project as an example of poor implementation of retributive philosophy: "While modern retributivist theory . . . supported much more lenient sentencing than existing ones, its application in the United States, and to a great extent in other common law countries, led to an increase in sentencing severity."<sup>185</sup> The report proceeds to compare the rise in incarceration rates in the United States and in Israel, finding a similar pattern of exponential growth, albeit on different scales.

The Dorner report excoriates some of the main features of punishment severity in the United States and urges the Israeli legislature not to follow in their path. In doing so, the report heavily relies on U.S. literature critical of the punitive turn. Accordingly, the report relies on behavioral literature to critique deterrence, insofar as it serves as a rationale for harsher sentencing, opting instead for improving apprehension odds.<sup>186</sup> The report also relies on situational crime prevention—the works of Weisburd and others in U.S. settings—to suggest that prevention is more effective than punishment.<sup>187</sup> A particularly interesting aspect of the report is its revision of Robert Martinson's classic article concluding that "nothing

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<sup>183</sup> National Research Council, *supra* note 181, at 323.

<sup>184</sup> The Public Committee Examining the Punishment and Treatment of Offenders, *supra* note 4, at 4.

<sup>185</sup> *Id.* at 3.

<sup>186</sup> *Id.* at 20.

<sup>187</sup> *Id.* at 21-22.



works” in prison rehabilitation. Relying on newer research conducted in U.S. settings, the Dorner report concludes that some evidence-based programs work, and more importantly—that effective rehabilitation can be achieved in community settings as well as in correctional ones.<sup>188</sup>

Another interesting feature of the Dorner commission was its recommendation to support and implement one particular U.S. innovation: community courts.<sup>189</sup> The report recommended expanding the pilot program for such courts by picking appropriate judges and establishing a case management system that would consistently refer cases to these unique courts. The special courts were pioneered by Joint-Ashalim, a public-private collaboration between the Israeli government, the Joint Israel nonprofit, and the New York Jewish Federation.<sup>190</sup> Daniella Beinisch, an academic-turned-policymaker, wrote her doctoral dissertation about U.S. problem-solving courts and brought those insights to Joint-Ashalim. In 2014, two courts were established, in Ramla and Be'er Sheva, and in 2016, the government decided to expand the program and inaugurate two more. Other Israeli scholars interested in problem-solving courts, Tali Gal and Hadar Dancig-Rosenberg, learned about them by conducting a taxonomy of U.S. courts.<sup>191</sup>

The Dorner report also discussed the pathologies of mass incarceration, such as its criminogenic effects and the threat to basic dignity. As an example, the report cites *Brown v. Plata*, arguing that “the rise of the prison population required confining them in overcrowded, difficult conditions. As a consequence, the United States Supreme Court found the correctional system unconstitutional and ordered the release of 46,000 prisoners.”<sup>192</sup>

This part of the report was not unrelated to developments in Israel. In 2014, the Association for Civil Rights in Israel (ACRI)

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<sup>188</sup> *Id.* at 23-24.

<sup>189</sup> *Id.* at 38-39.

<sup>190</sup> *Together in Doing Social Work for Young Children and Young People in Risk Situations* (trans. by author), About Ashalim, <http://www.ashalim.org.il/about>.

<sup>191</sup> Tali Gal and Hadar Dancig-Rosenberg, *Characterizing Community Courts*, BEHAV. SCI. L. 1 (2007).

<sup>192</sup> The Public Committee Examining the Punishment and Treatment of Offenders, *Report to the Minister of Justice*, *supra* note 4, at 27.

petitioned the High Court of Justice to alleviate the overcrowding in Israeli prisons.<sup>193</sup> The overcrowding issue had been mentioned before, in committees formed in the late 1970s and 1980s, and was frequently brought to public attention through the Public Defender's annual reports. Particularly notable was the 2013 Public Defender's report, devoted to the issue of overcrowding,<sup>194</sup> which stated that Israel accorded each inmate approximately 3 square meters of living space, contrasted with an average of 8.8 meters in western countries. Page 4 of the report offers numerous comparators and depicts Israel as an outlier, but notably does not list the United States among the western countries.<sup>195</sup> The same trend repeats itself when measuring number of inmates per cell.<sup>196</sup>

The report's divergence from the U.S. path is evident not only from its choice of comparative role models, but also from its choice of the unit of measurement for overcrowding. The *Plata* litigation addressed the overall number of prisoners in the correctional system compared to the system's design capacity, and the resulting order required the California Department of Corrections and Rehabilitation to release enough inmates to achieve a 137.5% occupancy.<sup>197</sup> By contrast, the Israeli measure, used in other European countries, assesses overcrowding using square meterage per inmate or number of inmates per cell. This measure is, arguably, a much better indicator of the conditions of incarceration and their immediate impact on the inmates' quality of life. Indeed, in December 2017, Nick Jones calculated the occupancy in California prisons in the supposedly *Plata*-compliant era. He found no less than 15 state prisons were still overcrowded, because the *Plata* measures pertained to the system as a whole, rather than to individual institutions.<sup>198</sup> Measuring overcrowding by territory has the additional advantage of enabling comparisons between inmates in different institutions; indeed, as the

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<sup>193</sup> HCJ 1892/14 ACRI *vs. the Legal Advisor to the Government* (decided Feb. 2, 2017).

<sup>194</sup> Public Defender's Office, *Prison Overcrowding in Israel*, July 2013.

<sup>195</sup> *Id.* at 4.

<sup>196</sup> *Id.* at 5.

<sup>197</sup> See *Brown v. Plata*, 563 U.S. 493, 503-41 (2011).

<sup>198</sup> Hadar Aviram, *Are CA Prisons Really Less Crowded?* California Correctional Crisis Blog (Jan. 17, 2018, 12:13 PM), <https://californiacorrectionscrisis.blogspot.com/2018/01/are-ca-prisons-really-less-crowded.html>.

statement of facts by the Court explains, while a minority of inmates enjoyed 4.5 square meters, most of them were housed under much more crowded conditions, with more than 40 percent of inmates living in less than three meters per person. Another advantage of this measurement is that it allows for a discussion of each inmate's territorial share in common areas, such as bathrooms and showers— notably, in *Plata*, the calculation method obfuscated the fact that many of these inmates were housed in triple bunks in formerly public areas of the prison, such as the San Quentin gym.<sup>199</sup>

The petition was colored, from its inception, by the state's efforts to avoid a court mandate. The correspondence between the parties reflects multiple reports arguing that the prison authority was in the process of constructing prisons, and the petitioners' replies that these long-term administrative promises were inadequate as solutions for the immediate problem.<sup>200</sup> While the decision itself refers to the challenge to dignity in the abstract, one of the petitioners' lawyers, Sigal Shahav, coordinator of the criminal justice clinic at the Academic Center for Law and Business in Ramat Gan, illustrated the problems in an article for Ha'aretz following the decision:

Such overcrowding increases the conflict between the prisoners and the violence and illness in the prison. These difficult conditions compound other problems: old, decrepit structures, some of them with serious moisture problems; lack of proper ventilation causing extreme temperature; in some correctional institutions the showers are located above crouching bathrooms, and sometimes the bathrooms and showers are separated from the cell by a mere curtain; because of the poor hygiene conditions there is a pest problem that hurts the prisoners.<sup>201</sup>

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<sup>199</sup> Laura Sullivan, *San Quentin's Gym Becomes One Massive Cell*, NPR (July 7, 2008, 11:43 AM), <https://www.npr.org/templates/story/story.php?storyId=92296114>.

<sup>200</sup> HCJ 1892/14 *Association for Civil Rights in Israel v. the Minister of Security* (2017), 7.

<sup>201</sup> Sigal Shahav, *Life in Three Square Meters*, HA'ARETZ, July 23, 2017.

An example of the shifting inspiration sources can be found in a story in Ha'aretz newspaper from 2017, which reports of a Belgian method for reducing overcrowding: Belgian inmates alternate between a week in prison and a week at home, enabling two inmates to "occupy" one bed by rotation.<sup>202</sup>

The decision in the overcrowding case led to a legislative release valve. The Prison Ordinance had already been amended in 1993 to create a release valve during overcrowded periods.<sup>203</sup> The Act to Amend the Prison Ordinance [Temporary] 2018 created an additional mechanism for shortening prison sentences, in the event that overcrowding persists despite the valve. The new amendment categorized prisoners by the length of their sentences, stating an incarceration term for each category.<sup>204</sup> As the Act was being proposed, a uniquely Israeli wrinkle unfolded: A story in Ha'aretz newspaper alerted the public to the fact that the new early release regime would set free 300 "security prisoners" – Palestinians convicted of terrorist acts.<sup>205</sup> As a consequence, the bill was amended, and the final excluded people incarcerated for terrorist acts.<sup>206</sup>

As with the *Plata* litigation, the prison overcrowding decision met compliance challenges at the prison level. In August 2018, Ha'aretz reported that prisoners at Ma'asiahu prison complained that nothing in their incarceration conditions had changed after the decision, and that their efforts to sue the state for the violations were met with retaliation and sabotage by prison personnel.<sup>207</sup> The state's

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<sup>202</sup> Shlomo Papirblatt, *Belgian Inmates Go Part Time: Spending a Week in Prison and a Week at Home*, HA'ARETZ, Oct. 11, 2017.

<sup>203</sup> Prisons Ordinance Amendment (No. 13) (Administrative Release), 5753-1993, HH No. 1426 p. 126 (Isr.).

<sup>204</sup> Prisons Ordinance Amendment (No. 18), 5760-2000, HH No. 1752 p. 284 (Isr.).

<sup>205</sup> Josh Breiner, *Israel Expected to Free 300 Palestinian Prisoners Due to Overcrowding*, HA'ARETZ (Oct. 6, 2018, 10:15 PM), <https://www.haaretz.com/israel-news/israel-expected-to-free-300-palestinian-prisoners-due-to-overcrowding-1.6532340>.

<sup>206</sup> Josh Breiner, *Israel Advances Bill to Reduce Prison Overcrowding That Excludes Security Prisoners*, HA'ARETZ (Oct. 29, 2018, 12:37 PM), <https://www.haaretz.com/israel-news/.premium-israel-advances-bill-to-reduce-prison-overcrowding-that-excludes-security-prisoners-1.6601500>.

<sup>207</sup> Josh Breiner, *Inmates in Ma'asiahu Prison: The Prison Authority is Preventing Us from Suing the State for the Violation of the HCJ Decision*, HA'ARETZ, August 23, 2018.

lack of compliance with the timetable set by the Court was the source of additional litigation. Moreover, ACRI continued to press the state, through the courts, about the implementation of the decision on so-called “security prisoners”, leading to a set of specialized solutions for this inmate population.<sup>208</sup>

The prison overcrowding litigation represents a mature and complicated approach toward the U.S. example. First, it reflects reliance on the American correctional landscape as a cautionary tale rather than an inspiration. At the same time, it represents a sophisticated approach toward U.S. civil rights litigation, adopting some important tactics such as prison documentation and international comparison and rejecting others, such as the measuring unit for overcrowding. It also reflects the increasing reliance on university clinics—a model of legal education adapted from U.S. schools—as important hubs of civil rights litigation. And finally, it reflects a healthy interest in locating alternative role models and sources of penological inspiration.

This last issue is evident in another example from the era of contention—the Act for Prohibition of Prostitution Consumption.<sup>209</sup> The law created an administrative offense, Consuming Prostitution, punishable by a considerable fine.<sup>210</sup> The Act modified legal status of sex work in Israel: the Penal Code never explicitly prohibited prostitution in itself, but it did criminally proscribe “keeping a place for the purpose of prostitution.”<sup>211</sup> The original purpose behind the offense was to target pimps and exploiters of sex workers, while leaving the sex workers themselves out of the criminalization framework; indeed, Supreme Court decisions from the 1990s instructed lower courts to interpret the offense according to the social purpose of eradicating the pimping phenomenon.<sup>212</sup> But the

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<sup>208</sup> ACRI, *Overcrowding in Prison and Arrest Facilities in Israel—Update*, August 8, 2008.

<sup>209</sup> Prohibition on Prostitution Consumption Law (Temporary Order and Legislative Amendment), 5779-2019, HH No. 1258 p. 58 (Isr.).

<sup>210</sup> *Id.* at ¶ 4.

<sup>211</sup> Penal Law, 5737-1977 sec. 204 (Isr.).

<sup>212</sup> Criminal Appeal 2249/92 *Hertzl Gavison v. the State of Israel*, available on Takdin, <https://www.takdin.co.il/search/%D7%A2%D7%A4%202249%2092%D7%A8%D7%A6%D7%9C%D7%92%D7%91%D7%99%D7%96%D7>

unintended consequence of the offense was the frequent criminalization of sex workers who worked from home.<sup>213</sup> Ironically, more sex workers were charged under the law that was meant to protect them than pimps<sup>214</sup>, perversely incentivizing sex workers who hoped to avoid prosecution to work in the unprotected streets.

But even this poorly designed legal arrangement was better than its U.S. counterparts, which criminalize both sides of the sex work transaction in all states but one.<sup>215</sup> In Nevada, ten counties legalize prostitution if conducted in a “licensed house of prostitution.”<sup>216</sup> All other states place the sex workers themselves under threat of incarceration, with the possibility of more severe sentencing for repeat offenders.<sup>217</sup>

The Israeli proposal explicitly rejected this aspect of the U.S. model, affirming its commitment to the view that sex workers were exploited, vulnerable victims, rather than criminal perpetrators. Following the Nordic Model,<sup>218</sup> the Israeli law explicitly targets clients of sex workers, including recipients of “lap dances” at strip joints, and in the future is designed to offer an educational alternative to the fine in the form of a “John school” equivalent (a privately provided workshop for sex work consumers already operates in Israel.)<sup>219</sup>

Importantly, the Swedish model is not clean of doubts. Naomi Levenkron, an expert on sex work policy and one of the new law’s

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<sup>213</sup> Revital Khovel, *How Prostitutes Became Vulnerable in their Homes*, HA’ARETZ, Oct. 7, 2014.

<sup>214</sup> *Id.*

<sup>215</sup> Ronald Weitzer, *Prostitution Control in America: Rethinking Public Policy*, 32 CRIME, L. & SOCIAL CHANGE 83 (1999).

<sup>216</sup> NRS 201.354. Brothels are not permitted in a county whose population is 700,000 or more [NRS 244.345]. All prostitutes must use condoms [NAC 441A.805] and be tested weekly for sexually transmitted diseases (STDs) and monthly for HIV [NAC 441A.800].

<sup>217</sup> Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN’S L.J. 47 (1995).

<sup>218</sup> Ane Mathieson, Easton Braman and Anya Noble, *Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. OF SOCIAL JUSTICE 367, 2016.

<sup>219</sup> Itay Ilnai, *We Have to Delegitimize, so that Going to a Prostitute Won’t Be a Bar Mitzvah Gift*, YEDIOT AHARONOT (Jan. 3, 2011), [https://www.yediot.co.il/articles/0,7340,L-5440505,00.html?fbclid=IwAR3Fa\\_-](https://www.yediot.co.il/articles/0,7340,L-5440505,00.html?fbclid=IwAR3Fa_-).

critics, points out that Sweden actively promotes client criminalization around the world and appointed a special consul for this purpose.<sup>220</sup> She also explains that the Swedish police not only arrest clients, but also notify landlords about sex work occurring in their home, with the unfortunate consequence of eviction or increased rent for the sex workers themselves, who continue to provide sex services under more vulnerable conditions.<sup>221</sup> Levenkron expresses doubts about the powers of a criminal sanction in the face of “the simple fact that men continue to rape, murder, and sexually harass regardless of the existence of legal prohibition.”<sup>222</sup> She finds irony in that

at a time in which feminism has liberated itself from the burden of law, excoriated the legal system, and turned to lynching rapists and harassers in the Facebook town square, it finds it appropriate to subject the women it regards as most vulnerable in society to a system it regards as patriarchal, oppressive, and discriminatory.<sup>223</sup>

Levenkron’s important critique notwithstanding, it seems that the social ills she identifies would be considerably worsened by adopting the U.S. model, which criminalizes the sex workers themselves.

This last point is generalizable to much of the criminal justice reform characterizing the Era of Contention. The Israeli solutions to problems such as sentencing disparities, prison overcrowding, and sex work, are not ideal, but they represent a clear trend of departure from blindly following United States reforms. U.S. criminal justice policy is either clearly rejected or adopted and then departed from. When U.S. criminal justice inspires, it is often in its adoption of alternative or dissenting ideas, such as community courts, john schools, and prisoner rights litigation. This recent trend of awakening calls for a broader

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<sup>220</sup> Naomi Levenkron, *Sex Work, Politics, and In Between*, HA’ARETZ (Oct. 12, 2018), <https://www.haaretz.co.il/opinions/premium-1.6593420>.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

inquiry into the similarities between the two countries, which might explain why it has come so late in the process.

As with the heyday of law and order, the era of contention reflects a policy transfer via both emulation and elite networking. Both the punitive proposals and their nonpunitive alternatives are emulations of trends existing in the United States, which is not uniformly punitive: community courts and sex worker customer reeducation exist side by side with private incarceration and mandatory minimums. Moreover, supporters and opponents of punitive policies alike appeal to their familiarity with the U.S. system, either by explicitly mentioning visits to the United States or by signaling familiarity through the comparative materials cited.

A remarkable aspect of the Era of Contention is the increasing influence of U.S.-educated academics on local controversies about policymaking. It is impossible to overestimate the impact of American legal education, particularly in the areas of critical legal studies, law and society, and critical writings about penology, on the Israeli academic scene. As mentioned above, Pnina Lahav identifies several stages in the “Americanization” of Israeli academe,<sup>224</sup> culminating in its “peak” from 2008 onward—the advent of the “era of contention.” Unsurprisingly, the arguments made by opponents of punitive U.S. policies echo American scholarship, and come from empirical legal studies, behavioral economics, critical legal studies involving gender and race, and the fields of law. What is especially interesting about Israelis returning from studying abroad is that not all join academia, and many of the people educated in the United States return to Israel to assume senior positions in government and policymaking, at the Ministry of Justice, the National Public Defender’s office, and various clinical centers at the heart of litigation. Far from simplistically representing the end of the United States “policy transfer” moment, this era reflects a complicated relationship with U.S. criminal justice, in which Israeli elite networking that acts against adopting U.S. policies is in itself the product of American critique of the same policies in their country of origin.

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<sup>224</sup> Pnina Lahav, *American Moment(s): When, How, and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools?*, 10 THEORETICAL INQUIRIES IN L. 653, 658 (2009).



## V: SIBLINGS IN DEVELOPMENT

## A. Applying U.S. Political Development to Criminal Justice

What can the two models of policy transfer teach us about the United States, Israel, and their interrelationship? The most important thing is that “criminal justice policy” is not a monolith, and that tendencies to adopt U.S. policies, as well as conscious decisions to deviate from them, are both done *in reference to* the United States. Different stakeholders in Israel have different ways of relating to U.S. policies: lawmakers seeking legitimacy and public support rely on American-inspired rhetoric devices, such as a claim of rising crime and danger to the public, whereas elite professionals, such as U.S.-educated criminal justice academics and senior policymakers, tend toglom onto the critical writing in the United States to oppose the adoption of unhealthy policies.

But why the United States, of all places? The answer might lie in the literature problematizing the perception of the United States as a developing country in the context of criminal justice. In the Slate magazine column “If It Happened There”, Joshua Keating narrates current events in U.S. politics using the journalistic style usually associated with reporting events in foreign countries. Here, for example, is Keating’s rewriting of the firing of James Comey:

The surprise dismissal of a powerful security services chief Tuesday night is widely seen here as a part of strongman President Donald Trump’s efforts to sideline critics and consolidate power, raising concerns about the state of democracy and the rule of law in this fragile but strategically vital North American country.

...

Still rated “Free” by the nongovernmental monitoring organization Freedom House, the United States is fiercely proud of its democratic tradition and the independence of its judiciary. When Trump, an ultranationalist former oligarch who has in the past

questioned the motives of judges who rule against him, took power in January, many experts feared his tenure could erode the influence and independence of America's democratic institutions. So far, most of those fears have not come to pass, as some of Trump's most controversial initiatives have been blocked by the judiciary and the legislature. But a key legislative victory early this month—rolling back most of the previous regime's health care initiatives—as well as this latest purge have reignited concerns among opposition leaders that the country's weakened institutions may not be enough to rein in Trump's ambitions.<sup>225</sup>

The humorous effect of Keating's column comes from the fact that the author describes a country that self-identifies as a first world, developed international leader, using the paternalistic, quasi-anthropological language usually used by first-world reporters to describe developing countries. But the outcome is thought provoking: Is there a real qualitative difference between United States politics and those of developing countries?

In the last three decades, American Political Development (APD), a subdiscipline of political science, has employed qualitative methods to examine the historical development of American politics. Rogan Kersh defines the discipline as follows:

APD focuses on the causes, nature, and consequences of key transformative periods and central patterns in American political history. More than other political scientists, APD scholars look to historical processes to analyze governing structures and policy outcomes, and to build theories about political change. More than most historians, APD analysts draw on evidence from the past to illuminate broad questions about today's

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<sup>225</sup> Joshua Keating, *If It Happened There: Political Chaos as Regime Purges Powerful Security Chief*, SLATE (May 10, 2017), [http://www.slate.com/blogs/the\\_slatest/2017/05/10/how\\_would\\_the\\_u\\_s\\_media\\_cover\\_james\\_comey\\_s\\_firing\\_if\\_it\\_happened\\_in\\_another.html](http://www.slate.com/blogs/the_slatest/2017/05/10/how_would_the_u_s_media_cover_james_comey_s_firing_if_it_happened_in_another.html).

U.S. polity and its idiosyncratic institutional features. APD researchers may also be distinguished from most historians by their willingness to advance comprehensive theories about American institutions, particularly the national state, and about governance.<sup>226</sup>

Some of the questions that APD scholars are interested in pertain to some sociopolitical aspects of life in the United States which, compared to other developed nations, seem to lag behind. For example, John Skrentny's *The Minority Rights Revolution*<sup>227</sup> examines the 1970s efforts toward racial equality in light of previous events, such as the aftermath of World War II and the Iron Curtain. Similarly, Paul Frymer's *Black and Blue*<sup>228</sup> and Karen Orren's *Belated Feudalism*<sup>229</sup> both discuss the historical and political causes for the weakness of the U.S. labor movement. Frymer shows a policy of "divide and conquer" between racial rights and labor rights, and Orren shows a disconnect between labor governance and democratic politics. But the APD engagement with issues of class and race has, so far, failed to encompass issues related to the criminal justice system, which has heavy implications for the failure to achieve class and racial equality.

In his keynote address at a Boston University symposium, Malcolm Feeley sought to harness insights from APD to understand criminal justice.<sup>230</sup> As Feeley argues, APD tends to rely on explanations of fragmentation and "weak state" to explain U.S. failures of creating a robust and functioning welfare policy. Applying these insights to the criminal justice area requires some modification. Feeley argues that, throughout its history, American criminal justice policy has been consistently described as failing to achieve its goals, but largely so because it has been compared to industrialized Western nations,

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<sup>226</sup> Rogan Kersh, *The Growth of American Political Development: The View from the Classroom*, 3 PERSP. POL. 335, 335 (2005).

<sup>227</sup> JOHN SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (1<sup>ST</sup> ED 2002).

<sup>228</sup> PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* (2008).

<sup>229</sup> KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1992).

<sup>230</sup> Malcolm Feeley, *How to Think About Criminal Court Reform*, 98 BU LAW REVIEW 673 (2018).

particularly Western European countries, and specifically Nordic countries.<sup>231</sup> These countries are typically regarded as “developed countries,” or the “global North”, and contrasted to “developing countries” or “the global South”, which are characterized by political instability, high level of interpersonal violence, wide gaps in income, and painful histories of slavery and racial oppression.<sup>232</sup> Feeley’s unflinching gaze on the two categories of countries leads him to conclude that “by many of the indicators I have set out above, the United States is ranked well below Western Europe, and toward the Latin American end of the spectrum.”<sup>233</sup>

While valuable as a rhetorical statement, Feeley’s observation is also valuable as offering an explanatory tool. The many failures of criminal justice reform in the United States—police violence, courtroom dynamics, the bail system, and the sentencing system—are easier to understand when drawing analogies to South American and other developing countries who suffer from similar problems. The source of the criminal justice system’s resistance to reform can only be found if we

dig deeper and seek to understand [it] in light of the culture and governmental structure. No serious diagnosis of the problems of education, public health, and criminal justice administration in developing countries occurs without its being anchored in an appreciation for the weaknesses in governmental structures. Similarly, too, I suggest, diagnosis of the obstacles in the American criminal process must be

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<sup>231</sup> Chris Weller, *Dutch Prisons are Closing Because the Country is So Safe*, THE INDEPENDENT, May 31, 2017, at <https://www.independent.co.uk/news/world/europe/dutch-prisons-are-closing-because-the-country-is-so-safe-a7765521.html> (discussing Nordic countries tend to be idealized for their humane penology); Christina Sterbenz, *Why Norway’s Prison System is So Successful*, BUSINESS INSIDER, Dec. 11, 2014, at <https://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12>, but cf Vanessa Barker, *Nordic Nationalism and Penal Order: Walling the Welfare State* (2017) (discussing closer look reveals problematic nationalistic trends emerging from recent waves of immigration).

<sup>232</sup> Feeley, *supra* note 230, at 729.

<sup>233</sup> *Id.* at 729-730.

anchored in a broader understanding of the failures of public administration and governmental structures.<sup>234</sup>

B. Israel and the United States. as sibling developing countries

Feeley's striking observation has important implications beyond U.S. criminal justice. There is an established body of scholarship that analyzes Israeli law in general, and Israeli criminal justice in particular, as products of Israel's political development and colonial legacy. In *Argonauts of the Eastern Mediterranean*,<sup>235</sup> Assaf Likhovski marshals historical examples to show how Israeli adoption of foreign policies was not merely a rational examination of the advantages of comparative legal structures, but also an act carrying a considerable symbolic load. Relying on Eric Posner's ideas about norms as a form of signaling and on David Nelken's ideas about adopting foreign norms as tokens of willingness to cooperate internationally, Likhovski explains two policy decisions—the Israel-Harvard project of the 1950s and the Israeli aid to Africa in the 1960s—as efforts to alleviate the “anxiety of influence” related to Israeli law, which in the 1950s was an amalgam of Islamic, French, and English norms and institutions. But the remedy for this eclecticism was even more eclecticism—seeking “the most advanced [legal] thought and best [legal] experience wherever it may be found.”<sup>236</sup> This comparative approach made Israel appear cosmopolitan and dressed up its eclecticism as forward-thinking originality and openness to considering (albeit not blindly accepting) models from other countries. Likhovski explains that Israel's heterogeneous legal mosaic was perceived by commentators as reflecting Israel's social and ethnic complexity. In the area of criminal law in particular, Likhovski quotes Israeli Supreme Court Judge Haim Cohn, who claimed that the new penal code “[would] be one of the contributions, however modest and ineffectual they may seem to be, to the progress of mankind under the

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<sup>234</sup> *Id.* at 730.

<sup>235</sup> Assaf Likhovski, *Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling*, 10 THEORETICAL INQUIRIES IN LAW 619 (2009).

<sup>236</sup> *Id.*

rule of law.”<sup>237</sup> Israel’s reliance on foreign influence was, thus, a way to portray Israel as part of the civilized world and refashion its legal eclecticism into a powerful display of advanced policymaking.

As Likhovski argues, the project of adopting and signaling a cosmopolitan perspective cannot be divorced from Israel’s geographical location and its colonial history. And, indeed, as Alexandre Kedar explains, the study of comparative law cannot be divorced from the legacy of colonialism and from the spatial, geographical dimension.<sup>238</sup> Israel’s identity as a former colony (a developing “learner”) is embedded in its legal DNA. Yael Berda identifies the roots of its ostensibly modern surveillance routine in British colonial practices.<sup>239</sup> Mitra Sharafi identifies the roots of its lawyering profession, like those of the other British colonies, in the history of the British metropole.<sup>240</sup> Various statutory practices in Israel, in areas as diverse as corporations,<sup>241</sup> tax,<sup>242</sup> and water law,<sup>243</sup> are embedded in its colonial history, as is its entire property law structure, which hails back to its days as an Ottoman colony.<sup>244</sup> Even its constitutional structure (Israel’s “basic laws”) evinces deep colonial influences.<sup>245</sup> Specifically in the context of criminal justice, Binyamin

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<sup>237</sup> *Id.*

<sup>238</sup> Alexandre (Sandy) Kedar, *THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY* 95 (Irus Braverman, Nicholas Blomley, David Delaney and Alexandre (Sandy) Kedar eds., 2014).

<sup>239</sup> Yael Berda, *Managing Dangerous Populations: Colonial Legacies of Security and Surveillance*, 28 *SOC. FORUM* 627 (2013).

<sup>240</sup> Mitra Sharafi, *A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire*, 32 *L. AND SOC. INQUIRY* 1059 (2007).

<sup>241</sup> Ron Harris & Michael Crystal, *Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine*, 10 *THEORETICAL INQUIRIES IN L.* 561 (2009).

<sup>242</sup> Assaf Likhovski, *Is Tax Law Culturally Specific? Lessons from the History of Income Tax Law in Mandatory Palestine*, 11 *THEORETICAL INQUIRIES IN L.* 725 (2010).

<sup>243</sup> David Schorr, *Water law in British-ruled Palestine*, 6 *WATER HIST.* 247 (2014).

<sup>244</sup> Robert Home, *An ‘Irreversible Conquest’? Colonial and Postcolonial Land Law in Israel/Palestine*, 12 *SOC. & LEGAL STUD.* 291 (2003).

<sup>245</sup> Amihai Radzyner, *The Irish Influence on the Israeli Constitution Proposal, 1948*, 69 *in* *THE CONSTITUTION OF IRELAND: PERSPECTIVES AND PROSPECTS* (Eoin Carolan ed., 2012).

Blum, Yoram Rabin and Barak Ariel identify deep British influences on Israel's procedure for admitting confessions into evidence,<sup>246</sup> despite the 1995 shift to a German-influenced criminal code.

If we accept this extension of Feeley's thesis—namely, that Israel, not only the United States, is a developing country from a criminal justice perspective—a possible explanation why U.S. correctional policy has been seductive and interesting to Israel might rely on their similarities as developing countries. Looking at both countries through the lens of development theory highlights several relevant similarities. First, both countries have a strong legacy of ethnic and racial conflict, which impacts the composition of the population subjected to criminal justice control. Second, both countries are characterized by high levels of interpersonal violence and, relatedly, a high concentration of guns. In the United States, gun ownership is the outcome of both illegal purchase and permissive gun laws,<sup>247</sup> and in Israel, guns circulating in civilian hands are related to the wide access—legal and illegal—to military weaponry even in civilian spaces.<sup>248</sup> In both countries, fetishization of protectionism and aggressive bravery plays into the culture of interpersonal violence. Third, both countries are characterized by unusual levels of police overreach and brutality,<sup>249</sup> far beyond their Western industrialized counterparts. And fourth, both countries rank considerably higher

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<sup>246</sup> Binyamin Blum, Yoram Rabin & Barak Ariel, *The Admissibility of Confessions Under Israeli Law: Procedural and Substantive Differences Between the "Free and Voluntary" Standard and the Judicial Exclusionary Rule for Unlawfully Obtained Evidence*, 46 MISHPATIM 815 (2018).

<sup>247</sup> Paul M. Reeping, Magdalena Cerdá, Bindu Kalesan, Douglas J. Wiebe, Sandro Galea, and Charles C. Branas, *State Gun Laws, Gun Ownership, and Mass Shootings in the US: Cross Sectional Time Series*, 34 BRITISH MEDICAL JOURNAL 1542 (2019).

<sup>248</sup> Rella Mazali, Smadar Ben Natan, Niv Khakhlili and Galit Lubatzki, *Unsecured: Weaponry in Civilian Space: How Many Weapons and How Are They Supervised?* ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL, 2017, <https://law.acri.org.il/pdf/Loose-Guns.pdf> (arguing that there is a proliferation of insufficiently regulated weapons in Israeli society, resulting in preventable crimes, specifically domestic violence.)

<sup>249</sup> GUY BEN PORAT AND FANNY YUVAL, *POLICING CITIZENS: MINORITY POLICING IN ISRAEL* (2019) (discussing the challenges and risks of over-policing against minorities in Israel); FRANKLIN ZIMRING, *WHEN POLICE KILL* (2017) (arguing that official statistics fall short of exposing the full phenomenon of lethal force exercised by police in the United States).

than other Western industrialized countries in perception of political corruption—in 2018, the United States at 22 and Israel at 34.<sup>250</sup>

The context in which these characteristics arise is, of course, different for the two countries. The United States has a long and difficult legacy of slavery;<sup>251</sup> whereas in Israel the ethnic conflict stems from the Israeli-Palestinian conflict and the Occupation,<sup>252</sup> as well as from ethnic and religious tensions within the Jewish population.<sup>253</sup> Moreover, gun ownership has a very different cultural significance in the two countries, though they both share fear and concern about guns ending up in inappropriate hands. And the differences in scale matter a great deal; it has often been said that “American criminal justice” is not a monolith, as there is considerable difference among state criminal justice policies.<sup>254</sup> Still, on a national scale, the cultural comparisons are striking. The trend of comparison is especially evident when comparing the Netanyahu and Trump administrations’ positions on “crimmigration,” drug enforcement, severity of punishment, and racial/ethnic discrimination in application of laws. Some manifestations of these policies have been particularly similar: The separation of immigrant children from their families at the U.S.

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<sup>250</sup> Transparency International, *Corruption Perception Index 2018*, <https://www.transparency.org/cpi2018>.

<sup>251</sup> EUGENE GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1976).

<sup>252</sup> AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* (2017).

<sup>253</sup> GUY BEN PORAT, *BETWEEN STATE AND SYNAGOGUE: THE SECULARIZATION OF CONTEMPORARY ISRAEL* (2013) (arguing for a process of division between religion and the state); YOAV PELED AND HORIT HERMAN PELED, *THE RELIGIONIZATION OF ISRAELI SOCIETY* (2019) (arguing for a reversal of the secularization trend and an increased influence of religion over daily life in Israel).

<sup>254</sup> JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).



border,<sup>255</sup> widely criticized both domestically<sup>256</sup> and internationally,<sup>257</sup> was reverberated in the incarceration of African asylum seekers at Saharonim prison in the desert, a policy move which similarly provoked international critique.<sup>258</sup> Similarly, the Trump Administration's enthusiasm for the death penalty for drug dealers,<sup>259</sup> even as the penalty is in its final throes,<sup>260</sup> is echoed by legislative efforts in Israel to make capital punishment a de-facto option<sup>261</sup>--with supporters in both countries making deterrence arguments.

#### CONCLUSION: EXPLAINING ISRAEL'S FASCINATION WITH AMERICAN CRIMINAL JUSTICE

How can the similarity between the two countries, particularly through the lens of political development, explain the impact of American criminal justice on Israeli policy? In *Lesson-Drawing in Public*

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<sup>255</sup> Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>.

<sup>256</sup> Phil McCausland, Patricia Guadalupe & Kalhan Rosenblatt, *Thousands across U.S. join 'Keep Families Together' march to protest family separation*, NBC NEWS (June 30, 2018, 2:49 PM), <https://www.nbcnews.com/news/us-news/thousands-across-u-s-join-keep-families-together-march-protest-n888006>.

<sup>257</sup> Nick Cumming-Bruce, *U.N. Rights Chief Tells U.S. to Stop Taking Migrant Children from Parents*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/world/europe/trump-migrant-children-un.html>.

<sup>258</sup> Amir Alon, *All remaining asylum seekers released from Saharonim Prison*, YNET (Apr. 15, 2018, 1:22 PM), <https://www.ynetnews.com/articles/0,7340,L-5231024,00.html>.

<sup>259</sup> Eli Rosenberg, *Trump is 'most excited' about death penalty for drug dealers. Rights groups say it's a terrible idea.*, WASH. POST (Feb. 15, 2018, 5:24 PM), [https://www.washingtonpost.com/politics/2019/02/15/trump-again-praises-strongmen-who-execute-drug-dealers-rights-groups-say-its-terrible-idea/?utm\\_term=.d8e1ced29722](https://www.washingtonpost.com/politics/2019/02/15/trump-again-praises-strongmen-who-execute-drug-dealers-rights-groups-say-its-terrible-idea/?utm_term=.d8e1ced29722).

<sup>260</sup> See generally Daniel LaChance, *The Death Penalty in the 21st Century*, OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (Henry Pontell ed.) (2019) (recounting reasons for the declining popularity of the death penalty).

<sup>261</sup> Daphne LiEl, *Capital Punishment for Terrorists To Be Voted On*, MAKO (Nov. 6, 2018), [https://www.mako.co.il/news-military/politics-q4\\_2018/Article-79073ad5f67e661004.htm](https://www.mako.co.il/news-military/politics-q4_2018/Article-79073ad5f67e661004.htm).

*Policy*,<sup>262</sup> Richard Rose explains that importing policies and ideas is a politically contested process, in which the choice who to learn from depends upon a subjective definition of proximity, epistemic communities linking experts together, functional interdependence between governments, and the authority of intergovernmental institutions.<sup>263</sup> Because this is a subjective and contested process, what Israeli policymakers see in the United States varies both generationally and across partisan lines. While in the early 1980s, as a country recently liberated from the legal shackles of British precedent, the U.S. example might have been appealing as a former British colony, and in the early 1990s, as a beacon of civil rights (at least on paper); in the late 1990s and 2000s U.S. public policy offers a glance in the mirror and the recognition of an older sibling, complete with virtues and warts not dissimilar from the Israeli ones.

The emergence of academic and legal elites in Israel that have been educated to critique (and often fault) the U.S. model is crucial. As Rose explains in *Lesson Drawing*, a crucial part of importing policies across borders is an assessment of their implementation in their home country—even before making the necessary cultural adjustments to the new policy climate.<sup>264</sup> That this assessment has become less glowing in the last decade and a half is a triumph of the critical work of legal and socio-legal scholars in the United States, whose critique resonated with their Israeli students and colleagues. In that respect, the era of contention can be explained in two ways: the legacy of American mass incarceration finally coming home to roost in international public opinion, and the maturation of Israeli criminal justice policy into a psychological rejection of the American “parental” authority.

It is imperative to encourage policymakers, legislators, and litigators in Israel to view future developments in the United States with a careful critical eye especially now, as human rights advocates set out to fight the Netanyahu regime’s Trumpian tendencies to make criminal law an instrument for disenfranchising, delegitimizing, and oppressing an increasing number of social sectors. While a change in both countries cannot come too soon, if reform is delayed in the United

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<sup>262</sup> RICHARD ROSE, *LESSON-DRAWING IN PUBLIC POLICY: A GUIDE TO LEARNING ACROSS TIME AND SPACE* (1993).

<sup>263</sup> See Richard Rose, *What Is Lesson Drawing?* 11 J. OF PUB. POLICY 3 (1991).

<sup>264</sup> *Id.*

States, Israeli criminal justice must vocally and clearly indicate its independence.