

Determination of Starting Sentences in Israel—System and Application



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The Israeli Penal Law Bill (Amendment No. 92, Structuring Judicial Discretion in Sentencing) 5766-2006 proposes that a committee be set up to establish sentences that will serve as starting points for judges in their sentencing deliberation (starting sentences). The Israeli Minister of Justice asked the authors to propose starting sentences for three prevalent serious offences in order to show the Knesset (the Israeli parliament) the methodology of determining such starting sentences and to help facilitate the debate about the consequences of these new guidelines. The ministers intended the Knesset to legislate these proposed starting sentences in the appendix to the law so that they would take effect with the amendment while allowing the newly created Starting Sentences Committee to amend these starting sentences at a later stage. The authors proposed starting sentences for robbery, burglary, and aiding illegal aliens and submitted the study to the Knesset. The details of the bill are currently being debated in the Constitution, Law and Justice Committee of the Knesset, in preparation for second and third reading.

The following article is an excerpted English translation of the general part of the study, which was published in Hebrew on the Knesset Web site,¹ and of the proposed starting sentence for robbery.

I. Background

The Israeli Penal Law Bill (Amendment No. 92, Structuring Judicial Discretion in Sentencing) 5766-2006² states that the “guiding principle in sentencing is the existence of a punishment which is commensurate with the severity of the offence and the culpability of the defendant.”³ The bill further proposes that a committee be set up to establish starting sentences; it will be “entitled in respect of such offences as it sees fit, to prescribe sentences that are commensurate with those offences, when committed in circumstances which are not exceptional in terms of aggravating or mitigating factors” (“the typical case” O.G & R.K.).⁴ The determination of a starting sentence requires the approval of the Knesset’s Constitution, Law and Justice Committee, and will be published in *Reshumot* (The Official Gazette).⁵ According to the bill,

[W]hen determining the starting sentence, the committee will take into consideration the guiding

principle, and for this purpose will take into account the social value which has been harmed as a result of the commission of the offence, the degree of harm caused to it, the prevailing sentencing policy and the fitting sentencing policy.⁶

The Ministerial Committee on Legislation decided that severe and frequent offences would be assigned starting sentences and that these would be tabled for debate by the Constitution, Law and Justice Committee of the Knesset and integrated into the bill during the debates preceding the second and third reading of the bill.⁷

The purpose of this study, which was ordered by the Israeli Ministry of Justice, is to suggest starting sentences for three prevalent serious offences in accordance with the guidelines set out in the aforementioned bill. In the first part of the document, we shall clarify the nature of the starting sentence, in which cases it should be applied, and the manner in which the court ought to make use of the starting sentence when reaching a verdict. We shall also consider the particular difficulties entailed in determining initial starting sentences at a stage when no starting sentences for other offences have yet been established, as well as the manner of overcoming these difficulties. In the second section of the original document, we proposed starting sentences for three common offences: aiding and harboring illegal aliens, robbery, and burglary of a dwelling; in this shortened version of the report, we shall refer only to the offence of robbery. The proposals will be accompanied by an analysis of the offences and the factors which led us to arrive at the said recommendations.

II. Definition of a Starting Sentence

A. A Starting Sentence as a Punishment Commensurate with Typical Circumstances

The starting sentence is the sentence which preserves the correlation between the severity of the punishment and the typical case of the offence, when there are no aggravating or mitigating circumstances. Section 40C of the bill indicates that in determining the commensurate sentence, consideration must be given to the social value which has been harmed as a result of committing the offence, the degree of harm caused to it, the prevailing sentencing

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policy, and the fitting sentencing policy. The bill declares that the requirement to preserve the correlation between the severity of the offence and the culpability of the defendant on the one hand, and the severity of the sentence on the other hand, expresses the principle of desert. The starting sentences express the degree of gravity with which society regards the offence, thereby promoting a consistent approach to sentencing.

In each case, the judge is required to determine the sentence that fits the severity of the offence while considering aggravating and mitigating circumstances, using the starting sentence as his basis for making this determination. The judge is not compelled to impose the starting sentence. He is not even asked to impose the starting sentence (unlike judges in systems which use presumptive sentences—that is, sentences called for under a sentencing guidelines grid). The starting sentence must reflect the punishment commensurate with the typical case of the offence, not the gravest instance (at which the maximum sentence is directed) nor the least severe one (at which the minimum sentence is directed). All that the judge is required to do is to begin the process of thinking about the sentence from the starting sentence, then decide on the degree and direction of deviation from it by weighing all of the aggravating and mitigating circumstances. The judge must explain the relationship between the punishment which he has imposed and the starting sentence (§ 40L(3) of the bill).

B. The Difficulties Entailed in Determining Initial Starting Sentences

The determination of starting sentences is not solely an analytical or deductive process—it requires value-laden decisions regarding the severity of the various offences and a way to convert this level of severity to a commensurate sentence. No tool or standard exists to measure the compatibility of the starting sentences with the various offences, and no persuasive theoretical means is available which can identify the degree of punishment commensurate with a particular offence.

The determination of initial starting sentences when no starting sentences have yet been prescribed for other offences raises two difficulties particular to this stage. The first difficulty arises from the absence of a source of comparison regarding the degree of punishment. Whereas there is fairly wide empirical and intercultural agreement regarding the relative degree of severity of different offences, it is much more difficult to reach agreement regarding the absolute degree of punishment commensurate with an offence.⁸ In most cases, different people will grade the severity of different offences in a similar manner; however, far more variations will be found when the same people are asked to state what the commensurate punishment should be in terms of imprisonment periods for each of these offences. Consequently, after a number of starting sentences have been laid down, it will be easier to prescribe additional starting sentences based on the relative degree of severity between offences. On the other

hand, determining the initial starting sentences cannot rely on relative standards of severity in the absence of a source of comparison.

In order to deal with this difficulty, our choice of the initial offences in respect of which starting sentences would be established also took into account the existence of guiding case law concerning the degree of punishment imposed for those offences. Likewise, we analyzed the type of protected interest which was harmed as a result of the offence, the degree of harm caused to it, and the existing sentencing practices for the offence (as required by § 40I(b) of the bill). In some of the cases we also considered the sentencing guidelines applied elsewhere in the world.

A second difficulty particular to this initial stage of analysis concerns the definition of the “typical case.” In view of the importance of this issue to the remainder of the analysis, we shall consider it in depth in the next section.

C. The Definition of the “Typical Case”

The starting sentence must be commensurate with the “typical case”—that is, with the case in which the offence is committed in circumstances which are not exceptional in terms of aggravating or mitigating factors. Nonetheless, the characteristics of the typical case are unclear. A determination is required, among other things, regarding the criteria for assessing the circumstances “which are not exceptional in terms of aggravating or mitigating factors.” Should the case be the median or the most frequent one? Or, alternatively, should the criteria for choosing the typical case be normative rather than empirical? If indeed one chooses the most frequent case, should the frequency of each circumstance be examined separately and in this way assemble the typical case, or should one identify the typical case on the basis of all the circumstances?

We believe that at this stage, it would not be appropriate to make a sweeping determination regarding the characteristics of the typical case. There may be occasions where it will be preferable to apply a punishment which is commensurate with the median case (the case where about half the cases are of greater severity and half of lesser severity), and there may be occasions where it will be preferable to refer to the most frequent case (the case which characterizes the greatest proportion of offences). For other offenses, it might be appropriate to consider additional factors when determining the typical case. After gaining experience setting starting sentences, it is possible that criteria will also be established for determining the typical case.

In addition to the circumstances of the offence, a decision must also be made regarding the relationship between the starting sentence and the characteristics of the offender and the process. For example, should the punishment in the typical case refer to the punishment which would be imposed on a defendant who has no criminal record, or on a defendant who better reflects the typical defendant tried for the offence under consideration and thus has a criminal record? Likewise, on the assumption that the majority of defendants receive more lenient

sentences because of guilty pleas, should the proposed starting sentence be the sentence which would be imposed on defendants following a guilty plea or should it reflect the punishment which the court would impose following a trial? The need to refer to these difficulties arises when determining the initial starting sentences only; subsequently, it will be possible to rely on the latter determinations for the purpose of prescribing other starting sentences.

As we explain subsequently, it follows from the bill that the starting sentence must relate to the average offender and not to an offender devoid of a criminal record—although the Sentencing Guidelines Council in England states explicitly that its guidelines refer to defendants who have no criminal record.⁹ There is a great deal of logic behind the English decision, because starting sentences relate to offences as defined by statute and consequently the gravity of the offence must be assessed solely on the basis of the elements of the offence as defined (including the required *mens rea*). Still, there are offences where the typical offender has some sort of criminal record. As long as an offender's criminal record is average compared with others who commit the same offence, that record is generally not weighed as an aggravating circumstance. In fact, the absence of a criminal record is often weighed as a mitigating factor.

The language of the bill also takes this approach. The bill states that the absence of a criminal record is a mitigating factor (§ 40F(d)(4)) in the same way as the existence of an extensive criminal record is, in particular circumstances, an aggravating factor (§ 40F(e)(1)). If the absence of a criminal record is a mitigating factor, then it is clear that the starting sentence cannot relate solely to defendants devoid of a criminal record. Accordingly, the starting sentence will refer to the commensurate punishment in the event of the typical case of the offence committed by an offender with a criminal record typical of the perpetrators of that particular offence.

Another question is whether the starting sentence must refer to the punishment imposed following a guilty plea or to the punishment imposed after a full trial. We believe that the English model should be adopted in this regard, whereby the sentence designated in the sentencing guidelines relates to the punishment imposed by the court in the typical case following a trial.¹⁰ This approach is preferable because although it is legitimate to regard a defendant's guilty plea and any assistance he gives to the enforcement agencies as a mitigating factor (*see* § 40F(d)(5)), it is not legitimate to regard his decision to pursue a trial as an aggravating factor.

If the starting sentence were to refer to defendants who plead guilty, a plea of not guilty would be regarded as an aggravating factor. Moreover, the starting sentences will guide the courts in situations where they exert the greatest influence on the punishment, following a full trial. They will also guide the parties who choose to negotiate a sentence in the shadow of the trial, regarding the expected post-trial sentence. For these reasons, there would be no point in adapting the starting sentence to possible plea

bargains. At the same time, when identifying current sentencing practices, we shall also refer to sentences imposed after charge bargains (in contrast to sentence bargains) because in these cases, the punishment reflects judicial determination of the commensurate punishment for the agreed charges.

D. The Starting Sentence and the Average Sentence for an Offence

The starting sentence does not necessarily reflect the average punishment imposed for an offence. Occasionally, the typical case will be found in the lower end of the severity scale of the offence. Thus, it is possible, for example, that the typical case of theft refers to shoplifting without pre-planning or particular sophistication, but in other cases the theft entails greater sophistication and the stolen item is of greater value. In such a case, the starting sentence will relate to the typical case, which is also the less severe case; however, the average will be higher because it will also embrace more serious acts of theft. Naturally, the converse situation is also possible, where the typical case is graver than the average. Additionally, referring to the average is problematic in multiple offences cases where the starting sentence will relate only to the standard of punishment commensurate with the commission of a single offence.¹¹

In summary, the starting sentences recommended in this study will relate to the punishment which should be imposed on a defendant who has an average criminal record relative to individuals accused of the same offence and, following a full trial, has been convicted of the commission of the offence in circumstances which are not exceptional in terms of aggravating or mitigating factors.

III. The Starting Sentence for Robbery and Aggravated Robbery

A. General

Section 402 of the Penal Law provides that:

Robbery

402(a) A person who steals a thing and, at the time of the act or immediately before or immediately thereafter, carries out or threatens to carry out an act of violence to any person or property in order to obtain or retain the thing or to prevent or overcome resistance to its being stolen is said to commit robbery and is liable to imprisonment for fourteen years

(b) if the robber is armed with any dangerous or offensive weapon or is in a group or if, at or immediately before or immediately after the time of the robbery, he wounds, strikes or otherwise uses personal violence against a person, is liable to imprisonment for twenty years.

Accordingly, robbery is theft carried out with the use or threat of violence. The section contains two provisions. The first, which we shall call ordinary robbery, concerns

any theft carried out with the use or threat of force. The second, aggravated robbery, concerns cases where the robber was armed with a weapon or offensive instrument, acted in a group, or used violence during the course of the robbery. Because aggravated robbery includes every case of the use of violence, apart from a relatively few cases where the defendant acted alone without a weapon or instrument likely to cause harm and confined himself to threats without exercising violence, the majority of robbery cases will fall into this category. As we shall discuss subsequently, the prosecution occasionally charges defendants for offences of non-aggravated robbery even if violence or a weapon was used, in cases where the circumstances are not particularly grave (sometimes within the framework of plea bargains).

B. Supreme Court Guidelines

The Supreme Court decisions in appeals against sentences for robbery provide only limited guidance for this study and, accordingly, the benefit to be gained by a detailed analysis of the case law is small. First, there are no prominent leading decisions which focus on sentencing guidelines for robbers. Second, many of the Supreme Court decisions on this issue refer extensively to general deterrence, whereas the bill does not give this consideration substantial weight¹² in view of empirical findings which show that harsher sentencing does not promote deterrence.¹³ In particular, this consideration has no place at the stage of prescribing the starting sentence.¹⁴ Notwithstanding these points, a review of the case law may be of assistance as an additional source of enlightenment when evaluating other factors and the manner in which these factors are weighed in relation to the offence of robbery. For these reasons, we shall refer to the case law in brief.

The case law indicates that, ordinarily, the offence of robbery will draw a custodial sentence. Thus, for example, it was stated in the *Habibi* case¹⁵ that “as a rule offences of robbery will lead to actual imprisonment and the reasons for this are clear—the need for deterrence and retribution as well as incapacitating the offender for a suitable period. And there are some who are punished by many years of imprisonment, as is proper.” In general, under this approach the personal circumstances of the defendants are relevant only to the question of the length of imprisonment. At the same time, it would appear that in exceptional circumstances—such as in cases with only a single offence of robbery, a particularly young offender or an offender who has no criminal record and a strong chance of rehabilitation—it is possible, under current case law guidelines, to impose on the defendant a term of imprisonment which may be carried out through community service.¹⁶

The requirement set out in Supreme Court decisions that, as a rule, custodial sentence should be imposed for offences of robbery, is indicative of the place of this offence on the penal scale. From this point of view, the case law is of importance when seeking to propose starting sentences for single offences; beyond this application,

case law is of no assistance in prescribing the starting sentence.

C. The Prevailing Sentencing Practices—Source of Information

A better tool for assessing the prevailing standard of punishment may be found in sampling sentences of defendants convicted of robbery. Using the Nevo Sentencing database, we identified 400 sentences relating to robbery offences from 2005 through 2009. After filtering out cases in which the robbery was accompanied by an additional significant offence or cases which dealt with more than a single offence of robbery, the remaining 264 cases provided the basis for data analysis. Cases in which the additional offence was relatively light (e.g., staying as an illegal alien, conspiracy, or burglary) were not excluded from the sample, provided that the offence accompanied the act of robbery (i.e., was not a separate event). Likewise, situations were included in which the robber was convicted of an additional offence that resulted from the violence exerted during the commission of the robbery (offences such as injury or causing grievous bodily harm), because these characteristics were taken into account as part of the description of the act of robbery.

We analyzed the database using a linear regression, a statistical tool which helps to predict the expected sentence in cases with various characteristics. The statistical model is accompanied by descriptive statistics which present simple averages of sentences in the different cases.

D. The Prevailing Sentencing Practice—Analysis of the Data

In 89 percent of the cases we analyzed, the convicted defendant was sentenced to imprisonment. In 9 percent of the cases, the sentence was community service, and in 2 percent of cases no term of imprisonment or community service was imposed. In almost all the cases (99 percent), the defendants were sentenced to a suspended term of imprisonment (in the majority of instances, in addition to the custodial sentence). The most common period of suspension was twelve months of imprisonment (37 percent of cases); however, suspended terms of imprisonment of eighteen months (20 percent of cases) or twenty-four months (18 percent of cases) were also frequently given. In contrast, it was relatively unusual to impose a fine; a fine was imposed in only 9 percent of cases, with the majority of the fines ranging from NIS (new Israeli shekel) 1,000 to NIS 10,000.¹⁷ At the same time, in 61 percent of cases the victim was awarded compensation, the average sum being NIS 6,000.

Of the database cases, 28 percent concerned convictions for ordinary robberies (average sentence, twenty-four months of actual imprisonment) and 72 percent concerned convictions for aggravated robbery (average sentence, thirty-five months of imprisonment).¹⁸ It should be noted that the prosecution has wide discretion to choose the charges, because the vast majority of ordinary robbery cases entail at least one of the aggravating circumstances

set out in subsection (b) of the Penal Law. In at least 56 percent of the cases in which the defendant was convicted of robbery in non-aggravated circumstances, the facts on which he was convicted (usually following a guilty plea) included an aggravated circumstance (such as violence, commission of the offence with a group, or possession of a weapon).¹⁹ Of these cases, 5 percent even involved the use of serious violence, and in 9 percent cold weapons (such as knives) were used. In the majority of cases (73 percent), the section under which the defendant was charged was determined in a charge bargain. The significance of this finding is that the choice between the two types of robbery is largely dependent on the discretion of the prosecution, not merely on the circumstances of the event.

In 39 percent of the cases, the value of the property which was robbed did not exceed NIS 1,000 (average sentence, twenty-five months of imprisonment). In 42 percent of the cases, the monetary value ranged from NIS 1,000 to NIS 10,000 (on average, thirty-three months of imprisonment). In 12 percent of the cases, the robbery involved between NIS 10,000 and NIS 100,000 (on average, thirty-eight months of imprisonment), and in the remaining 7 percent of cases the sums exceeded NIS 100,000 (on average, fifty-six months of imprisonment).

Of the cases in the sample, 84 percent concerned the full commission of the offence (average punishment, thirty-four months of imprisonment) and 16 percent dealt with attempted robbery (average punishment, twenty-three months of imprisonment). Forty-two percent of all the convicted defendants had no substantial criminal record (on average, twenty-four months of imprisonment), 30 percent had some criminal history (on average, thirty-four months of imprisonment), and 28 percent had an extensive criminal record (more than three previous convictions or more than six previous incidents; on average, forty-three months of imprisonment).

In 4 percent of the cases, the court used its discretion not to revoke an existing suspended sentence or order that the suspended sentence and the sentence for the robbery at issue be served concurrently. In 25 percent of the cases, the suspension of a previous sentence was revoked, at least partly, so as to make it run consecutively to the sentence imposed (the average sentence imposed on these defendants was forty-five months of imprisonment, including the period resulting from the revocation of the suspended sentence). After setting off revoked suspended sentences, the term of imprisonment imposed on individuals possessing some prior criminal record was thirty-two months, whereas the sentence imposed on those with an extensive criminal record was thirty-seven months.

A review of averages such as the aforementioned analysis is limited in its capacity to assess the standard of punishment, because the influence of every variable is calculated together with the influence exerted by other variables. A regression model allows an analysis of the influence of each variable separately while controlling the other factors. Accordingly, in an attempt to evaluate the weight of each variable on the term of imprisonment, a linear regression was carried out (where the term of imprisonment also included imprisonment which had been converted to community service). Variables which were found to lack a significant influence over the outcome (such as minor violence, threat of the use of cold or imitation weapons, and charge bargains) were removed from the analysis.

Because a revoked suspended sentence which was imposed consecutively was actually a punishment for a prior offence, we deducted this portion from the term of imprisonment in our analysis. Table 1 shows the influence of each variable on term of imprisonment for robbery.

The table helps assess the influence of each variable on the sentence. Defendants who are convicted of aggravated

Table 1
Estimating the Variables Affecting Term of Imprisonment for Robbery—
Linear Regression

	Unstandardized coefficients		Standardized coefficients		Significance
	B	Std. Error	Beta	t	
(Constant)	23.812	3.515		6.774	.000
Aggravated circumstances	4.172	2.227	.094	1.873	.062
Serious violence	12.272	2.639	.235	4.651	.000
Firearm	12.423	4.060	.153	3.059	.002
Guilty plea	-4.934	2.590	-.097	-1.905	.058
Plea bargain	-6.981	3.770	-.088	-1.852	.065
Some prior criminal record	3.847	2.297	.089	1.675	.095
Extensive criminal record	8.988	2.446	.201	3.674	.000
Theft between NIS 1,000 and 10,000	4.574	2.121	.113	2.157	.032
Between NIS 10,000 and 100,000	8.987	3.206	.145	2.803	.005
Above NIS 100,000	19.769	4.163	.256	4.748	.000
Positive pre-sentencing report	-12.415	2.340	-.277	-5.305	.000

Dependent variable: months of actual imprisonment (including community service) without a revoked suspended sentence that was imposed consecutively.

$R^2 = 0.457$, $F = 19.291$

robbery (according to § 402(b) of the Penal Law) should expect a term of imprisonment which is about four months longer than defendants convicted of what section 402(a) defines as ordinary robbery. Defendants who use severe violence should expect a term of imprisonment which is about twelve months longer than defendants who only use threats or moderate violence. The use of a firearm adds about twelve months of imprisonment, compared with the use of cold weapons, an imitation (toy) weapon, or the absence of a weapon. There is a connection between the type of weapon and degree of violence and the section under which a defendant is charged; therefore, the data should be read cumulatively.

Thus, a person who has committed a robbery with the threat to use a firearm may in effect expect a sentence which is about sixteen months longer than one who has committed a robbery by means of an imitation weapon (e.g., a toy gun). The former will be tried according to section 402(b) (robbery in aggravated circumstances, which adds about four months to the term of imprisonment) and also as one who has used a firearm (which adds about thirteen months to the term of imprisonment). Likewise, a person who has committed robbery using serious violence may expect a term of imprisonment about sixteen months longer than someone who has committed robbery without using any violence at all; the former may expect the heavier sentence both because of the level of violence (twelve months) and because he has been charged with the offence of robbery in aggravated circumstances (four months).²⁰

There is also a correlation between the amount stolen and the punishment, with the theft of small amounts taken as the basis. When the sum exceeds NIS 1,000, the sentence imposed increases by about five months. Robbery of more than NIS 10,000 leads to a sentence which is harsher by about nine months than the sentence for robbery of small sums. When the sum robbed exceeds NIS 100,000, the term of imprisonment is about twenty months longer than that for robbery of small sums of money. Conceivably, a correlation exists between the amount robbed and the degree of sophistication of the robbery; for this reason, the influence exerted by this factor is seen to be so large.

A defendant's criminal record greatly influences the level of punishment, notwithstanding that this fact is not directly seen in the regression. According to the model presented, a defendant with some criminal history may expect a term of imprisonment about four months longer than a defendant who has a clean record. A defendant who has an extensive criminal record may expect a term of imprisonment about nine months longer than a defendant without a criminal record.

At the same time, two additional significant variables lead to the conclusion that the criminal record has a much greater influence. First, defendants who have a completely clean record or who do not have many offences on their record will more often receive a positive pre-sentence

report. The sentence imposed on a defendant who has achieved a positive recommendation by the probation service is about twelve months lower than the sentence imposed on a defendant who has not been given such a report.²¹ Second, many of the defendants who had prior convictions were subject to the revocation of sentences which had been suspended, resulting in a longer overall sentence.

In fact, in 25 percent of the cases in our sample the court ordered the revocation of a suspended sentence, and this sentence was imposed consecutively. Revoked suspended sentences added about nine months, on average, to the term of imprisonment of that group of defendants. Because, as noted previously, we excluded revoked suspended sentences from the analysis, the influence of the criminal record seen here was small. Indeed, an examination of an alternative model in which pre-sentence reports were not included among the variables, and where revoked suspended sentences were not excluded, revealed that some criminal history adds about nine months to the term of imprisonment, whereas an extensive criminal record adds about eighteen months.

The majority of robberies are committed by way of snatching bags in the street or robbing shops or small businesses (in contrast to robbery of dwellings or large protected businesses, such as banks).²² For the most part, these acts of robbery are carried out with the use of minor or moderate level threats or violence.²³ Bearing these facts in mind, the typical instance we have referred to is the offence of robbery under section 402(b), committed by an offender with some criminal history (but not an extensive record) who did not receive a positive pre-sentence report, who has robbed sums worth thousands of shekels without the use of serious violence and while not in possession of a firearm. The model predicts that in such a case, the defendant can expect a custodial sentence of thirty-six months.²⁴

We also examined this outcome by identifying all the cases in which the defendant had some criminal history, was not given a positive pre-sentence report, did not enter into a sentence bargain, and was convicted of an offence under section 402(b) after robbing thousands of shekels without using serious violence and without a firearm. We found twenty-one such cases. The average sentence in these cases was thirty-two months of imprisonment, a result which is close to the result of the model.²⁵

It may be seen from the aforesaid that the level of punishment prevailing today for the offence of robbery in aggravated circumstances, committed without the use of a firearm and without serious violence, where the defendant has some but not an extensive criminal record, where he has not been the subject of a positive pre-sentence report and has not entered into a sentence bargain, and where the sum robbed is not exceptionally high, stands at about three years of imprisonment.

We have refrained from directly addressing the expected punishment for ordinary robbery. Indeed, according to the

model, a defendant who has been convicted of an ordinary robbery, where that defendant has some criminal record and where he has not been the subject of a pre-sentence report, should expect a sentence of about thirty-two months of imprisonment (only four months less than for aggravated robbery). However, this finding should be treated with particular caution—first, because most of the defendants who were convicted of the offence of ordinary robbery admitted the facts which establish aggravated robbery. It may be assumed that the aggravating circumstances which were proven (use of violence, possessing a dangerous instrument, or acting in a group) influenced the court when deciding the sentence. Second, the small number of cases meeting these criteria in the sample does not allow an examination of the prediction of the model by comparing it to the actual punishment in similar cases. Without a significant expansion of the sample of ordinary robbery cases, we cannot rely on these data. We would only note that a simple calculation of averages shows that the custodial sentence imposed in ordinary robbery cases is shorter by about a year than the custodial sentence imposed in cases of aggravated robbery.

E. Normative Considerations

Prima facie, the primary social value protected in the offence of ordinary robbery is property, because when violence is also involved (which infringes on bodily integrity), it is possible to convict the defendant of aggravated robbery. Accordingly, in an ordinary robbery, the protected social value of bodily integrity is only secondary and the degree of harm to it is low, because the offence (when it is committed without violence) relates only to the creation of a risk. However, notwithstanding that it is possible to convict a defendant who commits a robbery with the use of violence of aggravated robbery, the prosecution is also entitled to charge such a defendant with the offence of ordinary robbery. Section 402(a) is not limited to theft which is carried out with threats alone, but expressly refers to violence as one of the alternatives for the commission of robbery. Accordingly, in the event that the robbery is committed with violence, the prosecution is entitled to try the defendant under section 402(a) and is not compelled to demand his conviction under section 402(b).

Indeed, an analysis of the cases in our sample showed that the majority of defendants convicted of ordinary robbery—that is, an offence under section 402(a)—admitted the use of violence when perpetrating the robbery.²⁶ Accordingly, the starting sentence for the offence of ordinary robbery, which will be proposed subsequently, will also refer to acts of robbery accompanied by violence, in cases where the violence was minor.²⁷ According to this analysis, this section of the Penal Law is also intended to protect bodily integrity. Moreover, theft accompanied by threats which create a fear of the use of force for the purpose of taking property causes more harm to a person than theft unaccompanied by threats. For this reason, the social value protected by the offence of ordinary robbery is of higher importance than the one protected by property offences.

The offence of robbery in aggravated circumstances relates to robbery carried out with weapons or instruments which are capable of endangering or injuring (including a knife or other cold weapon), or which is committed in a group, or that includes violence. The social value protected by this offence, in addition to property, is the integrity of the body. The risk created by the robbery, when the robbery is carried out by a group or with a weapon, is also greater. Accordingly, the punishment must be harsher.

The aforementioned characteristics indicate that the ordinary offence of robbery is not minor but is, rather, an offence which must be regarded as more serious than property offences. Nonetheless, the more serious cases of robbery are included within the offence of aggravated robbery. It would seem appropriate to regard the offence of ordinary robbery as one located at the center of the penal scale, and the starting sentence relating to it must reflect this position. In contrast, the offence of aggravated robbery is located in the upper portion of the penal scale.

F. Comparative review

A difficult question concerns the weight which should be given to sentencing guidelines used in other parts of the world when prescribing starting sentences in Israel. Obtaining assistance from foreign guidelines raises a number of difficulties. First, the definition of the offences may be different in other countries, thus requiring caution when interpreting their data. Second, and more important, the choice of legal systems to be reviewed is largely an arbitrary one. Thus, the common law systems to which we often turn make frequent use of custodial sentences, and the terms of imprisonment are usually greater than in European countries.

Even among the various common law countries and the different continental systems, sentencing practices are very different. Reliance on the level of punishment in England, for example, would lead to much harsher sentences than would reliance on sentencing practices in the Netherlands—and there is no a priori reason to prefer the guidelines of one country over another. The difficulty is even greater because the levels of punishment in countries which adopt formal sentencing guidelines tend to be higher than in other Western countries. Likewise, the punishments in English-speaking countries (from which most of our data come) are harsher, on average, than in other Western countries.²⁸ Accordingly, it should not be assumed that the sample of the selected countries reflects a level of punishment customary in Western countries. Notwithstanding these difficulties, we include a short survey of the sentencing guidelines for robbery in a number of English-speaking countries²⁹ to allow consideration of and comparison with the sentences proposed in Israel.³⁰

1. The United Kingdom: Guidelines and Starting Sentences in England and Wales In 2006, the Sentencing Guidelines Council of England published guidelines for robbery.³¹ As is customary with the Council's guidelines,

they contain multiple provisions and a detailed discussion of different issues related to robbery, including instructions on how to assess the severity of the case. The starting sentences in the guidelines refer to defendants without a prior criminal record. The guidelines for robbery³² also refer to cases that according to the Israeli statutory definition would be considered aggravated robbery.

The Sentencing Guidelines Council prescribes starting sentences for the different types of robbery. The first type is robbery that includes threats and minimal use of force, for which the starting sentence for an adult offender without a criminal record is twelve months of imprisonment, with a sentencing range of up to three years of imprisonment. The second type relates to robbery committed using a weapon to threaten or in which the use of force caused injury to the victim. The starting sentence in these cases is four years of imprisonment, with a sentencing range of two to seven years of imprisonment. The third type includes cases of robbery in which grievous bodily harm was caused or weapons were used; in such cases, the starting sentence is eight years of imprisonment, with a sentencing range of seven to twelve years of imprisonment. The Sentencing Guidelines Council emphasizes that, as a rule, custodial sentences are to be imposed on the perpetrators of robberies; however, in special cases, community sentences will be imposed without a custodial sentence.

2. The State of Victoria in Australia Victoria has a Sentencing Advisory Council that from time to time publishes guidelines on a variety of issues related to sentencing, although it has not established a full set of guidelines for the various offences. Nonetheless, the Council also publishes reports on prevailing sentences and sentencing trends in relation to various offences, including robbery.³³ The picture presented by the report on robbery reveals that only half of those convicted received a period of imprisonment.³⁴ About 30 percent received a wholly suspended sentence of imprisonment, and another 8 percent received a partially suspended sentence of imprisonment. About 12 percent of those convicted were sentenced to a community-based order. The average length of imprisonment varied from year to year, ranging from eighteen months to twenty-eight months.

A separate, parallel publication by the Council refers to armed robbery.³⁵ This offence is more serious; most of those convicted were sentenced to imprisonment, at least part of which had to be served in actual custody (74 percent). However, the report shows more than a few wholly suspended sentences of imprisonment for this offence (10 percent), as well as community-based orders (12 percent). It should be emphasized that the aforementioned data refer to both juveniles and adult defendants. Among adults, the vast majority were sentenced to actual imprisonment. The average custodial sentence varied slightly over the years surveyed, ranging from thirty months of imprisonment to thirty-eight months of imprisonment.

3. Summary This brief survey of other legal systems shows that the offence of ordinary robbery is often regarded as more serious than other property offences but is not particularly grave per se. In many legal systems, the offence is located at the center of the penal scale (and, in some of them, even below the center point). Accordingly, in some of the legal systems, imposing community service and not an actual custodial sentence on an offender with a clean criminal record is regarded as a completely acceptable option. In contrast, the offence of aggravated robbery is located in the upper part of the penal scale. This offence is perceived as grave and as endangering human life, and therefore the sentence imposed for this offence is generally a lengthy term of imprisonment.

This initial comparative survey indicates that the sentences for ordinary robbery in Israel are relatively harsh compared with the common law countries surveyed, at least in respect of defendants without a prior criminal record. In the majority of legal systems surveyed, defendants without a prior criminal record who committed ordinary robbery were often sentenced to punishments which did not include a custodial sentence. In Israel, however, the guideline of the Supreme Court, implemented in the District Courts, is that, as a rule, the offence of robbery must carry with it a term of actual imprisonment even for defendants with a clean record. In contrast, the sentencing guidelines for aggravated robbery in the surveyed guidelines appear similar to the prevailing practice in Israel and occasionally are even harsher.

G. Conclusion Regarding Robbery and Aggravated Robbery

1. The Starting Sentence Taking into account the prevailing sentencing practices and case law guidelines, and following a consideration of sentencing customs and guidelines in other countries, the proposed starting sentence for the offence of robbery in aggravated circumstances under section 402(b) of Israeli Penal Law is thirty-six months of actual imprisonment supplemented by suspended imprisonment. This punishment largely reflects the existing sentencing practices and is also similar to the sentences suggested in the guidelines of the countries surveyed.

The starting sentence refers to cases in which a robbery, even when committed in the aggravated circumstances set out in section 402(b), is carried out without a firearm and when the accompanying violence, insofar as the robbery is accompanied by any violence, is only minor or moderate. Minor violence includes pushing, pulling the strap of a bag from a person's body, slapping, and the like. Moderate violence also includes punching, striking (as long as no grievous bodily injury is caused), and spraying materials which cause burning. Accordingly, cases of severe violence such as beatings, hard kicks, hitting with a stick or other blunt instrument, stabbing, suffocation, or other significant violence which causes real injury, as well as cases in which the defendant was in possession of a firearm during the

course of the robbery, have been removed from the application of the typical instance.³⁶

Taking into account the aforementioned considerations, it is proposed that the offence of ordinary robbery, under section 402(a), be assigned a starting sentence of eighteen months of imprisonment supplemented by a term of suspended imprisonment. This starting sentence relates to acts of robbery committed without any violence whatsoever or with minor violence only and with no firearms or cold weapons.³⁷ Even though this level of punishment is at a slightly lower level than that currently prevailing in other countries, we believe that this level of punishment is justified because the ordinary robbery is relatively close in nature to the offence of theft, and the use of a threat or minor violence, which certainly justifies a harsher sentence than in the case of theft, does not justify a *significantly* harsher sentence for ordinary robbery.³⁸

Moreover, this level of punishment is also justified because the typical case has been defined as including only acts of robbery which do not involve the use of violence, or where the level of violence is only minor, and only cases where the defendant does not use a weapon during the robbery. It should be noted that within this context, we have also taken into account the levels of punishment in the countries surveyed, as well as the sentences proposed there—which, as noted, in most cases do not include imprisonment for defendants devoid of a prior criminal record who carry out robberies unaccompanied by aggravated circumstances.

2. Additional Remarks The starting sentence is adapted to the average defendant—that is, a defendant who does not have a completely clean criminal record, but whose record is also not particularly extensive. As noted in section 40F(d)(4) of the bill, a clean criminal record is a mitigating factor, whereas an extensive record, as provided in section 40F(e)(1), will be regarded as an aggravating factor. Accordingly, it is certainly possible that defendants with an extensive criminal record will be sentenced to much longer terms of imprisonment than the starting sentence (particularly where the conditions set out in section 40E of the bill apply),³⁹ whereas in contrast, a defendant without any criminal record whatsoever will be sentenced to a term of up to six month of imprisonment—a term which may be converted into community service—particularly if he has been convicted of the offence of

ordinary robbery and if, according to the pre-sentence report, the likelihood of his rehabilitation is high.

The starting sentence has been adapted to an offence which is not exceptional either in terms of mitigating or aggravating circumstances (§ 40I(a)). The starting sentence for aggravated robbery, under section 402(b), refers to an offence committed without severe violence and without the use of a firearm. In the case of ordinary robbery, the starting sentence refers to circumstances where no moderate or severe violence and no weapon whatsoever was used. It follows that the use of a firearm or severe violence will be an aggravating factor in terms of the starting sentence for the offence of aggravated robbery (under § 402(b)), and that the use of any weapon and the use of violence which is not minor will be aggravating factors in terms of the offence of ordinary robbery (under § 402(a)).

Correspondingly, the sentences imposed on defendants who committed robbery with severe violence or when in possession of a firearm, are likely, as a rule, to be harsher—even significantly harsher—than the starting sentence, even relative to a person convicted of aggravated robbery. At the same time, this scenario does not exhaust the impact which violence or the type of weapon used has on a sentence. Thus, when determining the verdict of an offender convicted of aggravated robbery (e.g., robbery committed in a group), the judge is entitled to give a more lenient sentence to a defendant who committed the offence without any violence at all or to impose a harsher sentence on one who used a moderate level of violence. Likewise, the absence of a weapon may be a mitigating factor in the same way that the existence of a relatively dangerous cold weapon may be an aggravating factor.

Section 40F of the bill provides that

when determining the sentence . . . the court will take into account the aggravating and mitigating circumstances related to the commission of the offence and circumstances as aforesaid which are not related to the commission of the offence as specified in this section, **provided that none of these circumstances form the elements of the offence nor were taken into account when determining the starting sentence for that offence.** [emphasis added]

Nonetheless, where an offence can be committed with varying degrees of violence (and sometimes even without any violence at all), it is permissible to weigh the *severity* of

Table 2
Summary of the Proposed Starting Sentences

Offence	Starting sentence	Circumstances which are neither mitigating nor aggravating
Robbery, offence contrary to section 402(a) of the Penal Law, 5737-1977	Eighteen months of actual imprisonment and suspended imprisonment	Robbery committed with the use of threats or minor violence only, without the use of weapons
Robbery, offence contrary to section 402(b) of the Penal Law, 5737-1977	Thirty-six months of actual imprisonment and suspended imprisonment	Robbery committed with the use of minor or moderate violence, and without the use of a firearm

the violence even though the existence of the violence is one of the elements comprising the offence. Likewise, even though the existence of a weapon is one of the alternative circumstances giving rise to the offence of robbery in aggravated circumstances, the court is entitled to weigh the type of weapon when determining the level of sentence for this offence.

According to our proposal, the discrepancy between the starting sentence for ordinary robbery and the starting sentence for aggravated robbery is smaller than the discrepancy between the two types of offences prevailing in the countries surveyed. On the other hand, this discrepancy is greater than the one existing in the prevailing sentencing practices in Israel today. The increase in the discrepancy between the starting sentences may have ramifications for the distribution of power between the prosecution and the court, because the prosecution may increase its influence over sentences when choosing whom to charge with aggravated robbery and whom to charge with ordinary robbery.

As previously noted, the majority of those currently convicted of the offence of ordinary robbery in Israel admitted facts that would have established the offence of aggravated robbery, and their conviction of ordinary robbery stemmed only from the decision of the prosecution to confine itself to this offence. At the same time, it seems impossible to limit the influence exerted by the prosecution on the sentence by means of reducing the discrepancy between the starting sentences, because the prosecution always has the tools to change the charging section to a lighter offence (such as extortion by force, an offence under section 427 of the Penal Law, or extortion by threats, an offence under section 428 of the Penal Law). The only way of ensuring better judicial control of sentencing is if the courts will give greater consideration to the aggravating and mitigating circumstances of each case so that deviations from the starting sentence will be more substantial.

Notes

- ¹ See http://knesset.gov.il/committees/heb/material/data/H11-01-2010_17-30-27_kanay-gezel-sofi!!!.pdf.
- ² Government Bill, 5766, No. 241, dated 12/6/2006.
- ³ Section 40B(a) of the law, as amended by the bill.
- ⁴ Section 40I(a).
- ⁵ Section 40I(c).
- ⁶ Section 40I(b).
- ⁷ Decision No. Ch/348 of the Ministerial Committee for Legislation, dated 26/7/2009.
- ⁸ P.H. Robinson, *Distributive Principles of Criminal Law*, (Oxford, 2008) 154–57, 160–61.
- ⁹ See, e.g., the guidelines regarding burglary (ch. D) at <http://www.sentencing-guidelines.gov.uk/docs/Theft%20and%20Burglary%20of%20a%20building%20other%20than%20a%20dwelling.pdf>.
- ¹⁰ *Id.*
- ¹¹ The bill refers to multiple offences and provides that “the court can impose a separate sentence for each offence or impose a comprehensive sentence for all or some of the offences” (§ 40K). Currently, it is customary to impose a comprehensive sentence in the case of multiple offences.

- ¹² The guiding consideration according to the proposal is commensurateness (§ 40C). Rehabilitation on the one hand (§ 40D), as well as incapacitation on the other (§ 40E), are given special status under the proposal, because in particular cases they may justify the imposition of a sentence which is incompatible with the principle of commensurateness. In contrast, general deterrence appears as only one of the factors unconnected to the commission of the offence, and these factors are subject to the guiding principle of commensurateness, and do not override it. In this, the bill reflects the trend growing throughout the world to emphasize the need for a sentence which is proportional to the severity of the offence (just desert) as opposed to considerations of deterrence.
- ¹³ Whereas research indicates that increasing the risk of being caught increases deterrence for some offences, there is no basis for the prevailing intuition that the severity of the punishment, and particularly the period of imprisonment imposed on felons, in any way influences crime rates. For a summary of the findings in research literature in England and the United States, see A. VON HIRSCH, A.E. BOTTOMS, E. BURNEY, & P.-O. WIKSTROM, *CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH* (Hart, 1999).
- ¹⁴ However, considerations of general deterrence influence the severity of the offence to a certain extent. This state of affairs is reflected in relation to the offence of robbery, when the need to protect the public and prevent the commission of the offence influences assessment of the severity of the offence. See R. Kannai, *Construction of the Discretion of the Judge in Sentencing: Following the Goldberg Committee Report*, 15 BAR ILAN L. ST. 147, 163 (1999) (Heb.). See also J. ANDENAES, *PUNISHMENT AND DETERRENCE* (Univ. of Mich. Press 1974).
- ¹⁵ Criminal Appeal 3219/09 Habibi v. State of Israel (as yet unpublished, 7/7/2009); Criminal Appeal 2051/06 State of Israel v. Anon. (as yet unpublished, 3/7/2006).
- ¹⁶ Criminal Appeal 4154/07 Taha v. State of Israel (as yet unpublished, 9/9/2007); Criminal Appeal 8944/04 Lazdon v. State of Israel (as yet unpublished, 20/1/2005).
- ¹⁷ In about eighteen out of the twenty-three cases in which fines were imposed (78 percent), the amount of the fine was in the aforesaid range, whereas in four cases it was lower and in one case it was NIS 20,000.
- ¹⁸ If one does not include the parts of the sentences which resulted from the revocation of a suspended sentence, the average sentence for ordinary robbery is twenty-two months of imprisonment, and for robbery in aggravated circumstances is thirty-three months of imprisonment.
- ¹⁹ In fact, the number of cases in which the offence of robbery in aggravated circumstances was proven but the defendant was convicted only of ordinary robbery was higher, because the use of only moderate violence was not classified as an aggravating factor in the sample—even though as a matter of statute even moderate violence gives rise to an offence under section 402(b).
- ²⁰ It should be noted that the significance of the influence exerted by the section charged is marginal. Nonetheless, we have included it in the analysis because cumulatively with the level of violence and type of weapon, it is clear that someone who has committed a robbery in aggravated circumstances is sentenced to harsher punishments. In this context, it is noteworthy that in fact the commission of robbery in a group does not lead to a more serious sentence and perhaps even leads to a lighter one, even though the law regards being in a group as an aggravating factor. This outcome may occur because groups often include more passive participants who are convicted but whose acts are perceived to be relatively less grave. Because the existence of a group did not have a significant influence on the sentence, these data were not included in the model.

- 21 In the sample, 27 percent of the defendants received a positive pre-sentence report. A negative report was written about half the remaining defendants and no report at all was written about the second half. The level of punishment imposed did not differ between defendants whose reports were negative and defendants in respect of whom no report whatsoever was sought.
- 22 Thirty-three percent of the robberies were committed in the street, twenty three percent in a small business such as a shop or post office, fourteen percent in dwellings, six percent in taxis, seven percent in large and protected business (such as banks), and the remainder in other places.
- 23 The level of violence was primarily classified on the basis of a subjective assessment; however, for the purpose of illustration, common examples are given for the various levels of violence. Minor violence includes pushing, pulling the strap of a bag from the victim's body, slapping, and the like. Moderate violence includes punching, striking (so long as it does not cause grievous bodily harm), and spraying materials which burn. Serious violence includes beatings, hard kicks, hitting with a stick or other blunt instrument, stabbing, suffocating, or other significant violence which causes real injury. In about 53 percent of the cases, only the threat of force or minor violence was used; 29 percent of the cases included moderate violence and 18 percent of the cases involved serious violence.
- 24 The calculation was performed on the basis of adding the B coefficients of the variables "constant" (23.812), "aggravating circumstances" (4.172), "some prior criminal record" (3.847) and "theft between NIS 1,000—NIS 10,000" (4.574).
- 25 The average sentence in these circumstances was thirty-six months of imprisonment, out of which an average of four months related to a restored suspended sentence.
- 26 In only one case in the sample did the original charge refer to aggravated robbery and, after the trial, the court decided to convict the defendant of ordinary robbery only (having found that the robbery was not committed in a group upon acquitting the alleged accomplice of the convicted defendant). In two cases, following a hearing of the evidence, the defendants were convicted of the offence of ordinary robbery, as appearing in the indictment. In all of the remaining cases, the choice to charge the defendant solely with ordinary robbery was made by the prosecution, either in the framework of a plea bargain (in 90 percent of the guilty pleas relating to ordinary robberies) or without such an arrangement (in the remaining 10 percent of cases).
- 27 It should be noted that the issue discussed subsequently is not a simple one, and any decision regarding this issue has wide ramifications. The question is, Is it possible to define the "typical case" of a certain offence in a way that constitutes a more severe offence? This question arises when the prevailing practice is to charge a person with a particular offence, even if the facts to which he admits or of which he has been convicted constitute a more severe offence. It is possible that this issue, too, should be reexamined by the Committee for the Determination of Starting Sentences.
- 28 An indication of this state of affairs may be found in studies of the world prison population. Whereas in Northern Europe (Denmark, Sweden, Norway, and Finland), the number of prisoners for every 100,000 inhabitants is between 60 and 75 people, and in Central Europe (Germany, Austria, Belgium, France, and Holland) the numbers range between 90 and 100 prisoners for every 100,000 inhabitants, in England and Wales the number is 153, in Australia it is 129, in New Zealand it is 185, and in the United States, the Western country with the highest number of prisoners, this number stands at 756. See World Prison Population List (8th ed.) at http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf.
- It should be noted that in Israel, the number of prisoners for every 100,000 inhabitants is particularly high, standing at 326—more than every country in Western and Eastern Europe, except for Russia, Belarus, and Georgia. Even after deducting the prisoners charged with security offences (8,130 security prisoners out of 22,725 prisoners) the number of prisoners for every 100,000 inhabitants is above 200 (about 205), twice as many if not more than is customary in Western Europe.
- 29 Contrary to the state of affairs in England, as well as in some of the states of the United States, in the countries of continental Europe it is not customary to have commissions which set sentences, or committees which prescribe formal sentencing guidelines.
- 30 In addition to the guidelines detailed here, the original report also surveys the sentencing guidelines for robbery in U.S. states Minnesota, Washington, and Massachusetts—a section that was eliminated from this translated shorter version of our report.
- 31 See <http://www.sentencing-guidelines.gov.uk/docs/robbery-guidelines.pdf>.
- 32 Section 8(1) of the Theft Act 1968 provides: "A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force."
- 33 See http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/resources/file/eb885c01f168f45/Robbery_Snapshot_2007.pdf.
- 34 Over the five-year period, about half of the people sentenced for robbery received a term of imprisonment (46 percent, or 55 of 119 people), whereas 29 percent received a wholly suspended sentence of imprisonment, 12 percent received a community-based order, and 8 percent received a partially suspended sentence of imprisonment.
- 35 See http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/resources/file/eb8a7701f26cf71/Armed_Robbery_Snapshot_2007.pdf. Armed robbery is defined as including the situation where an offender uses or threatens to use force in order to steal, and at the time has with him a firearm, imitation firearm, offensive weapon, explosive, or imitation explosive.
- 36 Because the starting sentence relates only to cases with no evidence of severe violence or use of a firearm, it is very likely that its adoption will lead to harsher sentences; as in cases where severe violence or a firearm are used, this circumstance will be regarded as an aggravating circumstance and will raise the average sentence imposed.
- 37 Even though we found that the existence of moderate violence had no clear influence on the sentence, we believe that the typical case should not include cases of moderate violence, because as a rule it is more appropriate for these cases to be dealt with in the framework aggravated robbery. The significance of this approach is that if a person is tried for ordinary robbery even though he used moderate (or severe) violence, the court will regard the level of violence as an aggravating factor.
- 38 It should be noted that out of the fifty-one defendants in the sample who were convicted of ordinary robbery, four defendants were convicted of ordinary robbery even though they had used severe violence.
- 39 Section 40E provides that "the court is entitled to depart from the guiding principle and impose a harsher sentence in order to protect public safety, if it has found, inter alia, in view of the circumstances of the offence or the habits of the defendant, that the defendant is dangerous to the public." This section enables a harsher sentence to be imposed on a defendant who has an extensive criminal record, beyond the standard required according to the principle of commensurateness.