DO SENTENCING GUIDELINES INCREASE PROSECUTORIAL POWER? AN EMPIRICAL STUDY

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I
INTRODUCTION

Traditionally, judges have had tremendous flexibility in sentencing. Offering judges maximum discretion in the sentencing process allows them to consider not only an offender's criminal history and the severity of the crime committed, but also the complex web of mitigating and aggravating factors present in each case and additional qualitative factors, such as a defendant's testimony or self-presentation in a courtroom.

When judges are empowered with more discretion, however, there is heightened potential for inter-judge variability in sentencing. In order to reduce sentencing disparities caused by individual sentencers, several countries and jurisdictions, most notably in the United States, have enacted laws reducing judicial discretion over the type and length of sentence to be imposed on a defendant for a given offense. The purpose of these sentencing laws is to introduce more formal, rational decisionmaking processes and explicit rules into the legal sentencing system in order to improve inter-judge consistency and reduce disparities.[1] Whether sentencing guidelines usually succeed in reducing unwarranted disparities is a highly debated question.[2]

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1. *See* JOHN H. KRAMER & JEFFERY T. ULMER, SENTENCING GUIDELINES: LESSONS FROM PENNSYLVANIA 1–12 (2009); Robin L. Lubitz & Thomas W. Ross, *Sentencing Guidelines: Reflections on the Future*, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY (Office of Justice Programs, National Institute of Justice, Wash., D.C.), June 2001, at 1, 1–7; Joachim J. Savelsberg, *Law That Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law*, 97 AM. J. SOC. 1346, 1346 (1992).

2. *See* CASSIA SPOHN, HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN

Nevertheless, regardless of whether unwarranted disparities are reduced, it is often argued that sentencing guidelines and other limits on judicial sentencing discretion have a substantial side effect on the balance of power in court. Instead of mitigating the effect of personal discretion, the guidelines transfer much of the sentencing power and discretion from judges to prosecutors.[3]

Using a comprehensive set of data from Israel, we analyze sentencing outcomes for offenders convicted of aiding illegal aliens. These data are assessed to examine whether sentencing guidelines are likely to transfer sentencing power from judges to prosecutors in the Israeli system.

The next section is devoted to the discussion of the Israeli sentencing process and a description of the evolution of the sentencing law for aiding an illegal alien, including the Israeli Supreme Court's guiding decisions of *Khatib* and *Abu-Salem*.[4] Next, the literature on the effects of sentencing reforms on judicial and prosecutorial sentencing discretion is discussed. After making comparisons with American sentencing guidelines studies on the effect on judicial and prosecutorial discretion, we turn to the examination of Israeli sentencing practices during three different consecutive sentencing periods for this offense: pre-*Khatib*, post-*Khatib,* and post-*Abu-Salem*. This examination includes an analysis of the extent to which prosecutors and the courts circumvented the judicial guidelines in *Khatib* and their modification in *Abu-Salem*. Furthermore, we assess whether prosecutors gained additional sentencing control, previously vested in judges, after the *Khatib* guidelines limited judicial discretion in sentencing. The article concludes by exploring the legal and social ramifications of the findings.

A. Background on Sentencing Policy in Israel

Israel is home to approximately eight million people. Despite its small population, Israel has a relatively high incarceration rate: not including security prisoners, the incarceration rate is 205 per 100,000 persons—twice the rate of most Western European countries[5]—though still much lower than the incarceration rate of the United States.[6]

Israel's criminal justice system is similar to that of most common law countries, but with some important distinctions. After the police make an arrest, prosecutors decide whether to press charges. If a defendant is charged, he or she can negotiate a plea agreement with the prosecutor, plead guilty

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PUNISHMENT 299–306 (2d ed., 2009) ("[D]etermining whether sentencing guidelines have reduced disparity is complicated.")

3. *See* discussion *infra* Part I.C.

4. CrimA 5198/01 Khatib v. State of Israel 56(1) PD 769 [2001]; CrimA 3674/04 Abu Salem v. State of Israel (Feb. 12, 2006), Nevo Legal Database (by subscription).

5. Ruth Kannai, *Sentencing in Israel*, 22 FED. SENT'G REP. 223, 223 (2010).

6. *See* ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (8th ed., 2009), *available at* http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf.

without an agreement, or elect a bench trial. There are no juries in Israel.[7] A public defense attorney is provided for unrepresented defendants in every case that might result in imprisonment.

There are three levels of courts in Israel. The lowest level is the magistrate court, followed by the district court, which is both a court of first instance for serious crimes and an appellate court for other offenses, and then by the Supreme Court, the highest court in Israel. Because the offense selected for this paper is tried in magistrate courts, this lower court system is explored here in further detail. Magistrate judges try criminal cases that are punishable by a maximum of seven years imprisonment. A single magistrate judge presides over each case, except in special instances where a three-judge panel is appointed.[8]

Israeli judges enjoy a high level of discretion in sentencing. Minimum sentences are rare, and even then, judges are permitted to consider mitigating circumstances and to depart from the minimum sentence as long as they state the reasons for their decision.[9] Maximum penalties exist for all offenses, but in practice judges rarely impose sentences close to the maximum. Instead, they often offer significantly lighter penalties, including a fine, probation, or community service. Until 2011, judges under Israeli law had no directives outlining which factors to consider while sentencing, or how to prioritize them.[10] Given that sentences in Israel are subject to a relatively stringent appellate review, however, the appeals process is expected to mitigate some of the disparity resulting from judicial sentencing decisions.

Until a decade or two ago, criminal law was rarely an issue in political activities and campaigns. This situation has changed lately, and a "tough on crime" political environment led the Knesset to increase the severity of sentencing, which resulted in the adoption of minimum sentences for several offenses.[11] The Knesset has also discussed adopting a new sentencing reform, whereby a sentencing committee would determine starting-point sentences for common offenses. These starting-point sentences would instruct judges as to the

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7. *The Judiciary: The Court System*, ISR. MINISTRY OF FOREIGN AFFAIRS (2008), http://www.mfa.gov.il/MFA/Government/Branches+of+Government/Judicial/The+Judiciary-+The+Court+System.htm.

8. *Id.*

9. Murder is an exception to the rule. A mandatory life imprisonment for murder can be avoided only under a few exceptional circumstances prescribed by law.

10. In 2011, after the data were collected, the Knesset adopted a new sentencing law making commensurability between the gravity of the offense and the sentence the main sentencing consideration. *See* Kannai, *supra* note 5; Penal Law (Amendment No. 113), 5737-1977, 2337 LSI 170 (2012) (an unofficial translation of the amendment can be found at http://weblaw.haifa.ac.il/he/Events/Punishment/Documents/the%20new%20Israeli%20law.pdf).

11. *See* Penal Law (Amendment No. 91), 5737-1977, 2067 LSI 2, § 377B (2006) (adopting a minimum sentence for offenses of keeping a person under conditions of slavery and human trafficking); Penal Law (Amendment No. 55), 5737-1977, 1746 LSI 226, § 329(B) (2000) (adopting a minimum sentence for causing grievous harm to a family member); Penal Law (Amendment No. 68), 5737-1977, 1849 LSI 422, § 355 (2002) (adopting a minimum sentence for several sex offenses).

appropriate sentence for a typical case of a given offense.[12] If the bill passes, judges will be expected to begin considering a sentence from the starting-point sentence, deciding on the degree and direction of deviation from it by weighing all of the aggravating and mitigating circumstances.[13] Recently, the Knesset committee responsible for preparing the sentencing reform legislation decided to split it into two parts. They passed only the general part of the bill that deals with the sentencing considerations and factors, leaving the part that authorizes a committee to issue starting-point sentences to be decided in the future. Thus, the debate over sentencing guidelines in Israel is ongoing.

Recently, many countries have considered or adopted sentencing guidelines. In the concurrent debate in the Knesset, which will shape future Israeli sentencing law, it is particularly critical and urgent to examine whether sentencing guidelines achieve their goal. Fortunately, the Supreme Court's decisions in two cases about aiding an illegal alien, an offense according to section 12A of the Entry to Israel Law,[14] offer a rare opportunity to empirically examine the effect of sentencing guidelines in Israel.

B. Sentencing for the Offense of Aiding an Illegal Alien

Under section 12A of the Entry to Israel Law, it is an offense, punishable by a maximum term of two years of imprisonment, to harbor, employ, or accommodate a foreign national who is illegally in Israel.[15] The majority of illegal aliens aided are Palestinians from the West Bank.[16]

The Supreme Court established sentencing guidelines for aiding illegal aliens in the case of *Khatib*.[17] Khatib was a contractor who drove an illegal alien whom he planned to employ from the West Bank into Israel.[18] He was sentenced to thirty days of imprisonment and appealed the decision first to the district court and then, with permission, to the Supreme Court.[19] The Supreme Court decided to hear his appeal in order to "clarify the appropriate sentencing policy for this offense."[20] The Court reviewed several decisions of lower courts, finding that sentences ranged from fines and deferred sentences, to prison terms

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12. *See* Oren Gazal-Ayal & Ruth Kannai, *Determination of Starting Sentences in Israel—System and Application*, 22 FED. SENT'G REP. 232 (2010).

13. *Id.*

14. Entry into Israel Law, 5712–1952, 6 LSI 159, § 12A (1951–1952) (amended 1995).

15. *Id.* The conduct required for this offense will hereafter simply be described as aiding an illegal alien. Until 2000, this was an administrative offense, punishable mainly by a fine. Nevertheless, the prosecution had the power to indict such offenders instead of fining them, but had to state their reasons for doing so in writing. In fact, the police prosecution service disregarded the rule requiring the preference for an administrative fine, and used the regular criminal proceedings in virtually all cases. In April 2000, it became a regular criminal offense.

16. Section 12A defines a foreigner as a person entering from the West Bank and Gaza. Since Gaza is relatively isolated, almost all of the illegal aliens come from the West Bank.

17. *See* CrimA 5198/01 Khatib v. State of Israel 56(1) PD 769 [2001].

18. *Id.* at 771.

19. *Id.*

20. *Id.*

of several months. Justice Tirkel, writing for the Court, stated that he supported the harsher approach, and commented that had the state appealed, he would have been in favor of substantially increasing the sentence due to the wave of terror killings at that time.[21] According to Justice Tirkel, because the terror attacks are usually committed by Palestinians entering Israel illegally from the West Bank and Gaza, any help to such illegal aliens should be treated harshly.[22]

The Supreme Court provided guidance to the lower courts, stating that, barring *very exceptional circumstances*, the appropriate sentence for aiding an illegal alien should be imprisonment that *should not* be deferred or exchanged for community service, even if the defendant committed the offense out of naïveté or due to pressing needs of some sort.[23] The Court also clarified that lack of a prior criminal record should not qualify as an exceptional circumstance.[24] Because Supreme Court decisions in Israel bind the lower courts,[25] this ruling established a de facto mandatory sentencing guideline of a few months of imprisonment.[26]

Like most minor crimes and misdemeanors, this offense is prosecuted by police prosecutors, not the district attorneys. Following the *Khatib* decision, the head of the prosecution division in the police headquarter in Jerusalem issued guidelines instructing prosecutors to request a term of imprisonment in every case of aiding an illegal alien.[27] These prosecutorial guidelines caused many defendants to ask the attorney general to issue a stay of proceedings, arguing that the possible sentence they face is too severe, taking into account all the circumstances. These requests brought the issue to the attention of the Attorney General, who nominated a committee to examine the prosecutorial policy in these cases. In January 2005, the committee recommended that police prosecutors adopt a more lenient approach and take into account the personal circumstances of the defendant. However, the police objected to this change in policy.[28] The attorney general rejected their objection, and in May 2005 the state attorney issued new guidelines to the police prosecutors.

Soon after, in February 2006, a much more important change in policy was imposed. After the Supreme Court rejected several requests to review its policy over the years,[29] the Court decided again to hear appeals from several separate

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21. *Id.* at 774.

22. *Id.* at 773–774.

23. *Id.* at 775.

24. *Id.*

25. Basic Law: The Judiciary, 5744–1984, SH No. II 10 § 20(b), *available at* http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm.

26. The court did not specify the number of months.

27. RECOMMENDATION OF THE COMMITTEE FOR THE EXAMINATION OF THE ENFORCEMENT POLICY OF EMPLOYING, DRIVING AND ACCOMMODATING ILLEGAL ALIENS IN ISRAEL (2005) (on file with authors).

28. *Id.*

29. CrimA 4094/05 Ka'adan v. State of Israel (Apr. 28, 2005), Nevo Legal Database (by subscription); CrimA 2392/05 Saliman v. State of Israel (May. 4, 2005), Nevo Legal Database (by

defendants who had been sentenced to prison for aiding illegal aliens, and to issue guidance on the matter. This time, the Court adopted a more lenient approach. In *Abu-Salem*, the Court clarified that the wording of the "exceptional circumstances" provision from *Khatib* should not be interpreted too narrowly because sentences should always be individualized.[30] Implementing this new interpretation, the Court accepted the five separate appeals of defendants who had been sentenced to imprisonment under the *Khatib* precedent. Though the *Khatib* decision was not officially overturned in *Abu-Salem*, the acceptance of the appeals of all five defendants in *Abu-Salem*—each with different circumstances—was perceived as altering the rigid *Khatib* guidelines. Thus, beginning with *Abu-Salem*, the Court set a weaker presumptive sentencing law for aiding an illegal alien in place. The new decision was quickly incorporated into the guidelines the State Attorney issued to police prosecutors.[31]

Israeli case law therefore defined three different periods of sentencing for the offense of aiding an illegal alien. Before *Khatib*, no guidelines existed. Between *Khatib* and *Abu-Salem*, a relatively rigid sentencing guideline was in place. After *Abu-Salem*, a less rigid presumptive incarceration sentence was adopted.

C. Literature Review

Critics of sentencing reforms in the United States often voice their concern that guidelines transfer sentencing power to the prosecutor: "the Guidelines provide opportunities for [prosecutors] to pursue their own agendas that did not exist pre-Guidelines."[32] Dale Parent, the Director of Minnesota's Sentencing Guidelines Commission from 1978 through 1982, showed that changes in prosecutors' charging and negotiation practices occurred following the implementation of the Minnesota guidelines.[33] Professor Michael Tonry argued that mandatory penalty laws "provoke judicial and prosecutorial stratagems,

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subscription); CrimA 8758/04 Agrabia v. State of Israel (Sep. 27, 2004), Nevo Legal Database (by subscription); CrimA 9145/03 Mosail v. State of Israel (Nov. 9, 2003), Takdin Legal Database (by subscription); CrimA 8474/03 Vazuz v. State of Israel (Sep. 21, 2004), Nevo Legal Database (by subscription).

30. *See* CrimA 3674/04 Abu-Salem v. State of Israel (Feb. 12, 2006), Nevo Legal Database (by subscription).

31. ENFORCEMENT POLICY FOR EMPLOYERS, DRIVERS AND ACCOMMODATORS OF ILLEGAL ALIENS guidelines no. 2.15 (2006) (on file with authors).

32. James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Inter-Judge Sentencing Disparity Before and After the Federal Sentencing Guidelines,* 42 J.L. & ECON. 271, 302 (1999).

33. DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 181–186 (1988). Parent wrote that immediately following the implementation of the Minnesota guidelines, the imprisonment rate for all convicted felons dropped, but, nevertheless, within five years, the imprisonment rate had returned to the pre-guidelines level. *Id.* Parent cites several reasons for the increase, including "changes in the distribution of offenders on the sentencing grid stemming from changes in prosecutors' charging and negotiation practices." *Id.* at 190.

usually by accepting guilty pleas to other nonmandatory penalty offenses or by diverting offenders from prosecution altogether, that avoid their application."[34]

Judges agreed that a shift in power occurred after the implementation of sentencing guidelines. A study commissioned by the American Bar Association found that 76% of federal judges and 59% of state judges thought sentencing guidelines offered prosecutors too much power in plea bargaining.[35] Still, 73% of surveyed judges thought plea bargaining was used with about the right frequency.[36] In one survey of twenty federal district judges, 80% of those surveyed said that the guidelines "have transferred discretion in large measure to the prosecution."[37] Additional discontent was expressed by probation officers, who complained that "'fact bargaining' is undermining the sentencing guidelines."[38]

Interestingly, some prosecutors felt that guidelines limited their discretion. A county prosecutor in Missouri stated, "Prosecutors continue to be unhappy with the one-size-fits-all recommendations in the Missouri Sentencing Advisory Commission's recommendations. . . . There is, simply, no way to include enough variables in a recommended sentencing structure to provide a meaningful recommendation for any individual crime."[39]

These surveys may demonstrate that judges believe that the guidelines transferred sentencing powers. However, impressions based only on personal experience are often problematic sources of information about the reality.[40] Despite interest in the alleged transfer of power between the court actors, the many studies of the effects of sentencing guidelines failed to examine whether sentencing guidelines actually transferred control over sentences from judges to prosecutors.[41] Such a study would require quantification of the sentencing powers of judges and prosecutors both before the implementation of sentencing guidelines and after—a task that is not trivial.

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34. Michael Tonry, *Judges and Sentencing Policy—The American Experience*, *in* SENTENCING, JUDICIAL DISCRETION AND TRAINING 137, 152 (Colin Munro & Martin Wasik eds., 1992).

35. Don J. DeBenedictis, *How Long is Too Long?*, A.B.A. J., Oct. 1993, at 74, 79.

36. *Id.*

37. Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2046 (1992).

38. Fact bargains are plea agreements in which the parties stipulate the version of events that will be presented in court. *See* Paul J. Hofer, Kevin R. Blackwell & Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 262 (1999).

39. B. Watson, *Prosecutors Seek Changes to Sentencing Guidelines*, JEFFERSON CITY NEWS TRIB., June 8, 2010, at 7 (The prosecutors' association added that the "recommended sentences . . . are unreasonably lenient, particularly for violent and sex crimes.").

40. Berndt Brehmer, *In One Word: Not from Experience*, 45 ACTA PSYCHOLOGICA 223 (1980).

41. Rodney L. Engen, *Have Sentencing Reforms Displaced Discretion over Sentencing from Judges to Prosecutors?*, *in* THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 75, 82 (John L. Worral & M. Elaine Nugent-Borakove eds., 2008) (analyzing studies in the field and concluding that none of them have directly addressed the question).

Several studies have examined part of this question, however. For example, moderate evidence of the circumvention of prosecutorial guidelines reported has shown that guidelines were manipulated in 20% to 35% of guilty plea cases for similarly situated offenders.[42] In some cases, the extent of the deviation reached 70% to 90%.[43] The same study shows that the circumvention of guidelines was much more common in weapons and drug possession cases, in which the guidelines prescribed sentences that were harsher than the typical pre-guidelines sentencing practices. The *Khatib* guidelines similarly deviated from the pre-*Khatib* practices.

However, this study did not compare the effect of prosecutorial behavior under the guidelines to the effect that pre-guidelines prosecutorial practices—such as charge bargaining and sentence recommendation—had on sentencing. The study showed that prosecutors can, and sometimes do, circumvent the guidelines, but it did not show whether prosecutors affect the sentences more after the establishment of the guidelines than they did before. This type of study fails to show that it is the guidelines that have led to the increase in prosecutorial sentencing power relative to the judicial power.

An analysis of charge bargaining may reveal the effect of the guidelines on prosecutorial sentencing power. An increase in charge bargaining may be an indication of an increase in prosecutorial influence on sentencing, especially when the guideline sentence is prescribed for the "charged offense" and not the "real offense."[44] The studies examining prosecutorial practices do not show a clear pattern, however. One study shows a modest but significant decrease in charge bargains in Ohio after implementing guidelines.[45] Since the Ohio guidelines are very "soft," offering judges very limited guidance and considerable sentencing discretion, the authors concluded that "even modest shifts in sentencing practices might generate noticeable differences in processing at other decision points within the system."[46]

Conversely, various studies of the effect of the Minnesota Sentencing Guideline on charge reduction demonstrated that the overall guilty-plea rate remained constant under the guidelines, while charge bargains rose from 21% to 31% between 1978 and 1982.[47] However, a more statistically sophisticated

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42. Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1285 (1997).

43. *Id.* at 1292.

44. The Federal Sentencing Guidelines adopted a modified "real offense" sentencing system, requiring the judge to take into account the facts of the case, even if proving these facts in the jury trial phase would lead to a conviction of a more serious crime. In a "charge offense" sentencing system, this is prohibited. *See generally* Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 (1997).

45. John Wooldredge & Timothy Griffin, *Displaced Discretion Under Ohio Sentencing Guidelines*, 33 J. CRIM. JUST. 301, 314 (2005).

46. *Id.* at 314.

47. MINN. SENTENCING GUIDELINES COMM'N, THE IMPACT OF THE MN SENTENCING GUIDELINES: THREE YEAR EVALUATION 71 (1984).

study analyzed the Minnesota data and concluded that the overall rates of charge bargaining stayed constant before and after the implementation of the guidelines.[48]

Interestingly, even the Minnesota Sentencing Commission study that showed an increase in charge bargaining after the implementation of the guidelines did not indicate an increase in prosecutorial sentencing power. Although the reported rate of charge bargains increased after the implementation of the guidelines, the rate of sentence bargains was more than halved—falling from 60% to 26%.[49] It is thus unclear whether prosecutorial control over sentencing increased or decreased following the introduction of the Minnesota guidelines. Perhaps in the pre-guidelines period, prosecutors influenced sentences through sentence bargaining, and then exerted the same level of influence after the implementation of the guidelines through the use of charge bargaining. The commission also admitted that many other unanalyzed factors might account for the differences and the descriptive statistics provided should not be used to make evaluative conclusions. To the extent that changes in the use of plea bargaining can signal an increase in the relative influence prosecutors and judges have over sentencing, these studies do not supply conclusive evidence of such a shift in power.

Several other studies of other jurisdictions analyze the tendencies of prosecutors to reduce charges under different sentencing guidelines, but without comparing the result to the pre-guidelines charging policies.[50] In a few studies, researchers have attempted to analyze whether prosecutorial or judicial discretion more strongly affected sentencing outcomes. Ronald Wright and Rodney Engen (2006) argued that prosecutorial discretion mattered more than judicial decisionmaking under a sentencing guidelines regime.[51] The analysis of the changes in charges in North Carolina found that prosecutors reduced charges in nearly half of all felony cases that resulted in conviction, but that the effects did not apply equally to all crimes. The study also found that charge reductions heavily impacted the severity of the average sentence, such that

48. *See* Terance D. Miethe & Charles A. Moore, *Socioeconomic Disparities under Determinate Sentencing Systems: A Comparison of Preguideline and Postguideline Practices in Minnesota*, 23 CRIMINOLOGY 337, 348 (1985); *see also* Terence D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155 (1987) (showing that there was little change in the use of charge bargaining before and after the implementation of the Minnesota Sentencing Guidelines).

49. *See* MINN. SENTENCING GUIDELINES COMM'N, *supra* note 47.

50. *See* Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 AM. J. SOC. 1357 (2000) (showing that prosecutors changed their charging behavior when sentencing guidelines changed in the state of Washington). For a review of several other studies showing that prosecutors often reduce charges, thereby affecting the sentences, see Engen, *supra* note 41 at 77–80.

51. Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006).

"charge reductions prior to sentencing have a much greater impact on sentence duration than does the choice among sentencing options under the grid."[52]

Conversely, a study of one unnamed Midwestern county found that judicial discretion over sentence length was substantially greater than prosecutorial discretion over charge bargaining.[53] The researchers compared the number of charge reductions and sentence reductions, and the type of sentences meted out for a sample of closed felony cases bound over for trial in a city using voluntary sentencing guidelines in 1984.[54] They found that when prosecutors reduced charges, the presumptive sentences for offenders sent to prison decreased significantly (an average of forty-six months per case)—but judges reduced the sentences even more (by more than one hundred months on average).[55] For offenders sentenced to probation, prosecutors reduced sentences by an average of forty-one months, which judges brought down another fifty-nine months.[56] One explanation for the difference between these results could be that the data in the former study was collected from a jurisdiction using descriptive and voluntary sentencing guidelines, whereas the latter study used data from North Carolina, the state with the most mandatory sentencing guidelines.[57] More to the point, these studies did not compare these post-guidelines results to pre-guidelines measurements of sentencing discretion.

The studies of sentencing regimes to date indicate that by using charge or fact bargaining, prosecutors gain some control over sentences when judges' discretion is limited. However, only a few studies have compared the effect of prosecutorial sentencing power before and after the introduction of sentencing guidelines, and these studies have not confirmed the discretion transfer hypothesis. Additionally, most of these studies have used the rate of charge bargains (or charge reductions) as the main indicator for the amount of power prosecutors exert. However, the manipulation of charges in a post-guidelines environment can substitute for the manipulation of direct sentences in a pre-guidelines environment (through sentence bargaining). In fact, the Minnesota sentencing commission's study shows just that, indicating that the use of sentence bargaining at the time that charge bargaining became more common.[58] One cannot subsequently conclude from these studies that prosecutors' sentencing power increased post-guidelines.

Moreover, the literature to date does not show whether sentencing guidelines have a direct effect on sentences—an effect that is not intermediated

52. *Id.* at 1972.

53. J. Langley Miller & John J. Sloan, III, *A Study of Criminal Justice Discretion*, 22 J. CRIM. JUST. 107, 113 (1994).

54. *Id.* at 112.

55. *Id.* at 113.

56. *Id.*

57. *See* NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. ST. CTS., STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 5 (2008).

58. *See* MINN. SENTENCING GUIDELINES COMM'N, *supra* note 43.

through the charging powers. The existence of such a direct influence would be important for several reasons. First, charge bargaining is only a crude method for affecting the sentence, at least when sentencing guideline ranges are large enough. In many cases it is difficult to fine-tune sentences through charge bargaining. Second, charge bargaining is not always an option. For some offenses, there are limited options for reducing the charges. Third, many advocate the restriction of charge bargaining, among other things, in order to curtail prosecutors' sentencing discretion. However, if sentencing guidelines transfer sentencing powers to the prosecutors even in the absence of charge bargaining, the efforts to limit charge bargaining might not be sufficient.

Our study uniquely examines only one offense, an offense that is rarely the subject of charge bargaining. In this study, prosecutors charged the defendants only with aiding an illegal alien, so the charge bargaining was limited to dropping one or more counts of that offense in the few cases where the defendants were charged with several counts of this same offense. Accordingly, the current study examines the effect of sentencing guidelines on prosecutorial discretion when charge bargaining is very limited.

This study also differs from its predecessors in several other aspects. First, previous studies concentrated on the United States. It is unclear whether the effect of sentencing guidelines on prosecutorial sentencing powers is unique to the American legal system and to what extent the phenomenon is likely to repeat in other common law jurisdictions that adopt sentencing guidelines. Second, most of the American studies examined the effects of a relatively detailed and rigid sentencing guidelines regime—most prominently the federal sentencing guidelines, which direct the judges to a very narrow sentencing range. Most of the states studied use a two dimensional grid,[59] which is very different from the less technical guidelines that have been proposed or are in existence in other common law countries like England and Wales, and Israel. Prosecutors may have better control over sentencing under the first type of guidelines, but not under the second, less restrictive ones. Third, in an attempt to compare prosecutorial sentencing power before the guidelines and after, the previous studies analyzed many different offenses. In analyzing thousands of cases of one specific and simple offense that is usually committed by defendants with no prior criminal record, the risk that any finding will be the result of factors such as a change in the mix of the offenses brought by prosecutors or differences in the character of defendants through the years is substantially reduced. Hence, this study is the first to examine whether prosecutors gain direct sentencing powers when judges use non-grid sentencing guidelines.

The study also analyzes the level of judicial compliance with the guidelines in Israel. Studies of the American Federal Sentencing Guidelines pre-*Booker*[60]

59. In guidelines that use a grid, one axis represents the severity of the offense, and the other represents the defendant's criminal record. The sentence or sentencing range is determined by the intersection of the severity of the offense (the row) with the defendant's criminal record (the column).

60. *United States v. Booker*, 543 U.S. 220 (2005) (striking down federal sentencing statute that

show that the circumvention of guidelines appears in an identifiable minority of cases.[61] Many of these circumventions result from prosecutorial requests.[62] Concentrating on departures not sponsored or initiated by prosecutors reveals that the numbers are much lower. Between 2001 and 2007 only about 10% of the sentences included a downward departure from the guidelines that was not requested by the prosecution.[63] In Washington, departures from the guidelines based on an exceptional-circumstances exception, which contain a similarly worded exceptional-circumstances rule as *Khatib*, appeared in fewer than 5% of the sentences.[64] In Minnesota in 2009, where the guidelines offered only presumptive sentences, downward departures were found in about 20% of the sentences, and upward departures in another 4%.[65] Yet, here too, in at least 61% of these downward departures, the court stated that the prosecutor agreed or did not object to the departure from the guidelines. Only in 14% of cases did the judge mention the prosecutor's objection when departing from the guidelines. In the remaining 25% of cases, it is unclear whether the prosecutors agreed with the departure or not.[66] Hence, judges decided to depart from the guidelines contrary to prosecutors' requests only in a small percentage of the cases—somewhere between 3% and 8% of the sentences.

The Israeli Basic Law: Ihe Judiciary holds that "a rule laid down by the Supreme Court shall bind any court other than the Supreme Court."[67] Since the state can appeal to the district court when the magistrate's court does not comply with the ruling, and can also request to appeal to the Supreme Court when it is necessary to assure conformity, one would expect that such a clear sentencing rule laid down by the Israeli Supreme Court would be followed in almost all cases, as it is in Minnesota, Washington, and the U.S. federal system.

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required district courts to impose sentences within the range established by the Federal Sentencing Guidelines, rendering the Guidelines advisory and nonbinding).

61. *See* Schulhofer & Nagel, *supra* note 42, at 1285 (showing that approximately 20% to 35% of prosecutors circumvent the guidelines through charge bargaining, fact bargaining, bargaining over the guideline factors, and time bargaining); *see also* Brian D. Johnson, Jeffery T. Ulmer & John H. Kramer, *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 CRIMINOLOGY 737 (2008).

62. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2012) (authorizing downward departure for defendants who have rendered "substantial assistance" to law enforcement; other departure sponsored by the prosecutors can result from plea agreements and fast track programs in immigration cases).

63. Kate Stith, *The Arc of Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1458–60 (2008).

64. *See* Kate Stith, *Sentencing Guidelines in Washington State*, 76 LAW & CONTEMP. PROBS., no. 1, 2013 at 105, 123–24.

65. MINN. SENTENCING GUIDELINES COMM'N, SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS SENTENCED IN 2009, at 25 (copies may be requested from the Minnesota Sentencing Guidelines Commission *at* http://www.msgc.state.mn.us/msgc5/sentencing_practices.htm). Another 1% of the sentences included mixed departures.

66. *Id.* at 30. In the remaining cases the prosecutor's position was not stated in the decision.

67. Israeli Basic Law: The Judiciary 5744–1984, SH No. II 10 § 20, *available at* http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm.

On the other hand, if the rule deviates substantially from previous practices, courts might still look for venues to circumvent this ruling, despite its clarity.

D. Hypotheses

Because the *Khatib* decision instructed judges to impose a much harsher sentence than was common pre-*Khatib*, it was expected that when prosecutors asked the courts to depart from *Khatib* downward, courts would accept the request, knowing that this departure from the guidelines was unlikely to be appealed. On the other hand, when prosecutors insisted on incarceration, courts, knowing that an appeal would be likely to succeed, adhered to the Supreme Court's instruction. Hence, we predicted that as the rigidity of the sentencing guidelines increased, prosecutors would gain more sentencing power at the expense of judicial discretion. We thus hypothesized that *Khatib* substantially increased the percentage of cases in which the courts followed the prosecutors' sentence recommendations. In contrast, we hypothesized that *Abu-Salem* would reduce this percentage to a certain extent, though not to the pre-*Khatib* level.

Given that the defendants needed the prosecutor's mercy much more after *Khatib*, we hypothesized that plea bargains were more common *post-Khatib*, compared to *pre-Khatib*. Similarly, since *Abu-Salem* opened the door for more discretion in judicial sentencing, the rate of plea bargains was expected to decrease post *Abu-Salem*.

II
METHODOLOGY

A. The Offense

The subject matter of this study is the way the legal system treats those who have been accused of aiding an illegal alien. We selected the offense of aiding an illegal alien for several reasons. First, it is a very common offense, and therefore the number of incidents is likely to be sufficient for an elaborate statistical analysis. Second, this offense is often committed by people with no prior criminal background, making it relatively easy to control for criminal record—one of the most significant variables affecting sentencing. Third, it is a very well-defined offense with hardly any variation that might differentiate between the offenses. Hence, the characteristics and severity of the offense can be easily controlled.

B. Data

The study draws on two sources of data. First, it utilizes the police criminal-records database, which contains data on the total population suspected of violating the relevant offense between 1995 and 2007.[68] This database also

68. For the offense of aiding an illegal alien, see Entry to Israel Law, 5712–1952, 6 LSI 159, § 12A

includes information about all of the court cases reported during this timeframe, during which the Supreme Court issued the two major sentencing decisions regarding this offense, *Khatib v. The State of Israel* and *Abu-Salem v. The State of Israel*.[69] The police files include demographic and criminal information on the defendants—for example, age, nationality, gender, and criminal record—the date of the offense, whether charges were filed and in which court, and the court's decision (including verdict and sentence).

The second source of data is the court archives. The records from the police database of cases that ended up in court were identified in the court archives in order to examine the trial process more closely. The archive records were used to supplement the police data with information related to the court actors (ethnicity and gender of the judges, the prosecutors, and the defense attorneys). The court records also yielded more details about the offense: details indicating whether the defendant was driving, employing, or hosting the illegal alien; information revealing the motivation of the offender; and information relating to the legal process, such as the defendant's plea, the plea agreement if one was reached, the type of plea agreement, and the sentencing recommendations of the prosecution and defense.

After merging the data from both sources, we compiled a database of 3,277 court cases in which aiding an illegal alien was the defendant's only charge. These offenses were committed from 1995 through 2007, and were retrieved from fourteen magistrate courts, including all of the large magistrate courts in Israel. This process resulted in very detailed records about the offender, the offense, the judge, the prosecutor, the trial process, and the outcome.

C. Descriptive Graphic Analysis

Prior to our multivariate analysis, we present a graphical depiction of the rate of incarceration decisions in each quarter of a year compared to the rate of prosecutorial prison recommendations during the same quarter. This form of presentation yields information about fluctuations in prosecutorial and judicial compliance with the guidelines put forth by the Supreme Court, as well as the effect prosecutorial requests had on the judicial decisions over the selected time span. We then separate the cases that resulted from a sentence bargain and the cases that resulted from an unconditional guilty plea or trials. This division helps us examine the association between prosecutorial requests and judicial decisions when the prosecution and the defendant did not reach an agreement.

(1951–1952).

69. CrimA 5198/01 Khatib v. State of Israel 54(1) PD 769 [2001]; CrimA 3674/04 Abu-Salem v. State of Israel (Feb. 12, 2006), Nevo Legal Database (by subscription).

D. Dependent Variable

The dependant variable for this study is the *incarceration decision*. If the offender was sentenced to any term of imprisonment, the variable was coded 1. If the sentence did not include imprisonment, it was coded 0.[70]

E. Independent Variables

The independent variables included in the analysis are divided into three groups: *socio-demographic variables, time-related variables*, and *prosecution-related variables*.

Socio-demographic variables were used in an effort to control for variance related to personal characteristics. These variables have been traditionally considered to have an impact on the severity of the punishment:

Offenders' nationality was coded as a dichotomous variable with 1 representing Jewish and 0 representing Arab.

Offenders' age was coded as a continuous variable.

Offenders' family status was coded 1 if married and 0 if otherwise, which included single, divorced, and widowed.

Offenders' criminal history was coded as a dichotomous variable with 1 representing offenders with prior convictions and 0 representing offenders with no prior convictions.

Judges' nationality was coded as a dichotomous variable with 1 indicating that the judge was Jewish and 0 indicating that the judge was Arab.

Due to a lack of overall diversity in the offenders' gender (almost all offenders were male), gender was not entered as a control variable in this study.

Time-related variables were used in an effort to measure the effect of the Supreme Court guidelines. This variable contains the three periods of sentencing: pre-*Khatib*, post-*Khatib,* or post-*Abu-Salem*. Another time related variable was the *effect of terrorism*, which according to the Supreme Court was the reason for their harsher penalty recommendation.[71] This variable was measured by the accumulated number of terror-activities casualties in the three years preceding the sentence.

Prosecution-related variables were used in an attempt to measure the prosecution's impact on the trial's outcome. The first variable here was *prosecution request.* It was coded as a dichotomous variable with 1 meaning the prosecution asked for a prison sentence and 0 if the prosecution did not request imprisonment. The second variable was *plea bargain,* which is also a dichotomous variable in which 1 means the case was disposed through plea agreements and 0 means the disposition was not through a plea bargain. The type of plea bargain was also coded: when plea bargains included an agreed-upon sentence recommendation (sentence bargains), they were coded in a

70. Unlike the United States, Israel does not distinguish between jail and prison.

71. *See* CrimA 5198/01 Khatib v. State of Israel 56(1) PD 769, 773–774 [2001].

separate variable. Plea bargains that referred only to the charges (charge bargains) were removed from our analysis (5.8% of the convictions, *n*=71). Appendix 1 provides a summary of the major variables included in this study, their coding, and the descriptive statistics for each period.

F. Data Analysis

Most of the study's variables are categorical. Since the dependent variable—the courts' decision to incarcerate—was treated as a dichotomous decision, logistic regression models were used to estimate the dichotomous outcome.

Following the regression analysis, we calculated the predicted probabilities of incarceration for different profiles of offenders.[72] All the independent variables that reached statistical significance in the regression models were included in the profiles according to the following scenarios: the best case scenario, in which the significant variables receive the values that minimize the probability of incarceration; the worst case scenario, in which the significant variables receive the values that maximize the probability of incarceration; and the average case scenario based on the calculated mean values of the independent variables.[73] Next, in order to assess the impact of the prosecution's request for a prison sentence, two more profiles were calculated: those with and without the prosecution's request. These additional profiles were calculated while holding all other variables constant at their average. The final set of profiles replicated the one described above for each of the periods we referred to in the study—pre-*Khatib*, post-*Khatib*, and post-*Abu-Salem*.

The study focused on the court's decision as to whether or not to incarcerate the defendant. This stage in the criminal justice process is dependent on earlier decisions, particularly whether the police and prosecution decide to press charges.[74] Because we had the complete police database (N=34,343), which included cases that both did and did not result in indictment, we were able to calculate the likelihood of indictment for each period. The final sample included only those records where an indictment was issued (N=6,493). In the course of making this choice, the decision to incarcerate is not only a function of the independent variables at trial, but might also be affected by the probability of being charged following an arrest. Heckman's correction (*Lambda*) was used to deal with potential sample selection caused by the decision not to press charges against many of the suspects.[75]

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72. Prob.(event)=$1/(1+e^{-Z})$ when $Z=B_0+ B_1X_1+ B_2X_2+ \ldots B_pX_p$.

73. All independent variables that emerged as nonsignificant in the regression analysis were included in the calculation of the predicted probabilities at their mean value.

74. Acquittals and post-indictment dismissals might also affect the result, but they were too few to make a difference.

75. *See* James J. Heckman, *The Incidental Parameters Problem and the Problem of Initial Conditions in Estimating a Discrete Time-Discrete Data Stochastic Process*, *in* STRUCTURAL ANALYSIS OF DISCRETE DATA WITH ECONOMETRIC APPLICATIONS 179–95 (Charles F. Manski & Daniel McFadden eds., 1981) (Heckman recommended using a correction variable based on the first decision, which corrects the possible bias.).

III
RESULTS

Table 1 presents the rate of incarceration decisions pre- and post-*Khatib*, and post-*Abu-Salem*. As initially expected, we see a dramatic increase in incarcerations in the post-*Khatib* era. Prior to *Khatib*, the courts rarely imposed imprisonment, with only 3.3% of the convicted defendants being sentenced to prison. In contrast, following *Khatib*, 29.7% of the convictions resulted in incarceration.

After the *Abu-Salem* decision mitigated the *Khatib* guidelines, the incarceration rate went down to 16.4%. This result, on its face, indicates that the Supreme Court's decision had an impact on sentencing. Surprisingly, however, a substantial majority of the cases following the *Khatib* ruling, but before *Abu-Salem*, still did not end in a decision to incarcerate. This result occurred despite the Supreme Court's demand for a prison sentence for every such offender, save for exceptional circumstances. Although almost all convictions in the database resulted from guilty pleas (95.0%), only about half of the guilty pleas followed a plea bargain. More specifically, of the guilty plea cases, in only about half of the cases (50.7%; n=1255) did the parties (the prosecution and the defendant) reach a sentence bargain. In 5.8% (n=71) of the cases, the parties reached only a charge bargain (these cases were excluded from our analysis). In 43.5% of the cases (n=1164), the guilty plea was the result of a unilateral decision of the defendant without an agreement with the prosecutors.

Table 1: Imprisonment prior to and following the *Khatib* and *Abu-Salem* decisions.

	No incarceration	Incarceration	Total
Pre-*Khatib*	945 (96.7%)	32 (3.3%)	977 (100%)
Post-*Khatib*	948 (70.3%)	400 (29.7%)	1348 (100%)
Post-*Abu-Salem*	454 (83.6%)	89 (16.4%)	543 (100%)
Total	2347 (81.8%)	521 (18.2%)	2868 (100%)

Table 2: Plea bargains prior to and following the *Khatib* and *Abu-Salem* decisions.

	Plea bargains	Unilateral guilty pleas	Total
Pre-*Khatib*	274 (30.7%)	619 (69.3%)	893 (100%)
Post-*Khatib*	805 (64.2%)	449 (35.8%)	1254 (100%)
Post-*Abu-Salem*	423 (81.5%)	96 (18.5%)	519 (100%)
Total	1502 (56.3%)	1164 (43.7%)	2666 (100%)

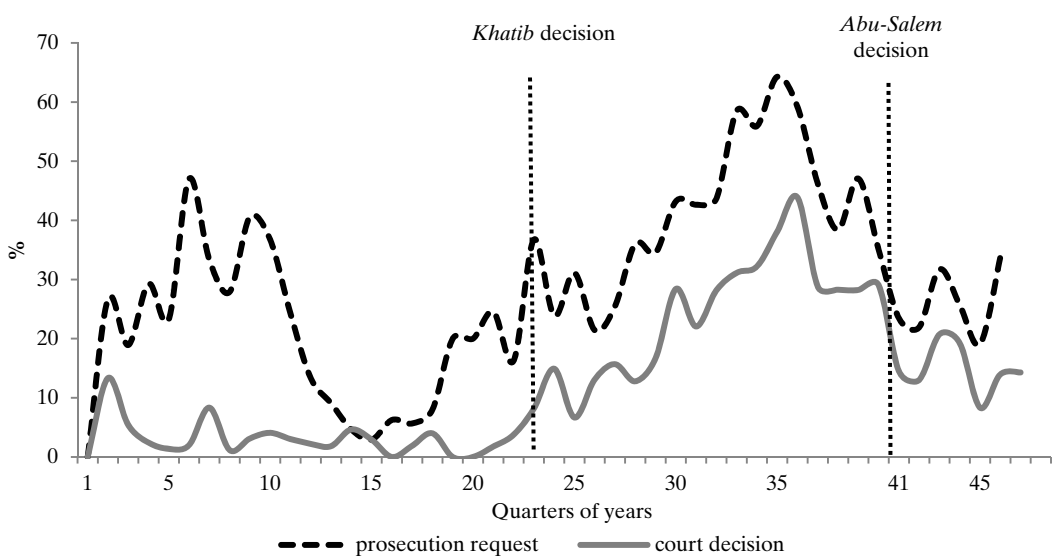
Because we included only cases where aiding illegal aliens was the only offense, charge bargains could include only removal of one or more charges out of several charges of this specific offense. We hypothesized that the motivation of the defendant to plead guilty unilaterally is higher when judges have more sentencing discretion—that is, when they are not bound by Supreme Court guidelines. As expected, the number of plea agreements went up sharply from only 30.7% in the pre-*Khatib* era to 64.2% post-*Khatib*. Yet, contrary to our expectations, the parties increasingly resorted to plea bargaining in the post-*Abu-Salem* era, reaching plea bargains in 81.5% of all cases, when judges gained back at least some of their sentencing discretion.

A. Prosecution Requests and Court Responses

Our main question was whether the *Khatib* guidelines transferred sentencing powers from judges to prosecutors. Figure 1 shows the percentage of convictions that resulted in imprisonment and the percentage of prosecutors' requests for such a sentence in each quarter of each year between 1995 and 2007.

Figure 1 displays several clear results. First, more prison sentences were requested by the prosecution and more prison sentences were imposed by the courts post-*Khatib* than in the pre-*Khatib* era. But the increasing trend of requesting and imposing prison sentences seems to start more than a year prior to the Supreme Court decision, indicating that the *Khatib* guidelines, at least to some extent, followed an already existing trend rather than initiating it. Figure 1 does demonstrate, however, that this trend gained a dramatic uplift following the *Khatib* ruling.

Figure 1: Percentage of prosecution requests for prison terms and court decisions for prison terms (calculated by quarters of years, with the *Khatib* decision handed down in the twenty-fourth quarter and *Abu-Salem* in the forty-first quarter).

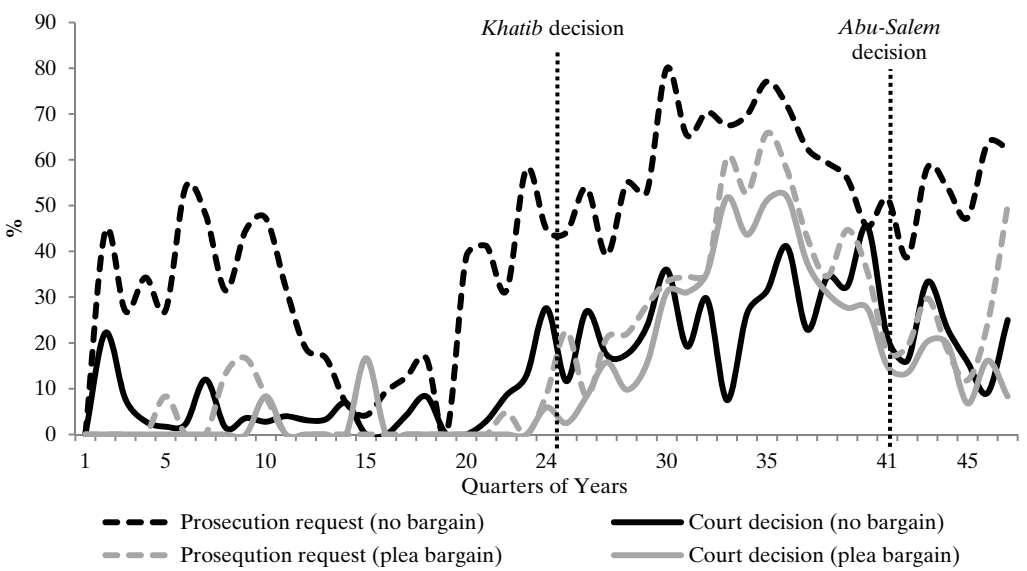


Similarly, the decline in prosecutors' request for prison sentences and the decline in incarceration decisions also began about a year and a half before the *Abu-Salem* decision. It appears that here too, the Supreme Court followed an already existing trend of declining incarcerations. This decline in prosecutors' requests for prison sentences started long before the state attorney issued the new guidelines that gave a green light to a softer prosecutorial approach.[76]

As Figure 1 shows, line prosecutors and magistrate judges changed the policies long before either the state attorney's guidelines or the Supreme Court's guidelines allowed such a change. Yet, *Khatib* probably had an effect on prosecutors' sentencing recommendations. A year after *Khatib,* prosecutors started asking for imprisonment in the majority of cases, and by the end of 2004, two years after *Khatib,* requests for prison terms reached a peak of 73% of the cases in the thirty-fifth quarter. Judges, on the other hand, imposed prison sentences only in a minority of cases in all quarters but one: quarter thirty-six, in which 51% of the convictions resulted in imprisonment.

Figure 2 adds another dimension to the discussion: the effect of sentence bargains. The gray lines represent the percentage of plea agreements in which the prosecutors asked for imprisonment (dashed gray line) and the percentage in which judges followed the request and handed down a prison sentence (continuous gray line). In this same figure, in black, we added the same information about the cases where the defendants were convicted without a plea bargain (mostly following a unilateral guilty plea). The percentages of cases where the prosecutors asked for imprisonment (dashed black line) and the percentage of actual prison sentences imposed (continuous black line) throughout the time period are also presented.

Figure 2: Percent of prosecution requests for prison and court decisions of prison in cases with and without plea bargaining (calculated by quarters).



As expected, when the parties reached a plea bargain, most of the prosecution's sentence recommendations for imprisonment were accepted. In some cases the parties to the sentence bargain agreed that the prosecutor would ask for imprisonment while the defendant would be allowed to ask for a different sentence. This granted the courts some discretion, as not all of the prosecutors' sentence recommendations were accepted.

Less expected was the relatively high rate of incarceration sentences in plea bargained cases following the decision in *Khatib*. While we expected that sentence bargaining would mainly be used to circumvent the harsh *Khatib* guidelines, in the minority of cases in which the defendant opted for a plea bargain, the process very often ended with the imposition of a prison sentence.

The results of the other cases that were not disposed through plea bargaining are even more unexpected. In most non-bargained cases in the post-*Khatib* era, prosecutors requested prison sentences. However, judges showed a high level of independence and, contrary to our hypothesis, often rejected the prosecutors' requests. Between *Khatib* and *Abu-Salem* only 43% of the prosecutors' requests for imprisonment were accepted absent plea bargaining. In all other cases absent plea bargaining, the court departed from the *Khatib* rule contrary to the prosecutor's request. In other words, in the post-*Khatib* era, defendants who did not plea bargain had a much better chance of escaping a prison sentence than those who plea bargained, regardless of the prosecutor's request.

This result contradicts two of our hypotheses. First, it shows that the circumvention of the *Khatib* guidelines did not occur by an increased resort to plea bargaining. Second, it shows that judges were much more willing than expected to disregard the Supreme Court ruling, even without the prosecutors' agreement. The result might even imply that some of the defendants who were willing to accept a prison sentence through a plea bargain would have been better off pleading guilty without bargaining, and putting their faith in the hands of the judge instead of the prosecutor.

B. Multivariate Analysis

The next step in the analysis was to determine which variables affected the probability of receiving a prison sentence following a conviction. Heckman's correction for the probability of being indicted was added to the regression model. Table 3 presents a stepwise logistic regression that contains four sets of variables (geographic variables, socio-demographic variables, time-related variables, and prosecution-related variables) that were entered sequentially. Presenting the five steps separately enables us to follow the changes in the effect of the variables as more independent variables are introduced into the model. This method of presentation underscores in this particular case the dramatic effect that the introduction of the prosecution-related variables (especially the prosecution's sentence recommendation) had on the relevance of the other sets of independent variables.

The first variable entered into the regression was the district in which the cases were tried (all were compared to the district of Haifa, which was the omitted category). In step 1 the regression reveals that there is a variation between court districts. Two districts are less punitive than Haifa (the Tel Aviv district and the Northern district) and one district is significantly more punitive (Jerusalem). As the other sets of variables were entered into the regression, the effect of the district declined and only the Tel Aviv district (which showed a less punitive attitude) maintained its significance and seemed to affect the likelihood of imprisonment.

As far as the demographic variables are concerned (step 2), nationality seems to play a significant role in all steps. Arabs seem to have a higher probability of receiving a prison sentence than Jews. Furthermore, Jewish judges tend to be more likely to impose prison sentences than Arab judges. In all steps, the prior criminal record of the defendant also seems to be a significant variable in the decision to impose a prison sentence.

In step 3, we first added the variable representing the period. Following the distribution of cases in Figures 1 and 2, we divided the time frame into five consecutive periods:

1. Pre-*Khatib* 1—Quarters 1–19—from 1995 until the outbreak of the Second Intifada (the wave of uprising and terror attacks against Israeli targets that started in October 2000), when the rate of prosecution requests for prison sentences started rising noticeably;[77]
2. Pre-*Khatib* 2—Quarters 20–23—from the start of the Intifada until the *Khatib* decision;
3. Post-*Khatib* 1—Quarters 24–36—from the *Khatib* decision until the end of 2004, when the prison sentence rate peaked (which coincided with a decline in the Intifada);
4. Post-*Khatib* 2—Quarters 37–40—from the beginning of 2005 until the *Abu-Salem* decision; and
5. Post-*Abu-Salem*—Quarters 41–45—from *Abu-Salem* until the end of 2007.

As Table 3 shows, in periods 3, 4, and 5 the probability of imprisonment increased compared to period 1.

In the next step (step 4), we introduced the number of terror casualties in the three years preceding the sentence. This variable arguably represents the effect that terror had on the prevalence of prison sentences. The regression shows that the larger the number of terror casualties, the greater the probability of courts imposing prison sentences. Introducing this variable reduced the effect of periods 4 and 5 on imposing prison sentences. However, the effect of period 3, the one immediately following the *Khatib* ruling, remained significant, even when controlling for terror casualties.

77. The attempt to stop residents of the West Bank and Gaza from entering Israel is motivated mainly by security reasons, and the level of terrorism was thus included as a factor.

Table 3: Logistic regression for court imprisonment decisions.

	B (S.E) Exp(B)	B (S.E) Exp(B)	B (S.E) Exp(B)	B (S.E) Exp(B)	B (S.E) Exp(B)
Lambda	-.023	-.158	-.080	-.061	.013
	(.103)	(.111)	(.118)	(.119)	(.151)
	.997	.854	.923	.941	1.013
Court regions[1]					
Northern District	-1.166***	-.422	-.533	-.646	-.039
	(.299)	(.333)	(.353)	(.358)	(.419)
	.312	.656	.587	.524	.962
Tel Aviv District	-1.053***	-.705*	-.847**	-.946***	-.984***
	(.249)	(.261)	(.283)	(.286)	(.309)
	.349	.494	.429	.388	.374
Jerusalem District	.832***	.805***	.236	-.031	.190
	(.209)	(.218)	(.246)	(.254)	(.306)
	2.298	2.238	1.266	.970	1.209
Southern District	-.108	.236	.362	.295	1.253*
	(.412)	(.434)	(.477)	(.477)	(.576)
	.898	1.266	1.436	1.344	3.502
Central District	.141	.384	.091	-.036	.405
	(.195)	(.205)	(.229)	(.234)	(.265)
	1.152	1.468	1.095	.964	1.499
Demographic characteristics					
Nationality		-1.163***	-.980***	-.912***	-.742***
		(.136)	(.143)	(.145)	(.180)
		.313	.375	.402	.476
Age		-.008	-.011*	-.012*	-.012
		(.005)	(.005)	(.005)	(.007)
		.992	.989	.988	.988
Family status		-.419**	-.328*	-.324*	-.166
		(.144)	(.153)	(.155)	(.197)
		.658	.721	.723	.847
Prior conviction		.637***	.790***	.824***	.484*
		(.137)	(.148)	(.150)	(.182)
		1.890	2.203	2.280	1.623
Judges' nationality		1.906***	2.011***	2.030***	2.231***
		(.413)	(.412)	(.421)	(.468)
		6.728	7.469	7.613	9.313
Periods[2]					
Period 2 (Pre-*Khatib* 2)			.230	.479	.250
			(.432)	(.435)	(.485)
			1.259	1.615	1.285
Period 3 (Post-*Khatib* 1)			2.253***	1.214***	1.015**
			(.235)	(.304)	(.359)
			9.513	3.367	2.760
Period 4 (Post-*Khatib* 2)			1.626***	1.199***	1.067***

			(.197)	(.212)	(.262)
			5.082	3.317	2.907
Period 5 (Post-*Abu-Salem*)			.074***	.185***	.188
			(.179)	(.185)	(.247)
			1.077	1.404	1.207
Terror atmosphere					
Casualties				.004***	.001
				(.001)	(.001)
				1.004	1.001
Prosecution requests					
Plea bargaining					-.642
					(.563)
					.526
Prosecution- prison					3.273***
					(.474)
					26.392
Interaction– plea*prosec_prison					1.811***
					(.581)
					6.115
Constant	-1.306	-.2.290	-3.688	-3.221	-5.867
-2 Log likelihood	2276.918	2115.505	1895.352	1861.944	1197.532
Chi square	147.655***	161.413***	220.153***	33.407***	664.412***
Nagelkerke R Square	.095	.191	.313	.331	.632

[1] Each category of the predictor variable (except the reference category) is compared to the reference category which is the first category.
[2] Each category of the predictor variable (except the reference category) is compared to the average effect of the former categories.
* $p < .05$; ** $p < .005$; *** $p < .001$.

Finally, in step 5, we added the prosecution-related variables. As expected, Table 3 shows that the most significant predictor of the courts' decision to incarcerate is the prosecution's request. This tendency is enhanced when the plea includes also a punishment recommendation, as shown by the interaction variable presented in Table 3.

Next, we focused on the extent to which the prosecution's request for a prison sentence affects the likelihood of such a sentence, while controlling for the variable of a plea bargain. In other words, we wanted to determine whether the request of the prosecution in and of itself affected the court's decision or whether it was the plea bargain that mattered. According to Table 4, as expected, the prosecution's request for imprisonment was found to have the strongest effect on imposing a prison sentence. In order to highlight the effect of the prosecution's request on the likelihood of incarceration, we calculated the ratio between the odds ratios of the prosecution effects.[78] The results show

78. The formula {[odds/(odds+1)] - .50} converts odds ratios to probabilities and enables to

that the prosecution's requests increase the probability of incarceration in plea bargained cases by 49.85% and in 46.6% in the absence of plea bargain.

Table 4 highlights the effect of the requested punishment among the plea-bargained cases. The prosecution's request becomes clearly the most dominant variable in the regression. The unusually high odd ratio of 682 indicates that when the prosecutor requested imprisonment as part of the plea, almost invariably, the judge impose imprisonment. When the punishment, whatever it might be, is part of the agreed bargain, both the norm and the common practice is that the judge will accept it. Once a plea bargain that includes an agreed punishment is presented, all other independent variables become insignificant or have negligible effect on the outcome,.

In the absence of a plea agreement, terrorism did not have a significant effect, but the period of sentencing was statistically significant. The periods that seem to be related to a high probability of the imposition of prison sentences were those that followed the *Khatib* decision (periods 3, 4, and 5). Demographic variables also produced significant effects. The regression shows that absent a plea bargain, the likelihood of imprisonment increased when the defendants were Arabs, when the judges were Jewish, and when the defendant had a prior criminal record.

Table 4: Logistic regression for court decisions for imprisonment—divided by five periods—differential models.

	Cases with a plea bargain (n=1276)		Cases without a plea bargain (n=1475)	
	B (S.E)	EXP(b)	B (S.E)	EXP(b)
Lambda	.067	1.069	-.080	.923
	(.342)		(.198)	
Court regions[1]				
Northern region	-.560	.571	.257	1.294
	(1.102)		(.488)	
Tel Aviv region	.070	1.073	-.947**	.388
	(.950)		(.341)	
Jerusalem region	1.046	2.847	-.085	.919
	(.810)		(.410)	
Southern region	2.354	10.529	.947	2.579
	(1.616)		(.647)	
Central region	1.748*	5.741	.312	1.367
	(785)		(.296)	
Demographic characteristics				
Nationality	-.736	.479	-.640*	.527
	(.419)		(.232)	

measure and compare the effect prosecution requests has on incarceration decisions. *See* Cassia Spohn & David Holleran, *The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders*, 38 CRIMINOLOGY 281, 293 (2000).

Age	-.002	.998	-.004	.996
	(.017)		(.009)	
Family status	-.525	.592	-.283	.754
	(.447)		(.251)	
Prior conviction	-.068	.934	.749***	2.115
	(.432)		(.226)	
Judges' nationality	.815	2.260	2.415***	11.192
	(1.222)		(.551)	
Terror atmosphere				
Casualties	.006**	1.006	-.001	.999
	(.002)		(.001)	
Periods[2]				
Period 2 (Pre-*Khatib* 2)	-16.334	689.084[3]	.324	1.382
	(4309.29)		(.502)	
Period 3 (Post-*Khatib* 1)	6.535	49.784	1.583***	4.868
	(2154.64)		(.502)	
Period 4 (Post-*Khatib* 2)	3.908	20.463	1.486***	4.419
	(1436.43)		(.331)	
Period 5 (Post-*Abu-Salem*)	3.019	1.006	.163	4.868
	(1077.32)		(.400)	
Prosecution requests				
Prosecution-prison	6.526***	682.476[4]	3.353***	28.581
	(.538)		(.482)	
Guilty plea	-		-.105	.901
			(.324)	
Constant		-6.175		-6.996
-2 Log likelihood		267.916		689.245
Chi square		846.987***		348.940***
Nagelkerke R Square		.848		.442

[1] Each category of the predictor variable (except the reference category) is compared to the reference category which is the first category.

[2] Each category of the predictor variable (except the reference category) is compared to the average effect of the former categories.

[3] The second period of the study is very short, including only a small amount of cases , none of which ended in plea bargain and prison sentence. The odds ratio is calculated to compare the odds of prison sentence across groups and since one of the groups has 0 cases the calculated odds ratio is extremely high.

[4] The impact of prosecution prison recommendation on receiving prison sentence is measured by the odds of prison recommendation to receive prison sentence divided by the odds of non-prison recommendation to receive prison sentence. Since courts rarely impose harsher sentences than requested in the plea bargain, the last group is very small (only 6 cases, which comprise 2.5% of the prison sentences) and the odds ratio is extremely high.

* $p < .05$; ** $p < .005$; *** $p < .001$.

Following the regression analysis (Table 4), we calculated the predicted probabilities (Table 5) for profiles representing the best, worst, and average case scenarios. The results show an identical pattern for the best, worst, and average scenario profiles, indicating that in the absence of plea bargain, the probability of incarceration is higher than in the plea bargained cases. However, when examining the effect of the prosecution's request on the incarceration probabilities—when all other variables are held at the average—the pattern reverses. The probability of receiving a prison sentence declines without a plea bargain: a 16% chance in cases without a plea bargain as opposed to a 57.9% chance in cases with a plea bargain. This pattern seems to contradict our expectation that a plea bargain ought to reduce the chances of receiving a prison sentence. It also shows that the impact of the prosecution in cases where there was no plea bargaining was significantly weaker.

Table 5: Probabilities of being incarcerated.

	With a plea bargain	Without a plea bargain
Best-case scenario	.005	.0003
Average-case scenario	.028	.105
Worst-case scenario	.976	.966
Prosecution asked for prison sentence	.772	.338
Prosecution did not asked for prison sentence	.004	.017

IV
DISCUSSION

At the onset of our study, we hypothesized that the strict sentencing guidelines would move sentencing discretion from judges to prosecutors. Despite the common belief that this displacement of power does occur, studies thus far have had difficulty proving it. The Israeli Supreme Court ruling in the *Khatib* case presented a unique opportunity to examine the effect of such guidelines, particularly because of the focus on only one single offense. However, the results do not support the displacement of discretion hypothesis.

Our findings show that the trend of "getting tough" did not start with the *Khatib* ruling, and the trend of easing off did not start with *Abu-Salem*. It is true that plea bargains became more common following *Khatib*, but the use of plea bargaining kept increasing after the *Abu-Salem* decision as well, when the guidelines became less stringent. Thus, the popular use of plea bargains is not necessarily the result of the decision in *Khatib*. At the very least, additional reasons may explain the continuous resort to plea bargains. These may include increased caseloads in the entire criminal justice system, as well as pressures for efficiency and the quick disposition of cases.

More importantly, when examining cases where the parties did not come to an agreement, we found no indication of an increase in prosecutorial sentencing

power. It is true that, following *Khatib*, the overall number of prison sentences did increase, even in the absence of plea bargains. However, there is no evidence that would allow us to attribute this trend to increased prosecutorial power. Following *Khatib,* prosecutors asked to imprison most of the defendants who did not reach a plea agreement, but the courts rejected most of these requests despite the Supreme Court's ruling.

Prosecutors may have gained power in plea bargaining. Following *Khatib*, many defendants agreed to a sentence bargain that included an imprisonment component. It might be that defendants, knowing of the *Khatib* decision and believing that judges would follow it, found no reason to believe that they had a chance of escaping prison if they placed their faith in the hands of the court. Therefore, they were willing to strike a bargain that might send them to prison, but perhaps for a shorter term.

However, these defendants might have been wrong. When a plea bargain was not reached, the prosecution had a difficult time convincing the courts to impose a prison sentence, despite the *Khatib* guidelines. Prosecutors may have gained sentencing power because defendants simply were not aware of how often the courts failed to comply with the guidelines, but in the absence of plea bargains it was the court, not the prosecutors, who departed from the guidelines.

Our study does not support the displacement of power hypothesis. Courts have continued to exert sentencing power by refusing to impose incarceration sentences even when prosecutors have asked for such sentences based on the existing Supreme Court Guidelines. The actual effect of the courts' independent approach might be even stronger than the data suggests. Prosecutors are repeat players in court. They appear before the same judges time and time again. Hence, when there is no plea bargain, they may often adjust their recommendation in light of the policy of the court, refraining from asking for imprisonment when they know they will not receive such a sentence. If this is the case, the magnitude of the magistrate courts power is even stronger than our result indicates. Though this speculation needs further testing, it is very likely that had the judges adhered to the *Khatib* ruling more closely, prosecutors would have asked for imprisonment in many more cases.

Why have judges demonstrated more independence than the prosecutors? After all, when judges reject the prosecutors' request to abide by the guidelines, they face the risk of being reversed on appeal. On the other hand, prosecutors who decide to be more lenient than the guidelines require cannot be reversed—and judges rarely impose a harsher sentence than asked. Accordingly, one would expect the prosecutors to depart from the guidelines more often than the judges. Why did the opposite occur?

Several explanations for this puzzling result are possible. Perhaps judges are less concerned with appeals than expected. It is possible that police prosecutors, who frequently appear before the same judge, do not initiate such appeals very often. Similarly, the district attorneys, who must authorize each appeal, do not

necessarily prioritize appeals on such sentences. Moreover, district courts do not necessarily differ from the magistrate in their willingness to circumvent the guidelines. While a second, discretionary appeal from the district court to the Supreme Court could discipline district courts, the state attorney is very selective in initiating such second appeals. In fact, in a search of Supreme Court decisions in requests for discretionary appeal, we could not find even one request of the state to consider an appeal against a district court decision that circumvented *Khatib*. Only defendants appealed to the Supreme Court in this type of case. Hence, pro-defendant departures from the guidelines are rarely appealed and even less often reversed. Additionally, it might be that judges are not so concerned about being reversed. After all, these are not very salient cases and reversals would not likely impugn their reputations.

On the other hand, we might have underestimated the effect of the internal prosecutorial guidelines. Perhaps prosecutors did not use their power to circumvent the guideline more often because of the internal guidelines instructing them to ask for imprisonment sentences in these cases. The high levels of compliance with the guidelines may be attributable to the fact that the prosecutors here are police prosecutors who serve in an organization that emphasizes hierarchy. Unlike judges, who are subject only to the vague notion of "the law," police prosecutors are accountable to their superiors, and their performance is routinely examined. Police prosecutors might have been concerned if imprisonment rates for this offense in their office were too low, despite the clear attempt of the office in Jerusalem to strictly enforce the law on that offense. In other words, prosecutorial guidelines might have mitigated the effect that judicial sentencing guidelines had on prosecutorial sentencing discretion.

It is unclear to what extent we can generalize the effect of the *Khatib* sentencing guideline. It is possible that judges will adhere to guidelines more closely when most cases are subject to a guidelines regime. Moreover, the *Khatib* guidelines clearly deviated from the pre-*Khatib* practices. Courts might be more willing to follow guidelines that better represent the preguidelines practices.

Yet the findings do question whether sentencing guidelines in Israel can achieve their goals. It seems that not only prosecutors are able to circumvent such guidelines, but that courts can also do the same. Moreover, the proposed guidelines system, which relies on starting-point sentences, is much weaker than the *Khatib* guidelines, which required a specific type of sentence absent exceptional circumstances. If courts often circumvented this rigid guideline, issued by the highest judicial instance in the country, they are even more likely to disregard the proposed weaker guidelines when they perceive it as unjust or wrong.

V
APPENDIX:
MAJOR VARIABLES INCLUDED IN THIS STUDY, THEIR CODING, AND THE DESCRIPTIVE STATISTICS FOR EACH PERIOD

Variables	Codings	Pre-*Khatib*	Post-*Khatib*	Post *Abu-Salem*
Defendants' Nationality	1 = Jewish 0 = Non-Jewish	573 (54.3%) 483 (45.7%)	593 (38.6%) 945 (61.4%)	250 (41.2%) 357 (58.8%)
Defendants' Age	Years	39.37 (11.750)	39.92 (12.602)	39.32 (12.719)
Defendants' Family Status	1 = Married 0 = Not Married	945 (87.0%) 141 (13.0%)	1307 (83.0%) 267 (17.0%)	473 (76.7%) 144 (23.3%)
Defendants' Prior Convictions	1 = Yes 0 = No	235 (23.8%) 753 (76.2%)	240 (17.4%) 1142 (82.6%)	84 (13.6%) 473 (84.9%)
Guilty Pleas	1 = Plea Bargain 0 = Unilateral Guilty Plea	274 (30.7%) 619 (69.3%)	805 (64.2%) 449 (35.8%)	423 (81.5%) 97 (18.5%)
Prosecution Request for Imprisonment	1 = Yes 0 = No	761 (80.6%) 183 (19.4%)	931 (77.8%) 265 (22.2%)	342 (73.9%) 121 (26.1%)
Incarceration	1 = Yes 0 = No	32 (3.3%) 945 (96.7%)	400 (29.7%) 948 (70.3%)	89 (16.4%) 454 (83.6%)