
Trespassing: Detention of Asylum Seekers at the Widening Margins of Criminal Law

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This article examines the legal structuring of the policing and detention policies that target asylum seekers in Israel. It explores overlaps and intersections of policing practices with the general conduct of criminal policing. Compared to countries that resort openly to criminal law as a central method of policing unwanted immigration, the Israeli legal system preserves a categorical separation between its criminal system and immigration law enforcement. Yet a closer analysis of policing practices reveals a growing overlap and practical interconnectedness between the separate branches of law that erodes formal categorical distinctions.

bulk of the work, instead of, for example, establishing an external committee to determine sentencing “starting points,” the legislature also entrusted the appeals court with an important task: not only to review the final sentence imposed on the offender, but also to review the sentencing range created by the trial bench. This task is of particular importance when there are conflicting rulings from the trial courts as to the appropriate sentencing range for similar offenses, as well as when the appellate court believes that the accepted sentencing range should undergo a change. Fulfilling this task should lead to a gradual collection of guideline sentencing ranges to which the trial judges could refer. Thus the judiciary itself would create the sentencing “ladder,” leading to greater consistency in sentencing while still allowing for flexibility for the individual judge.

Employing both quantitative and qualitative methods, we demonstrate that Israel’s Supreme Court (sitting as the highest Court of Appeals) has not yet taken on the guiding leadership role that the legislature envisioned for it. The Supreme Court does reprimand the trial court when it does not follow the new statutory regime, but does not see its role as reviewing the sentencing range determined by the trial court, even when it disapproves of the range. Oftentimes, the Supreme Court weighs in only on the final sentence imposed on the offender, and therefore does not provide sufficient guidance as to the sentencing range itself. Additionally, the Supreme Court rarely decides to “organize” a specific offense and set out more narrow sentencing ranges for the various instances of the offense’s broad statutory

range. We argue that without the Supreme Court's cooperation, and without its recognition of the amendment's importance and the disparity problem that justified it, the new sentencing scheme will fail to achieve its purpose, and the sentencing inequality that the legislature sought to repair will persist.