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The Post-Sheinbein Israeli Extradition Law: Has it Solved the Extradition Problems Between Israel and the United States or Has it Merely Shifted the Battleground?

Abraham Abramovsky*
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ABSTRACT

In this Article, the Authors examine Israel's stance on extradition. In Part II, the Article offers an historical timeline of the development of Israel's extradition policies, from common law to reciprocity. In Part III, the Article examines Israel's initial attempts to address the problems inherent in its operating extradition policy. This section also includes an analysis of the reform movement's effect on specific cases. In Part IV, the Article examines the most recent reform of Israel's extradition policy.

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I. INTRODUCTION

On April 19, 1999, the Israeli parliament enacted the Extradition Act (Amendment No. 6), which, for the first time since 1978, permitted the extradition of Israeli nationals who had committed crimes abroad.¹ From independence in 1948 until 1978, Israel had followed the common-law tradition, inherited from the British Mandatory authorities, of extraditing its own citizens.² In 1978, under new political leadership and in the wake of a succession of high-profile cases, Israel amended its extradition statute by adopting the Continental system, declaring that it would no longer extradite its nationals.³

This policy existed in Israel without major difficulty until 1997.⁴ Beginning in the mid-1990s, however, Israeli officials, concerned that

1. See Extradition Act (Amendment No. 6) (1999).
 2. See *infra* notes 31-64 and accompanying text.
 3. See *infra* notes 126-33 and accompanying text.
 4. See *infra* notes 175-83 and accompanying text.

Israel's extradition policy rendered it a haven for Jewish criminals, began to study proposals for full or partial return to the pre-1978 system.⁵ In September 1997, this reform process gained impetus with the flight of teenage murderer Samuel Sheinbein from Maryland to Israel.⁶

The disconcerting aspects of the Sheinbein case stemmed from the fact that Sheinbein was born in the United States and, prior to being accused of the gruesome murder of Enrique Tello, Jr., had never lived in Israel.⁷ He, however, was able to claim that because his father was an Israeli citizen, he was a national of Israel pursuant to the Nationality Law of 1952 and that his extradition was thus precluded by the 1978 statute.⁸ This placed the Israeli government in the position of being forced—against its will and against the interests of its closest ally, the United States—to prosecute in the Israeli courts a fugitive who had no prior connection whatsoever with Israel. In addition, the case became a political and diplomatic debacle for Israel, straining U.S.-Israeli relations to the point where leading members of the U.S. Congress threatened to cut off aid.⁹

The damage that the Sheinbein case caused to U.S.-Israeli relations, combined with Israel's anger at the cynical manner in which Sheinbein manipulated its legal system, led to the repeal of the 1978 extradition legislation. On September 2, 1999, Sheinbein pled guilty in the Jerusalem District Court to Tello's murder, putting an end to the two-year battle over his extradition between Israel and the United States.¹⁰ By then, however, the case had also put an end to Israel's twenty-year experiment with nonextradition of its nationals.

Rather than returning to the pre-1978 system, however, the new legislation divided Israeli citizens for the first time into two categories.¹¹ Israeli nationals who are residents of Israel at the time an extradition request is made may now be extradited, but only on condition that they be returned to Israel to serve any prison sentence that may be imposed if convicted by the courts of the requesting state.¹² Those who are not residents at the time of the extradition request may be extradited regardless of whether the requesting state

5. See *infra* notes 163-234 and accompanying text.

6. For a complete discussion of the facts of the Sheinbein case up to and including the decision of the Supreme Court of Israel, see generally Abraham Abramovsky & Jonathan I. Edelstein, *The Sheinbein Case and the Israeli-American Extradition Experience: A Need for Compromise*, 32 VAND. J. TRANSNAT'L L. 305, 309-11, 315-21 (1999).

7. *Id.* at 317.

8. *Id.* at 317-18.

9. *Id.* at 316.

10. See Ramit Plushnick & Katherine Shaver, *Sheinbein's Guilty Plea Doesn't End Dissension*, WASH. POST, Sept. 3, 1999, at B1.

11. See Extradition Act Amendment, § 1(A)(1).

12. *Id.*

agrees in advance to allow them to serve their sentences in Israel and would thus ordinarily be incarcerated in the prisons of the requesting state.¹³

The 1999 law represents the latest chapter in Israel's continuing effort to balance its historic role as a sanctuary for persecuted Jews with its obligation as a sovereign state to assist other nations in combating crime. Like Israel's previous attempts to achieve this balance, however, the most recent amendment to the Extradition Act may not constitute the desired solution. Because the significant date for determining Israeli citizenship and residency is the date of the extradition request rather than the date the offense was committed, the possibility remains that a fugitive might seek the protection of Israeli law by fleeing to Israel and attempting to remain there long enough to qualify as a resident.¹⁴

Moreover, due to differences in sentencing policy between Israel and other nations, especially the United States, future manipulation of the amended Israeli extradition law is not only possible but likely.¹⁵ It may well be that only the battleground has shifted; while Israeli nationality is no longer a bar to extradition, the issue of Israeli residency can still be used by fugitives to gain advantage and disrupt the extradition process. Thus, despite the confident assertion of Israeli diplomat Lenny Ben-David that there would be "no more Sheinbeins,"¹⁶ it is likely that Israel will find itself with more unwanted and politically damaging guests.

Accordingly, this Article will trace the history of extradition in Israel, analyze the interpretation of the 1999 amendments to the Israeli Extradition Act, and suggest further revisions. Part II will discuss extradition in Israel from the Mandate of Palestine through the Sheinbein case, including both the legislation and the cases and principles that shaped the various amendments to the law. Part III will examine the movement for reform that arose prior to and during the Sheinbein case, the substance of the 1999 legislation, and its interpretation by the Israeli courts. Finally, Part IV will discuss the reasons why the current Israeli extradition statute remains subject to abuse by fugitives and suggest possible amendments that will move Israeli law closer to the balance it has sought. While cases involving extradition disputes between Israel and other countries will be discussed, the primary focus of this Article will be the extradition relationship between Israel and the United States.

13. *Id.*

14. *See infra* notes 383-90 and accompanying text.

15. *See infra* notes 444-52 and accompanying text.

16. Lenny Ben-David, Editorial, *For Israel, No More Sheinbeins*, WASH. POST, Mar. 23, 1999, at A16.

II. FROM HERZL TO SHEINBEIN: EXTRADITION AND THE ZIONIST IDEAL

On November 29, 1947, the United Nations General Assembly issued Resolution 181, calling for the partition of the British Mandate of Palestine into Arab and Jewish states.¹⁷ Six months later, on May 14, 1948, British forces withdrew from Palestine, and the Provisional Government of the State of Israel declared independence.¹⁸ On the same day, the new nation, which was already embroiled in military clashes with Palestinian Arab irregulars, was invaded by the forces of five Arab nations.¹⁹ The ensuing war lasted slightly more than a year, ending with the conclusion of a cease-fire agreement with Syria on July 20, 1949.²⁰

A. 1896-1975: Zionist Honor and the Common Law

The Israeli victory in the War of Independence resulted in the formation of the first Jewish state in modern times and the culmination of the Zionist movement first articulated by Theodor Herzl half-a-century before.²¹ One of the first acts of the State of Israel after securing its immediate independence was to give expression to another of the founding Zionist ideals by enacting the Law of Return.²² This statute, enacted in 1950, allows any Jew to immigrate to Israel and immediately obtain Israeli citizenship, without the necessity of obtaining permission either before or after settling in Israel.²³ As originally enacted, it prohibited the government of Israel from limiting the total volume of immigration and allowed the preclusion of individual immigrants only if they were "engaged in an activity against the Jewish people" or presented a threat to public health.²⁴ As one noted Israeli academic has stated, the Law of Return

17. See G.A. Res. 181, U.N. GAOR, 2d Sess., Supp. No. 11, at 322, U.N. Doc. A/364 (1947).

18. See David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 836 (1996).

19. *Id.* at 834 (discussing the April 1948 agreement among Israel's neighbors to invade Mandatory Palestine upon the withdrawal of British forces).

20. *Id.* at 836. See *id.* at 839-46 for a discussion of the cease-fire negotiations during the Israeli War of Independence.

21. See generally THEODOR HERZL, *THE JEWISH STATE* (1896) (discussing the restoration of the Jewish State).

22. Law of Return, 1950, 4 L.S.I. 114 (1950).

23. *Id.* See also Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 240 (1999) (stating that the Law of Return encompasses an 'open door' policy toward Jewish immigrants and is viewed as one of the country's founding principles").

24. Law of Return, 1950, 4 L.S.I. 114 § 2(b) (1950).

views every Jew and his or her family members as *in potentia* citizens of the State of Israel, thus establishing a formal, legal link between the State of Israel and the community of world Jewry, and expressing a fundamental Zionist value upon which the State itself is founded: that Israel should provide a home to any Jew who so desires.²⁵

One of the corollaries of this policy of unrestricted immigration was that Israel "established a policy, since consistently followed, of aiming at the conclusion of extradition agreements with as many States as possible."²⁶ This was done both out of recognition of the "growing interdependence of States" and out of awareness that a country which was a haven for Jews might also become a haven for Jewish criminals.²⁷ If such criminals were allowed to obtain sanctuary in Israel, both the international relations of the Israeli government and the maintenance of domestic law and order would be prejudiced.²⁸

In fact, more than half-a-century before the creation of Israel, the founding philosopher of the Zionist movement argued that extradition was a matter of honor for any Zionist state.²⁹ In his seminal 1896 work, *The Jewish State*, Theodor Herzl wrote:

Every just private claim originating in the [requesting] countries will be heard more readily in the Jewish State than anywhere else. We shall not wait for reciprocity; we shall act purely for the sake of our own honor . . . we shall deliver up Jewish criminals more readily than any other State would do, till the time comes when we can enforce our penal code on the same principles as every other civilized nation does.³⁰

Thus, although Israel did not adopt a domestic extradition statute until 1954, the post-independence government continued to apply the 1926 Extradition Ordinance promulgated by the British Mandatory authorities.³¹ Pursuant to the 1926 statute, Israel

25. Shachar, *supra* note 23, at 234. See also *id.* at 240 (describing the Law of Return as "a statutory expression of the Zionist perception of independent statehood").

26. Theodor Meron, *Israel and the European Extradition System*, 5 ISR. L. REV. 75 (1970).

27. *Id.* at 76.

28. *Id.* See also Joshua Schuster, *Paris Jews Worry About Image After Some are Accused in Scandal*, JERUSALEM POST, Mar. 15, 2001, at 4 (describing French television documentary entitled "Israel—A Criminal's Paradise").

29. HERZL, *supra* note 21, at 102.

30. *Id.*

31. Extradition Ordinance, No. 44 of 1926, 1926 Palestine Ordinances 211 (Dec. 1, 1926), reprinted at 1 Laws of Palestine 677-92 (1934). See also Meron, *supra* note 26, at 76 (discussing continuation in force of the Palestine extradition act); Peter Elman, *The Retroactivity of the U.S.-Israel Extradition Treaty*, 1 ISR. L. REV. 356, 361 (1966) (stating that "since the Extradition Ordinance 1926 this country has had an extradition law"). The 1926 Ordinance in fact replaced an earlier Extradition Ordinance of 1924, which was equivalent in all material respects with the exception of certain technical provisions regarding the applicability of British treaties. See Extradition Ordinance, No. 18 of 1924, promulgated in Palestine Gazette No. 115 (Jun. 15, 1924). The provisions of the Extradition Ordinance largely conformed to traditional

concluded provisional agreements in the form of exchange of notes with France in 1951 and with Belgium in 1953.³² These agreements were governed by the terms of the pre-existing extradition treaties between these countries and the United Kingdom.³³

In 1954, the Israeli parliament, the Knesset, replaced the British ordinance with domestic legislation to ensure that Israel would not become a haven for Jewish criminals.³⁴ First, the Law of Return was amended to provide that the Minister of the Interior could refuse permission to immigrate to Israel if he was satisfied that "the applicant had a criminal past likely to endanger public welfare."³⁵

common law practice, containing requirements of dual criminality, specialty, and presentation of a prima facie case as preconditions for extradition and providing that political offenses were not extraditable. See Extradition Ordinance 1926, *supra*, at §§ 2(b), 7(a)-(b), 10(1)(a)-(b), 12(1), 1926 Palestine Ordinances at 211-15. *But see* Abu Dourrah v. Attorney General, 8 L. Rep. Pal. 43, 44-45 (Pal. S. Ct. 1941) (holding that murder could never be a political offense). It should be noted that the Ordinance applied only to countries outside the British Commonwealth; rendition between the Mandate of Palestine and other British possessions was governed by the Fugitive Offenders Act, 1881, 44 & 45 Vict., c. 69 (Eng.). See Palestine Order in Council § 35(iv) (Aug. 10, 1922), *reprinted at* 3 Laws of Palestine at 2578 (making the Fugitive Offenders Act applicable to Palestine); *see also* 3 Laws of Palestine at 1727-28 (listing countries to which the 1926 Ordinance was applicable); Supplement No. 2 to Palestine Gazette 455 (July 26, 1934) (setting forth extradition agreement with Transjordan government under authority of the 1926 ordinance). In addition, prior to the 1926 Ordinance, the Mandatory government had concluded two provisional extradition agreements with the French administration in Syria (including Lebanon) and the Kingdom of Egypt. See Schedule 2 to the Extradition Ordinance 1926, *reprinted at* 1 Laws of Palestine 687-91 (giving the full text of the agreements). The agreements differ significantly from the Ordinance; the agreement with France does not require a prima facie case and the agreement with Egypt does not require dual criminality. See Provisional Agreement for Extradition of Offenders between Syria and Palestine, art. 10, 1 Laws of Palestine at 688 (July 11, 1921) (requiring only that "the charge [be] sufficiently made out" to satisfy the examining magistrate); Provisional Agreement Between the Governments of Egypt and Palestine with Regard to the Extradition of Offenders, art. 2(a), 1 Laws of Palestine at 689 (Oct. 1, 1922) (calling for rendition of all persons against whom a warrant has been issued in the requesting state without regard to dual criminality). Unlike the Extradition Ordinance, these agreements lapsed upon the creation of the State of Israel, as Israel did not inherit the Mandate's international obligations. See Meron, *supra* note 26, at 76; *see also infra* notes 39-42 and accompanying text. For additional discussion of the Palestine-Syria interim agreement as it pertained to extradition of nationals, *see infra* note 57 and accompanying text.

32. Yehuda Z. Blum, *On the "Retroactivity" of the Israel-U.S. Extradition Treaty*, 1 ISR. L. REV. 362, 365 n.17 (1966). The provisional agreements operated for periods of one year and were renewed at the conclusion of each period pending the conclusion of a formal extradition treaty. *Id.* at 365.

33. *Id.* at 365. The Anglo-French extradition treaty dated from 1876 and the Anglo-Belgian treaty from 1901. *Id.*

34. See Meron, *supra* note 26, at 76-77.

35. *Id.* at 77 (citing Law of Return (Amendment) 1954, 8 L.S.I. 144, § 2 (1954)). This limitation on the immigration of criminals was arguably against Herzl's conception of the Zionist state, which provided that reformed Jewish criminals should be permitted to enter. HERZL, *supra* note 21, at 102 (stating that "we shall receive our

This discretion, which was exercised most notably in the case of organized crime figure Meyer Lansky,³⁶ was broad enough to include “substantial criminal records” even in the absence of prior convictions.³⁷

On the same day, the Knesset also adopted Israel’s first domestic extradition statute.³⁸ In most respects, this statute was modeled upon the pre-existing British Mandatory law.³⁹ Indeed, it specifically provided that requests previously made under the 1926 ordinance would be honored, although repealing the ordinance itself, except for provisions concerning the taking of evidence on behalf of foreign governments.⁴⁰ In addition, the Extradition Act formally declared that the Fugitive Offenders Act of 1881,⁴¹ which was previously applicable in Palestine, no longer permitted rendition of suspects to Commonwealth countries outside the extradition process.⁴² This declaration was arguably unnecessary given Israel’s position that it did not inherit the international obligations of Mandatory Palestine,⁴³

criminals only after they have suffered due penalties . . . [b]ut having made amends, they will be received without any restrictions whatever, for our criminals also must enter upon a new life”).

36. See Herb Keinon, *Fit to be Tried: But Where?*, JERUSALEM POST, Oct. 17, 1997, at 11.

37. Meron, *supra* note 26, at 77.

38. Extradition Act, 1954, 8 L.S.I. 144 (1954).

39. See Meron, *supra* note 26, at 76-77.

40. Extradition Act, § 25(a), 8 L.S.I. at 148. The sections of the Ordinance retained by the 1954 statute provided that Israeli magistrates could subpoena witnesses and take evidence on behalf of foreign countries to be used in criminal matters pending in the requesting state. See Extradition Ordinance 1926, *supra* note 31, §§ 21-22, 1926 Palestine Ordinances, at 218.

41. 44 & 45 Vict. c.69 (Eng.), reprinted at 3 Laws of Palestine 2532-47. Section 2 of this Act provided that “[w]here a person accused of having committed an offence . . . in one part of Her Majesty’s dominions has left that part, such person . . . if found in another part of Her Majesty’s dominions, shall be liable to be apprehended and returned in the manner provided by this Act to the part from which he is a fugitive.” *Id.* § 2, 3 Laws of Palestine at 2534. The Fugitive Offenders Act was made applicable to Palestine by Section 35(iv) of the Palestine Order in Council of August 10, 1922, reprinted at 3 Laws of Palestine 2578.

42. Extradition Act, § 25(b), 8 L.S.I. at 148.

43. See Meron, *supra* note 26, at 76. This position was contrary to that of certain other countries including Britain, which maintained that a post-colonial government was bound by agreements negotiated during the colonial period unless it specifically abrogated those agreements after independence. See *Shehadeh v. Comm’r of Prisons*, 14 L. Rep. Pal. 461, 462-63 (Pal. S. Ct. 1947) (holding that extradition agreement between French Mandatory authorities in Syria and Lebanon remained in force between the Lebanese Republic and Palestine); see also *Perlin v. Superintendent of Prisons*, 9 L. Rep. Pal. 683, 684-85 (Pal. S. Ct. 1942) (noting that “it seems to be settled practice in International Law that treaties and international agreements are not affected by a change in government or in the form of government, of one of the contracting parties and remain in force until denounced by the new government”). Thus, in the absence of the explicit declaration contained in the 1954 statute, British authorities might have argued that Israel was still bound by the terms of the Fugitive Offenders Act.

but was included “[f]or the removal of doubt.”⁴⁴

In accordance with the English common-law tradition upon which it was based, the 1954 statute was silent as to the extradition of Israeli nationals.⁴⁵ It conditioned extradition on the existence of an agreement providing for reciprocity between Israel and the requesting state,⁴⁶ contained a provision against double jeopardy,⁴⁷ and required that sufficient evidence be presented to justify a trial in Israel if the crime had been committed there.⁴⁸ In addition, the statute contained a “rule of specialty”—a provision specifying that the requesting state could only prosecute the fugitive for the offense for which his extradition was sought.⁴⁹ The 1954 law, like the ordinance of 1926, required dual criminality—that the offense for which extradition was sought be a crime under both the laws of Israel and those of the requesting state.⁵⁰ Each of these requirements adhered to long-standing common-law principles of extradition.

The Extradition Act of 1954, however, also contained significant departures from the previous ordinance. In accordance with developing international norms, the statute provided that extradition would not be granted in capital cases unless the requesting state agreed in advance not to seek or impose the death penalty.⁵¹

44. Extradition Act, § 25(b), 8 L.S.I. at 148.

45. See S.Z. Feller, *The Scope of Reciprocity in Extradition*, 10 ISR. L. REV. 427, 433 (1975) (stating that, due to the failure of the 1954 statute to address the extradition of Israeli nationals, “a restriction on the non-extradition of nationals in an international agreement does not give rise to, or vest directly, any rights in the individual [citizen of] Israel”).

46. See Extradition Act, § 2(1), 8 L.S.I. at 144. The statute also made clear that a fugitive who had fled after being convicted abroad, as opposed to before trial, could also be extradited if he had not served his full sentence. See *id.* This precluded anomalies such as that in *El-Kharraz v. Attorney General*, 7 L. Rep. Pal. 162, 163 (Pal. S. Ct. 1940), in which the Supreme Court of the Mandate of Palestine denied a Jordanian extradition warrant on the ground that the fugitive had already been convicted and was therefore not a “person charged” pursuant to the Palestine-Jordan extradition agreement.

47. *Id.* § 8, 8 L.S.I. at 145. Specifically, a fugitive in Israel could defeat extradition if he had been “tried in Israel for the criminal act for which extradition is requested and has been acquitted or convicted,” or if he had been convicted and served his sentence abroad. *Id.*

48. See *id.* § 9, 8 L.S.I. at 145.

49. *Id.* § 17, 8 L.S.I. at 146.

50. *Id.* § 2(2), 8 L.S.I. at 144. The Extradition Act of 1954 differed from the 1926 Ordinance, however, in that it did not limit extraditable offenses to a specified list of crimes but rather allowed extradition for any offense punishable by at least three years imprisonment under the law of Israel and the requesting state. See *id.* Schedule 2, 8 L.S.I. at 148; see also *Da’na v. Superintendent of Prisons*, 3 L. Rep. Pal. 157, 158 (Pal. S. Ct. 1936) (refusing Egyptian extradition request under 1926 ordinance on the ground that sodomy was not specifically listed as an extraditable offense).

51. See Extradition Act, § 16, 8 L.S.I. at 146. This provision of Israeli extradition law, like those involving extradition of nationals, has led to friction between Israel and the United States, which is the Western industrial nation that makes the most use of the death penalty. See also Lisa Van Proyen, *Murder Suspects*

Extradition would also be denied under the 1954 law if the statute of limitations for the offense had lapsed either under the laws of the requesting state or those of Israel.⁵² The Extradition Act also included a political offense exception similar to that contained in the 1926 statute, with an additional exception for military offenses.⁵³ Finally, in a provision “reflect[ing] the sensitivity of Jews as a persecuted people,”⁵⁴ the statute permitted courts to refuse extradition upon a finding of reasonable grounds for assuming that the accusation arose from racial or religious discrimination.⁵⁵

The extraditability of Israeli nationals occasioned little controversy or comment during the early years of the state. In an effort to achieve reciprocity, Israeli extradition treaties during that period conformed to the practices of the requesting states with respect to extradition of nationals.⁵⁶ In this, Israel continued the policy that had been exercised by British authorities during the Mandatory period. For example, a 1921 agreement between the British Mandate government and the French administration in Syria, consistent with French practice, reserved the right of each party to refuse to extradite French subjects to Palestine or British subjects to Syria.⁵⁷ In contrast, the 1922 agreement between the Mandatory

Face Trial in Israel; Death Penalty Foils Extradition, DAILY NEWS OF LOS ANGELES, May 17, 2000, at 3 (stating that Hanan Nathan and Ben Cohen would likely be tried in Israel for the Los Angeles murder of rival gang member Alon Giladi because Israel would not extradite them to face the death penalty); *see also* Margot Dudkevitch, *Two Israelis Suspected in Los Angeles Murder*, JERUSALEM POST, May 18, 2000, at 4 (stating that Israeli police recommended the indictment of Hanan Nathan and Ben Cohen in Israel).

52. *See id.* § 8(2), 8 L.S.I. at 145.

53. *See id.* § 2(2), 8 L.S.I. at 144 (specifying that an offense of a political character was not an extraditable crime); *id.* § 10(b), 8 L.S.I. at 145 (stating that a court shall not declare a wanted person subject to extradition if “the request for extradition aims at prosecuting or punishing him for an offense of a political character, though *prima facie* it is not made in connection with such an offense”); *id.* Schedule 2(a)(1), 8 L.S.I. at 148 (stating that an offense was not extraditable if it was “an offense with which a person can only be charged if at the time of committing it he [was] a soldier within the meaning of the Army Code”).

54. Meron, *supra* note 26, at 81.

55. Extradition Act, § 10, 8 L.S.I. at 145.

56. *See supra* notes 31-33 and accompanying text.

57. *See* Provisional Agreement for Extradition of Offenders between Syria and Palestine, July 11, 1921, art. 5, 1 Laws of Palestine at 688. The terms “British subject” and “French subject” were undefined in the agreement, but apparently did not include Syrians, Lebanese, or Palestinians as these were consistently mentioned separately from British or French subjects. *See, e.g., id.* art. 7, 1 Laws of Palestine at 688 (referring to requests for “a French subject, a Syrian or a Lebanese” and for “a British subject or a Palestinian”); *see also id.* art. 14, 1 Laws of Palestine at 689 (defining the “Syrians” to include “subjects of the State of Syria, the Government of Lattaquieh, and the Jebel Druze”). Accordingly, the agreement’s provisions for nonextradition of nationals apparently protected only French and British personnel present in the Mandatory territories rather than the indigenous inhabitants. *See, e.g.,* Perlin v. Superintendent of Prisons, 9 L. Rep. Pal. 683, 684 (Pal. S. Ct. 1942) (extraditing a

authorities and the Kingdom of Egypt made no provision for nonextradition of nationals.⁵⁸

The same pattern was followed by the post-independence government of Israel. Israel's bilateral treaties with France, Luxembourg, Belgium, and South Africa, for instance, specifically forbade the extradition of nationals or allowed the requested state to refuse extradition where one of its nationals was sought.⁵⁹ The European Convention on Extradition,⁶⁰ to which Israel was one of the original parties in 1957, likewise permitted parties to refuse the extradition of nationals in accordance with domestic law.⁶¹ The bilateral extradition treaties concluded between Israel and the common-law countries of the United Kingdom, Canada, and Swaziland, on the other hand, were silent as to the extradition of nationals.⁶² In fact, the extradition treaty concluded in 1962 between Israel and the United States, unique among Israel's bilateral extradition treaties, specifically provided that neither party could refuse extradition solely on the ground that the fugitive was a national of the requested state.⁶³

Ironically, the first significant protest against extradition of Israeli nationals occurred in the same year. This protest arose from the case of Robert Soblen, a U.S. Jew who fled to Israel after being convicted of espionage.⁶⁴ After an extradition request was made by the United States pursuant to the newly ratified treaty, Soblen was arrested and placed on a flight for the United States.⁶⁵ During the flight, Soblen slashed his wrists.⁶⁶ Although this suicide attempt was unsuccessful, he subsequently succeeded in killing himself by ingesting poison while under guard at a London hospital.⁶⁷

Palestinian Jew to Lebanon under the terms of the agreement). *But see* El Zahir v. Acting British Magistrate, Haifa, 13 L. Rep. Pal. 120, 127-28 (Pal. S. Ct. 1946) (opinion of DeComarmond, J.) (noting that the extradition treaty differentiated between the terms "English" and "British" and that a person "of Arab or African origin" might be a British subject).

58. See Provisional Agreement between the Governments of Egypt and Palestine with Regard to the Extradition of Offenders, Dec. 1, 1922, 1 Laws of Palestine 689-91.

59. See Feller, *supra* note 45, at 428-30.

60. European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273 [hereinafter European Convention].

61. See Feller, *supra* note 45, at 430 (citing European Convention, *supra* note 61, art. 6).

62. *Id.* at 427.

63. See Convention on Extradition Between the Government of the United States of America and the Government of the State of Israel, Dec. 10, 1962, U.S.-Isr. 14 U.S.T. 1707, *corr. version in* 18 U.S.T. 382 (1967).

64. Ann LoLordo, *To Extradite or Not to Extradite?*, BALTIMORE SUN, Oct. 23, 1997, at 2A.

65. *Id.*

66. *Id.*

67. *Id.*

The death of Soblen struck a chord with many Israelis, including then-opposition leader Menachem Begin.⁶⁸ In an impassioned article written in the newspaper of the Likud Party, Begin expressed the opinion that no Jew should ever be extradited from Israel.⁶⁹ Begin quoted from Deuteronomy 23:15: "You shall not give up to his master a slave who has escaped from his master to you."⁷⁰ In contrast to Herzl's promise that a Zionist state would readily extradite Jewish criminals, Begin "considered it the role of the Jewish state to give asylum to wanted Jews."⁷¹

Begin's position, although new to Israel, was grounded in the long-standing practice of civil law countries.⁷² The protection of nationals from extradition had its roots in the feudal loyalties of medieval times and had been the practice of France since the 1830s.⁷³ By the end of the nineteenth century, a clear pattern had developed, with the majority of Continental states refusing to extradite their nationals and the common-law countries allowing such extradition.⁷⁴ During the twentieth century, the practice of nonextradition of nationals spread to Latin America and was enshrined in the South American Bustamante Code agreement of 1928 and the Central American Extradition Convention of 1934.⁷⁵ The Arab League extradition agreement of 1952 also contained a discretionary provision allowing parties to refuse to extradite their nationals.⁷⁶ By the 1970s, S.Z. Feller, one of the leading Israeli authorities on extradition, was able to describe nonextradition of nationals as an "international norm" and conclude that 155 of 163 extradition agreements published in the League of Nations Treaty Series contained at least some restriction on the extradition of nationals.⁷⁷

The arguments that would influence the debate over whether Israeli nationals should be extradited had first been framed in 1878 by the British Royal Commission on Extradition.⁷⁸ In its report to Parliament, the Commission stated that:

In favour of such a provision it is said that a man should not be drawn from his natural judges; that the State owes to its subjects the

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* (quoting former Israeli cabinet member Arye Naor).

72. *Id.*

73. Michael Plachta, *(Non-)Extradition of Nationals: A Never-Ending Story*, 13 EMORY INT'L L. REV. 77, 83 (1999).

74. *Id.* at 83-84.

75. Feller, *supra* note 45, at 448.

76. *Id.* (citing SATYA DEVA BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 220 (1968)).

77. Feller, *supra* note 45, at 452.

78. Theodor Meron, *Non-Extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No. 1306*, 13 ISR. L. REV. 215, 215-16 (1978).

protection of its laws, and that it fails in this duty if it hands over any of them to a foreign jurisdiction . . . that it is impossible to place entire confidence in the justice of a foreign State . . . and that it is a serious disadvantage to a man to be tried in a foreign language, and where he is separated from his friends and his resources. . .⁷⁹

The Commission concomitantly presented the countervailing arguments in favor of extradition of nationals.⁸⁰ Among these were that “[t]he offence is an offence against the law of the country in which it is alleged to have been committed . . . [w]hy, because he has escaped beyond the jurisdiction of that law, should an offender . . . be in a different position from that in which he would have been in the country from which he has escaped?”⁸¹

Some fifty-seven years later, a 1935 Harvard University study of extradition revisited the issue and strongly supported the principle of extradition of nationals.⁸² The Harvard panel rejected the argument that a fugitive’s compatriots are his “natural judges,” concluding instead that the natural judges of an accused are those of the state where the crime was committed.⁸³ In addition, the panel noted that if a nation distrusted the justice system of another country, it should refuse extradition to that state altogether rather than exempting its own nationals.⁸⁴ The Harvard report proposed a model convention on extradition providing that “a requested State shall not decline to extradite a person claimed because such person is a national of the requested State.”⁸⁵ In light of the fact that many nations were traditionally reluctant to extradite their citizens, however, the draft convention included an alternative provision allowing a requested state to try the fugitive in its own courts in lieu of extradition.⁸⁶

79. *Id.* at 216 (quoting REPORT OF THE ROYAL COMMISSION ON EXTRADITION, 1879, C. 2039 at 6, 24) [hereinafter COMMISSION REPORT].

80. Meron, *supra* note 78, at 216.

81. *Id.* (quoting COMMISSION REPORT).

82. Meron, *supra* note 78, at 216 (citing *Draft Convention on Extradition, (with comment)* 29 AM. J. INT’L L. 15, 127-29 (Supp. 1935)) [hereinafter *Harvard Research*].

83. *Harvard Research, supra* note 82, at 128.

84. *Id.* at 128. This argument was echoed by James Leslie Brierly in his 1926 report to the League of Nations Committee for the Progressive Codification of International Law, in which he stated that distrust of a foreign judicial system “would seem to be a reason which would justify the refusal of extradition to that State altogether, but could not justify the practice of differentiating between nationals and other persons.” James Leslie Brierly, *Report on Extradition*, 20 AM. J. INT’L L. 244 (Supp. 1926). In addition, Professor Charles DeVisscher, in a presentation to the same committee, argued that “authorities of a country where an offence has been committed are best qualified to punish it and in that respect they possess a natural jurisdiction.” Meron, *supra* note 78, at 217 (discussing Brierly’s and DeVisscher’s views).

85. *Harvard Research, supra* note 82, at 123.

86. Feller, *supra* note 45, at 448 (discussing the Harvard Draft Convention).

B. 1975-1997: Reciprocity and Sanctuary

Despite the Soblen affair and Begin's heartfelt pronouncements, the debate concerning the extradition of nationals remained a largely academic one in Israel until the late 1970s. In 1975, a private bill was introduced by nine members of Knesset providing that an Israeli national "shall not be extradited unless his extradition is requested for an offense committed prior to his becoming an Israeli national," but the Knesset did not enact this bill into law.⁸⁷ In the same year, however, noted Israeli academic S.Z. Feller expressed the view that Israel should conform to the Continental framework and decline to extradite its nationals.⁸⁸ Professor Feller based this conclusion on two factors: the requirement of reciprocity contained in Israeli domestic extradition law and the fact that extradition from Israel could not be granted in the absence of a treaty.⁸⁹

The requirement of reciprocity, according to Feller, had the potential of leading to practical difficulties in extraditing Israelis to European nations that refused to extradite their own nationals.⁹⁰ He illustrated this by giving the example of an Israeli national who, "having committed an extraditable offence in Switzerland, eventually finds his way back to Israel."⁹¹ Because Swiss law at that time absolutely forbade the extradition of Swiss nationals,⁹² Professor Feller noted that the reciprocity provision in section 2(A) of the 1954 Extradition Act could bar the extradition of the Israeli national to Switzerland.⁹³ While Feller argued in favor of an interpretation of reciprocity under which Switzerland could meet its obligation by prosecuting its own nationals rather than extraditing them, he noted that the Israeli courts might not agree.⁹⁴ If the Israeli courts were to

87. *Id.* at 454 n.52.

88. *Id.* at 452-55.

89. *Id.* at 438-54.

90. *Id.* at 439-40.

91. *Id.* at 438.

92. *Id.* at 438 n.16 (citing Extradition Law art. 2 (Switz. 1892)). The Swiss law in effect in 1975 provided that Swiss nationals would not be extradited but would instead be tried by the courts of Switzerland, provided that the offenses of which they were accused were crimes in Switzerland. *Id.* Swiss law has since been amended to permit the extradition of nationals, but only upon their written consent. Plachta, *supra* note 73, at 84.

93. Feller, *supra* note 45, at 439-40.

94. *Id.* at 445-46. Feller states that

where Switzerland does not extradite because of Swiss nationality and for that reason at the request of Israel as the requesting state extra-territorial jurisdiction arises in Switzerland, then the reciprocity rule will oblige Israel to extradite to Switzerland an Israeli national when an Israeli court lacks extra-territorial jurisdiction even in consequence of a request by Switzerland.

disagree with Feller and interpret reciprocity in a way that required exactly identical treatment of citizens, then Israel would be unable to extradite its nationals to most European or Latin American countries.⁹⁵

As importantly, Professor Feller noted that, at the time of his writing, Israel maintained extradition treaties with only twenty-one countries and that Israeli domestic law did not permit extradition in the absence of a treaty.⁹⁶ Moreover, with a narrow exception directed primarily at international terrorism, Israeli courts lacked jurisdiction over offenses committed outside the borders of Israel.⁹⁷ Hence, if an

Id.; *id.* at 448 (arguing that reciprocity could be satisfied by “one obligation set against another, one exemption against another, each according to the values, concepts and perceptions of the state involved”). Feller based this conclusion on his view that “reciprocity [can] be fully satisfied by substantive and global equivalence . . . in order to make possible the prosecution or punishment of an offender when the other conditions for extradition are present,” but noted the opposing view under which “formal symmetry and complete identity [were] necessary in every detail between the conditions under which the two states are required to extradite or are prevented from extraditing. . . .” *Id.* at 445. Feller also stated:

The extradition law of Israel . . . requires both policy and normative reciprocity and therefore it is perfectly legitimate for the court to deal with the question of whether the system of norms upon which the petition is founded does in fact ensure reciprocity, including *inter alia* the matter of the extradition of nationals.

Id. at 451. In addition, Feller noted that where a treaty did not make nonextradition of nationals conditional upon prosecution in the requested state, reciprocity did not exist because no mutuality of obligations existed. *Id.* at 453 n.48.

95. *Id.* at 446-48.

96. *Id.* at 452-53.

97. *Id.* at 453. The exception to the Israeli rule against extraterritorial jurisdiction was created by the Penal Law (Offences Committed Abroad) Act, 28 L.S.I. 32 (Isr. 1973). Section 2(a) of this act provided that:

[T]he courts in Israel are competent to try under Israeli law a person who committed an act abroad which would have been an offence had it been committed in Israel, and which harmed or was intended to harm the State of Israel, its security, property or economy or its transport or communication links with other countries.

Id. § 2(a), 28 L.S.I. at 32; *see also id.* § 4(a), 28 L.S.I. at 34 (granting jurisdiction over offenses committed abroad which “harmed or were intended to harm the life, person, health, freedom or property of an Israeli national or resident of Israel”); Meron, *supra* note 78, at 219 n.16. This legislation thus represented an adoption of the “passive personality” principle of jurisdiction, under which a nation may exercise jurisdiction over an offense committed outside its borders if that state or a national thereof was the victim or intended victim. *Id.* at 219 (stating that the 1973 legislation “introduced in a very wide and comprehensive way the principle of passive personality”). In fact, the 1973 act may represent the broadest exercise of passive personality jurisdiction adopted by any nation, as it encompasses crimes against certain world Jewish and Zionist organizations as well as against the State of Israel or its nationals. *See* Penal Law (Offences Committed Abroad) Act, Schedule 1, 28 L.S.I. at 35. In addition, section 1 of the 1973 law adopted the theory of universal jurisdiction with respect to crimes of genocide, piracy, hijacking, and drug trafficking. *See id.* § 1, 28 L.S.I. at 32. Prior to

Israeli national committed a crime in a nation with which Israel did not have an extradition treaty, he would escape punishment entirely.⁹⁸ As Feller noted:

Israel's extra-territorial jurisdiction . . . is very narrow and its normative basis is moreover unsystematic and incoherent. What is most troubling is that the mass of really serious and relatively frequent crimes are not caught by this jurisdiction. An Israeli national may without criminal liability steal, rob, deceive, rape, forge—even currency, commit arson and destroy property, kill—even with premeditation, as long as he escapes to Israel; and if there is no possibility to extradite him, either because of the absence of an extradition agreement or of reciprocity in the extradition of nationals, he will be regarded by local law as not having committed any wrong so long as he remains within the area since it is completely forbidden to prosecute him in order to establish his culpability.⁹⁹

This situation “[would cut] off the state [of Israel] with all its legal and moral values from those of its nationals who are abroad.”¹⁰⁰

Accordingly, Professor Feller advocated that Israel adopt the “active personality” principle of jurisdiction, under which Israeli courts would have jurisdiction over all offenses committed by Israeli nationals in foreign countries.¹⁰¹ By doing so, Israel would assure that its citizens would be held responsible for their criminal acts abroad, even if no extradition treaty existed between Israel and the country where the crime was committed.¹⁰² Yet in the interests of reciprocity and humanitarianism, Feller “concur[red] with those who shrink from the extradition of Israeli nationals.”¹⁰³ In essence, Feller advocated a shift in Israeli extradition norms from its British-influenced common-law tradition to the Continental system. In other words, Feller argued that Israel should “prohibit the extradition of nationals while extending the extra-territorial jurisdiction of Israeli courts to such a national even if his extradition is not requested.”¹⁰⁴

Two years later, in 1977, two high-profile extradition cases moved Professor Feller's views on extradition of nationals to the forefront of public debate. The first of these mirrored the example

1978, however, Israeli law generally did not recognize the “active personality” principle, under which jurisdiction could be based upon the nationality of the offender as opposed to the victim. See Meron, *supra* note 78, at 219-20. The 1973 act did adopt active personality jurisdiction for official corruption and frauds against the state of Israel, but not for crimes against the person. See Penal Law (Offences Committed Abroad) Act, § 3(a), 28 L.S.I. at 33.

98. Feller, *supra* note 45, at 452-53.

99. *Id.* at 453.

100. *Id.*

101. *Id.* at 453-54. Feller argued that Israeli acceptance of active personality jurisdiction should extend to “all crimes and misdemeanors,” subject to a requirement of dual criminality. *Id.* at 453 n.50.

102. *Id.* at 454.

103. *Id.*

104. *Id.* at 455.

used by Feller in his article. This event was the case of Reuben Pesachowitz, an Israeli national who was sought by Switzerland on charges of fraud.¹⁰⁵ In opposition to the Swiss extradition request, Pesachowitz urged that the preclusion of nationals from extradition under Swiss law fell short of the reciprocity required by the 1954 Extradition Act and hence barred his own extradition.¹⁰⁶ The Supreme Court of Israel, however, adopted Feller's conception of the reciprocity rule, holding that the provision of the European Convention on Extradition requiring that requested states try their citizens in lieu of extradition established sufficient mutuality of obligations between Israel and Switzerland.¹⁰⁷ Despite the court's ruling, however, Pesachowitz' arguments received broad support both from the Israeli public and from politicians who shared Begin's sentiments.¹⁰⁸ His extradition to Switzerland engendered support for a policy of protecting Israelis from trial in foreign countries.¹⁰⁹

The second case to gain widespread publicity in Israel during 1977 was that of Shmuel Flatto-Sharon, a financier who was wanted in France on allegations that he had defrauded French citizens of approximately sixty million dollars.¹¹⁰ During the early 1970s, Flatto-Sharon emigrated to Israel.¹¹¹ After France requested his extradition in 1976, the fugitive millionaire began a concerted effort to avoid being extradited.¹¹² In that year, Flatto-Sharon published a fifty-one page French-language pamphlet, later translated into English and Hebrew, which depicted him as a Holocaust survivor and a friend of then-Minister of Finance Pinhas Sapir with significant investments in Israel.¹¹³ Although not specifically mentioning extradition, the pamphlet emphasized the need for solidarity between Israel and the Jews in the diaspora.¹¹⁴ It stressed the need for Israel to provide representation to "every individual Jew in the world" and advocated that all Jews should be provided with Israeli passports whereby they could obtain sanctuary in the event of persecution.¹¹⁵

105. See Cr. A. 308/75, *Pesachowitz v. State of Israel*, 31(2) P.D. 449, 455 (Isr. 1977).

106. *Id.* at 456.

107. *Id.* at 465. See also *Kamiar v. Attorney General*, 22(2) P.D. 85, 115 (Isr. 1972) (holding that a formal condition of reciprocity is met by an agreement that imposes obligations upon both Israel and the other contracting party).

108. *Pardon from the Highest*, *ECONOMIST*, Sept. 17, 1977, at 83.

109. *Id.*

110. *Israel Court Orders Candidate To Begin a Bribery Jail Term*, *N.Y. TIMES*, June 28, 1984, at A6.

111. *Id.*

112. *Id.*

113. Shmuel Flatto-Sharon, *THE INTERNATIONAL OF ISRAELI CITIZENS* 7-11 (1976).

114. See *id.* at 39-51.

115. *Id.* at 39, 43. Flatto-Sharon proposed that these goals be achieved by the formation of a quasi-governmental "International of Israeli Citizens," whose members

Flatto-Sharon used this manifesto as a springboard to enter politics. He campaigned in the 1977 Knesset elections with the openly stated purpose of avoiding extradition by gaining parliamentary immunity.¹¹⁶ Under ordinary circumstances, his attempt would likely have failed. At the time, however, anti-French sentiment was high in Israel due to France's refusal to extradite Abu Daoud, an alleged perpetrator of the September 1972 massacre of Israeli Olympic athletes in Munich, to Israel or West Germany.¹¹⁷ As a result, Flatto-Sharon's campaign attracted the support of a number of prominent Israelis—including Begin, who protested vociferously against Flatto-Sharon's extradition to France.¹¹⁸ Although Flatto-Sharon hardly spoke Hebrew and had to campaign with the aid of an interpreter, he secured thirty-five thousand votes in the May 1977 election, winning a seat in the Knesset and gaining parliamentary immunity.¹¹⁹

The same election brought Begin's Likud Party, which had hitherto been in the opposition, to power as the leading party in a center-right coalition.¹²⁰ Begin himself became Prime Minister.¹²¹ Soon after his election, Begin capitalized on the sentiment generated by the Pesachowitz and Flatto-Sharon cases to give effect to his long-standing view that Israeli citizens should not be extradited.¹²² The result was the Offences Committed Abroad (Amendment of

would obtain Israeli protection in return for financial and political support in their home countries. See *id.* at 39-51. Subsequently, Flatto-Sharon in fact founded an organization called the "World Congress for the Defense of Jews in Distress." 25 *Israelis Test Gun Skill to Protect Europe's Jews*, N.Y. TIMES, Oct. 10, 1980, at A13.

116. Susan Hattis Rolef, *Crooks and Books*, JERUSALEM POST, June 16, 1997, at 6. See also H.D.S. Greenway, *One-Man Political Party Wins Two Seats in Israel*, WASH. POST, May 21, 1977, at A8; *27 Parties to Vie for Israel Vote*, SAN DIEGO UNION-TRIB., June 3, 1984, at A21 (noting that Flatto-Sharon's election "saved him from extradition to France"). Flatto-Sharon supplemented his anti-extradition platform by promising that "as a businessman he would strive to make Israel a more attractive place to live." Greenway, *supra*, at A8.

117. Brandon S. Chabner, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law Against Terrorist Violence Overseas*, 37 UCLA L. REV. 985, 1004 (1990). The reason given by the French courts for refusing to extradite Abu Daoud to Israel was that his extradition was being sought under a passive personality theory of jurisdiction, which was not recognized by French law. *Id.* This rationale, however, was inapplicable to West Germany, which had territorial jurisdiction over Daoud. In addition, Chabner notes that the French decision "seem[s] particularly inflexible" because the French courts had applied passive personality jurisdiction on prior occasions to obtain jurisdiction over defendants accused of crimes against French nationals. *Id.* at 1004 n.83.

118. *Pardon from the Highest*, *supra* note 108, at 83.

119. Greenway, *supra* note 116, at A8. See also Susan Hattis Rolef, *Wasted Votes*, JERUSALEM POST, Apr. 8, 1996, at 6 (stating that Flatto-Sharon received 35,049 votes).

120. *Pardon from the Highest*, *supra* note 108, at 83.

121. *Id.*

122. *Id.*

Enactments) Act of 1978, commonly referred to as the Offences Committed Abroad Act.¹²³

This law created an extradition regime for Israel that followed the proposal set forth by Feller in 1975. On the one hand, the Extradition Act was amended to provide that no Israeli citizen could be extradited except for an offense committed before he obtained citizenship.¹²⁴ On the other hand, Israeli courts were given jurisdiction to prosecute Israeli citizens, or noncitizen residents, for offenses committed outside Israel.¹²⁵ This extraterritorial jurisdiction was subject to a requirement of dual criminality,¹²⁶ and Israeli courts were prohibited from imposing penalties greater than could have been imposed in the state where the offense took place.¹²⁷

In addition, the statute made provision for Israel to administer the sentences of fugitives who fled to Israel after being sentenced by the courts of another country.¹²⁸ As with extraterritorial jurisdiction, Israel could only enforce a foreign sentence if it were imposed for an extraditable offense and could not enforce it beyond the maximum penalty provided by Israeli law for an equivalent crime.¹²⁹ The Offences Committed Abroad Act was introduced in the Knesset on July 25, 1977 and enacted on January 3, 1978—with Flatto-Sharon, who was part of the governing coalition, among those voting in favor.¹³⁰

123. Offences Committed Abroad (Amendment of Enactments) Act, 1978, 32 L.S.I. 63 (1978).

124. *Id.* § 2, 32 L.S.I. at 64. As originally drafted, the bill precluded the extradition of Israeli nationals even for offenses committed prior to becoming citizens, but the bill was amended in committee to allow extradition for such offenses. Meron, *supra* note 78, at 215 n.1.

125. *See* Offences Committed Abroad (Amendment of Enactments) Act, § 1, 32 L.S.I. at 63-64.

126. *Id.* § 1(1), 32 L.S.I. at 63.

127. *Id.*

128. *Id.* § 1(3), 32 L.S.I. at 63-64.

129. *Id.* § 1(3), 32 L.S.I. at 64. Enforcement of foreign sentences, however, was not confined to sentences imposed by countries having extradition treaties with Israel. *See id.*

130. Meron, *supra* note 78, at 215 n.1. *See also Pardon from the Highest*, *supra* note 108, at 83 (noting that Flatto-Sharon was a member of the governing coalition). Flatto-Sharon's term in office was characterized by flamboyant gestures including support for homeless Israeli squatters seeking housing in Jerusalem, negotiation of prisoner exchanges, and formation of a private defense force for French and Belgian synagogues after a synagogue bombing in Paris. William Claiborne, *Settlers Pitch Their Tents in Jerusalem*, WASH. POST, June 16, 1980, at A1 (discussing Flatto-Sharon's role in financing a tent city for Israeli slum-dwellers); David M. Alpern, *A Three-Way Spy Swap*, NEWSWEEK, May 1, 1978, at 26 (detailing Flatto-Sharon's involvement in the exchange of imprisoned spies); *25 Israelis Test Gun Skill to Protect Europe's Jews*, *supra* note 115, at A13 (discussing recruitment of twenty-five Israeli combat veterans by Flatto-Sharon to protect European synagogues). Flatto-Sharon, however, was ultimately convicted of vote-buying in connection with the 1977 election, sentenced to nine months in prison, and suspended from the Knesset. *Israeli*

Although supported by a majority of legislators, the Offences Committed Abroad Act was not without its detractors.¹³¹ Writing shortly after the passage of the law, Israeli academic Theodor Meron contended that a Continental extradition regime was logistically impractical and potentially dangerous to Israel's world standing.¹³² Meron noted that "the procedural law [of Israel]—including the law of evidence—pertaining to criminal cases has remained particularly well suited to the territorial principle of jurisdiction."¹³³ This occurrence was due to the fact that Israel, which followed the adversarial system of common-law criminal jurisprudence rather than the inquisitorial system common to civil-law countries, required "the prosecution [to] bring witnesses to give oral evidence in order to establish every point in its case."¹³⁴ Thus, the fact that witnesses and physical evidence had to be transported to Israel would make it difficult to conduct a trial in accordance with Israeli due process standards when an offense was committed abroad.¹³⁵ This conflict left Israel with a Hobson's choice between lowering evidentiary standards in cases where crimes were committed abroad or foregoing prosecution due to inadequate evidence.¹³⁶

Professor Meron also criticized the 1978 statute as providing protection to "not only nationals of Israel who normally reside in Israel . . . [but] Israeli nationals who reside in foreign countries and whose Israeli nationality constitutes merely a formal bond."¹³⁷ This protection raised the danger of "encourag[ing] attempts to escape from lawful custody abroad and reach Israel."¹³⁸ Israel would in fact be powerless to extradite nationals "even in cases which would cause the Government embarrassment in its relations with the foreign States concerned and harm Israel's international reputation."¹³⁹ This argument was especially compelling in the context of U.S.-Israeli

Parliament Suspends Member Convicted of Crime, N.Y. TIMES, May 20, 1981, at A7. See also Greenway, *supra* note 116, at A8 (noting that switchboards were jammed by Israeli voters "calling to find out how and where to apply for a bribe" from Flatto-Sharon). Flatto-Sharon lost bids for re-election in 1981 and 1984, but was never returned to France to serve his five-year sentence due to the expiration of the statute of limitations. LoLordo, *supra* note 64, at 2A. See also *Israeli Legislator and Financier Sentenced in Absentia by France*, N.Y. TIMES, Sept. 20, 1979, at 14 (stating that a French court sentenced Flatto-Sharon in absentia to five years in prison and a fine of seventy-two hundred dollars).

131. Meron, *supra* note 78, at 215-18.

132. *Id.* at 220-28.

133. *Id.* at 220.

134. *Id.* at 220-21 n.17.

135. *Id.* at 221.

136. *Id.* Meron also questioned whether there was a sufficient basis in international law for assuming active personality jurisdiction over persons who were residents but not citizens of Israel. *Id.*

137. *Id.* at 222.

138. *Id.* at 225.

139. *Id.* at 222.

relations, because Israel's extradition treaty with the United States explicitly committed it to extradite its nationals.¹⁴⁰ Accordingly, Meron concluded that the 1978 legislation was unnecessary, particularly in light of the antidiscrimination provisions and the broad discretion granted to Israeli authorities under the 1954 act.¹⁴¹ In sum, he contended that the Offences Committed Abroad Act created "a real danger that . . . Israel would become a haven for criminals."¹⁴²

Despite Professor Meron's criticism, the Offences Committed Abroad Act was deemed by many to be consistent with Israel's role as a sanctuary for Jews.¹⁴³ This sentiment was further reinforced by the case of William Nakash in 1985.¹⁴⁴ Nakash, a French Jew, was accused of the 1983 murder of an Arab nightclub owner and drug dealer.¹⁴⁵ Rather than stand trial in France, Nakash fled to Israel and acquired citizenship, remaining there until the French government submitted an extradition request some two years later.¹⁴⁶ Although Nakash was extraditable under the 1978 law because he had committed the murder before he became an Israeli citizen, many Israeli leaders were reluctant to return him to France due to a perception that his life would be in danger from Arab gangs in French prisons.¹⁴⁷ Among his supporters was then-Justice Minister Avraham Sharir, who stated publicly that "[he] would rather be known as soft-hearted than bear responsibility for sending Nakash to his death in a French prison."¹⁴⁸ As a result, Sharir attempted to exercise his discretion under section 18 of the 1954 Extradition Act to deny the French request; the Israeli Supreme Court, however, ruled that he had abused his discretion by acting without sufficient evidence of danger to Nakash's life.¹⁴⁹ While Nakash was ultimately extradited, the case further galvanized public opinion in Israel against the rendition of citizens for trial and imprisonment abroad.¹⁵⁰

Moreover, for two decades after the enactment of the Offences Committed Abroad Act, the Continental system did not cause serious difficulties in Israel. In fact, Israeli authorities conducted several

140. *Id.* at 226-27.

141. *Id.* at 222-24, 229.

142. *Id.* at 229.

143. *Id.* at 222.

144. *See Nakash v. State of Israel*, 40(4) P.D. 78 (1986).

145. *Id.* at 85.

146. *Id.*

147. *Id.* at 88. Nakash also argued that the murder of which he had been convicted was a political offense because it was committed due to the failure of French authorities to protect Jews from Arab violence, but this argument was rejected by the Israeli courts. *Id.* at 90.

148. Keinon, *supra* note 36, at 11.

149. Nakash, 40(4) P.D. at 94.

150. Keinon, *supra* note 36, at 11.

successful prosecutions of Israeli nationals who had fled to Israel after committing crimes abroad. The first such instance was the 1993 trial of Isaac Kirman, a small-time drug dealer who had fled to Israel after being indicted in Suffolk County, New York.¹⁵¹ Subsequently, Yair Orr and Nadav Nakan were convicted in Israel on charges stemming from a California murder.¹⁵² In addition, Israel Mizrahi was convicted on U.S. drug trafficking charges, although acquitted of the Brooklyn murder of Israeli gangster Michael Markowitz.¹⁵³

These joint prosecutions, although not without difficulty, generally went smoothly. Through mutual cooperation, Israeli and U.S. prosecutors ironed out difficulties resulting from transportation of witnesses and physical evidence, including the taking of depositions abroad.¹⁵⁴ In fact, prosecution in Israel offered certain advantages that were not available in the U.S. criminal justice system. Unlike U.S. investigators, Israeli police are not required to "minimize" their invasion of a suspect's privacy through wiretaps and can listen to entire conversations rather than only the portions indicating criminal intent.¹⁵⁵ Due to the lack of a jury system and exclusionary rule in Israel, trials frequently proceed more quickly and at less cost than if they had been conducted in the United States.¹⁵⁶ Moreover, a defendant's silence can be held against him in an Israeli court, and prosecutors are permitted to appeal verdicts of acquittal.¹⁵⁷ Accordingly, although prosecutions in Israel presented certain logistical difficulties, they did not unduly strain U.S.-Israeli law enforcement relations.

Concomitantly, Israel continued to extradite Israeli citizens who had committed crimes prior to emigrating to Israel. Among the most famous examples was the case of "Crazy Eddie" Antar, who was extradited to the United States by Israeli authorities to face charges of embezzlement and fraud.¹⁵⁸ In addition, Robert Manning, a member of the Jewish Defense League who had emigrated to Israel after killing a secretary at an Arab-American organization in

151. Mark Cohen, *New York v. Kirman/Israel v. Kirman: A Prosecution in Tel Aviv under Israeli Law for a Narcotics Offense Committed in New York*, 4 CRIM. L.F. 597, 604-05 (1993). Cohen, an assistant district attorney in Suffolk County, was the lead American prosecutor in the Kirman case. *Id.* at 605.

152. Abraham Abramovsky, *Partners Against Crime: Joint Prosecutions of Israeli Organized Crime Figures by U.S. and Israeli Authorities*, 19 FORDHAM INT'L L.J. 1903, 1914-17 (1996).

153. *Id.*

154. *Id.* at 1912-14.

155. *Id.* at 1913.

156. *Id.* at 1917 n.65 (citing interview with Kirman prosecutor Mark Cohen).

157. *Id.* at 1913-14.

158. *Id.* at 1908 n.24.

California with a letter bomb, was extradited to the United States to face a sentence of life without parole.¹⁵⁹

By the early 1990s, however, the Israeli policy on extradition of nationals was beginning to strain Israel's international relations, especially with the United States.¹⁶⁰ A key factor in the development of this tension was the criminalization of money laundering by the United States in 1986¹⁶¹—a measure that was not followed by Israel until 2000.¹⁶² This difference meant that the money laundering statute, which was a key component of U.S. efforts against international organized crime, could not be enforced in Israel. As a result, large-scale Israeli money launderers such as Adi Tal were not only able to escape prosecution in the United States by fleeing to Israel, but could not be prosecuted under Israeli domestic law due to the lack of dual criminality.¹⁶³

In addition, as national borders became more porous both to human traffic and to money, crime itself became more international in scope and transnational offenses and investigations became increasingly common.¹⁶⁴ When Professor Feller argued against extradition of Israeli nationals in 1975, he was able to assert that “only in very exceptional circumstances are [foreign] states in fact interested in having persons extradited to them.”¹⁶⁵ To say the least, this statement was far less applicable twenty years later.

The increasing emphasis on international cooperation in law enforcement can best be illustrated by the rapid growth in the number of mutual legal assistance treaties (MLATs) during the last quarter of the twentieth century.¹⁶⁶ The United States concluded its first MLAT, with Switzerland, only two years prior to Professor Feller's article.¹⁶⁷ By the mid-1990s, however, it had concluded similar treaties with more than twenty-five countries and

159. *Id.* For additional discussion of *Manning*, see *infra* notes 471-97 and accompanying text.

160. See Abramovsky & Edelstein, *supra* note 6, at 332-33.

161. 18 U.S.C. §§ 1956-57 (1986).

162. Nina Gilbert, *The Money-Laundering Prohibition Law Approved*, JERUSALEM POST, Aug. 3, 2000, at 4. Israel's lack of a money laundering statute prior to 2000 has been widely criticized as facilitating the commission of crimes by expatriate Israeli nationals because they were able to deposit the proceeds of their crimes safely in Israel. *Israel Rejects French Criticism of Failure to Extradite in Money-Laundering Case*, HA'ARETZ, Feb. 23, 2001 (describing accusations by French authorities that French Jews with dual Israeli nationality regularly flew to Israel to deposit the proceeds of bank fraud).

163. Abramovsky & Edelstein, *supra* note 6, at 333.

164. Abraham Abramovsky & Jonathan I. Edelstein, *Time for Final Action on 18 U.S.C. § 3292*, 21 MICH. J. INT'L L. 941, 946-48 (2000).

165. Feller, *supra* note 45, at 452.

166. Abramovsky & Edelstein, *supra* note 164, at 947-52.

167. Treaty of Mutual Legal Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019.

dependencies.¹⁶⁸ In addition, U.S. law enforcement agencies increasingly dispatched personnel to assist in investigations in other countries and even began opening permanent offices abroad.¹⁶⁹ As the United States increased its international law enforcement efforts, it began to demand greater cooperation in the area of extradition as well as investigation.¹⁷⁰ As a result, any nations that had hitherto refused to extradite their citizens, including Mexico, Colombia, and the Dominican Republic, began to re-examine their policies.¹⁷¹

C. 1997-1999: Meron's Prophecy Realized

The breaking point in Israeli extradition policy, however, did not occur until Samuel Sheinbein fled to Israel in 1997.¹⁷² Just as Professor Feller's words had proven prophetic with the advent of the Pesachowitz case, Professor Meron's criticism of the 1978 act accurately predicted the Sheinbein debacle. Moreover, the Sheinbein case validated Professor Meron's critique of Israel's extradition policy just as many Israelis had seen the Pesachowitz case as validating Professor Feller's.

In September 1997, Sheinbein was accused by Maryland prosecutors of the grisly murder of Hispanic teenager Enrique Tello, Jr.¹⁷³ On September 19, one day after Tello's burned and mutilated body was discovered by police, Sheinbein disappeared from Maryland, surfacing in Israel six days later.¹⁷⁴ At first, his family represented to Maryland authorities that Sheinbein would surrender voluntarily; however, he was not present on the flight on which he was scheduled to arrive in the United States.¹⁷⁵ Acting on the request of the United

168. Abraham Abramovsky, *Prosecuting the "Russian Mafia": Recent Russian Legislation and Increased Bilateral Cooperation May Provide the Means*, 37 VA. J. INT'L L. 191, 207 n.91 (1996) (listing countries with which the United States had functioning MLATs). At the time of this writing, the United States has ratified mutual legal assistance treaties with thirty-six countries, including Israel, and nine other treaties have been approved by the Senate Foreign Relations Committee. See Bruce Zagaris, *Uncle Sam Extends Reach for Evidence Worldwide*, 15 CRIM. JUST. 4, 7 (2001). In addition, the United States has begun to enter into multilateral MLATs; an Organization of American States treaty now under consideration by the Senate would allow inter-American cooperation in law enforcement. *Id.* at 9.

169. ETHAN NADELMANN, COPS ACROSS BORDERS 103-88 (1993) (describing the international role taken by U.S. law enforcement officials between 1940 and 1992).

170. Abramovsky & Edelstein, *supra* note 6, at 334-38.

171. *Id.* at 342-43. See also *Libman v. The Queen*, [1985] 2 S.C.R. 214 (Can. 1985) (stating that "we should not be indifferent to the protection of the public in other countries . . . [i]n a shrinking world, we are all our brother's keepers").

172. Abramovsky & Edelstein, *supra* note 6, at 306-08.

173. *Id.* at 309.

174. *Id.*

175. *Id.* at 309-10.

States government, Israeli authorities arrested Sheinbein in Tel Aviv pending the submission of a formal extradition request.¹⁷⁶

Rather than submitting to extradition, Sheinbein—even though he had been born in the United States and had never so much as set foot in Israel prior to murdering Tello—maintained that he was an Israeli citizen from birth and hence could not be extradited.¹⁷⁷ Specifically, Sheinbein argued that his father was an Israeli citizen and that, as a result, he was entitled to citizenship under Section 4 of the Israeli Nationality Law of 1952.¹⁷⁸ Because Israeli law permits dual citizenship,¹⁷⁹ Sheinbein's claim was initially accepted as valid by Israeli authorities, who offered to pay for a trial in Israel in lieu of extradition.¹⁸⁰

At this point, the floodgates were opened. The State Attorney of Montgomery County, Maryland, who was engaged in a tough re-election battle, denounced Israel's refusal to extradite Sheinbein and demanded his immediate return.¹⁸¹ He was supported in this demand by the large Hispanic population of Montgomery County, who were incensed at the perceived leniency that Sheinbein would receive if sentenced in Israel for the murder of a member of their community.¹⁸² In addition, the call for Sheinbein's return was taken up by then-Secretary of State Madeleine Albright and by Representative Robert Livingston of Louisiana, who threatened to suspend American aid to Israel unless Sheinbein was extradited.¹⁸³

Faced with this pressure, Israeli authorities commenced extradition proceedings against Sheinbein.¹⁸⁴ In proceedings before the Jerusalem District Court, they argued both that Sheinbein was not an Israeli citizen and alternatively that he should be extradited because he was only a technical citizen lacking substantial ties to Israel.¹⁸⁵ Judge Moshe Ravid attempted to mediate the crisis by suggesting that Sheinbein be extradited to the United States for trial on condition that he serve his sentence in Israel if convicted.¹⁸⁶ This

176. *Id.* at 310.

177. *Id.* at 317-18.

178. *Id.* at 318. *See also* Nationality Law, 1952, 6 L.S.I. 50, 51 (1952) (providing that "[a] person born while his father or mother is an Israeli national shall be an Israeli national from birth").

179. Nationality Law, § 14(b), 6 L.S.I. at 53 (stating that "[a]n Israeli national who is also a foreign national shall, for the purposes of Israel law, be considered an Israeli national").

180. Abramovsky & Edelstein, *supra* note 6, at 310.

181. *Id.* at 316.

182. *Id.*

183. *Id.* at 316-17.

184. *Id.* at 318-19.

185. *Id.* at 318.

186. *Id.*

compromise was rejected by U.S. authorities, requiring Judge Ravid to rule on the merits.¹⁸⁷

On September 6, 1998, Judge Ravid ruled that Sheinbein could be extradited.¹⁸⁸ Rejecting the contention that Sheinbein's grandparents had renounced their Israeli citizenship, he ruled that Sheinbein's father—and therefore Sheinbein himself—was an Israeli citizen.¹⁸⁹ Nevertheless, he concluded that "Sheinbein is not enough of a citizen to deserve protection under Israeli law" because he had never lived in Israel, had used a U.S. passport to enter the country, and had no meaningful connections to the State of Israel.¹⁹⁰ In doing so, Judge Ravid noted that "[a] citizenship that is empty of meaning and all feelings and interest [was] not enough" to entitle Sheinbein to protection from extradition.¹⁹¹

On February 25, 1999, a divided Supreme Court reversed Judge Ravid's ruling and held that Sheinbein could not be extradited.¹⁹² The 3-2 decision was made despite a vociferous dissent from Chief Justice Aharon Barak, who echoed Professor Meron's words of twenty years previously:

How would a person be perceived, one who has a foreign citizenship and whose ties are to the foreign country, were he to claim that it would be unjust to try him in accordance with the laws of that country, whose culture he is familiar with, whose language he speaks, to which he is connected, and to which he is tied with all his heartstrings? How can one justify the claim that the State of Israel—to which he has no connection nor ties at all . . . is the one that must activate against him its criminal laws and its criminal jurisdiction?¹⁹³

Thus, like Judge Ravid, Chief Justice Barak proposed a test that would require Israeli nationals to prove a sufficient connection with the State of Israel in order to enjoy the benefits of the Offences Committed Abroad Act.¹⁹⁴

Moreover, even the three-judge majority was clearly reluctant to allow Sheinbein to remain in Israel, stating that:

One may wonder whether there is in fact material justification for providing immunity from extradition to those who are citizens but *are not residents* of this country, and have no real connection to Israel. Indeed, it is doubtful that one can identify at all, as a rule, any

187. *Id.* at 319.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 319-20.

192. Sheinbein v. Attorney General, Crim. App. 6182/98 53(1) P.D. 625 (Isr. 1999).

193. *Id.* at 638-39 (Barak, J., dissenting).

194. *Id.* at 643-44.

substantial injustice in having these citizens face justice for offenses they have committed, in the country that is the center of their lives.¹⁹⁵

The majority concluded, however, that it was up to the Knesset, rather than the courts, to remedy the deficiencies in the statute.¹⁹⁶

On September 2, 1999, the Sheinbein affair came to an end when Sheinbein pled guilty to murder in a Jerusalem court and was sentenced to twenty-four years in prison.¹⁹⁷ By that time, however, it had become clear to Israeli officials that Israel could not continue to follow a policy of nonextradition of nationals without jeopardizing its international relations. It was a foregone conclusion that Israel's extradition laws would be reformed; the only questions were how soon and in what manner.

III. THE REFORM MOVEMENT, THE NEW LAW, AND SUBSEQUENT DEVELOPMENTS

The movement to reform Israel's extradition policy had already begun considerably prior to the Sheinbein case.¹⁹⁸ Not only had Israel's extradition policy harmed its international relations, but the existence of the Offences Committed Abroad Act proved to have unintended and harmful effects on individual Israelis.¹⁹⁹ According to statistics compiled by the Israeli Justice Ministry, Israeli nationals arrested outside Israel had been denied bail for the specific reason that their nonextraditability rendered them flight risks.²⁰⁰ Moreover, as a prominent Israeli commentator noted, prosecution of fugitives in lieu of extradition was less practical in Israel than in civil-law

195. *Id.* at 660-61 (opinion of Or, J.).

196. *Id.* at 656-58. Notably, Judge Or cited the American decision of *United States v. Gaggi*, 811 F.2d 47 (2d Cir. 1987) (holding that criminal penalties for civil rights violations under the pre-1996 version 18 U.S.C. § 241 do not apply to acts against noncitizens), in support of his argument that courts should exercise restraint in altering legislative determinations concerning the rights of citizenship. *Id.* at 656 (citing *Gaggi*, 811 F.2d at 58). Subsequently, on March 22, 1999, the court denied the government's request for a rehearing en banc. See Abramovsky & Edelstein, *supra* note 6, at 321.

197. Plushnick & Shaver, *supra* note 10, at B1. In Maryland, he would have faced life without parole. See Abramovsky & Edelstein, *supra* note 6, at 319.

198. Edna Arbel, *The Israeli Extradition Act: A Suggestion for Reform*, 15 JUST. 3, 6 (1997).

199. *Id.*

200. *Id.* A number of reported decisions in the United States have cited nonextradition of nationals as a reason for denying bail to citizens of foreign countries facing American charges. See, e.g., *Hababou v. Albright*, 82 F. Supp. 2d 347, 350-52 (D.N.J. 2000) (denying bail to French defendant because extradition of nationals was forbidden under French law); *United States v. Stroh*, 2000 WL 1832956 (D. Conn. Nov. 3, 2000) (denying bail to accused money launderer with strong Israeli connections because money laundering was not an extraditable offense under the U.S.-Israeli treaty).

countries because Israel had adopted the common law requirement of confrontation and the prohibition against hearsay evidence.²⁰¹ This policy meant that witnesses and physical evidence had to be brought to Israel from abroad, rendering Israeli trials expensive and often impracticable.²⁰² Thus, by the mid-1990s, the Israeli government was increasingly coming to the conclusion that nonextradition of nationals was both outdated and harmful to the majority of Israeli nationals who chose to face justice abroad rather than flee.²⁰³

But for the Sheinbein case, however, extradition reform might well have been debated for an extended period. As with money laundering legislation, there was no real sense of urgency in Israel to reform its extradition policy during the mid-1990s.²⁰⁴ It was the Sheinbein affair that gave impetus to the movement to change the law. In addition to the withering international criticism leveled against Israel both by political leaders and U.S. editorial columnists, many Israelis were angered by Sheinbein's cynical manipulation of their legal system.²⁰⁵ Although a minority of Israelis supported Sheinbein's battle against extradition,²⁰⁶ the majority viewed the case as a graphic illustration of the domestic and international weaknesses of Israeli extradition policy.²⁰⁷ Moreover, the high-profile nature of the Sheinbein case drew attention to other cases in which Israelis had fled to Israel to escape prosecution and caused both the U.S. and the Israeli public to regard the extradition statute as an immediate and pressing concern.²⁰⁸

A. 1996-1999: Two Proposals For Reform

Suggestions for reform followed two patterns. The first of these was proposed soon after Sheinbein's flight to Israel by Edna Arbel, who was then the chief Israeli prosecutor.²⁰⁹ In a December 1997 article co-authored by Irit Kohn, chief of the international division of the Israeli Attorney General's office, Arbel suggested that the Extradition Act be amended to make Israeli citizens extraditable, but

201. Arbel, *supra* note 198, at 8.

202. *Id.*

203. *Id.* at 6.

204. *Id.* at 5.

205. See *supra* notes 172-97 and accompanying text.

206. See Abramovsky & Edelstein, *supra* note 6, at 314 n.71 (noting that some Israelis supported Sheinbein due to the danger of anti-Semitism in U.S. prisons and the possibility of danger to his safety from vengeful Hispanic prison gangs).

207. *Id.* at 317.

208. See Matthew Dorf, *Israel Extradition Law Offers Help to Alleged Criminals*, JEWISH BULL. N. CAL., Feb. 27, 1998, available at <http://www.jewishsf.com/bk980227/ushelp.htm> (stating that, subsequent to the Sheinbein case, five Israelis had fled to Israel to escape U.S. fraud and money laundering charges).

209. Arbel, *supra* note 198, at 3.

only with a condition.²¹⁰ Specifically, Arbel “proposed that Israel’s Extradition Law be amended to permit the extradition of an Israeli national to a requesting State, provided that the requesting State agrees in advance that if the Israeli is convicted, he will be returned to serve his sentence in Israel if he so requests.”²¹¹

In support of her suggestion, Arbel noted that the Netherlands had adopted a similar statute in 1986 and that the Dutch experience had been “successful.”²¹² In fact, even prior to 1986, the Netherlands had allowed for the possibility of prisoner transfer in its extradition treaty with the United States.²¹³ Article 8(1) of this treaty, which was signed in 1980 and ratified in 1983, provides that “[i]n the event there is a treaty in force between the Contracting Parties on the execution of foreign penal sanctions, neither Contracting Party may refuse to extradite its own nationals solely on the basis of their nationality.”²¹⁴

Although the Netherlands was the only nation prior to the amendment of the Israeli extradition statute to enact legislation conditioning extradition on transfer of penal sanctions, the concept was hardly a new one. As early as 1970, a European commentator had suggested conditional extradition as an alternative solution for nations that refused to extradite their nationals,²¹⁵ and a similar

210. *Id.* at 9-10.

211. *Id.*

212. *Id.* at 10. The Dutch statute upon which current Israeli law is modeled is Section 4(2) of the Extradition Act (Neth. 1986), which states that extradition of Dutch nationals may only be permitted if “in the opinion of the Dutch Minister of Justice there is sufficient guarantee that if the national should be sentenced to an unconditional custodial sentence in the requesting State for the offenses for which his extradition is granted, the national would be able to serve such sentence in the Netherlands.” In 1986, the Netherlands also adopted domestic legislation permitting the enforcement of foreign criminal judgments. See Law on the Transfer and Enforcement of Criminal Judgments, Stb. No. 464/1986 (Neth. Sept. 10, 1986). These two domestic laws followed a 1983 amendment to the Dutch Constitution that specifically permitted the extradition of nationals. See D.J.M.W. Paridaens, *The Extradition of Nationals According to Dutch Law*, 62 INT’L R. PENAL L. 515, 516 (1990). Prior to 1983, “it was assumed that the Dutch Constitution prohibited the extradition of nationals,” although such extradition was apparently not explicitly forbidden. *Id.*

213. Extradition Treaty, June 24, 1980, U.S.-Neth., art. 8, 35 U.S.T. 1334, 1338.

214. *Id.* This provision, however, was never used prior to the amendment in the Dutch Extradition Act, as the Netherlands did not accede to the Council of Europe Convention on the Transfer of Sentenced Persons until September 30, 1987. See Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 27 I.L.M. 275 (entered into force July 1, 1985). The United States and the Netherlands were not parties to a bilateral agreement on the transfer of penal sanctions, so the condition precedent set by the Dutch-American extradition treaty was not fulfilled until the Netherlands acceded to the convention. *Id.* Moreover, the treaty provision was arguably unconstitutional under Dutch law at the time it was drafted. See Paridaens, *supra* note 212, at 516 (noting that the Dutch Constitution was assumed to prohibit the extradition of nationals prior to 1983).

215. See Plachta, *supra* note 73, at 116 n.150 (1999) (citing H. Schultz, *Les formes nouvelles de la collaboration des États dans l’administration de la justice pénale*,

provision was included in a 1978 model extradition treaty that foreshadowed the Dutch-American treaty of 1980.²¹⁶ In April 1996, the Group of Seven recommended, as one of three alternative solutions to the problem of nonextradition of nationals, that nations "allow for conditional extradition on the condition that it is only for trial and that its national be promptly returned after trial to its territory for service of any sentence within the limits of the law of the Requested State."²¹⁷

The concept of conditional extradition gained further support during the late 1990s. In December 1997, a conditional extradition provision was included for the first time in a multilateral treaty, the United Nations Convention for the Suppression of Terrorist Bombings.²¹⁸ Section 8(2) of this treaty, adopted at the insistence of the United States, provided that a state could comply with its extradition obligations under the convention by surrendering an accused terrorist bomber for trial on the condition that he be returned to his native country to serve his sentence.²¹⁹ Moreover, even where conditional extradition was not specifically required by domestic law or treaty, it was "not uncommon" by 1998 for requested states to require advance agreement to repatriation prior to honoring an extradition request.²²⁰ Thus, even though the Netherlands was the only country to have specifically included such conditions in domestic legislation at the time of the Arbel article, Arbel was able to state confidently that "such provisions may become the trend in countries which do not extradite their own nationals."²²¹

in L'AMELIORATION DE LA JUSTICE RÉPRESSIVE PAR LE DROIT EUROPÉEN 104 (P. Vander ed. 1970)); see also SHEARER, EXTRADITION IN INTERNATIONAL LAW 126-27 (1971) (suggesting that the most appropriate sites for adjudication and rehabilitation could be secured by extraditing nationals for trial on condition that they be repatriated to serve any sentences imposed).

216. See *Model Convention on Expatriation of Accused Persons for Trial and Sentence and Repatriation for Enforcement of Sentence*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 58TH CONFERENCE 380-90 (1978). The model convention has been cited as an inspiration for the Dutch legislation. See Plachta, *supra* note 73, at 116 n.150.

217. Senior Experts on Transnational Organized Crime, *P8-Senior Experts' Group Recommendations* (Apr. 12, 1996), § 10(1), available at [wysiwyg://395/http://www.library.utoronto.ca/g7/crime/40pts.htm](http://www.library.utoronto.ca/g7/crime/40pts.htm). Section 10(2) of the Senior Experts' recommendations also suggested that states permit the transfer or surrender of their nationals for trial, conditional upon advance agreement to allow them to serve their sentences in their native countries, where surrender without formal extradition was permitted by domestic law. *Id.* § 10(2).

218. United Nations: International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, 37 I.L.M. 249.

219. *Id.* art. 8(2). For a discussion of the United States' role in securing the adoption of this provision, see Samuel M. Witten, *The International Convention for the Suppression of Terrorist Bombings*, 92 AM. J. INT'L L. 774, 779 (1998).

220. John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 206 (1998).

221. Arbel, *supra* note 198, at 10.

In addition, as Arbel noted, the administration of foreign sentences was not without precedent under Israeli law.²²² Section 1(3) of the 1978 Offences Committed Abroad Act permitted Israel to take over the enforcement of a foreign sentence if an Israeli national fled to Israel after being sentenced rather than before trial.²²³ Moreover, in 1996, Israel acceded to the Council of Europe Convention on the Transfer of Sentenced Persons, commonly known as the Strasbourg Convention,²²⁴ and simultaneously adopted domestic legislation providing for the repatriation of foreign nationals imprisoned in Israel and the administration of foreign sentences in the event that Israelis imprisoned abroad were returned to Israel.²²⁵ Accordingly, if the Israeli Extradition Act was to be amended to allow extradition upon condition of repatriation after sentence, a mechanism for enforcing the foreign sentence was already in place.

Other, more practical, reasons also supported conditional extradition of Israeli nationals. As noted by Arbel, extradition conditioned upon transfer of penal sanctions would serve the objectives of law enforcement by allowing trials to take place where the crime was committed and where witnesses could be subpoenaed.²²⁶ At the same time, such a policy would serve the humanitarian end of permitting convicts to serve their sentences close to their families and be rehabilitated in their native culture.²²⁷ Moreover, such a provision would not sacrifice the objectives of the Offences Committed Abroad Act.²²⁸

Although the ostensible primary reason for the 1978 act was to protect Israelis from anti-Semitism in foreign courts,²²⁹ subsequent

222. *Id.* at 9-10.

223. *See* Offences Committed Abroad (Amendment of Enactments) Act, § 1(3), 32 L.S.I. 63.

224. Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 22 I.L.M. 530. For a discussion of the provisions of the Strasbourg Convention and their impact upon Israeli extradition law, *see infra* notes 481-86 and accompanying text.

225. Law Transferring Prisoners to their Own Country, 1996 S.H. 1603, *as amended*, 1999 S.H. 1720.

226. Arbel, *supra* note 198, at 10.

227. *Id.*

228. *Id.*

229. *See* Sheinbein v. State of Israel, Cr.A. 6182/90 53(1) P.D. 625, 632-45 (Isr. 1999) (Barak, J., dissenting). Chief Justice Barak cited three reasons in support of the 1978 legislation:

The first reason is that it would be unjust to try a person in a country whose laws he is unfamiliar with, and whose language he does not speak. It is improper to sever a person from his country, from his family, from his nation and from his people, those who are his natural judges. The second reason is that a country has an obligation toward its citizens, to protect them from a different judicial system . . . [and] the third reason is that one cannot trust an alien judicial system, and one cannot be certain that a foreign judicial proceeding would mete out justice to one who is not "its" citizen.

events made clear that foreign prison conditions were a much more pressing concern.²³⁰ In the Nakash case, for instance, the qualms of the Israeli Attorney General about surrendering Nakash to France were predicated not upon any unfairness of the French judicial system but upon the possible danger to his life from Arab gangs in French prisons.²³¹ In the Sheinbein case itself, one of the key reasons for nonextradition cited by Sheinbein's supporters was the possible danger to his life from Hispanic gangs if incarcerated in the United States.²³² The Knesset debates following the Sheinbein case likewise revealed a concern that "an Israeli citizen who . . . ha[s] been here for many years" should not be required to "serve his sentence in a foreign land, far from his home, distant from his family."²³³

There are several reasons why the possibility of foreign incarceration is a much more practical consideration for Israelis than the possibility of trial in a foreign country. As noted by Arbel and others before her, Israel simply does not conclude extradition treaties with countries where anti-Semitism is rampant in the judicial system.²³⁴ Israel is currently a party to the European Convention on

Id. at 636-37.

230. In addition, Professor Meron has pointed out that, as long as Israel has control over its nationals after sentencing, "the possibility of release from imprisonment [exists] in the rare cases where a miscarriage of justice may be considered to have occurred." Meron, *supra* note 78, at 225 n.32 (paraphrasing SHEARER, *supra* note 215, at 127). This possibility may be given effect due to the fact that, under the Strasbourg Convention, Israel has ultimate authority to pardon or parole a repatriated prisoner according to Israeli law in the event that it deems a conviction unfair or a sentence too severe. *See infra* notes 481-93 and accompanying text (discussing the provisions of the Strasbourg Convention relating to pardon and parole). The authority to release Israeli nationals upon repatriation, although it should be used sparingly if at all, can be regarded as a final safeguard in the event that an Israeli is subjected to anti-Semitic prosecution abroad despite the precautions built into Israeli pre-extradition proceedings.

231. *See supra* notes 144-50 and accompanying text.

232. *See supra* note 206.

233. Proceedings of the Knesset Committee for Constitution, Law and Jurisprudence, statement of MK Hanan Porat (1999), *quoted in* Cr. C. (B.S.) 2484/99, Attorney General v. Harosh, slip op. at 56 (Jm. 2000) (*Harosh I*); *see also id.* (statement of MK Tal) (stating that "in my opinion if a Jewish prisoner is serving time in Florida and is in danger and it is possible to transfer him from Florida to a jail [in Israel] this should be done"). For additional Israeli authorities citing foreign prison conditions as a reason for nonextradition of nationals, *see* S.Z. FELLER, EXTRADITION LAWS 122 (1980) (stating that the goals of punishment and rehabilitation are stymied by incarceration of a convicted criminal outside his native country); *see also* Proceedings of the Knesset Committee for Constitution, Law and Jurisprudence, statement of MK Glass, Knesset Transcript 81 (1978), *quoted in Harosh I*, *supra*, at 46 (citing the possibility of foreign incarceration as one of the reasons for the proposal of the Offences Committed Abroad Act).

234. Arbel, *supra* note 198, at 5. *See also* Meron, *supra* note 78, at 222 (stating that "Israel has concluded extradition agreements with States that have legal systems and traditions it felt it could trust"); *Harvard Research*, *supra* note 82, at 128-29

Extradition, consisting primarily of Western European countries; in addition, Israel has bilateral extradition treaties with the United States, Canada, South Africa, Australia, Fiji, and Swaziland.²³⁵ Few, if any, of these countries are likely to deny a fair trial to an Israeli Jew on account of his citizenship or religion. Moreover, because Israeli law forbids extradition in the absence of a treaty,²³⁶ there is no danger that Israeli nationals might be extradited to a country with widespread anti-Semitism through non-treaty-based agreement between Israeli and foreign prosecutors.

In addition, even though the accession of such countries as Russia and Ukraine to the European Convention on Extradition²³⁷ might raise the specter of anti-Semitic influences in the judicial system, this danger is alleviated by the terms of the convention itself. Specifically, Article 3(2) of the convention states that a person shall not be extradited if the requested state

has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.²³⁸

(stating that distrust of a foreign legal system could be a ground for refusing extradition outright but not for distinguishing between citizens and noncitizens).

235. Arbel, *supra* note 198, at 5.

236. See Extradition Act, § 2(1), 8 L.S.I. at 144.

237. See Dan Izenberg, *Court Allows First Extradition to Russia*, JERUSALEM POST, Sept. 22, 2000, at 6A (noting that Russia ratified the convention on March 9, 2000); see also *Prosecutor Criticizes Parliament's Moves in Case of Former Premier*, BBC SUMMARY OF WORLD BROAD., Oct. 13, 1999 (excerpting Ukrainian Television First Program of 11 October 1999) (noting that Ukraine ratified the convention on January 16, 1998). Recently, Hungary has also become a party to the convention. See *Police Intend to Call for Extradition of Former Government Official*, HUNGARIAN NEWS AGENCY (MTI), Dec. 5, 2001 (quoting Hungarian Justice Ministry official Ildiko Gal as stating that "there is a valid extradition agreement between Hungary and Israel"). The possibility of anti-Semitic influence in the Russian judicial system is likely to come into play due to the recent arrival of media magnate Vladimir Gusinsky in Israel after a Spanish court refused a Russian extradition request. *In Israel, Goussinsky Fights Extradition to Russia*, JERUSALEM POST, Apr. 27, 2001, at 1A. While Israeli authorities have acknowledged that extradition would be possible in the event that Russia submitted a request to Israel, commentators have noted that extradition is unlikely due to the support of Israeli political leaders and Jewish organizations. *Id.*; see also Uri Dan, *Russian Tycoon Takes Refuge in Tel Aviv*, N.Y. POST, Apr. 29, 2001, at 22 (stating that Gusinsky had the support of several Israeli political figures and that he "arrived in Israel . . . knowing he won't be extradited because he is regarded as a political refugee").

238. European Convention on Extradition, *supra* note 60, § 3(2). This rule abrogates the traditional rule of non-inquiry into the fairness of a requesting state's justice system. See *In re Extradition of Howard*, 996 F.2d 1320, 1329-31 (1st Cir. 1993) (considering a similar provision in the extradition treaty between the United States and the United Kingdom and noting that it permits limited inquiry into the potential for discrimination in requesting state); see also *In re Requested Extradition of Smyth*, 61 F.3d 711, 715-16 (9th Cir. 1995) (reading the same provision as allowing

This policy is critical in that the European Convention is the only multilateral extradition treaty to which Israel is a party, and therefore the only agreement in which Israel does not have full control as to its treaty partners.²³⁹ Thus, Israel is free both to decline to enter bilateral treaties with countries where anti-Semitic prosecutions might be instituted and to refuse extradition should any such country accede to the European Convention.

Moreover, Israeli domestic law is not without safeguards if it appears that charges have been lodged due to anti-Semitism. The Israeli extradition statute contains a provision mirroring that of the European Convention, which allows a court to refuse extradition if it finds "reasonable grounds" that the accusation "arises from racial discrimination."²⁴⁰ In addition, like most common-law countries, Israel requires prima facie evidence that a fugitive has committed a crime as a condition of extradition.²⁴¹ In fact, in its ratification of the European extradition convention, which did not require such evidence, Israel specifically reserved its right to honor extradition requests only if prima facie proof were presented with the request.²⁴² Thus, an Israeli magistrate would have the power to deny extradition in the event that the evidence submitted with the request revealed that the charges had been fabricated for anti-Semitic reasons.

Even where charges are genuine, the discretion permitted to the Attorney General by the Israeli Extradition Act provides a further

consideration of the "treatment the accused will likely receive at the hands of the requesting country's criminal justice system"); Richard J. Wilson, *Toward the Enforcement of Universal Human Rights Through Abrogation of the Rule of Non-Inquiry in Extradition*, 3 ILSA J. INT'L & COMP. L. 751, 763 (1997) (discussing the European Convention).

239. See Yaffa Zilbershats, *Extraditing Israeli Citizens to the United States: Extradition and Citizenship Dilemmas*, 21 MICH. J. INT'L L. 297, 307-09 (2000).

240. Meron, *supra* note 78, at 222-23 (citing Extradition Act, § 10, 8 L.S.I. at 145).

241. See, e.g., Attorney General v. Freedman, 40(4) P.D. 301, 305; Kamiar v. State of Israel, 22(2) P.D. 85, 115.

242. See Arbel, *supra* note 198, at 6. This requirement has, on occasion, caused friction between Israel and certain European countries. For instance, tensions arose between Israel and France in early 2001 after Israel refused an extradition request for twelve fugitives with dual French and Israeli nationality because French authorities had not presented prima facie evidence of guilt. See Schuster, *supra* note 28, at 4. This refusal led to mutual recriminations, with French authorities accusing Israel of foot-dragging and harboring fugitives and Israeli officials responding that the France had only itself to blame for submitting incomplete documentation. *Id.*; see also Thierry Leveque, *Israel Denies Protecting Fugitives from French Law*, JERUSALEM POST, Feb. 25, 2001, at 4 (quoting French prosecutor Francois Franchi as saying that Israel had made no effort to track the fugitives down and had "put itself beyond the pale of the international community"); *Israel Rejects French Criticism of Failure to Extradite in Money Laundering Case*, *supra* note 162 (quoting an Israeli Justice Ministry spokesman as saying that "[i]t has been a year since the French promised to pass on to Israel material that would make it possible to move forward in dealing with the [extradition] but they have not done so yet").

safeguard in cases where anti-Semitic influences in foreign jurisdictions might prevent the charges from being adjudicated fairly.²⁴³ Section 2 of the Act provides that the Attorney General “may,” rather than “shall,” honor an extradition request if the other statutory conditions are satisfied.²⁴⁴ The Israeli Supreme Court has interpreted this section as making extradition a discretionary rather than a mandatory act.²⁴⁵ This discretion was exercised by then-Attorney General Avraham Sharir in declining to extradite Nakash on the ground that his life might be in danger in a French prison.²⁴⁶ While the Israeli Supreme Court found that Sharir had abused his discretion by acting without sufficient proof of danger to Nakash’s life, it left open the possibility that extradition might properly be denied if such evidence existed.²⁴⁷ When combined with the antidiscrimination provision of the European Convention, this discretion provides an avenue of relief should an Israeli national prove that he will be unable to receive a fair trial in a foreign country due to anti-Semitism. It should be noted that this provision has been invoked by Israel on at least one recent occasion in refusing a Lithuanian request for the extradition of suspected KGB officer Nachman Dushansky.²⁴⁸

243. See Extradition Act, § 18, 8 L.S.I. at 147. It should be noted that section 10 of the Extradition Act, which allows a court to refuse extradition in the event that an accusation “arises from” racial or religious discrimination, pertains only to racially motivated charges and not to the possibility of anti-Semitic influence in cases where charges are properly brought. See Extradition Act, § 10(a), 8 L.S.I. at 145.

244. See *id.* § 18, 8 L.S.I. at 147.

245. See *Nakash v. State of Israel*, 40(4) P.D. 78.

246. *Id.* at 86.

247. *Id.* at 93. Such proof might consist, for example, of evidence that anti-Semitism has infected the judicial system of the requested state on past occasions. *Id.* But see *In re Requested Extradition of Smyth*, 61 F.3d 711, 719-22 (9th Cir. 1995) (holding that accused IRA member was required to prove that he personally, as opposed to Catholics or IRA members in general, likely would be subject to discrimination upon return to Northern Ireland, and that he could not rely upon past instances of prejudice to prove likelihood of discrimination in the future). The Ninth Circuit decision in *Smyth* reversed a decision by a Federal magistrate judge holding that the petitioner had proved by a preponderance of the evidence that anti-Catholic bias was pervasive in the Northern Ireland criminal justice system and that he would likely be subjected to adverse prison conditions if incarcerated in Maze Prison. See *In re Requested Extradition of Smyth*, 863 F. Supp. 1137, 1146-52 (N.D. Cal. 1994). The decision of the Ninth Circuit is, of course, not binding on Israeli courts, which could choose instead to adopt the scheme of proof established by the magistrate judge. This is especially so given that the Israeli statute requires only that the accused show “reasonable grounds,” rather than proof by a preponderance of the evidence, to demonstrate that extradition should be denied in cases where charges are allegedly motivated by anti-Semitism. See Meron, *supra* note 78, at 222-23.

248. See *Israel Refuses Lithuanian Request to Interview KGB Officer Wanted for Genocide*, BALTIC NEWS SERVICE, Oct. 22, 2001 (stating that Israeli authorities believed that Duchansky had been singled out for prosecution because other, non-Jewish officers living in Lithuania had not been charged).

These safeguards, however, are much weaker in practical terms when prison conditions rather than trial are at issue. A courtroom is a much more controlled environment than a prison. In the countries with which Israel has concluded extradition treaties, trials are open processes that can be monitored by Israeli diplomats, and any anti-Semitic influences can be quickly detected and protested. Prisons, however, are closed environments that are subject to much less judicial scrutiny and cannot be monitored continuously.²⁴⁹ Moreover, Jews form a very small minority in most Western prison populations and are often at risk from anti-Semitic inmate gangs.²⁵⁰ In the United States, for instance, white-supremacist prison gangs have committed anti-Semitic assaults, and African-American gangs, such as the Bloods, also have anti-Semitic elements.²⁵¹ Prison guards, who frequently come from rural areas where few, if any, Jews live, might also be less than accommodating to Jewish concerns or might even be anti-Semitic themselves.²⁵² Thus, even in countries where anti-

249. See, e.g., *In re New York State Law Enforcement Officers Union*, 694 N.Y.S.2d 170, 174 (N.Y. App. Div. 1999) (Peters, J., dissenting) (noting that U.S. prisons are a "netherworld" where correction officers have broad latitude in their day-to-day interactions with prisoners); see also *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (stating that courts should afford prison officials broad deference in the administration of their institutions).

250. See generally Tex. Dep't Criminal Justice, *Texas Prison Gangs*, DALLAS MORNING NEWS, July 16, 2001, at 6A (describing in detail the common gangs in Texas prisons).

251. See, e.g., Douglas Belkin, *Advocates: Jewish Community Shuns Its Inmates*, PALM BEACH POST, Aug. 2, 1998, at 1B (discussing harassment of Jewish prisoners in Florida by fellow inmates); Ronald Smothers, *State is Trying to Arrange Another TV Broadcast by Rioting Ohio Inmates*, N.Y. TIMES, Apr. 18, 1993, § 1, at 30 (discussing an anti-Semitic act by a white supremacist organization in an American prison); Gary Rosenberger, *A Chaplain for Jews in Prison*, U.P.I., Sept. 1, 1989 (describing anti-Semitism within black prison gangs).

252. Compelling evidence of this can be demonstrated by examining cases from New York State, which contains the largest Jewish population in the United States. See, e.g., *New York State Correctional Officers and Police Benevolent Ass'n, Inc. v. State of New York*, 726 N.E.2d 462, 464-65 (N.Y. 1999) (affirming a judgment ordering reinstatement of a state corrections officer, Edward Kuhnel, who was discharged for flying a Nazi flag from his porch); *In re New York State Law Enforcement Officers Union*, 694 N.Y.S.2d at 177 (Peters, J., dissenting) (noting that Kuhnel had previously been involved in white supremacist activities and arguing that his discharge was warranted in light of the "deleterious effects of allowing militant white supremacists to stand guard over the safety and welfare of racial minorities"); *Curle v. Ward*, 399 N.Y.S.2d 308 (N.Y. App. Div. 1977), *modified*, 389 N.E.2d 1070 (N.Y. 1979) (reinstating corrections officer who had been discharged for suspected Ku Klux Klan membership); *Bass v. Grottoli*, 1998 U.S. Dist. LEXIS 15204 (S.D.N.Y. 1998) (denying summary judgment to state in civil rights case where New York prison inmates alleged numerous anti-Semitic acts by guards). Similar incidents have been reported in other states having substantial Jewish populations. See, e.g., *Weicherding v. Riegel*, 981 F. Supp. 1143 (C.D. Ill. 1997), *aff'd*, 160 F.3d 1139 (7th Cir. 1998) (upholding dismissal of Illinois correction officer who was a member of the Ku Klux Klan); *Lawrenz v. James*, 852 F. Supp. 986 (M.D. Fla. 1994) (upholding discharge of Florida correction officer who wore t-shirt adorned with a swastika and the words "white power"). Even in the

Semitism in the justice system is not a danger, Jewish prisoners might still face adverse conditions.

In addition, while such conditions might possibly justify discretionary refusal of extradition under the Nakash precedent, they will often be difficult to prove due to lack of documentation and variation between prisons within the foreign country.²⁵³ Moreover, unlike cases where charges are brought for anti-Semitic reasons, the Israeli courts have no statutory authority to refuse extradition due to prison conditions, so the recourse of the accused would only be to the Attorney General.²⁵⁴ Refusal to extradite under such conditions might also constitute a breach of the European Convention on Extradition, as the antidiscrimination provision of that treaty concerns only prejudice at trial.²⁵⁵ Thus, Arbel's suggestion for conditional extradition was founded, not only upon growing international precedent, but upon the very considerations of protection of Israeli citizens that formed the underpinning of the Offences Committed Abroad Act.

The other primary suggestion for post-Sheinbein extradition reform, however, was entirely unprecedented. This reform was the proposal, first made by Judge Ravid of the Jerusalem District Court and later adopted by Chief Justice Aharon Barak in his dissenting

absence of outright anti-Semitism, Jewish prisoners can often face more prosaic difficulties, including restrictions on diet, facial hair, or religious garb. See generally Abraham Abramovsky, *First Amendment Rights of Jewish Prisoners: Kosher Food, Skullcaps and Beards*, 21 AM. J. CRIM. L. 241 (1994); see also Johnson v. Horn, 150 F.3d 276, 284-86 (3d Cir. 1998) (holding that diet of cold vegetables, bread, and vanilla-flavored liquid nutritional supplement was sufficient to satisfy requirement that Jewish inmates in New Jersey be provided with kosher meals).

253. See, e.g., Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577 (1992) (discussing differences among women's prisons in the United States).

254. See Extradition Act, § 10(a), 8 L.S.I. at 145 (specifying that a court may refuse extradition where "the accusation or request arises from racial or religious discrimination").

255. See European Convention on Extradition, *supra* note 60, § 3(2). The treaty provision specifying that extradition may be denied if the fugitive's "position may be prejudiced" due to his religion, might arguably apply to cases where the fugitive would be prejudiced due to prison conditions, but the context of this language deals exclusively with the possibility of fabricated charges or unfair trials. *Id.* While the *Smyth* decisions applied a similar provision of the U.S.-British extradition treaty to prison conditions, the language of that treaty—unlike that of the European Convention or the Israeli domestic legislation—specifically provided that extradition could be denied if the fugitive "would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions." See Supplementary Extradition Treaty, June 25, 1985, U.S.-U.K., art. 3(a), Exec. It should also be noted that the United States has "strenuously resisted" the inclusion of antidiscrimination provisions in extradition treaties. Wilson, *supra* note 238, at 763. Thus, there is no treaty provision expressly protecting Israeli citizens sought by the United States, which form a significant percentage of requests for extradition from Israel.

opinion, that Israeli citizens be divided into residents and nonresidents for extradition purposes.²⁵⁶ No country had ever divided its citizens into classes that had varying degrees of protection under the criminal law.²⁵⁷

The separation of Israeli citizens into residents and nonresidents, however, was virtually dictated by the facts of the Sheinbein case.²⁵⁸ Moreover, the division of Israeli nationals into classes was made necessary by the nature of Israeli citizenship itself.²⁵⁹ The Israeli citizenship law is one of the most stringent in the world in the area of protecting citizens' right to retain their nationality.²⁶⁰ An Israeli national does not lose his status by accepting citizenship in another country, and Israeli citizenship cannot even be voluntarily renounced without the express consent of the Minister of the Interior.²⁶¹ Moreover, any person born to at least one Israeli citizen parent is an Israeli citizen from birth, whether or not he was born in Israel.²⁶² In addition, Israel has traditionally been a country of high emigration as well as immigration, with Israeli citizens frequently returning to the countries of their ancestry to rejoin their families.²⁶³ Thus, it was inevitable that Israel—even more than most countries—would accumulate a class of nonresident citizens, some of whom had never even set foot in Israel despite possessing Israeli nationality from birth.

In addition, Israel is one of a very few countries where foreigners with no previous ties to the country can obtain immediate citizenship.²⁶⁴ A majority of immigrants to Israel arrive as *olim* under the Law of Return, which confers citizenship “from the date of aliyah”—the date of immigration.²⁶⁵ This means that it is possible for a Jew to acquire Israeli citizenship prior to beginning the years-long process of building a life in and developing ties to Israel.

256. See *supra* notes 188-94 and accompanying text.

257. See *Sheinbein*, 53(1) P.D. at 656-61.

258. See *supra* notes 6-13 and accompanying text.

259. See generally Shachar, *supra* note 23, at 234-37.

260. *Id.* at 264.

261. *Id.*

262. Nationality Law, 1952, 6 L.S.I. 50, 51, § 4.

263. See, e.g., Calev Ben-David, *A Vote for Post-Zionism*, JERUSALEM POST, Jan. 28, 1997, at 6 (noting that 600,000 Israelis were living abroad).

264. Law of Return, 1950, 4 L.S.I. 114, § 1 (stating that “every Jew has the right to come to this country as an *oleh*”). See also Nationality Law, 1952, 6 L.S.I. 50, § 2(a) (providing that “every *oleh* under the Law of Return . . . shall become an Israeli national”). Germany has a statute similar to the Law of Return; however, ethnic Germans are required to show “strong cultural, especially linguistic, linkage to the German nation in order to acquire immediate German citizenship.” See Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195, 209 n.59 (2000). In addition, the German legislature acted in 1993 to place an annual limit on the number of ethnic Germans who could obtain immediate citizenship through return. *Id.*

265. Nationality Law, 1951, 6 L.S.I. 50, § 2(b)(2).

In contrast, the great majority of nations allow foreigners to become citizens only after an extended period.²⁶⁶ In the United States, for example, an alien admitted as a permanent resident can generally become a citizen only after a period of five years' continuous residence and must be physically present in the United States for at least half of that period.²⁶⁷ Moreover, an absence of six months or more will break the continuity of residence unless the applicant can prove that he did not abandon his residence during that period, and an absence of one year or more will break the continuity of residence unless prior permission is obtained from the Attorney General.²⁶⁸ Thus, by the time a resident alien acquires U.S. nationality, he has already been a resident of the United States for several years and has developed bona fide ties to the country. In contrast, this fact is often not the case with Israeli citizens, which means that a reason exists for dividing Israeli nationals into classes that does not exist in other countries.

Accordingly, the amended Israeli extradition statute ultimately adopted by the Knesset included elements of both the Arbel and Ravid proposals. As originally drafted, the proposed amendment provided that a fugitive who was both an Israeli citizen and an Israeli resident at the time of the commission of the offense could only be extradited on condition of repatriation after sentence, while all other citizens were subject to unconditional extradition.²⁶⁹ The Knesset Committee for Constitution, Law and Jurisprudence, however, substituted a provision under which persons who were Israeli nationals and residents at the time an extradition request was made would be entitled to repatriation, regardless of whether they were residents at the time of the commission of the offense.²⁷⁰ The reasons for this were twofold. One was the committee members' concern that, due to the fact that residency was undefined in the amendment, Israelis who committed crimes during relatively brief absences from Israel might be subject to unconditional extradition.²⁷¹ In addition, the committee was concerned that, if an extradition request were

266. See, e.g., 8 U.S.C. §§ 1427, 1430 (2001) (stating that, in the United States, aliens are required to reside in the country for three to five years before becoming citizens).

267. 8 U.S.C. § 1427(a)(1) (2001). A shorter waiting period of three years is provided for spouses of servicemen, and up to five aliens a year may be granted immediate citizenship based on "extraordinary contributions to national security." 8 U.S.C. §§ 1430(a), 1427(f)(1) (2001).

268. 8 U.S.C. § 1427(b) (2001). A resident alien absent from the United States for a year or more must also establish that he is employed by the U.S. government, a U.S. research institution, or a corporation engaged in the development of foreign trade or commerce of the United States. *Id.*

269. Cr. C. (B.S.) 2484/99, *Attorney General v. Harosh*, slip op. at 55-56.

270. *Id.* at 56.

271. *Id.* (citing Proceedings of the Knesset Committee for Constitution, Law and Jurisprudence, statement of MK Hanan Porat).

made many years after the commission of a crime, a person who had shifted his entire personal and family life to Israel might be subjected to extended incarceration in a foreign land.²⁷²

The bill in its altered version echoed a proposal made during the Sheinbein crisis by MK Amnon Rubinstein, who suggested that Israeli citizens should be made extraditable unless they had lived in Israel at least one year prior to the extradition request being made.²⁷³ The 1999 amendment, however, did not include a definite time period such as that proposed by Rubinstein, as the Knesset committee rejected a suggestion by MK Reuven Rivlin for "an obligatory examination . . . on the issue of the length of stay in Israel which would grant residence to a fugitive."²⁷⁴ Nevertheless, the final draft of the bill retained the provision setting the relevant point in time for determining citizenship and residency as the date of the extradition request rather than the date the offense was committed.²⁷⁵

Accordingly, the amended statute provided that "[a] person who committed an extraditable offense . . . and who is an Israeli citizen and an Israeli national at the time of the extradition request" would not be extradited unless "[t]he country requesting his extradition commits itself in advance to transfer him back to Israel to serve his sentence there, if he is convicted and a prison sentence is imposed."²⁷⁶ On the other hand, persons who were not Israeli citizens or Israeli residents at the time of the extradition request would be extradited unconditionally.²⁷⁷ The statute, however, left the term "Israeli resident" undefined rather than adopting the tests suggested by Ravid or Barak.²⁷⁸ The new law, the Extradition Act (Amendment No. 6), was passed by the Knesset on April 19, 1999 and entered into

272. *Id.* See also *id.* at 50-51 (discussing the committee proceedings).

273. Keinon, *supra* note 36, at 11.

274. Cr. C. (B.S.) 2484/99, Attorney General v. Harosh, slip op. at 56. MK Rivlin's evident intention was that a minimum period of residency should be established in order to prevent fugitives who had lived in Israel for a short time from claiming the protection of the law. See Knesset Transcript, *supra* note 271 (statement of MK Rivlin). Specifically, he stated that

. . . not only does a Jewish criminal libel the Jewish nation, but then he seeks refuge in it. When a person asks for the protection of the state we have to examine if he truly has connections to the state and is not a person who, after committing a crime . . . states, "I am a Jew, protect me from those nations who I harmed."

Id.

275. Extradition Act (Amend. No. 6), § 1(A)(1) (1999). The amended act also specified that extradition must be sought for the purposes of bringing the fugitive to trial in the requesting state rather than in some other country. *Id.*

276. *Id.*

277. *Id.* § 1(A)(2).

278. *Id.* § 1(A)(1).

force on April 29—ironically, barely two months after the Israeli Supreme Court's decision in *Sheinbein*.²⁷⁹

B. 1999-2001: The Israeli Experience Under The Amended Act

As of May 2001, seven extradition requests have been made under the new statute.²⁸⁰ Of these, five have been made by the United States, one by Canada and one by Russia.²⁸¹ Three have resulted in decisions by the Israeli Supreme Court, and three others have resulted in lower court decisions.²⁸²

Thus far, interpretation of the statute has centered on two primary issues: whether it is retroactively applicable to crimes committed before its effective date and the method of determining whether an Israeli citizen is a resident or nonresident. Ironically, however, the first case to reach the Israeli courts under the 1999 amendment raised neither of these issues. This was the case of Daniel Weiz, a nineteen-year-old Israeli citizen accused in the murder of Dimitri (Matty) Baranovsky while on leave from the Israeli army in November 1999.²⁸³

According to Canadian authorities, Weiz, together with a group of approximately fifteen other Russian and Israeli youths, entered G. Ross Lord Park in Toronto on the night of November 14, 1999 with the intention of fighting a rival Russian gang.²⁸⁴ Instead, they found Baranovsky and several friends, none of whom were associated with the gang they had come to fight.²⁸⁵ Deprived of their chosen target, they demanded money and cigarettes from Baranovsky and his friends—a confrontation that ended when Baranovsky was knocked to the ground and kicked to death.²⁸⁶ According to witnesses who cooperated with the Toronto police, Weiz—who returned to his Israeli military unit a week after the killing—participated in pummeling and kicking Baranovsky.²⁸⁷

The subsequent extradition proceeding was the first to take place under the 1999 legislation.²⁸⁸ The retroactivity of the new law, however, was not at issue because the murder of Baranovsky was

279. *Harosh*, Cr. C. (B.S.) 2484/99 at 8.

280. See *infra* notes 283-441 and accompanying text.

281. See *id.*

282. See *id.*

283. *Attorney General v. Weiz (Decision on Bail Application)* (unreported) (Jm. Feb. 2, 2000) (Arad, J.).

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. See Heidi J. Gleit & Aryeh O'Sullivan, *Soldier Arrested in Toronto Murder*, JERUSALEM POST, Dec. 20, 1999, at 2 (stating that "Weiz would be the first Israeli extradited since the Knesset altered the Extradition law . . .").

committed after the effective date of the act. The Weiz proceeding was first simply because Canadian authorities acted with remarkable dispatch, submitting a formal extradition request barely a month after the killing.²⁸⁹

Nor was Weiz' Israeli residency an issue in the courts. After being informed of Weiz' fugitive status, the Israeli Attorney General's office made an initial determination that he was an Israeli resident and informed Canadian authorities that extradition proceedings would only be instituted if Canada agreed in advance to allow him to return to Israel to serve any sentence that might be imposed.²⁹⁰ Subsequently, Canadian authorities undertook such a commitment, and extradition proceedings were commenced.²⁹¹ Weiz' sole remaining line of defense was to attack the prima facie case submitted against him by Ontario prosecutors by claiming that it was built on perjured evidence.²⁹² The Israeli courts rejected this defense and extradited Weiz to Canada on October 29, 2000.²⁹³

It was left for the next court to grapple with the issue of who was and was not an Israeli resident for the purpose of the amended extradition statute. This issue occurred in the case of Sharon Harosh, an Israeli national wanted on a number of state and federal charges in New York.²⁹⁴ In the initial extradition request, it was alleged that Harosh "posed as [a] stock broker . . . and contacted, via the telephone, elderly people, encouraging them to invest in the shares of a company named Blackwell."²⁹⁵ In fact, Blackwell was a fictitious company, and the funds invested by the victims—totaling \$185,000—were transferred to bank accounts outside the United States, including accounts located in Israel.²⁹⁶ Based on these allegations, New York state authorities charged Harosh with grand larceny, possession of stolen property, and violation of commercial regulations.²⁹⁷

289. See *Attorney General v. Weiz (Decision on Bail Application)* (unreported) (Jm. Feb. 2, 2000) (Arad, J.). The extradition request, accompanied by supporting affidavits, was submitted on December 17, 1999. *Id.* See also Sam Pazzano, *Canuck Law Whiz for Weiz in Matti Killing Case*, TORONTO SUN, Jan. 6, 2000, at 37 (quoting Weiz' Canadian attorney, Edward Greenspan, concerning the extradition request and Weiz' arrest in Israel).

290. Nicholas Keung, *Israel's High Court Orders Murder Suspect to Canada*, TORONTO STAR, Oct. 6, 2000.

291. See Extradition Act (Amendment No. 6), § 1(A)(1) (1999).

292. *Attorney General v. Weiz* (unreported) (Jm. Feb. 2, 2000) (Arad, J.).

293. Gretchen Drummie, *Weiz Flown to Toronto*, TORONTO SUN, Oct. 31, 2000, at 4. A preliminary hearing in Toronto was scheduled for July 9, 2001. *Court Sets July Preliminary Hearing for Israeli Facing Murder Charges*, AGENCE FRANCE-PRESSE, Jan. 8, 2001. As of this writing, the Weiz case is still in the pretrial stage.

294. Cr. C. (B.S.) 2484/99, *Attorney General v. Harosh*, slip op. at at 2-6.

295. *Id.* at 2.

296. *Id.* at 2-3.

297. *Id.* at 3.

Subsequently, an additional extradition petition²⁹⁸ was submitted detailing another fraud allegedly committed by Harosh.²⁹⁸ In this case, Harosh solicited investments in a company named Goldman, Lender & Co. Holdings.²⁹⁹ Unlike Blackwell, this company existed, but had been created for the sole purpose of perpetrating the fraud and did not conduct any legitimate business activities.³⁰⁰ This fraud purportedly netted approximately \$300,000, which was also deposited in overseas accounts.³⁰¹ These allegations led to Harosh's indictment on federal charges of wire fraud, securities fraud, and conspiracy.³⁰²

In contrast to the Weiz case, U.S. authorities declined to guarantee in advance that Harosh would be returned to Israel to serve his sentence if convicted.³⁰³ Instead, the Israeli government submitted evidence in support of its contention that Harosh was not a resident of Israel at the time the extradition request was made.³⁰⁴ Specifically, the Israeli Attorney General submitted proof that Harosh had lived in the United States from October 1991 until August 1998, that he had married a U.S. citizen and had two children in the United States, that he had made only brief visits to Israel after 1993, and that he had become a permanent resident of the United States beginning in 1996.³⁰⁵ He left the United States only after his bank accounts were frozen on August 5, 1998, and lived in Israel less than a year between his flight from U.S. justice and the submission of the first extradition request.³⁰⁶ Harosh did not testify or submit any evidence to the Israeli court.³⁰⁷

In opposition to the U.S. extradition request, Harosh made two primary arguments: that the 1999 amendments did not apply retroactively to crimes committed prior to their effective date and that he was a resident of Israel and, therefore, could not be extradited without an advance guarantee that he would be allowed to serve his sentence there.³⁰⁸ The first of these issues—retroactivity—had received surprisingly little prior treatment in Israeli courts. While Israel, in keeping with Anglo-American practice, had consistently

298. *Id.* at 4-5.

299. *Id.* at 4.

300. *Id.* at 5.

301. *Id.*

302. *Id.*

303. *Id.* at 6.

304. *See id.* at 57-60.

305. *Id.* at 57-58. The total length of Harosh's visits to Israel after 1996 did not exceed three weeks. *Id.* at 58.

306. *Id.* at 58-59.

307. *Id.* at 60.

308. *Id.* at 7-8. Harosh also argued that the district court should not rule on the U.S. extradition request without taking testimony from him. *Id.* at 8. The district court, however, summarily dismissed this argument, holding that nothing had prevented Harosh from testifying or submitting evidence if he had chosen to do so. *Id.* at 10.

applied extradition treaties retroactively,³⁰⁹ previous extradition statutes had generally narrowed rather than expanded the scope of persons subject to extradition.³¹⁰ Accordingly, there had been little call by the Israeli government to give retroactive effect to newly enacted extradition laws.

The Supreme Court of Israel, however, had addressed itself to this matter in the 1972 decision of *Hackstater v. State of Israel*.³¹¹ In *Hackstater*, the Israeli court held that the dual criminality provision contained in Article 2(2) of the 1954 Extradition Act applied only to substantive crimes and not to procedural rules.³¹² Thus, as long as the offense for which extradition was sought was a crime in the requesting state and in Israel at the time it was committed, a fugitive could not defeat extradition on the ground that the procedure under which he was extradited was not then in existence.³¹³ As the court stated, "[the fugitive's] legal liability for the offense negates any possible right that might arise in his favor by virtue of the fact that at the time he committed the offense there was not yet a law, in accordance with which it was possible to detain him."³¹⁴ In fact, the Supreme Court of Israel regarded this proposition as "so simple and self evident that the legislature saw no need at all to state it explicitly."³¹⁵

Accordingly, the *Harosh* court found little difficulty in applying the 1999 amendments retroactively. It noted that "extradition law addresses itself to extradition, that is to say, with a way of implementing criminal liability, not in determining the criminal responsibility itself."³¹⁶ In other words, the amendment to the Israeli extradition statute did not make criminal an act that was not previously a crime, but merely provided a method of prosecuting fugitives for acts that were already illegal when they were committed.

309. See Elman, *supra* note 31, at 359-62; see also Cr. A. 557/71, *Hackstater v. State of Israel*, 26(1) P.D. 243, 255 (Isr. 1972) (stating that "the fact that the extradition law or the extradition treaty were not yet in effect at the time [a fugitive] committed the offense, does not detract from his liability according to the law, and does not open a door for him to flee from the law"). Because the *Hackstater* case concerned the application of a treaty, any pronouncements therein concerning statutory law could be regarded as dicta; however, they were strongly stated and in accordance with the practice of other common-law jurisdictions.

310. See *supra* notes 51-55 and accompanying text (describing new restrictions built into the 1954 Extradition Act); see also *supra* notes 123-30 and accompanying text (describing the 1978 prohibition on the extradition of citizens).

311. *Hackstater*, 26(1) P.D. at 243.

312. *Id.* at 252.

313. *Id.* at 253.

314. *Id.* at 255.

315. *Id.* See also *id.* at 256 (stating that "there is in the law but one clear directive, that both in the requesting country and in Israel there was law in effect, in accordance with which the offense was indeed an offense at the time it was committed").

316. Cr. C. (B.S.) 2484/99, *Attorney General v. Harosh*, slip op. at 12.

Thus, an extradition statute was not a substantive criminal law but merely a "procedural norm" that "does not lose its applicability by virtue of the fact that the offense that is the subject of the extradition was committed prior to the enactment of the extradition law."³¹⁷

In addition to citing *Hackstater*, the *Harosh* court noted that retroactive application of extradition statutes was in conformance with U.S. law³¹⁸ and stated that the Knesset had specifically rejected a provision that would have restricted the 1999 amendments to offenses committed after their effective date.³¹⁹ Thus, while acknowledging Justice Theodor Or's dicta in *Sheinbein* that "[t]he freedom from extradition has been recognized as a basic right in fundamental law,"³²⁰ the court rejected the argument that this "right" required the application of an ex post facto concept similar to that of substantive criminal law.³²¹

The court then turned to the standard by which Israeli residency was to be determined under the 1999 act.³²² It began this analysis by noting that "the term 'resident' appears in many laws," but that different statutes contained varying definitions of the term and some left it entirely undefined.³²³ The court declined to find any of these definitions controlling, electing instead to construe the term judicially in light of the overall purpose of the statute.³²⁴ In this vein, it relied upon a 1978 decision of the Supreme Court of Israel, construing the term "resident" in the context of a different statute, which noted that "I do not see much point in such comparisons between laws on various subjects, because the meaning of the same term can be different when it appears in different laws, all depending upon the entire law's content and on its general purpose."³²⁵ Accordingly, the court proceeded to examine both the history of the term "resident" in Israel and the events leading up to the 1999 amendments.³²⁶

Specifically, the court noted that "[i]nitially the term 'resident' was identified with the English term 'domicile,'" but that this interpretation was later abandoned by the Israeli courts.³²⁷ Instead, "the term 'resident' is a complex one, based on a whole array of

317. *Id.* at 12-13.

318. *Id.* at 17 (citing 4 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE 76 (1989)).

319. *Id.* at 18.

320. *Sheinbein*, 53(1) P.D. at 658-59 (opinion of Or, J.).

321. *Harosh*, Cr. C. (B.S.) 2484/99, at 19.

322. *Id.* at 36-55.

323. *Id.* at 36-37.

324. *Id.* at 37.

325. C.A. 657/76 *Harashut Hamusmechet Letzora hok Nehey Redifot Hanazim v. Hasdai*, 32(1) P.D. 778, 781 (Isr. 1978).

326. *Harosh*, Cr. C. (B.S.) 2484/99 at 38-42.

327. *Id.* at 38 (citing C.A. 587/85, *Strak v. State of Israel*, 41(3) P.D. 227 (Isr. 1987)).

connections, both connections existing at present, as well as those that existed in the past."³²⁸ Moreover, these connections included "both factual connections . . . as well as emotional connections—the subjective ones that constitute, in their accretion, the centrality of a person's life."³²⁹

Both objective and subjective analyses of residency had previously occurred in Israeli law. In the 1963 decision of *Matalon v. Regional Rabbinical Court of Tel Aviv-Yafo*,³³⁰ for instance, the Israeli Supreme Court noted that residency is established by "sincere and true desire . . . to remain in the new country."³³¹ Some fifteen years later, the high court likewise held that "the decisive fact . . . is that while [the respondent] . . . did, indeed, depart from the country for a protracted period of time . . . he did so with the actual intention of returning to it, and this actual intention continued and remained within him during his entire sojourn abroad."³³²

More recent decisions of the Israeli Supreme Court, however, tended to emphasize objective over subjective connections in determining whether a person was a resident of Israel. In the 1987 decision of *Strak v. State of Israel*,³³³ for instance, the court held that:

It is not the intention of a person, nor the circumstances that existed in the past, that determine the place of residence of a person at any given time. It is, rather, the place to which the person is attached in a factual—actual—sense. In other words, the place to which he is connected with the preponderance of factual connections.³³⁴

This distinction was made even more explicitly in *Awad v. Minister of the Interior*,³³⁵ the decision upon which the *Harosh* court relied most heavily in arriving at its own determination.³³⁶ The petitioner in *Awad* was an Arab resident of East Jerusalem who had declined to accept Israeli citizenship following Israel's annexation of the city in 1967, and instead received a permanent resident's certificate.³³⁷ Subsequently, in 1970, he "left Israel to study in the United States . . . [and] later obtained a U.S. green card and, in 1978,

328. *Id.*

329. *Id.* at 38-39.

330. H.C. 129/63, *Matalon v. Reg'l Rabbinical Court of Tel Aviv-Yafo*, 17(3) P.D. 1640 (Isr. 1963).

331. *Id.* at 1644.

332. C.A. 657/76, *Harashut Hamusmehet Letzora hok Nehey Rechfot Hanazim v. Hasdai*, 32(1) P.D. 778, 781 (Isr. 1987).

333. C.A. 587/85, *Strak v. State of Israel*, 41(3) P.D. 227 (Isr. 1988).

334. *Id.* at 230.

335. H.C. 282/88, *Awad v. Minister of the Interior*, 42(2) P.D. 424 (Isr. 1988).

336. Cr. C. (B.S.) 2484/99, *Attorney General v. Harosh*, slip op. at 52-54.

337. See David Herling, *The Court, the Ministry and the Law: Awad and the Withdrawal of East Jerusalem Residence Rights*, 33 ISR. L. REV. 67, 75 (1999); see also *id.* at 71 (noting that Israeli citizenship was offered to the sixty-six thousand Arab inhabitants of East Jerusalem in 1967, but "it was not and has not been sought by the great majority").

U.S. citizenship.”³³⁸ He visited Israel only three or four times between 1970 and 1983, but made more frequent trips to Israel during the succeeding four years as he became active in the movement against the Israeli occupation of the West Bank and Gaza.³³⁹ In 1987, he applied to renew his Israeli identity card, but his application was denied on the basis that he had ceased to be a resident of Israel.³⁴⁰ In early 1988, the Ministry of the Interior additionally ordered that he be deported from Israel.³⁴¹

Awad challenged both orders on the ground, *inter alia*, that during his absence from Israel, he had always intended to return.³⁴² The Israeli Supreme Court, however, held that intention, in and of itself, was not controlling, stating that:

It may be that in [Awad's] heart of hearts he sought to return to Israel. But the decisive criterion is the reality as it actually occurred. Based on this criterion, at a certain stage the petitioner moved his center of life to the United States, and he may no longer be viewed as one who resides permanently in Israel.³⁴³

It was the “center of life” test that the *Harosh* court, upon analysis of Chief Justice Barak’s dissent in *Sheinbein*, adopted as relevant to the 1999 extradition statute.³⁴⁴

The court, however, noted that, although intent was not controlling as to whether a person’s “center of life” was in Israel, it was nevertheless relevant.³⁴⁵ Although a determination of the center of a person’s life rests substantially upon objective facts, the court found that such facts could be explained or further illuminated by analysis of the intent with which they were performed.³⁴⁶ Thus, “integrat[ion of] the objective and subjective considerations” was necessary in order to complete the examination of whether Harosh was a resident of Israel.³⁴⁷

338. *Id.* at 75.

339. *Id.* at 75-76.

340. *Id.* at 75.

341. *Id.*

342. H.C. 282/88, *Awad v. Minister of the Interior*, 42(2) P.D. 424, 434 (Isr. 1988).

343. *Id.*

344. Cr. C. (B.S.) 2484/99, *Attorney General v. Harosh*, slip op. at 42-47. The *Harosh* court noted that the *Sheinbein* decision contained “[a]n exhaustive discourse on the purpose of the legislation that is the basis of the Extradition Law,” and therefore informed the court’s analysis of the meaning of “residency” in the context of extradition from Israel. *Id.* at 42.

345. *Id.* at 41-42.

346. *Id.* at 41; *see also id.* at 47-51 (discussing relevance of Harosh’s intent to escape U.S. justice to determination of whether his flight to Israel represented an attempt to establish his center of life there).

347. *Id.* at 41-42 (citing C.A. 4127/95, *Zelkind v. Beit-Zayit*, 52(2) P.D. 306, 321 (Isr. 1998) (stating that “only the integration of objective criteria . . . and subjective

In determining how these facts should be weighed, the district court relied upon two critical factors. First, the court determined that, although the fact that Harosh had moved to Israel in order to escape U.S. justice was relevant, it did not by itself establish that his center of life was outside Israel.³⁴⁸ The court found this principle to be consistent both with the legislative intent that those with many years' residency in Israel be protected notwithstanding an improper motive for flight³⁴⁹ and with the prior dicta of the Israeli Supreme Court that "[o]ne does not examine too closely the motives of the one arriving, nor what has motivated him to change his domicile."³⁵⁰ Accordingly, although "one who arrives in Israel after having fled the wrath of justice in his own country of residence may have to bear a heavier burden in order to prove his residency," this fact was not by itself decisive.³⁵¹

The other determination made by the district court was that a change of residency takes a substantial amount of time.³⁵² In this instance, the court again relied heavily upon *Awad* and upon the subsequent decision of *Zelkind v. Beit-Zayit*.³⁵³ In the latter decision, the Israeli Supreme Court held that "it can be said that the duration of absence from the fixed place of domicile can serve as a significant indication . . . and can point to the severance of connection with the fixed abode."³⁵⁴ Likewise, in the *Awad* decision, the high court noted that "there is certainly a time span during which the focal point of a person's life hovers, in a sense, between his previous place and his new place."³⁵⁵ Thus, although acknowledging the *Zelkind* court's dicta that "duration of time cannot serve as an exclusive and sufficient gauge" for determining residency,³⁵⁶ the *Harosh* court

criteria . . . will aid us in determining whether the condition of permanent living quarters has been fulfilled").

348. See *id.* at 47-51. The court stated that "one may not view flight from justice as a reason that, in and of itself, deprives residency in accordance with the Extradition Law," but that "the consideration of fearful flight from justice to Israel can be taken . . . as a factual consideration that can raise doubts about the real intentions . . . and may, by the nature of things, raise the suspicion that the stay in Israel is a temporary one, until the storm blows over and not later." *Id.* at 50-51.

349. *Id.* at 50-51 (citing remarks of MK Hanan Porat at a hearing before the Knesset Committee on Constitution, Law and Jurisprudence).

350. *Id.* at 50 (quoting *Matalon*, 17(3) P.D. at 1644). The *Matalon* court additionally stated that "[e]ven an improper motive is proper as far as decision on [the] question [of residency] is concerned, but only if [the petitioner's] true and sincere desire is to remain in the new country, and not merely to live and reside in it until the storm has passed." *Matalon*, 17(3) P.D. at 1644.

351. Cr. C. (B.S.) 2484/99, *Attorney General v. Harosh*, slip op. at 51.

352. *Id.* at 52-55.

353. C.A. 4127/95, *Zelkind v. Beit-Zayit*, 52(2) P.D. 306 (Kr. 1998).

354. *Id.* at 319.

355. H.C. 282/88, *Awad v. Minister of the Interior*, 42(2) P.D. 424, 434 (Isr. 1988).

356. *Zelkind*, 52(2) P.D. at 320.

found it to be a critical factor.³⁵⁷ Specifically, the court found that, when an Israeli citizen lives abroad, his center of life gradually shifts away from Israel to the country where he resides.³⁵⁸ At a certain point, his status changes from a resident of Israel to a resident of the foreign country, and, if this point is passed, he must gradually re-establish his residency upon return to Israel.³⁵⁹

The court then applied the law it had made to the facts of Harosh's case, determining whether Harosh had lost his Israeli residency during his sojourn in the United States and, if so, whether he had regained it since his flight from justice.³⁶⁰ Earlier, the court had considered the applicable burden of proof and found it to rest upon the Israeli government by a preponderance of the evidence.³⁶¹ The court, however, noted that "in a situation in which a negative fact is involved, and the negative fact is normally known and available to the defendant, it is sufficient for the accuser to present a scant quantity of evidence."³⁶² Thus, once the Israeli government had met this burden of producing a minimal amount of evidence showing that Harosh was not a resident of Israel, the burden of proof shifted to Harosh to come forward with evidence that he was a resident.³⁶³ Moreover, the court noted the long-standing Israeli rule that, in both civil and criminal cases, an adverse inference could be drawn from a party's failure to testify about facts within his knowledge.³⁶⁴

In light of this, the court determined that Harosh's prolonged absence from Israel, coupled with the fact that he had married a U.S. citizen and obtained a green card in the United States, meant that his center of life had shifted to the United States between 1991 and 1998.³⁶⁵ Moreover, the court found that the eleven months that Harosh had resided in Israel prior to the extradition request were not sufficient to establish that he had shifted his center of life back to Israel, especially in light of his failure to present evidence of any relevant details.³⁶⁶ Thus, the court concluded that although "at present there are, in fact, ties connecting the respondent to Israel, these are insufficient to bestow upon the respondent the status of an Israeli resident as defined in the Extradition Law."³⁶⁷ The court found further support for this conclusion in the fact that Harosh was

357. Cr. C. (B.S.) 2484/99, Attorney General v. Harosh, slip op. at 54-55.

358. *Id.*

359. *Id.*

360. *Id.* at 57-65.

361. *See id.* at 21-25, 31-36.

362. *Id.* at 25-26.

363. *Id.* at 26.

364. *See id.* at 61-62 (citing C.A. 548/79, Sharon v. Levy, 35(1) P.D. 736, 760 (Isr. 1981)).

365. *Id.* at 58.

366. *Id.* at 59-60, 63.

367. *Id.* at 63.

familiar with the English language and U.S. culture and would thus not face trial or imprisonment in an unfamiliar environment if he were to be unconditionally extradited to the United States.³⁶⁸

It should be noted that the *Harosh* court's reliance on *Awad* was somewhat ironic. The *Awad* case involved a Palestinian Arab from East Jerusalem—a class of resident whose rights the Israeli government has frequently been less than willing to protect.³⁶⁹ Indeed, the *Awad* case itself has been criticized as a decision that opened the door to arbitrary revocations of residence permits for East Jerusalem Arabs.³⁷⁰ With the *Harosh* case, a precedent created in the context of a disfavored group of noncitizens has now been made applicable to citizens. By relying upon *Awad*—which was also cited by Chief Justice Barak in his dissenting opinion in *Sheinbein*³⁷¹—the *Harosh* court stated more clearly than words could express that Israeli citizens seeking to avoid extradition would likewise be viewed with disfavor.

A similar conclusion was reached in the case of Chaim Berger, a Hasidic rabbi from New Square, New York was wanted by U.S. authorities on fraud charges.³⁷² Berger was born in Hungary in 1926, emigrated to the United States in 1951, and rose to become the head of education and religious institutions of the Jewish community in New Square.³⁷³

Beginning in 1995, the U.S. government began to investigate Berger and others in connection with “a massive conspiracy to obtain by fraud millions of dollars in student financial aid, rental subsidies, social security benefits and small business loans.”³⁷⁴ The centerpiece of the scheme consisted of obtaining more than eleven million dollars in Pell grants through the false enrollment of thousands of New Square residents in nonexistent independent study programs.³⁷⁵

368. *Id.* at 62-63. It should be noted that in a previous article concerning extradition between the United States and Israel, author Abraham Abramovsky commented that, if an Israeli court were to determine that a person was an Israeli citizen but did not enjoy the same legal protection as other citizens, it would be equivalent to “being half pregnant.” See Abramovsky & Edelstein, *supra* note 6, at 320. In this respect, the *Harosh I* decision may qualify as the first Israeli judicial declaration of half-pregnancy.

369. See Herling, *supra* note 337, at 99-105 (discussing arbitrary non-renewals of East Jerusalem identity cards by the Israeli Ministry of the Interior).

370. *Id.* at 90-91 (citing *Shqaqi v. Minister of the Interior*, 95 (2) Takdin Elyon 1614).

371. See *Sheinbein*, 53(1) P.D. at 638-39 (Barak, J., dissenting).

372. See *United States v. Berger*, 224 F.3d 107, 111-12 (2d Cir. 2000) (Berger III).

373. See Cr. A. 2600/00, *Berger v. Attorney General*, slip op. at 1-2 (Isr. 2000) (Berger II).

374. *Berger III*, 224 F.3d at 111.

375. *Id.* at 111-12. Pell grants are scholarships provided by the U.S. government to needy students. *Id.* See also Benjamin Weiser, 6 *Indicted in Fraud*

During the investigation, Berger's attorneys engaged in active plea negotiations with U.S. prosecutors and specifically informed them that Berger did not intend to flee the United States.³⁷⁶ Specifically, they "pointed out that Berger had resided in New Square for decades and that his children and grandchildren resided in New Square and its immediate neighborhoods."³⁷⁷

During this time, however, Berger was exploring the option of emigrating to Israel.³⁷⁸ During a visit to Israel in 1996 on the occasion of a grandchild's wedding, he "attempted to obtain documentation as a newly arrived immigrant but returned to the United States."³⁷⁹ Subsequently, in February 1997, he again arrived in Israel and succeeded in obtaining citizenship pursuant to the Law of Return.³⁸⁰ In addition, he obtained housing as a new immigrant, registered for national health care benefits, and voted in the 1999 Israeli elections.³⁸¹

On May 28, 1997, Berger was named in a federal indictment on the fraud charges in the Southern District of New York.³⁸² Shortly thereafter, he failed to appear in court for arraignment upon the indictment.³⁸³ On July 8, 1998, U.S. authorities requested his extradition from Israel, and he was arrested in Jerusalem on February 28, 1999.³⁸⁴ Prior to being indicted, Berger had never resided in Israel or held Israeli citizenship.³⁸⁵

In light of this, the district court, like that in *Harosh*, held that Berger had not acquired Israeli residency during his twenty month sojourn in Israel.³⁸⁶ Specifically, the court noted that:

The Extradition Law was not intended to provide a fugitive from justice, who has lived for 71 years outside of Israel, since his birth . . . the benefit of serving his sentence in Israel, a benefit the legislators intended to grant to a citizen who is a resident with a real connection to Israel, who has manifested his desire to live permanently in Israel, and

Over Use of Grants for Hasidic Groups, N.Y. TIMES, May 29, 1997, at A1 (describing the scheme perpetrated by Berger and his co-defendants).

376. *Berger II*, Cr. A. 2600/00, slip op. at 2.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *2 Accused of Fraud Fail to Appear in Court*, N.Y. TIMES, Jun. 6, 1997, at B7.

384. *Berger v. Attorney General*, slip op. at 2. See also Randal C. Archibold, *4 Who Got Leniency Defrauded U.S. for Religion*, N.Y. TIMES, Jan. 26, 2001, at B1.

385. B.S. 2140/99, *Attorney General v. Berger*, slip op. at 21, ¶ 110 (Jan. 2000) (Or, J.) (Berger I).

386. *Id.*

has done so without any connection to his fearful flight from justice in a country that has served as his permanent residence for decades.³⁸⁷

Both Harosh and Berger appealed, and their cases were decided by the Israeli Supreme Court on the same day.³⁸⁸ In the Harosh case, the three judge panel unanimously affirmed the “thorough and comprehensive” decision of the district court, based largely on its reasoning.³⁸⁹ In fact, the Supreme Court examined the question of residency largely as an afterthought, concurring in the district court’s reliance on the *Awad* decision and its “center of life” test.³⁹⁰ The court also concurred in the district court’s analysis of the retroactivity issue, with the additional comment that Harosh had not acquired a “vested right” in nonextradition when he returned to Israel prior to the adoption of the new law.³⁹¹ Specifically, the court noted that “one cannot assume that the previous law created expectations (surely unreasonable ones) in Israeli citizens that they can commit extraditable offenses outside of Israel, and would then always be able to flee to Israel.”³⁹²

In one important departure from the district court’s reasoning, however, the Supreme Court stated in dicta that the 1999 amendment could not be retroactively applied to Israeli citizens whose extradition had previously been sought unsuccessfully by the United States.³⁹³ This statement seems likely to foreclose any renewed application to extradite either Sheinbein himself or any other Israeli whose extradition was sought and denied under the 1978 statute. Moreover, this reasoning represents a significant departure from standard common-law practice in both the United States and the Commonwealth, under which multiple requests for extradition may be made even if the same person was previously found nonextraditable under a prior law.³⁹⁴

387. *Id.*

388. Cr. A. 3025/00, *Harosh v. State of Israel*, slip op. at 27 (Isr. 2000) (*Harosh II*). See also *Berger II*, at 6; Dan Izenberg, *Supreme Court Rules Two Can be Extradited to U.S.*, JERUSALEM POST, Nov. 16, 2000, at 5 (stating that the decisions were rendered simultaneously).

389. *Harosh II*, Cr. A. 3025/00, slip op. at 4.

390. *Id.* at 23-29.

391. *Id.* at 17-23.

392. *Id.* at 21. The court also noted that any presumption in favor of a vested right of nonextradition is overcome by the countervailing interest of the Israeli government in cooperating with other nations to fight crime. *Id.* at 18-20.

393. *Id.* at 16.

394. For the U.S. position, see *Collins v. Loisel*, 262 U.S. 426, 429-30 (1923) (holding that double jeopardy does not apply to extradition proceedings); see also *In re Extradition of Burt*, 737 F.2d 1477 (7th Cir. 1984) (holding that fugitive could be extradited to West Germany despite denial of previous request); *In re Extradition of McMullen*, 989 F.3d 603 (2d Cir. 1992) (holding that extradition law targeted at accused IRA bombers whose extradition had previously been unsuccessfully sought could be applied retroactively and was not an unconstitutional bill of attainder). For

With respect to residency, the Supreme Court agreed with the court below that Harosh's center of life had moved to the United States during his absence from Israel and that he had not re-established residency during the short period of his return.³⁹⁵ The court also concurred in the district court's opinion that flight from justice, by itself, did not preclude a finding that a fugitive was a resident of Israel, but agreed that Harosh had not re-established residency even with the benefit of this presumption.³⁹⁶ Specifically, although "Harosh began a process of integration into the life of Israel," that process "ha[d] not yet been completed" at the time the extradition request was made.³⁹⁷

In addition to its determination of Harosh's extraditability, the court made a number of other statements in dicta for the guidance of future courts. For instance, the court made clear that a short absence from Israel would not result in the loss of residency and would thus not shift the burden to the fugitive to demonstrate that residency had been re-established.³⁹⁸ In addition, the Supreme Court declined to uncritically accept the district court's finding that the applicable burden of proof in establishing nonresidency was preponderance of the evidence, suggesting that "the criminal character of the extradition process" might require proof beyond a reasonable doubt.³⁹⁹ The exact conditions required for an Israeli citizen to lose his status as resident, however, were left for another day, as was a final determination of the applicable burden of proof.⁴⁰⁰

the Commonwealth position, see *In re Lind and Sweden*, 23 C.C.C. (3d) 181, 191 (Ontario High Ct. 1985) (allowing extradition of fugitive to Sweden under amended statute, despite denial of previous request under former law); see also *Dutton v. Republic of South Africa*, 1999 Aust. Fed. Ct. LEXIS 1 (Aust. Fed. Ct. 1999) (allowing extradition of fugitive to South Africa under amended statute, despite denial of previous request under former law). Curiously, though, the *Harosh II* court's position is not without precedent in Israeli history, as an 1934 extradition agreement between the British Mandatory authorities and the government of the Transjordan provided that "cases in respect of which an extradition request has already been made and refused by the competent authorities shall not be included" in its retroactive application. Extradition Agreement, Pal.-Transjordan, art. 9, reprinted at Supplement 2 to Palestine Gazette No. 455 (July 26, 1934). This agreement was not cited as precedent by the *Harosh II* court.

395. Cr. A. 3025/00, *Harosh v. State of Israel*, slip op. at 28-29. Harosh was subsequently extradited to the United States and arrived in New York on January 5, 2001, becoming the first native-born Israeli citizen to be extradited from Israel. *For the First Time, Israel Extradites a Citizen*, AGENCE FRANCE-PRESSE, Jan. 5, 2001.

396. *Harosh II*, Cr. A. 3025/00 at 27, 29.

397. *Id.* at 29.

398. *Id.* at 26 (stating that "[a]n Israeli student who studies outside of Israel does not, in and of itself, negate his residency").

399. *Id.* at 30.

400. See *id.* The court found it unnecessary to determine the applicable burden of proof because it held that Harosh had failed to establish residency under either a preponderance or a reasonable doubt standard. *Id.*

In the Berger case, the decision of the district court was likewise affirmed.⁴⁰¹ While noting that the relevant date for determining residency was the date of the judicial application for extradition in February 1999 rather than the date extradition was first requested by U.S. authorities in July 1998,⁴⁰² the court held that Berger had not remained in Israel long enough to qualify as a resident.⁴⁰³ The majority opinion noted that:

More meaningful ties are needed from both a period of time and other factors before the center of Berger's life could pass from the United States—where he resided for more than 45 years, wherein his children and grandchildren are present and where his congregation is present and with whom he is inextricably tied—before the center of his life could pass to Israel.⁴⁰⁴

While agreeing that “the fact of fleeing from prosecution in and of itself” was not enough to warrant a conclusion that Berger was not an Israeli resident, this fact “[swung] the scales greatly in favor of a temporary stay or a stay until the storm is over.”⁴⁰⁵ In light of this, the “first steps” that Berger had taken toward establishing Israeli residency were not enough to shift the center of his life.⁴⁰⁶

This holding, however, was challenged by a dissent from Justice Levin.⁴⁰⁷ Despite the fact that Berger had never been an Israeli citizen or resided in Israel prior to fleeing, Justice Levin argued that he had proven that it was common for Hasidic rabbis to retire to Israel.⁴⁰⁸ Specifically, he noted that: “Berger . . . proved that it is the practice amongst the elders of his community to immigrate to Israel at the end of their life in order to reside in Israel. This fact is true whether or not the investigation against him persuaded Berger to hasten his emigration.”⁴⁰⁹ Accordingly, he asserted that there was

401. Cr. A. 2600/00, *Berger v. Attorney General*, slip op. at 3-4.

402. *Id.* at 3.

403. *Id.*

404. *Id.*

405. *Id.* at 4.

406. *Id.* It should be noted that the dispute over Berger's Israeli residency was not the only controversial aspect of his case, as he and three co-defendants were among those who received commutations of their sentences on President Bill Clinton's last day in office. See Ward Harkavy, *Hillary Gets Fitted for a New Mouthpiece*, VILLAGE VOICE, Jan. 31, 2001.

407. Cr. A. 2600/00, *Berger v. Attorney General*, slip op. at 4-6 (Levin, J., dissenting).

408. *Id.* at 5-6.

409. *Id.* at 6. Justice Levin also stated that his conclusion as to Berger's residency “gain[ed] strength” from the fact that he registered as an immigrant to Israel and thus became a “resident” within the terms of the Israeli census law. *Id.* In addition, he noted that the Knesset was considering an amendment to shift the significant date for determining residency from the date of the extradition request to the date of the offense, thus indicating that the 1999 amendment did not intend to preclude fugitives from establishing residency. *Id.*

sufficient evidence to determine that Berger had moved to Israel permanently rather than simply "until the storm blows over."⁴¹⁰

In addition to *Harosh* and *Berger*, two other extradition requests under the new law have resulted in determinations of extraditability by Israeli district courts.⁴¹¹ The first of these is the case of Daniel Krasnick, an attorney indicted in Suffolk County, New York in 1997 on charges of embezzling \$103,000 from a cooperative apartment corporation.⁴¹² After his law license was suspended by the Appellate Division, First Department in February 1998, Krasnick fled to Israel and acquired citizenship.⁴¹³ He, however, stayed in Israel for just five months before leaving for Italy, remaining there until September 1999 when he returned to Israel.⁴¹⁴ On July 20, 2000, the Jerusalem District Court held that these brief sojourns in Israel did not qualify him as a resident under the Extradition Law and declared him unconditionally extraditable.⁴¹⁵ Krasnick chose not to appeal and was returned to the United States, thus becoming the first Israeli citizen actually extradited under the new law.⁴¹⁶ Subsequently, he entered a guilty plea to larceny in the Suffolk County Court and was sentenced to one year imprisonment.⁴¹⁷

A similar result was reached in the case of Gennady Yagudaev, who is likely to become the first Israeli citizen extradited to Russia.⁴¹⁸ Yagudaev, who was sentenced to thirteen years in prison by a Russian court in 1983, escaped from prison in 1992 after serving nine years of his sentence.⁴¹⁹ Subsequently, in November 1996, he

410. See *id.*; see also Cr. A. 3025/00, *Harosh v. State of Israel*, slip op. at 32-33 (Levin, J., concurring) (explaining his dissent in *Berger II* and differentiating it from the facts of the *Harosh* case). Subsequent to the Supreme Court ruling, Berger also drew support from other quarters. MK Shimel Halpert of the United Torah Judaism party, for instance, unsuccessfully introduced a bill that would have exempted anyone over age seventy from extradition. See Nina Gilbert & Dan Izenberg, *Sheetrit appeals 'Berger law' vote*, JERUSALEM POST, June 28, 2001, at 4. Berger was also successful in seeking a rehearing by an extended panel of seven Supreme Court justices, but this panel ruled against him by a vote of 4-3. See Dan Izenberg, *Berger's appeal rejected paving way for US extradition*, JERUSALEM POST, Aug. 6, 2001, at 1. On August 7, 2001, Berger was returned to the United States, where he was arraigned and held without bail. See Devlin Barrett, *Pardon-Case Fugitive Denied Bail*, N.Y. POST, Aug. 8, 2001, at 13.

411. James Bernstein, *Lawyer Ordered to Return to U.S.*, NEWSDAY (New York), July 25, 2000, at A8; Dan Izenberg, *Court allows first extradition to Russia*, JERUSALEM POST, Sept. 22, 2000, at 6A.

412. Bernstein, *supra* note 411, at A8.

413. *Id.* Krasnick was ultimately disbarred due to his failure to respond to the disciplinary proceeding. *In re Krasnick*, 684 N.Y.S.2d 542, 543 (N.Y. App. Div. 1999).

414. Bernstein, *supra* note 411, at A8.

415. *Id.*

416. *Id.*

417. Interview with Mark Cohen, Suffolk Co. Assistant District Attorney (June 30, 2001).

418. See Izenberg, *supra* note 411, at 6A.

419. *Id.*

emigrated to Israel, claiming falsely that he was single and had no criminal record.⁴²⁰ His stay in Israel was apparently intermittent and punctuated by frequent returns to Russia; during one of these visits in November 1998, he was involved in a kidnapping for ransom.⁴²¹ On September 22, 2000, the Jerusalem District Court found that he was unconditionally extraditable on both counts, as his intermittent residence in Israel was not enough to "cut himself off from his homeland and . . . become involved in daily life in Israel."⁴²²

The case of Rachamim Anatian, a rabbi sought by the United States in connection with an alleged fraud on the Coutts bank in England,⁴²³ has not yet been decided in the Israeli courts, but is unlikely to present any difficult issues. Anatian, who was born in the United States and lived in Brooklyn at the time the offense was allegedly committed, emigrated to Israel only in 1999.⁴²⁴ Because his extradition from Israel was requested little more than a year later,⁴²⁵ it is unlikely that he will be found to have established Israeli residency.

The case of Dov Engel, however, presented far more difficult issues of residency. Engel, a fifty-two-year-old Brooklyn businessman, was charged in the Eastern District of New York with defrauding several banks of amounts totaling \$115 million.⁴²⁶ After the scheme began to unravel in September 1997, Engel fled to Israel and became an Israeli citizen.⁴²⁷ Because U.S. authorities did not request his extradition until September 2000, he had resided

420. *Id.*

421. *Id.*

422. *Id.* Curiously, under the Israeli Nationality Law, a person who acquires Israeli citizenship by naturalization may be deprived of his citizenship for fraud in the application process, but a Jew who emigrates under the Law of Return may not. See Nationality Law, § 11(a)(1), 6 L.S.I. 50, 52 (1952) (stating that "a person having acquired Israel nationality by naturalization" may be deprived of citizenship obtained under false particulars); see also *id.* §§ 2, 5, 6 L.S.I. at 50-51 (distinguishing between Israelis who obtain citizenship under the Law of Return and those who become citizens through naturalization). Neither the Nationality Law nor the Law of Return itself contain any similar provisions with respect to Israelis who immigrated as *olim*. *Id.* See also Law of Return, 4 L.S.I. 114. Accordingly, Yagudaev's extraditability was apparently dependent upon his Israeli residency, as neither the government nor the court could make him extraditable by stripping him of his citizenship.

423. Patrick Weever, *Queen's Bank at Centre of International Fraud Trial*, THE TIMES (London), Sept. 24, 2000, at 1.

424. Paul Beckett, *Prosecutors are Probing Britain's Coutts Loans to U.S. Client*, WALL ST. J., July 28, 1999, at B12.

425. See Weever, *supra* note 423, at 1 (noting that Anatian's extradition had been requested prior to September 2000).

426. Mike Claffey, *Fugitive Bizman is Busted in Israel*, DAILY NEWS (Suburban Section), Sept. 1, 2000, at 1.

427. Pete Bowles, *Fraud Charges Reach Abroad*, NEWSDAY, Sept. 1, 2000, at A3.

continuously in Israel for three years at the time the request was made.⁴²⁸

Initially, the Israeli Attorney General, at the request of U.S. authorities, proceeded against Engel as a nonresident. As it became clear that Engel could make a strong argument in favor of residency, however, U.S. and Israeli authorities agreed to allow Engel to serve his sentence in Israel on condition that he consent to extradition.⁴²⁹ Accordingly, on March 26, 2001, the Jerusalem District Court entered judgment against Engel declaring that he was extraditable but that "he [would] not be extradited . . . until the United States agrees that he will be returned to serve his sentence in Israel if convicted."⁴³⁰

The advantage obtained by Engel from his flight to Israel was brought home dramatically at his sentencing on December 3, 2001. Under U.S. sentencing guidelines, he was eligible for a sentence of more than eleven years in prison.⁴³¹ In Israel, however, the maximum sentence for bank fraud is five years, and Engel would serve no more than the amount of time under Israeli law.⁴³² The sentencing judge expressed her exasperation, stating that Engel "knew that [the United States] couldn't touch him" in Israel and that she was "sentencing [him] as if he would serve his time in the U.S.," but these were futile gestures.⁴³³ The inescapable fact was that, by fleeing to Israel and taking advantage of the 1999 act, Engel unilaterally reduced his sentence by more than half.

The Engel case, like the Weiz case before it, revealed the weaknesses of the new Israeli extradition law. As in *Engel*, difficult questions might have arisen if the residency of Daniel Weiz had been contested in the courts. Weiz, although born in Israel, had moved with his parents to Canada at the age of twelve, nearly seven years before the Baranovsky murder, and had lived in Israel only intermittently since then.⁴³⁴ In fact, Weiz' only significant period of Israeli residency since 1992 took place during the six months between February and August 1999, after he jumped bail on assault and robbery charges in Canada.⁴³⁵ Moreover, after obtaining a month's

428. *Id.*

429. Cr. C. (B.S.) 1732/00, Attorney General v. Engel, slip op. at 2 (Zur, J.). See also *Israeli Extradited to U.S. for Fraud Trial*, JERUSALEM POST, Mar. 27, 2001 (stating that prosecutors had reached an agreement with Engel under which he would be allowed to serve his sentence in Israel on condition that he did not appeal against extradition to the Israeli Supreme Court).

430. *Engel*, Cr. C. (B.S.) 1732/00 at 2.

431. See Karen Freifeld, *Israeli Law Cuts Sentence for \$115M Fraud*, NEWSDAY, Dec. 4, 2001, at A12.

432. See *id.*

433. See *id.*

434. Attorney General v. Weiz, (*Decision on Bail Application*) (unreported) (Jm. Feb. 2, 2000) (Arad, J.).

435. *Id.*

leave from the Israeli military in August 1999, Weiz overstayed his leave, settled accounts with the Canadian criminal justice system, and returned to his parents' home in Toronto.⁴³⁶

Nevertheless, during Weiz' brief sojourn in Israel, he had undertaken one of the most fundamental expressions of citizenship—service in the Israeli military. In addition, Weiz rejoined his military unit after returning to Israel in November 1999 and remained in active service until he was arrested at the request of the Canadian authorities.⁴³⁷ Thus, had the Israeli government attempted to commence extradition proceedings against Weiz as a nonresident, it would have been in the potentially uncomfortable position of arguing that an active-duty member of its military was not entitled to the protection of Israeli law. Given the previous dicta of the Israeli Supreme Court that "it may be that after a short absence it would be possible, under certain circumstances, to obtain a sharp severance of connection to the [former] domicile,"⁴³⁸ Weiz might have persuasively argued that his induction into the Israeli military accomplished just that.

The capitulation of the prosecutors in the Engel case, however, is even more illustrative of the weaknesses of the new statute. With the concession of Engel's residency status, he became the second person, after Sheinbein, who had no connection to Israel at the time of his offense but who nevertheless obtained the protection of Israeli law. Moreover, at the time he committed his offense, Engel did not even have the technical Israeli nationality that Sheinbein was able to claim.⁴³⁹ Thus, the assertion of Israeli diplomat Lenny Ben-David that there would be "no more Sheinbeins" under the new law has been proven untrue.⁴⁴⁰

IV. NO MORE SHEINBEINS: FURTHER REFORM OF THE EXTRADITION ACT

The Extradition Act (Amendment No. 6) of 1999 represents an attempt by Israel to substantially modify its extradition laws and practices. Like prior Israeli extradition legislation, the 1999 amendment is an attempt to balance Israel's humanitarian interest

436. *Id.*

437. *Id.*

438. C.A. 4127/95, *Zelkind v. Beit-Zayit*, 52(2) P.D. 306, 319-20 (Isr. 1998). It is also noteworthy that at least one Justice of the Israeli Supreme Court apparently believes that an indicted fugitive's inability to return to the United States "makes his commitment to the move to Israel all the greater." See Izenberg, *supra* note 411, at 6A (quoting Israeli Sup. Ct. Justice Dalia Dorner).

439. See Bowles, *supra* note 427, at A3.

440. Ben-David, *supra* note 16, at A16.

in protecting its bona fide nationals with its responsibility to cooperate with other nations in the fight against international crime. Aware of the shortcomings of both the traditional common-law approach and the absolute Continental prohibition against the extradition of nationals, the Knesset sought to emulate the mixed approach of the Netherlands.⁴⁴¹

In addition, the Knesset recognized that a significant proportion of Israeli nationals do not have strong connections to Israel, either because they are relatively recent arrivals who have not yet shifted the center of their lives to Israel or because they are *yordim*—emigres—who have long since shifted the center of their lives away.⁴⁴² This point was graphically brought home to Israeli lawmakers by the case of Samuel Sheinbein, a nonresident citizen who manipulated the Israeli legal system to his own gain and to the detriment of the U.S.-Israeli relationship.⁴⁴³ Accordingly, the Knesset took the unprecedented step of dividing Israeli citizens into residents and nonresidents.⁴⁴⁴

The 1999 law, however, does not foreclose the possibility of future manipulation of the Israeli extradition system, either by new immigrants or by long-departed *yordim*. As the cases of Sharon Harosh and Chaim Berger demonstrate, both *yordim* and *olim* who claim to be residents of Israel can litigate the merits of their claims and obtain serious consideration in the Israeli courts, with Berger obtaining the support of one Justice of the Supreme Court of Israel.⁴⁴⁵ Accordingly, the possibility exists that future cases similar to Sheinbein's will strain U.S.-Israeli relations and further reform of the Israeli extradition process is thus necessary in order to achieve the balance that Israel desires.

Any analysis of the prospects for reform of the Israeli extradition law, however, must take into account the political forces that shaped the 1999 amendments, as any attempt at reform will likely encounter the same forces. Moreover, the weaknesses of the 1999 statute have not yet been fully illustrated by actual cases, so Israeli lawmakers may not be fully aware of the potential difficulties that may flow from application of the new law. Accordingly, this section will analyze both the forces that gave rise to the 1999 statute as well as potential worst-case scenarios before making recommendations for reform.

441. See *supra* notes 212-21 and accompanying text.

442. See *supra* notes 259-68 and accompanying text.

443. See *supra* notes 172-97 and accompanying text.

444. See *supra* notes 276-78 and accompanying text.

445. See *supra* notes 407-10 and accompanying text.

A. *Why Did Israel Separate Its Citizens Into Classes?*

In the 1999 extradition law, Israel did what no other country in the world has done—divided its citizens into two classes for extradition purposes.⁴⁴⁶ No longer are fugitives in Israel divided into citizens and noncitizens. Now, it is possible to be a citizen but not a resident—which is equivalent, for extradition purposes, to not being a citizen at all.⁴⁴⁷

In examining the reasons behind this unprecedented measure, it must be remembered that the 1999 law was passed in reaction to the Sheinbein case and was intended to prevent a repetition of the abuse of Israeli citizenship perpetrated by Sheinbein.⁴⁴⁸ The law itself, however, was as much at fault for this abuse as Samuel Sheinbein. By allowing Jewish immigrants to obtain immediate citizenship, permitting dual citizenship, and prohibiting renunciation without the consent of the Ministry of the Interior, this statute allows many who have little if any connection to Israel to claim that they are citizens.⁴⁴⁹

Thus, in order to prevent the Sheinbein case from recurring, Israel was faced with three alternatives. First, it could restrict its citizenship law by providing, for example, that persons who become citizens or permanent residents of another country could not also be citizens of Israel. Likewise, Israel could have replaced the Law of Return with a naturalization process similar to that of most other nations.⁴⁵⁰ This alternative, however, would infringe on the broad conception of Israeli citizenship, which stems from the idea of Israel as a nation of refuge.⁴⁵¹ If Israel is to provide protection to Jews who claim its shelter, then Israeli citizenship must be something that can never be forfeited.⁴⁵² Thus, restricting the citizenship law was not a palatable alternative to the Knesset.

Second, the Israelis could have eliminated all distinctions between citizens and noncitizens with respect to extradition and agreed to extradite all citizens without conditions. This alternative, however, would also conflict with the concept of Israel as a nation of refuge, as well as with the additional humanitarian principle that persons should be imprisoned in their own country if possible. If Israel had changed the law to make citizens unconditionally extraditable, then people who had spent their entire lives in Israel,

446. See *supra* notes 256-79 and accompanying text.

447. See *supra* notes 269-79 and accompanying text.

448. See *supra* note 258 and accompanying text.

449. See *supra* notes 261-65 and accompanying text.

450. See *supra* notes 266-68 and accompanying text.

451. See Shachar, *supra* note 23, at 240.

452. *Id.* at 264-65.

and had known no other country, might have faced long prison sentences away from their homeland and families. Such persons would also have faced the distinct possibility of anti-Semitic acts by other inmates or prison officials, which would be antithetical to Israel's historical role of protecting Jews from anti-Semitism.⁴⁵³

Moreover, although Israeli citizens who were unconditionally extradited would still be eligible for repatriation under the provisions of the Strasbourg Convention,⁴⁵⁴ there would be no guarantee that this would happen. In fact, repatriation would be unlikely in many cases, especially where Israelis were extradited to the United States.⁴⁵⁵ While prisoner transfers are rapidly becoming an accepted norm in Europe,⁴⁵⁶ this is not the case in the United States, where retribution rather than rehabilitation is often the driving force in sentencing decisions.⁴⁵⁷ In the U.S. criminal justice system, and to a lesser extent the Canadian one,⁴⁵⁸ it is more important that prisoners are punished in the jurisdiction where their crimes are committed than that they be rehabilitated within their own culture.⁴⁵⁹ Therefore, if Israel allowed its citizens to be extradited unconditionally, it is likely that a significant number of them would not be returned to serve their sentences.

Such cases would constitute the reverse of the Sheinbein case. Instead of fugitives with little or no connection to Israel claiming the protection of Israeli law, Israelis with a similarly tenuous connection to a foreign state might find themselves at the mercy of its prison system.⁴⁶⁰ This was the condition that was unacceptable to the Knesset Committee on Constitution, Law and Jurisprudence.⁴⁶¹

453. See *supra* notes 249-52 and accompanying text.

454. Cr. A. 3025/00, *Harosh v. State of Israel*, slip op. at 31 (noting that, even though the U.S. government had not agreed in advance to allow Harosh to serve his sentence in Israel, nothing prevented him from being repatriated after sentence at the discretion of the United States).

455. See David S. Finkelstein, *Ever Been in a [Foreign] Prison? The Implementation of Transfer of Penal Sanctions Treaties by U.S. States*, 66 *FORDHAM L. REV.* 125, 136 (1997) (noting barriers to the regular use of penal transfer treaties by the United States).

456. Yaffa Zilbershats, *Extraditing Israeli Citizens to the United States—Extradition and Citizenship Dilemmas*, 21 *MICH. J. INT'L L.* 297, 305 (2000) (describing repatriation of prisoners as a "developing trend" that has gained wide acceptance in Europe).

457. See Finkelstein, *supra* note 455, at 159 (noting that considerations of retribution impede acceptance and use of prisoner transfer treaties).

458. See Dan Izenberg, *Murder in Toronto's Jewish Community Shakes the City*, *JERUSALEM POST*, Mar. 24, 2000, at 6B (discussing Canadian criticism of repatriation as a condition of Weiz' extradition to stand trial in Toronto).

459. See Finkelstein, *supra* note 455, at 159.

460. Cr. A. (B.S.) 2484/99, *Attorney General v. Harosh*, slip op. at 56 (citing remarks of MK Hanan Porat during proceedings of Committee on Constitution, Law and Jurisprudence).

461. See *id.*

Thus, in its effort to eliminate the possibility of another Sheinbein case, Israel was apparently not willing to go to the other extreme.

That left the third alternative—to distinguish between classes of citizens, as Judge Barak and MK Rubinstein had suggested.⁴⁶² By doing so, however, Israel may have painted itself into another corner. Specifically, as made clear by the remarks of MK Hanan Porat, the addition of “residency” as a qualification for protection under the extradition law forced Israel to change the relevant time from the date the crime was committed to the date of the extradition request.⁴⁶³ Otherwise, if significant delay resulted between the commission of the offense and the extradition request, certain bona fide citizens and residents of Israel would be subject to extended imprisonment away from their homes and families.⁴⁶⁴

B. *Sheinbeins in Waiting: Delayed Extradition and Residency*

This focus on the date of the extradition request, however, carries its own difficulties. Specifically, it opens the protection of Israeli law even to persons who were not Israeli citizens at the time they committed offenses in other countries, provided only that they become Israeli citizens and remain in Israel long enough to qualify as residents.⁴⁶⁵ Prior to 1999, such persons were clearly not entitled to protection from extradition to any degree.⁴⁶⁶ Now, however, they may seek protection, at least to the extent of being allowed to serve their sentences in Israel, by claiming that they have become resident citizens.⁴⁶⁷

Such extended delays in the extradition process are not unprecedented, especially where the investigation is complex and time-consuming.⁴⁶⁸ As discussed above, Dov Engel resided in Israel for three years before the United States requested his extradition.⁴⁶⁹

462. See *supra* notes 193-94 and accompanying text (discussing Judge Barak's proposed categorization of Israeli citizens for extradition purposes); see also *supra* note 273 and accompanying text (discussing MK Amnon Rubinstein's proposal to require Israeli residency for one year as a condition of nonextraditability).

463. *Harosh*, Cr. C. (B.S.) 2484/99 at 56.

464. *Id.* See also *id.* at 50-51 (discussing the reasons why the date of the extradition request was selected as the relevant date for determining residency).

465. Cr. A. 3025/00, *Harosh v. State of Israel*, slip op. at 25 (reaffirming that flight from justice does not by itself establish that a fugitive is not an Israeli resident provided that the other necessary conditions are met).

466. See *supra* note 124 and accompanying text; see also *supra* notes 158-59 and accompanying text.

467. See *supra* notes 426-33 and accompanying text (describing the Dov Engel case).

468. See Charles Bremner, *Italy Block Agreement on Europe Warrant*, *TIMES* (London), Dec. 7, 2001, at 11 (discussing delays which often accompany extradition process).

469. See *supra* note 428 and accompanying text.

In the case of Isaac Kirman, a full decade elapsed between the date of the offense and his trial in Israel.⁴⁷⁰

The case of Robert Manning, also involving a decade-long delay, provides perhaps the most graphic illustration of the way the 1999 act could be abused. Manning, a member of the radical Jewish Defense League who was accused in the 1980 letter-bomb murder of Patricia Wilkerson in California, became an Israeli citizen and took up permanent residence in Israel during 1981.⁴⁷¹ Subsequently, Manning was also accused in the 1985 letter-bomb killing of Arab-American activist Alex Odeh.⁴⁷²

Due to administrative delay, however, the United States did not request Manning's extradition from Israel until 1991.⁴⁷³ Under the 1978 statute, Manning could not be extradited for the Odeh killing because it had been committed after he acquired Israeli citizenship, but he was unconditionally extraditable for the 1980 murder.⁴⁷⁴ Accordingly, he was returned to the United States in 1993, convicted in federal court, and sentenced to life without parole in a U.S. prison.⁴⁷⁵

Under the new law, however, Manning—who resided in Israel for ten years before U.S. authorities requested his extradition—would not be extraditable unless the United States undertook in advance to allow him to serve his sentence in Israel.⁴⁷⁶ This is because, having lived continuously in Israel for such a long period before the submission of the extradition request, he could have meritoriously claimed that Israel was now the center of his life. Thus, the Manning case illustrates how the 1999 law has the potential to create diplomatic difficulties similar or equivalent to the Sheinbein case. Even under the Offences Committed Abroad Act, the Manning investigation caused considerable friction between Israeli and U.S. law enforcement officials.⁴⁷⁷ U.S. authorities accused Israel of dragging its feet in processing the extradition request,⁴⁷⁸ and the United States was finally forced to agree to prosecute Manning for only one of the two murders of which he was suspected.⁴⁷⁹ Had the

470. See Cohen, *supra* note 151, at 599-605.

471. See Tom Tugend, *JDL Member Gets Life Term in Bombing*, JEWISH TELEGRAPHIC AGENCY, June 16, 1995.

472. See Gordon Dillow, *Mail-Bombing Suspect a Man of Many Faces*, L.A. TIMES, Aug. 5, 1993, at B1.

473. See *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995).

474. Michael Hedges, *Bomb Suspect Finally Faces Trial: Arab-Americans, FBI Say Israel Stalled Extradition*, WASH. TIMES, July 26, 1993, at A1.

475. See Tugend, *supra* note 471. Manning's wife Rochelle was also sought for extradition to the United States, but she died of a heart attack in an Israeli prison before she could be returned. *Id.*

476. See Extradition Act (Amend. No. 6) § 1(A)(1) (Isr. 1999).

477. See Hedges, *supra* note 474, at A1.

478. *Id.*

479. See Tugend, *supra* note 471.

1999 law been in effect, the United States may well have had to agree to yet another condition—that Manning be returned to Israel to serve his sentence in the event of conviction. In other words, Manning—who was a U.S. citizen and had lived in Israel only after becoming a fugitive from justice—would have been entitled to the protection of Israeli law.

Moreover, such protection would have benefitted Manning and prejudiced the United States. Specifically, under Israeli domestic law, prisoner transfers must be effected pursuant to the terms of either a multilateral or bilateral convention or to a special agreement between Israel and the sentencing state.⁴⁸⁰ Thus, a prisoner transfer between Israel and the United States would be effected either under the terms of the Strasbourg Convention or those of an agreement between U.S. and Israeli authorities in that particular case.⁴⁸¹ In either event, it is likely that Manning would have served a shorter sentence in Israel than was imposed in the United States.⁴⁸²

If an Israeli national sentenced to imprisonment in the United States is transferred under the Strasbourg Convention, Israel would be entitled either to continue the enforcement of the U.S. sentence or to convert it into a judgment under Israeli law.⁴⁸³ If Israel chooses the latter course, then the sanction would be determined exclusively by the Israeli penal code and parole regulations and would not be subject to any minimum sentence provided by U.S. law.⁴⁸⁴ Thus, Israel would be entitled to parole the transferred prisoner according to its own law—and, under the terms of the Convention, the United States would be specifically forbidden from “enforc[ing] the sentence if the administering State considers enforcement of the sentence to have been completed.”⁴⁸⁵

480. See Law Transferring Prisoners to Their Own Country, 1996 S.H. 1603, § 3, as amended, 1999 S.H. 1720. A special agreement is “a specific agreement between the two countries concerning the transfer of a particular prisoner.” *Id.*

481. See *supra* notes 224-25 and accompanying text (noting that Israel is a party to the Strasbourg Convention). The United States ratified the Strasbourg Convention on March 11, 1985. Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 22 I.L.M. 530, ratified by United States, Mar. 11, 1985, 24 I.L.M. 929 (1984).

482. See Penal Code 1977, § 41, 251 Special Vol. (Isr. 1977) (stating that, under ordinary circumstances, the maximum prison sentence provided for by Israeli law is twenty years).

483. See Strasbourg Convention, *supra* note 224, art. 9(1); see also Law Transferring Prisoners to Their Own Country, 1996 S.H. 1603, § 10(a)(1), as amended, 1999 S.H. 1720 (stating that an Israeli court could reduce a foreign sentence to the maximum provided by Israeli law if the agreement governing prisoner transfers between Israel and the sentencing state permitted); *id.* § 14(8)(a)(ii) (stating that a foreign sentence more severe than the maximum permitted under Israeli law must be reduced to the maximum that would be allowed if the prisoner had been sentenced in Israel).

484. See Strasbourg Convention, *supra* note 224, art. 11(1)(d).

485. *Id.* art. 8(2). See also Law Transferring Prisoners to Their Own Country, 1996 S.H. 1603, § 11, as amended, 1999 S.H. 1720.

Nor would the safeguards normally available under the Convention to protect the integrity of the U.S. sentence be available in a case such as Manning's. In the ordinary prisoner transfer situation that is governed by the Convention, the prisoner is in the custody of the sentencing state, that is thus in a position to demand that enforcement of its sentence be continued as a condition of transfer.⁴⁸⁶ Under the 1999 amendment to the Israeli extradition law, however, the arrangements for transfer must be made in advance of extradition while the fugitive is in Israeli custody.⁴⁸⁷ Accordingly, it would be Israel rather than the United States that would be in a position to dictate the conditions under which the sentence would be enforced.⁴⁸⁸

The same factors would apply if Manning were returned to Israel pursuant to a special agreement between Israel and the United States.⁴⁸⁹ Because Israel would have custody of Manning and would be able to control the terms of his extradition, it is likely that Israeli authorities would reserve the power to review and reduce his sentence and to parole him according to Israeli law. Thus, although Israeli domestic law conditions the power of Israeli courts to reduce foreign sentences upon the existence of an agreement allowing it to do so,⁴⁹⁰ it is probable that the terms of Manning's extradition would have permitted them to convert the judgment against him into one under Israeli law.⁴⁹¹

Thus, had Manning been entitled to serve his sentence in Israel, there would have been no guarantee that his U.S. sentence of life without parole would have been honored by the Israeli courts.

486. See *id.* art. 9(2) (stating that the sentencing state has the right to demand that the administering state inform it, prior to transfer, as to whether it will continue to enforce the sentencing state's judgment or convert it into a judgment under domestic law).

487. See Extradition Act (Amendment No. 6), § 1(A)(1) (1999).

488. See Van Proyen, *supra* note 51 (quoting Los Angeles Deputy District Attorney Craig Hum as saying that "there's nothing we can do about [the terms of extradition] because [Israel has] the bodies"). Arguably, the United States would not be in a position to complain in the event that Israel chose to convert an American sentence into a judgment under its own law, because this is also the practice of the United States. When a U.S. citizen under foreign sentence is repatriated to the United States under a prisoner transfer treaty, the United States Parole Commission converts the judgment into one for the equivalent offense under U.S. law and calculates a sentence under the United States Sentencing Guidelines. See *Asare v. United States*, 2 F.3d 540, 542 (4th Cir. 1993) (describing the Parole Commission regulations). On at least some occasions, this results in reduction of the foreign sentence. See *id.* at 543 (noting that the Parole Commission had reduced the British sentence of a repatriated U.S. citizen from six years to five).

489. See Tugend, *supra* note 471.

490. See Law Transferring Prisoners to Their Own Country, 1996 S.H. 1603, § 10(a)(1), as amended, 1999 S.H. 1720.

491. *Id.* § 11 (stating that, upon review by an Israeli court, a foreign sentence is converted into a judgment of the Israeli courts).

Instead, his life sentence might well have been converted into a judgment under Israeli law, which does not provide for life imprisonment without parole.⁴⁹² This difference in law would potentially have allowed him to go free after eighteen years despite the fact that he had committed a terrorist murder.⁴⁹³

Such an outcome would have created far greater friction between the United States and Israel than actually occurred. Like Sheinbein, Manning would have been an accused murderer who gained considerable practical benefit from Israeli law despite having no real connection to Israel. In addition, because at least one of the crimes of which Manning was suspected was committed against a prominent Arab-American activist, there would have been considerable outcry from the Arab-American community much as there was from the Latino community in the Sheinbein case. This outcry would be especially so in light of the probable perception among Arab-Americans that he would receive preferential treatment in an Israeli prison.⁴⁹⁴ In other words, had the 1999 law been in effect at the time Manning's extradition was requested, the Manning case would have had the same potential for political explosion as Sheinbein's flight from justice.

In fact, the Manning matter might have been deemed even more egregious than the Sheinbein case. Unlike Sheinbein, who could claim at least technical Israeli citizenship as of the date he murdered Tello, Manning did not have even formal Israeli nationality when he committed his crime.⁴⁹⁵ Moreover, Manning's crime was not only a gruesome murder but a terrorist act, and Israeli obstructionism would have impaired the long-standing cooperation between Israel and the United States in the fight against terrorism.⁴⁹⁶ Had it refused to extradite Manning, Israel might well have found it difficult to obtain the extradition of suspected Arab terrorists who had fled to the United States.⁴⁹⁷

Thus, despite being enacted in reaction to the Sheinbein case, the 1999 law poses the potential for equally explosive cases in the future. The Manning case is not unique, as evidenced by the number of U.S. citizens who have sought refuge from the law in Israel, and the new law will make it even less so. An American Jew accused of

492. See Gerald Mizejewski, *Teen Will Plead Guilty in Israel*, WASH. TIMES, Aug. 25, 1999, at A1 (describing effect of life sentence under Israeli law).

493. *Id.*

494. See Timothy M. Phelps, *Through Palestinian Eyes: Arabs in Territories Say Israel Has Gone Beyond Occupation to Confiscation*, NEWSDAY, June 6, 1988, at 4 (discussing perception among Arabs that Israelis who commit crimes against Arabs are treated leniently in Israeli prisons).

495. See Tugend, *supra* note 471.

496. See Hedges, *supra* note 474, at A1 (discussing the impact of the Manning case on Israeli-U.S. cooperation against terrorism).

497. *Id.*

murder, or of another serious offense, would have little to lose and much to gain by fleeing to Israel. The worst that will happen is that he will be apprehended and extradited, leaving him no worse off than when he began. Moreover, if he can remain in Israel long enough to qualify as a "resident" prior to an extradition request being made, then he could potentially be entitled to serve his sentence in Israel and gain the benefit of the considerably more lenient Israeli parole policy.

Moreover, it is precisely the most heinous offenders—those who potentially face life imprisonment in the United States—who have the greatest incentive to flee. An American Jew facing a short prison term has much less reason to abandon his entire life in the United States simply for the privilege of serving that sentence in Israel. On the other hand, in cases where a life sentence is not mandatory under Israeli law, the maximum sentence that may be imposed by an Israeli court is twenty years.⁴⁹⁸ Accordingly, an American Jew facing life imprisonment for a drug offense—which does not carry a mandatory life sentence in Israel—would stand to reduce his sentence considerably if he remained a fugitive in Israel long enough to establish residency. Simply put, the Israeli law as it now stands would make Israel a potential haven, not merely for criminals, but for the worst criminals.

This possibility has not gone unnoticed by Israeli legislators. On two occasions, bills have been introduced into the Knesset that would amend the Extradition Act to provide that Israeli citizens are unconditionally extraditable unless they were both citizens and residents at the time their offenses were committed.⁴⁹⁹ The explanatory memorandum in support of the first of these bills states that:

The law that was passed permits a person who is not a citizen and not a resident to flee to Israel after committing an offense, to obtain Israeli citizenship, and even to claim Israeli residence if some time . . . has elapsed between the day of his arrival in Israel and the day a request for his extradition was submitted; in other words, a person who knows that an investigation is being conducted against him in another country, but who has not yet been arrested or indicted, flees to Israel and is granted citizenship by relying on the Law of Return. He will also claim that his sojourn in Israel is a permanent one, based on the accepted criteria for determining a center of life.⁵⁰⁰

The version of this bill introduced in the 1999-2000 session of the Knesset, however, was not enacted, and the version introduced in the following session likewise failed, albeit by a single vote.

498. See Penal Code § 41, Special Vol. (1977).

499. See Knesset Bill 2842/5760; Knesset Bill 2920/5761.

500. Cr. C. (B.S.) 2484/99, Attorney General v. Harosh, slip op. at 64 (citing Explanatory Note to Knesset Bill 2842/5760).

C. Two Proposals For Reform

It is clear that, if another incident similar to the Manning case takes place, the Israeli judicial system would potentially be subject to continued manipulations by Jewish criminals from foreign countries. In light of the goals of the Israeli extradition statute, the specific abuses that are possible under the current law and the issues raised by judicial decisions under both the 1978 and 1999 statutes, two possibilities for reform suggest themselves.

The first is a modified version of the amendments suggested in the 1999-2000 and 2000-2001 sessions of the Knesset. This proposal would shift the relevant date for determining citizenship and residency from the date of the extradition request to that of the offense, but include a specific definition of residency in the statute. Such a definition could consist either of a bright-line test or a multifactor subjective test. A bright-line test might exclude, for example, any Israeli citizen who is not a citizen or permanent resident of another country, or—like the Adoption of Children Law—require that the fugitive have lived in Israel for three of the five years preceding the commission of the crime.⁵⁰¹ Alternatively, if a more flexible standard is desirable to provide the courts with discretion in extraordinary cases, then the statute could adopt a multifactor test such as that proposed by Judge Ravid.⁵⁰² This standard might include such factors as place of birth, place of domicile, length of residence or absence, dual citizenship, and use of a foreign passport.⁵⁰³

Defining the term “resident” in the extradition statute would provide guidance to the Israeli courts, would streamline the process of adjudicating residency status, and would also alleviate the concerns of MK Porat, at least somewhat, by reassuring Israelis that they would not lose their residency status during relatively brief trips abroad. In addition, MK Porat’s other concern—that the lives of bona fide Israeli immigrants might be disrupted by extradition requests made many years after the offense at issue—could be addressed by another amendment to the statute. Specifically, the provision of the Extradition Act barring extradition after the expiration of the statute of limitations could be amended to provide that the calculation of the statute of limitations not include any tolling resulting from the requested person’s status as a fugitive.⁵⁰⁴ In the context of Israeli-

501. See *id.* at 36-37 (discussing the definition of residency under the Adoption of Children Law).

502. See *supra* notes 188-94 and accompanying text.

503. See Abramovsky & Edelstein, *supra* note 6, at 343-44 (proposing a test that would include these factors).

504. See, e.g., 18 U.S.C. § 3290 (2001) (providing that no statute of limitations provided in the Federal criminal code shall run while the defendant is a fugitive).

U.S. extradition, this proposal would limit extradition for all but the most serious federal offenses to a five-year period, thus minimizing the possibility that a long-time Israeli resident would be subjected to trial and imprisonment away from his family and country. At the same time, because there is no statute of limitations for murder under U.S. law,⁵⁰⁵ there would be no possibility that the statute of limitations would preclude the extradition of a fugitive wanted for murder.

Alternatively, the Extradition Act could be amended to establish two relevant dates rather than one. Specifically, this new law would limit the protection of conditional extradition to persons who hold Israeli citizenship at the time of the offense and are Israeli residents on the date of the extradition request. This proposal might, in fact, be the most effective method of preventing future manipulations of the Israeli extradition process. On the one hand, people like Manning—who were not Israeli citizens at the time of the offense—would be unable to flee to Israel and establish residency at some future date. On the other hand, people like Sheinbein—who were technically Israeli citizens but had not established residency at the time extradition was requested—would not be able to escape extradition merely due to their formal Israeli nationality. Persons with real connections to Israel, however, as demonstrated by their pre-existing citizenship and continuing residency, would be eligible to serve their sentences in Israel consistent with Israeli ideals and international humanitarian norms.

This alternative would also harmonize Israeli extradition procedure with domestic Israeli legislation concerning transfer of penal sanctions. The 1996 statute providing for administration of foreign sentences provides that, as a general rule, only those who were Israeli citizens at the time of commission of the offense may be transferred.⁵⁰⁶ Although this condition could be waived in the discretion of the Ministers of Justice and Internal Security,⁵⁰⁷ it is nevertheless in conflict with the current extradition law, which makes transfer mandatory in many cases even where the fugitive was not a citizen when the crime was committed.⁵⁰⁸ By amending the Extradition Act to require citizenship on the date of the offense and residency as of the date of the extradition request, Israeli extradition law would be brought into consistency with the statute governing prisoner transfers.

505. See 18 U.S.C. § 3281 (2001).

506. See Law Transferring Prisoners to Their Own Country, 1996 S.H. 1630, § 7(a)(1), as amended, 1999 S.H. 1720.

507. *Id.* § 7(b).

508. See *supra* note 476.

D. *An Afterthought: Is Citizenship Necessary?*

A final consideration that may be addressed when reforming the Israeli extradition statute is whether the protection of conditional extradition should be extended to Israeli residents who are not citizens. Just as Israel has a large population of nonresident citizens, it is also home to a considerable number of noncitizen residents. These include the Arabs of East Jerusalem and the Golan Heights, all of whom were offered Israeli citizenship after the annexation of these territories but few of whom have accepted.⁵⁰⁹ Notwithstanding the fact that they are not Israeli citizens, however, the great majority of them were born in East Jerusalem or the Golan, reside there with their families, and have never known any other home.⁵¹⁰

This fact means that the same humanitarian norms that underlie the policy of repatriation of sentenced Israeli nationals—the proximity of the prisoners' friends and families and rehabilitation within their own cultures—are equally applicable to the Arabs of the Golan and East Jerusalem. Indeed, as long ago as 1970, Theodor Meron noted that the modern trend is to merge the concepts of permanent or long-term residency and nationality.⁵¹¹ Specifically, he noted that "[t]here is a growing tendency to assimilate residence to nationality" because "[f]or a person who is really rooted in a [country of which he is not a citizen], extradition may create problems similar to those arising out of extradition of the nationals of the requested State."⁵¹² Given that Israel is home to more than 200,000 permanent residents who are not citizens, this consideration is an especially acute one for Israeli lawmakers.⁵¹³

In addition, it should be noted that, since 1978, noncitizen residents of Israel who commit crimes in foreign countries are subject to the active personality jurisdiction of the Israeli courts on the same basis as citizens.⁵¹⁴ Thus, as Meron pointed out, because the Offences Committed Abroad Act "makes residents of Israel subject to the jurisdiction of Israeli courts with regard to ordinary offences committed abroad . . . should [they not be granted the same degree of]

509. See Herling, *supra* note 337, at 71.

510. *Id.*

511. See Meron, *supra* note 26, at 78 n.7.

512. *Id.*

513. See David Bedeen, *Down and Out in the Capital*, JERUSALEM POST, Mar. 12, 1999, at 4 (stating that 200,000 East Jerusalem Arabs do not hold Israeli citizenship).

514. See Offences Committed Abroad (Amendment of Enactments) Act, § 1(1), 32 L.S.I. (stating that "[t]he courts in Israel are competent to try under Israeli law an Israeli national or resident of Israel who committed abroad an act which, had it been committed in Israel, would be one of the offences included in the Schedule to the Extradition Law").

immunity from extradition, which has been granted to nationals?"⁵¹⁵ Certainly, if a permanent resident's connection to Israel is sufficient for active personality jurisdiction, then equitable considerations would seem to dictate that it is also sufficient to require his repatriation if sentenced abroad. As Israel increasingly expands its conception of nationality and becomes a country of equal rights,⁵¹⁶ the consideration of ensuring that permanent residents do not face extended incarceration away from their homes and families should be an important one. It may thus be desirable to extend the protection of conditional extradition to persons who are (1) either citizens or permanent residents of Israel as of the commission of the offense for which extradition is requested, and (2) residents of Israel as of the date the extradition request is made.

V. CONCLUSION

With the Extradition Act (Amendment No. 6) of 1999, Israel has taken a step forward in its effort to balance its role as a sanctuary for world Jewry with its obligation to cooperate with other nations against crime.⁵¹⁷ In several critical respects, however, the 1999 amendment does not go far enough. In fact, the new law opens the door to manipulation of the Israeli extradition process by persons with no pre-existing Israeli citizenship or connection to Israel, as long as they can remain in Israel long enough to qualify as residents before an extradition request is made. As the example of the Manning case demonstrates, this effect has the potential to lead to political and law enforcement dilemmas every bit as damaging as the Sheinbein case. While citizenship is no longer a bar to extradition from Israel, the battleground has merely shifted to the issue of residency; the possibility of manipulation of the extradition system by foreign Jewish criminals still exists. As shown by cases such as those of *Berger*, *Harosh*, and *Engel*, Jews who commit crimes abroad will

515. Meron, *supra* note 78, at 224.

516. See Shachar, *supra* note 23, at 248-52 (detailing the liberalization of the Israeli concept of citizenship).

517. It should also be noted that Israel and the United States are currently discussing the possibility of a new extradition treaty under which all offenses punishable by more than one year in prison under the law of each country, rather than only the specific offenses listed in an annex to the treaty, would be extraditable. See Dan Izenberg, *Israel, US Begin Drafting New Extradition Treaty*, JERUSALEM POST, Sept. 15, 1999, at 5. If such a treaty is negotiated and ratified, it would also represent a step forward in Israeli-U.S. extradition relations, as the list of offenses in the appendix to the 1962 treaty do not include such frequently committed crimes as money laundering. See *United States v. Stroh*, 2000 WL 1832956, 2000 U.S. Dist. LEXIS 21223, at *15 (D. Conn. 2000) (noting that money laundering was not among the extraditable offenses in the U.S.-Israeli treaty).

continue to flee to Israel in the hope of either avoiding extradition outright or attempting to be extradited on favorable terms.

Accordingly, further reform of the Israeli extradition law is necessary in order to eliminate, or at least minimize, this possibility. This goal could be accomplished either by requiring Israeli residency as of the date of the offense but defining residency more clearly or by continuing to require residency as of the date of the extradition request but adding an additional requirement of citizenship on the date the offense is committed. Either alternative would greatly minimize the likelihood of abuse while providing maximum protection to the legitimate interests of Israel and the United States.