> "They will not despise a thief if he steals to sate his appetite, for he is hungry".
>
> (Proverbs 6:30)

STEALING FOOD TO SATISFY HUNGER: THE CASE OF ISRAEL

By Yoram Rabin and Yaniv Vaki[*]

I. INTRODUCTION

Roman Ostriakov was a 31-year-old homeless Ukrainian immigrant living in Genoa, Italy, when in 2011 he entered a supermarket and purchased breadsticks with the little money he had. One of the shoppers spotted Ostriakov putting additional food into his pocket and reported him to the store personnel. Ostriakov was detained when he attempted to leave the supermarket. Police were called, and a search of his pockets discovered two pieces of cheese and a package of sausages he had not paid for. Ostriakov was arrested and charged with theft of the cheese and sausages, worth $5.50 (€4.07). Ostriakov was convicted of the theft, for which he was sentenced to six months in jail and a €100 fine, which he obviously could not afford to pay. Following two unsuccessful appeals to Genoa's Court of Appeals, the case reached Italy`s highest court — the Supreme Court of Cassation in Rome. The Supreme Court acquitted him, holding that:

> The condition of the defendant and the circumstances in which the merchandise theft took place prove that he took possession of that small amount of food in the face of the immediate and essential need for nourishment, acting therefore in a state of necessity. People should not be punished if, forced by need, they steal small quantities of

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> food in order to meet the basic requirement of feeding themselves.[1]

In its ruling, the Court accepted the argument that given Ostriakov`s state of hunger, which required immediate satisfaction, his act falls under the defence of necessity.[2] The acquittal by Italy`s Supreme Court was extensively covered in various international media outlets.[3]

Many nineteenth century novels, such as the iconic *Les Misérables,*[4] describe food stealing as a social phenomenon occurring within the context of hunger and poverty. Even though the scope of this phenomenon in the West has meanwhile declined, it has remained noticeable in many countries, especially in modern, industrial societies. People coping with poverty, *i.e*. the absence of basic resources such as food, clothing, housing or medical care, also experience tangible difficulties when attempting to integrate into society and they often suffer from social exclusion and dependence on others. In one of his books, written in the mid nineteenth century, Friedrich Engels passionately described the plight of the English working class, arguing that poverty had transformed them into a group exhibiting an especially high level of criminality.[5] These findings were empirically

1 Supreme Court of Cassation, Judgment 18248, fifth criminal section, 2 May 2016 (hereinafter: "Ostriakov" case).

2 *See* "Stealing Food Out of Necessity is Not a Crime, Rules Italy's Supreme Court", 64 *Justice Denied: The Magazine for the Wrongly Convicted* 4 (2016).

3 *See, e.g.,* "Theft of sausage and cheese by hungry homeless man 'not a crime'" *The Guardian,* 3 May 2016; "Stealing food if you are poor and hungry is not a crime, Italy's highest court rules", *The Telegraph,* 3 May 2016; "Italian court rules food theft 'not a crime' if hungry", *BBC News*, 3 May 2016; "Can the Homeless and Hungry Steal Food? Maybe, an Italian Court Says", *N.Y. Times*, 3 May 2016; "Il diritto di avere fame" [The right to be hungry], *La Stampa*, 3 May 2016.

4 Les Misérables is a French historical novel by Victor Hugo first published in 1862. The book describes the adventures of Jean Valjean, born to a poor family, who cared for his sister and her seven children following her husband's death. When the family became penniless, Jean was caught stealing a loaf of bread and was sentenced to five years in jail. Due to his frequent attempts to escape, his incarceration was extended to a total of 19 years. The novel contains searing criticism of the conditions of poverty and of French society's attitude to the poor and unfortunate.

5 F. Engels, *The Condition of the Working Class in England* (1845).

confirmed.[6] Economic hardship and the distress it engenders can drive individuals towards confrontations with the law.[7] As Delgado stated:

> An environment of extreme poverty and deprivation creates in individuals a propensity to commit crimes. In some cases, a defendant's impoverished background so greatly determines his or her criminal behavior that we feel it unfair to punish the individual.[8]

What, then, is the approach taken by criminal law toward offences—especially those against property—committed because of the perpetrator's need to obtain basic sources of subsistence, such as food? This question raises fundamental issues about the criminal justice system and its boundaries.[9] This Article analyzes the issue by utilizing the following test case: the approach taken by Israeli criminal law toward acts of theft of food committed in circumstances of poverty, scarcity and hunger.[10]

II. DECIDING NOT TO PROSECUTE

The main path of coping with crimes of theft committed against the background of hunger and need is to avoid prosecuting the perpetrator (and when possible, placing him or her in the care of social services).[11] This

6 *See, e.g.,* P. Weirs, "Wartime Increases in Michigan Delinquency", 10 *Am. Sociological Rev.* 515-532 (1945); C. Burt, *The Young Delinquent* (1944); W. Warner & P. S. Lunt, *The Social Life of a Modern Community* (1941); P. Wolf, "Crime and Social Class in Denmark", 13 *Brit. J. Crim.*, 5-17 (1962).

7 T. Kaslasi-Goldstein, "'Poverty Cases': The Public Offender's Struggle with Crimes Perpetrated on Account of Economic Hardship", 8 *MA'ASEI MISHPAT – TEL AVIV Univ. J. L. & Social Change* 113 (2016) [Hebrew].

8 R. Delgado, "*'Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?* 3 *L. & Inequality* 9 (1985).

9 *See, e.g.,* M. Estrin Gilman, "The Poverty Defense", 47 *U. Rich. L. Rev.* 495 (2013); S. Bhattacharjee, "Should Valjean have been Punished for Stealing Bread? On Poverty and Criminal Responsibility", 5 *J. Indian L. & Soc.* 1 (2013); W. C. Heffernan & J. Kleinig (editors) *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (W. C. Heffernan & J. Kleinig eds., 2000).

10 The findings of this research do not relate to acts of burglary that incorporate, other than theft, a fundamental element of violence, which Israeli courts treat with extreme severity. It is also worth noting that poverty, want and hunger are relevant for a range of offences other than theft.

11 *See* the position taken by Israel's Public Defender's Office, as reflected in its 2014 Annual Report at 15 (Aug. 2015): "In the opinion of the Public Defender, in cases of this type, it is appropriate for the police and the prosecuting authorities to act on their own accord and direct the individual to the care of social services for the purpose of finding an appropriate solution to her distress, that is, to abstain from prosecuting, which introduces further difficulties and reduces the defendant's chances of escaping the poverty cycle and

outcome can be reached by applying three alternative mechanisms: The principle that criminal law is the last resort; the principle that the State should refrain from prosecuting in cases that lack public interest; and the use of conditional orders.

A. The Last Resort Principle

In Israel, as in other countries, the *last resort principle* is considered the fundamental guideline when determining the scope of application of the substantive criminal law.[12] According to this principle, criminal sanctions are the ultimate threat available to the legal system; therefore, before they are imposed, other options must be examined and preferred. Criminal law is the last resort not only when it comes to criminal legislation; it also applies to criminal procedure, where the principle specifically demands that a criminal trial and the imposition of punishment should be avoided whenever possible.[13] In Israel, the last resort principle was discussed in the seminal *Schwartz* case.[14] In that case, it was used to justify the prosecution's decision not to indict commanders of a soldier who had committed suicide, but rather to subject them to disciplinary proceedings. The principle was utilized in this case even though the commanders did not demonstrate sufficient vigilance with regard to the early signs of the soldier's suicidal tendencies and thus, the conditions of causing death by negligence may have been met. Israel's Supreme Court, when referring to the last resort principle in its decision, stated: "The premise is that there are means, other than criminal law... Therefore, the prosecuting authorities should examine whether criminal prosecution is the proportionate measure in the case before them".[15]

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need. In cases where bills of indictment have been submitted, the Public Defenders are guided to raise arguments of this type with the aim of convincing the prosecutor to withdraw the accusations or to acquit the accused due to the absence of criminal culpability, the existence of a defence, or the presence of administrative and constitutional arguments against submitting an indictment. The prosecuting authorities have frequently been convinced, subsequent to the Public Defenders' arguments, that prosecuting was not the appropriate way to deal with the problem. It has been found, more than once, that the moral and legal difficulties entailed with submitting an indictment for an act provoked by need to survive and live in dignity have not escaped a judge's gaze". This position was reiterated in the Public Defender's 2016 Annual Report at 133 (Aug. 2017), as well as in its 2018 Annual Report at 17-18 (Jun. 2019).

12 D. Husak, "The Criminal Law as Last Resort", 24 *Oxford J. Legal Stud.* 207 (2004); N. Jareberg, "Criminalization as Last Resort (Ultima Ratio)", 2 *Ohio St. J. Crim. L.* 521 (2005), J. W. Ouwerkerk, "Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?", 3 *New J. Eur. Crim. L.* 228 (2012).

13 A. Harduf, "How Crimes Should Be Created: A Practical Theory of Criminalization", 49 *Crim. L. Bulletin* 31, 60 (2013).

14 *Schwartz v. Attorney General*, HCJ 88/10 (2010).

15 *Schwartz* case, *id.*, at sec. 19 of the Justice Joubran opinion.

Accordingly, when a homeless person steals food to assuage his hunger or when a single mother steals food to feed her young children, it is worth examining whether another, more moderate and proportionate way of handling the case is available so as to avoid imposing criminal sanctions. In such situations, it is generally preferable that the case be handled by the social service authorities, whose mission, *inter alia*, is to assist citizens escape the poverty cycle.

B. Lack of Public Interest

Article 62(a) of Israel's Criminal Procedure Law states: "Where it appears to the prosecutor to whom the investigation material has been transmitted that there is sufficient evidence to charge a particular person, he shall prosecute him unless he is of the opinion that the circumstances surrounding the act are, in general, unsuitable for bringing the suspect to criminal trial …".[16] This section specifies two aggregate criteria for making a decision. The first is the existence of sufficient evidence to bring the suspect to trial. This criterion is necessary, but not sufficient. The second criterion demands proving that the circumstances surrounding the act justify bringing the suspect to trial.[17] In Israeli criminal law, as in the majority of countries, the second criterion demands proving whether it is in the public's interest to bring the suspect to trial. This decision is normative in nature and subject to the prosecutor's discretion. The prosecutor is thus required to balance the degree of public benefit in holding a criminal trial against the possible harm to society if the charges are dropped. This balancing is done according to the circumstances surrounding each individual case in light of the relevant social norms. In other words, the task is to weigh the benefits of enforcing criminal law against its disadvantages. The fact that a person suspected of stealing undertook the act in order to satisfy his or her hunger (or that of his or her children) is one relevant, even crucial, criterion among those weighed in determining whether to bring a suspect to trial. It is one that can often tip the scales.

We argue that a trial held for the offence of stealing basic commodities is usually *not in public's interest* when the following criteria are met: (1) the act is meant to fulfill an essential and immediate human need to assuage hunger; (2) the commodity is not particularly expensive; (3) the act is not committed in an organized or pre-arranged manner or includes an element of

16 Sec. 62, *Law of Criminal Procedure [Combined Version]*, 1982.

17 In 2018, the wording of Sec. 62 was revised. The phrase "no public interest is involved" was changed to "the circumstances surrounding the act are, in general, unsuitable for bringing the suspect to criminal trial."

violence (which would transform it from theft to burglary[18]); and (4) the offender's lack of a significant criminal record. Even if the respective act exhibits the fundamental elements of a crime, the entire set of circumstances may provide sufficient reasons to refrain from indictment. Considering the low level of guilt in such cases, compared to the grave harm caused to the helpless perpetrator, it should be concluded that holding a criminal trial serves no public interest.

C. Conditional Orders

In 2012, Israel amended its Law of Criminal Procedure by adding a chapter that provides the prosecution with a new administrative enforcement mechanism as an alternative to the conventional criminal system.[19] According to this arrangement, the prosecutor has the authority to close the case provided that the suspect admits to the facts and offences attributed to him or her, and complies with conditions agreed upon by both parties (hereinafter: "Conditional Order(s)").[20] The conditional order provides prosecutors the option of redirecting criminal cases to the care of administrative authorities outside the courts without judicial intervention.

A conditional order allows, among other things, when appropriate the closing of a case against the perpetrator without indictment. This alternative was intended to expand the prosecutor's "toolkit" by adding a mechanism (beyond the binary choice between closing the case or prosecuting the suspect) that allows for a more moderate and appropriate response when confronted with particular offences and under specific conditions while ensuring adequate correlation between the severity of the crime and its circumstances and the society's reactions to the criminal.

The cases most suitable for conditional orders are those where the public's interest in bringing the accused to trial is marginal, meaning that holding a trial will have little public benefit, but at the same time, closing the case would also not adequately serve the public's interest. However, once the

18 Israeli case law has dealt severely with robbery offences, even when committed on the basis of scarcity, poverty or hunger. *See, e.g., Arlichson v. State of Israel*, Criminal Appeal 2304/11 at para. 5 of the decision handed down by Justice Rubinstein (published in NEVO, 19 Jan. 2012); *Oren v. State of Israel*, Criminal Appeal 1875/14 at para. 14 of the decision handed down by Justice Barak-Erez (published in NEVO, 13 May 2015).

19 Sec. 67A – 67L of the *Law of Criminal Procedure [Consolidated Version]*, 1982.

20 A list of conditions is enumerated in para. 67c of the Law of Criminal Procedure. That list includes, among other terms, payment to the State Treasury, payment of compensation to the parties injured as a result of the crime, compliance with a supervised program, participation in a rehabilitation or therapeutic program, including community service, commitment to abstain from criminal activity ("recognisance order"), and so forth.

suspect meets all the stipulations set forth in the conditional order, any remaining public interest in holding a trial "evaporates". This means that it is appropriate to utilize a conditional order when compliance by the offender to all the stipulations set forth in the conditional order negates any public interest in prosecution of the case.

It appears that crimes committed within the framework of severe economic distress and the need to obtain basic subsistence goods in order to quell hunger are usually of minor severity. Considering the conditions in which they take place and the level of harm caused, they can generally be more-aptly dealt with by means of a conditional order. Such orders are subject to several statutory preconditions including, i.e., the lack of a criminal record for the five years preceding the commission of the crime in question as well as the absence of any other open cases involving the accused.[21] When these stipulations add to the basic traits of the case as described, the public's interest in prosecuting becomes negligible. Under such circumstances, enforcement in the form of a conditional order is more proportional and thus preferable to strict enforcement of criminal law. Conditional orders therefore represent a social response fitting the case's seriousness.

This approach was adopted by the magistrate's court in the *Tzaalach* case.[22] The accused, having no criminal record, was destitute to the extent that her young daughters were suffering from deprivation and hunger. The accused had forged the signature of another person on a number of checks in order to purchase food from a local supermarket for the purpose of feeding her girls. The judge ruled that the prosecuting authorities' decision to bring her to trial was unreasonable and unjust; she then ordered that the parties be referred to a Conditional Order proceeding. After the parties signed the Conditional Order, the indictment was annulled. Conditional orders have often been used in order to avoid prosecution for theft due to starvation or severe shortage, similar to the outcome of the *Tzaalach* case. The Israeli Conditional Orders' database indicates that 28 cases of theft of basic commodities (such as small amounts of meat, fish, baby formula, diapers, etc.), committed in 2020 under conditions of poverty, were closed after the parties signed a Conditional Order.

21 Sec. 67a(d)(2) of the *Law of Criminal Procedure [Consolidated Version]*, 1982. For a ruling holding that economic adversity cannot overcome a weighty criminal record *see John Doe v. The State of Israel*, HCJ 2608/13 at para. 9 of Justice Rubinstein's decision (published in NEVO, 25 Jul. 2013): "We have not been convinced that the crime resulted specifically from economic hardship, but even if true — the Israeli public is not required to bear the risk presented by someone who repeatedly returns to his evil ways".

22 *State Prosecutor, Haifa District v. Tzaalach*, Criminal Case 11518-03-16 (27 Jun. 2019).

To conclude, conditional orders reify the "last resort principle" in the sense that they make available a more efficient and less damaging alternative to the initiation of criminal proceeding. As Israel's High Court of Justice held in *Schwartz*, even when the offence inflicts harm to society, we should not enforce the law by means of criminal proceedings when there are more lenient and less harmful measures for dealing with the case.[23]

III. SUBSTANTIVE DEFENCES

Under Israeli criminal law, generally similar to most Anglo-American Criminal Codes, motive is not in itself an element of the crime and is irrelevant to criminal liability unless specifically made relevant within a crime's statutory definition (for example, as in hate crimes[24]). That is the reason why at the stage of determining criminal responsibility (unlike the sentencing stage) no weight is given to whether the perpetrator was motivated by hunger or privation. Nevertheless, even though hunger or poverty are not themselves independent arguments for the defence, the conditions of hunger or poverty can, in some circumstances, be relevant for establishing criminal defences, primarily that of necessity and *de minimis*, to which we now turn.

A. Necessity

Can a hungry, penniless person who stole in order to satisfy his hunger argue the defence of necessity? The question of whether hunger can establish a necessity defence was debated in the well-known English case of *Dudley and Stephens*.[25] Dudley (the captain) and Stephens, along with Brooks and Parker (the victim), crew members of a sinking yacht, escaped in a small open lifeboat, adrift for weeks on the high seas without food and water, except for two tins of turnips and a turtle they caught. After twenty days, seeing no rescue in sight, Dudley and Stephens proposed that one person sacrifice himself in order to save the rest. Brooks was opposed but Dudley and Stephens decided to kill Parker since he was the weakest and youngest. Dudley and Stephens did so and, together with Brooks, 'feasted' on his body. Four days later, the three were picked up by a passing ship. After their return to England, Dudley and Stephens were charged with murder. The two argued necessity as their defence. At the trial, it was agreed that had they not

23 Schwartz, *supra* note 14, at sec. 20 of the Justice Joubran opinion.

24 J. Morsch, "The Problem of Motive in Hate Crimes: The Argument against Presumptions of Racial Motivation", 82 *J. Crim. L. & Criminology* 659 (1991); J. Y. Kim, "Hate Crime Law and the Limits of Inculpation", 84 *Neb. L. Rev.* 846 (2005).

25 *R. v. Dudley & Stephens,* 14 Q.B.D. 273 (D.C.) (1884).

consumed their comrade, they would most probably have starved to death prior to being saved.

During the trial, the judge mentioned the intense hunger the defendants experienced and that due to their condition, it was difficult to expect them to maintain a reasonable level of discretion or unblemished behavior. Nevertheless, the judge rejected the necessity defence, convicted the two of murder and sentenced them to the statutory death penalty with a recommendation for mercy. Queen Victoria did pardon Dudley and Stephens and up until their release, the defendants managed to serve six months in prison. It is commonly believed that the court's rejection of the necessity defence in this case rested on the fear of undermining public morals and that it reflects the long-held view under common law that killing an innocent person in order to prevent the death of others is immoral and should be resolutely rejected. A reading of the ruling indicates the court`s understanding of the defendants' state of extreme hunger and their intense need to obtain food at all costs under these circumstances. And yet, the rejection of the necessity defence was warranted for another reason—cannibalism toward the innocent. Thus, as will be explained below, under less-extreme conditions, where scarcity and hunger are the cause for the commission of a property offence such as theft, and not the murder of an innocent person, employing the necessity defence may be feasible.

Turning to Israeli criminal law, can an act of stealing food to assuage hunger successfully establish the defence of necessity? According to section 34K of Israel's Penal Law, 1977:

> A person shall bear no criminal liability for an act required to have been done immediately to save his or another's life, freedom, body or property from an imminent danger of serious injury deriving from the circumstances at the time of the act, and for which no alternative action was available.

Food is a fundamental need. People who do not satisfy that need suffer the torments of hunger and are exposed to physical harm and even death. Therefore, a state of hunger that cannot be immediately alleviated by any means other than the theft of food may meet the three conditions stipulated in sec. 34K of Israel's Penal Law:

> 1. The theft of food is **immediately required** [emphasis added] in order for a person to save his life or sustain his body. This condition applies not only to life-

> threatening situations caused by hunger, but also to situations where hunger may cause bodily harm;
> 2. The state of hunger creates "imminent danger of serious injury deriving from the circumstances at the time of the act"; and
> 3. The theft may be the sole action available in order to obtain nourishment. In such situations, the condition that "no alternative action was available" is also met.

Nonetheless, the necessity defence has yet to be successfully employed in Israeli case law so as to acquit a defendant from the crime of stealing food when motivated by hunger. The same holds for the US:

> Courts have been reluctant to recognize economic hardship as creating conditions of necessity, reasoning that poor people usually have some alternatives other than committing a crime …. The necessity defense is a difficult standard to meet, and there are no reported cases in which a poor person was acquitted on economic grounds under the necessity defense.[26]

Hence, the Italian case of *Ostriakov*, discussed above, seems to be the only instance in which a defendant was acquitted from stealing food based on the necessity defence.[27]

[26] Gilman, *supra* note 9, at 507-508. *See also* Bhattacharjee, *supra* note 9, at 7: "Not surprisingly, courts across major common law countries have been reluctant to recognize poverty as sufficient basis for the defence of necessity". *See also* Jeremy Waldron, "Why Indigence is not a Justification", in *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law*, *supra* note 9, at 98. However, verdicts have been handed down where poverty-stricken defendants were acquitted on the basis of the necessity defence from the offences of begging or gathering alms and of anti-camping laws that bars homeless encampments in specific areas. *See Eichorn* case, 81 *Cal. Rptr.* 2d 535 (Cal. Ct. App. 1998). In that case, a California Court of Appeals found that a trial court should have allowed a homeless man cited for violating the City of Santa Ana's anti-camping ordinance to plead a necessity defence. *See* A. K. Fasanelli, "Note in re Eichorn: The Long-Awaited Implementation of the Necessity Defence in a Case of Criminalisation of Homelessness", 50 *Am. U. L. Rev.* 323 (2000).

[27] *Ostriakov* case, *supra* note 1.

B. De Minimis

Another relevant defence that can be applied in situations of theft against a background of shortage and poverty is the *de minimis* defence, stipulated in sec. 34Q of Israel's Penal Law. The section states:

> A person shall bear no criminal liability for an act where, in view of the nature, circumstances and consequences of the act, and of the public interest, the act is too trivial.

Sec. 34Q, incorporated into the Israeli Penal Law in 1994, was meant to provide the courts with a power previously assigned exclusively to the prosecution: the authorization to close cases due to a lack of public interest. The Supreme Court ruled that on the basis of the *de minimis* defence, the courts were authorized to "[e]xclude from criminal liability acts that meet the technical criteria for the existence of an offence, but do not exceed the threshold of criminality required, in substantive terms, for a conviction".[28] Scholars have stressed the contribution of the *de minimis* defence for realizing the "individualization of justice" by softening the abstract definition of a crime and adapting it to concrete cases.[29]

In light of the above, should difficult personal circumstances of severe poverty and need be considered as factors relevant to the *de minimis* defence? According to one opinion, the court is allowed to only assess the act in and of itself and should ignore the culprit's personal circumstances.[30] However, the majority opinion held by scholars, with which we concur, is that in order to apply the *de minimis* defence, the particulars of the crime should be considered without ignoring the defendant and his situation. In other words, when examining the relevant elements of the concrete event, factors associated with the defendant's circumstances could also be taken into account.

28 *The State of Israel v. Ariel Electrical Engineering, Traffic Lights and Supervision*, Criminal appeal 7829/03, 60(2) PD 120, 145 (2005).

29 J. Broder, "The Limits of the De Minimis Defence in Light of Article 34Q", 21 *Bar-Ilan L. Stud.* 495, 500-501 (2004) [Hebrew].

30 M. Gur-Arye, "Penal Law (Preliminary and General Part) Bill, 1992", 24 *Mishpatim* 9, 70 (1994) [Hebrew].

In the *Bahalker* case, the court acquitted the accused from the theft of food products based on the *de minimis* defence.[31] The case involved an accused who stole a credit card from the complainant's mailbox, and went shopping for meat, chicken, dairy products, beverages and other items. The Magistrate's court, after reviewing the evidence and the personal circumstances of the accused, held that the *de minimis* defence should be applied:

> After examining the details of the indictment, I can only conclude that it refers to a situation of poverty, of misfortune, more than a felony with hidden criminal intentions. With the onset of the New Year holidays, we are unfortunately forced to consider issues regarding the circumstances in which the State filed the indictment against the accused, who wished to purchase food for herself and children despite her empty pockets. There are instances in which an indictment consolidates all of the felony's basic elements, as in the case before us, but the harm to the value protected by the offence is minimal.[32]

The court subsequently enumerated six reasons why it was appropriate to apply the *de minimis* defence to the case and to acquit the accused:[33]

(1) The indictment referred to the theft of a credit card for the purpose of purchasing the basic items necessary to sustain life, such as meat, chicken, and dairy products. Furthermore, the State claimed that the total value of the products was unknown, suggesting that the products may have been of little value.
(2) Admittedly, the theft of a credit card adds an additional dimension to the offence, but the main point of the indictment is the accused's purpose, to purchase food for her children.
(3) The accused is the mother of two children, and the food she wished to steal was meant for one of the children who suffers from a heart defect.
(4) There was evidence that the accused was destitute.
(5) The accused confessed.
(6) The accused has four previous convictions but none of them relates to property offences.[34]

31 *State of Israel v. Bahalker,* Criminal case (Magistrate's Court, Ramla) 17571-01-18, (2018).

32 *Ibid*.

33 *Ibid*.

34 One of the accused's previous convictions was for breaking-and-entering. However, the court noted that the break-in, committed within the framework of a complicated

The Court made clear its position that when applying the *de minimis* defence, it may consider not only the particulars of the offence, *i.e.*, the small value of the stolen item, but also the defendant's personal situation, whether she was indigent and whether she and her children were hungry. In light of the above, the Court decided to acquit the accused and the State Attorney decided not to challenge the acquittal.[35]

An additional ruling in which the accused was acquitted of stealing food based on the *de minimis* defence is the *Michaelov* case.[36] In this instance, the accused was a poor, elderly woman living on an income security allowance from the State. She had stolen $90 worth of meat from a supermarket. She was caught and prosecuted for theft. The court acquitted her while noting that:

> The context of the offence was solely her state of economic need …. The accused had committed the act not for the purpose of enriching herself; this fact must be taken into account. This was not a property crime which is usually intended to make an easy profit. At the same time, we should consider the personal circumstances in which the accused found herself, her advanced age and economic hardship. With respect to the offence's 'outcomes', we can say that the damage was minor in terms of its type and scope.[37]

The judge expressed his discomfort regarding the indictment against such a defendant:

> I believe it proper to note that I sometimes feel uncomfortable with the indictment of a person for stealing food when the offence's one and only purpose is sustenance and elemental existence. We are not speaking of the theft of food accompanied by the theft of indulgences such as perfume or commercial-scale theft of food. It takes little effort to imagine the difficulties faced

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relationship between the accused and her former partner, was intended to remove her own belongings.

35 The authors verified this fact.

36 *State of Israel v. Michaelov*, Criminal case 46952-12-12 (2014).

37 *Id.*, at paras. 14-16 of the verdict.

> by a person forced to steal food in order to survive and the shame accompanying this situation.[38]

The final example is the *Jane Doe* case involving the defendant's theft of four cans of baby formula with a total worth of $80.[39] The accused was born and raised in an ultra-Orthodox Jewish family but at 17.5 years of age, she left her strictly religious lifestyle. She was consequently banished from the family home and excommunicated. She later became pregnant out of wedlock and gave birth to a daughter, who she raised as a single parent. At the time of the incident, the child was just over two years old. During this period, the infant's father had denied his paternity and refused to pay child support. An NGO supporting single mothers provided some aid but eventually informed the accused that her eligibility for support was limited in time. The accused also claimed that she was unable to find employment due to demands that she do shift work while having no one to help tend for her child. According to documents presented to the court, at the time of the offence the accused was barely surviving on a social security allowance. Consequently, the court stated:

> My review of the defendant's bank statements for the relevant period … shows no indication of spending on luxuries. On the day of the incident, her account was empty. The evidence shows that she had only NIS 200 in her possession, an amount by which she had to maintain herself and her two-year-old daughter, including food and travel expenses for the two-week period until the next social security payment. These were the circumstances in which the accused entered a store and stole goods in order to feed her small daughter so as to avoid hunger; yes, it was a theft, but it wasn't an act that the public is interested in transforming into a criminal offence. Under these conditions, the theft is not committed in order to enrich or entertain oneself. It is committed as a result of duress and despair. In this case, not only is the public uninterested in a conviction and a punishment, but such a measure would also contradict the sense of justice and values upheld by our society as a Jewish and democratic state.

38 *Id.*, at para. 14 of the verdict.

39 *State of Israel v. Jane Doe*, Criminal Case 25906-08-19 (2021).

Accordingly, the court ruled that the accused was subject to the *de minimis* defence and therefore acquitted her of the charges.

To summarize, when the theft is of food having little value, and when the act stems from the absence of means to maintain life and is intended to prevent the hunger of the defendant and his or her dependents, the *de minimis* defence can provide the foundations for acquittal.

IV. SENTENCING

Where a person is indicted for stealing food in spite of the fact that his or her sole purpose was to protect his or her family's existential needs, and where the defences of necessity or *de minimis* are rejected by the court, mitigating the severity of the penalty should still be considered.[40]

In 2012, Israel's Parliament (the Knesset) approved a new sentencing law. Israel thus became one of the latest jurisdictions to introduce statutory guidelines for courts to follow when sentencing.[41] The new Act's text begins by specifying its purpose, after which it introduces the philosophical orientation of sentencing. Section 40B stipulates that "[t]he guiding principle in sentencing is proportionality between the seriousness of the offense committed by the offender and his degree of culpability, and the type and severity of his punishment". The Act then presents a multi-stage methodology for courts to follow when sentencing, which can be summarized as follows:[42]

- First stage – Determining a proportionate sentence range (PSR), drawing upon a list of statutory factors related to the offense.
- Second stage – Deciding whether to deviate from the PSR in order to promote rehabilitation or protection of the public.
- Third stage – If the court remains within its PSR, it should then locate a sentence within that range, drawing on additional factors unrelated to the offense.

40 For a discussion of the extent to which poverty currently mitigates the severity of the penalty, especially in the US and Australia, *see* M. Bagaric, "Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing", 33 *Law & Ineq.* 1 (2015); P. Pettit, "Indigence and Sentencing in Republican Theory", in *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law*, *supra* note 9.

41 J. V. Roberts & O. Gazel-Ayal, "Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012", 46 *Isr. L. Rev.* 455 (2013).

42 *Id.*, at 459.

As to the first stage, section 40I of the law identifies 11 factors that should determine the upper and lower limits of the PSR related to an offense. One of these, specified in section 40I(a)(5), states that the Court should consider the offender's level of culpability as reflected in his or her reasons for committing the offense. Hence, if the distress of poverty and hunger indeed brought the defendant to commit the crime, the Court is instructed to take these factors into consideration when determining the PSR.

Another relevant factor in determining the PSR is the proximity of the circumstances of the offense to legal defences of criminal responsibility (section 40I(a)(9)). As a result, if the circumstances of the theft committed by the accused that stem from distress of poverty and hunger do not establish the defences of necessity or *de minimis*, it is still possible for the court to take into account the proximity of the circumstances to the legal defences of criminal responsibility when defining the PSR.

As to the third stage, section 40K identifies 11 additional sentencing factors, unrelated to the offense, that can help the Court locate a sentence within the PSR. According to section 40K(8), when determining a fitting penalty, the Court is permitted to consider "the severe life circumstances that had an impact on the commission of the offense".

An example of the application of the option of taking the defendant's severe circumstances into account during the sentencing is the *Katzatzh* case.[43] In this case, a resident of the occupied territories who had entered Israel illegally, grabbed an IPhone from the hand of the complainant, a woman innocently walking along a Jerusalem street. In the course of the theft, the complainant was injured and required medical care. The offender was brought to trial and convicted of robbery[44] and illegal entry into Israel.[45] The police arrested the offender shortly after he had committed the crime. Following his detention, the defendant stated that he was in serious economic straits, which had led him to commit the offense in order to obtain money to purchase a special type of infant formula (one containing a protein supplement) for his baby son. This product costs NIS 80 (equivalent of approximately $25) but that day he had managed to earn only NIS 60 for snow removal. After considering what motivated the defendant, the court imposed a penalty close to the PSR's lowest threshold.[46]

43 *State of Israel v. Katzatzh*, Criminal case (Jerusalem District) 55254-12-13 (2014).

44 Israeli Penal Law, 1977, at para. 402(a).

45 Entry into Israel Law, 1952, at para. 12(1).

46 *Katzatzh* case, *supra* note 43, at paras. 67-85. In paras. 67-68 the Court states: "The uniqueness of this case is found in the testimony given by the defendant, his father-in-law and his wife, stating that the purpose of the theft was to finance the basic needs of the

V. COMMUNITY COURTS

Community Courts were established in the United States to address crime-related issues in local communities and thereby enhance the residents' sense of security and wellbeing.[47] Based on the offender's plea of guilt, Community Courts strive to offer alternative, community-based and therapeutic sanctions in lieu of incarceration. Community Courts apply a combination of therapeutic, problem-solving,[48] and community justice principles,[49] implemented by an interdisciplinary team that constructs and oversees custom-tailored treatment programs for defendants. The problem-solving orientation, in particular, provides the court staff with the information and sentencing options they need to provide more individualized justice.[50]

In December 2014, Israel's first Community Court was established in the city of Beer-Sheva, one of the nation's largest yet poorest cities whose population is composed, *inter alia*, of two groups characterized by above-average poverty rates: a large Bedouin community and a community of immigrants from Ethiopia. A second Community Court was established in September 2015 in Ramla, a city with a mixed Jewish-Arab population and relatively high crime rates. Beer-Sheva and Ramla were selected as suitable sites due to their common characteristics as urban centers with highly heterogeneous populations facing a range of social problems.[51] Community Courts were later established in other cities as well, including Haifa, Jerusalem, Nazareth, and Tel-Aviv-Yaffo.

The Community Courts were established within the framework of local magistrates' courts, the trial instance for low-level offenses. A designated team was formed for each court, consisting of a retired judge, a court

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defendant, his wife and infant son, which included the purchase of baby food. As stated, … the State, agreed that the facts were correct. Based on these facts, the State also requested punishment."

47 T. R. Clear, & D. R. Karp, "The Community Justice Movement", in *Community justice: An emerging field*, 3 (D. R. Karp, ed., 1998).

48 H. Dancig-Rosenberg & T. Gal, "Characterizing Community Courts", 35 *Behavioral Sciences & the L.* 523, 525 (2017).

49 B. J. Winick, "Therapeutic Jurisprudence and Problem-Solving Courts", 30 *Fordham Urb. L.J.* 1055 (2003); S. L. Burns, "The Future of Problem-Solving Courts: Inside the Courts and Beyond", 10 *U. Maryland L. J. Race, Religion, Gender & Class* 73 (2010).

50 Dancig-Rosenberg & Gal, *supra* note 48, at 525.

51 *Id.*, at 526.

coordinator, a community social worker, and representatives of the public prosecutor, the police, the public defender's office and the probation office. Working in close collaboration, these professionals use a teamwork approach to holistically address a range of rehabilitative goals for each individual defendant in five areas: health, welfare, employment, support networks, and adjustment to a law-abiding way of life.[52] Community Courts tend to deal with incidents of hunger-motivated thefts by means of an "enforcement procedure".[53] The Israeli Community Court's rehabilitation model is especially appropriate for dealing with offenses stemming from economic distress, based on the assumption that a crime committed against a background of severe poverty is often not the product of free choice but of inability to sustain oneself by dignified means of subsistence. These crimes thus largely result from one's life circumstances, and the values expressed in the familial, communal and cultural circles that mold social behavior. Given this perspective, Community Courts attempt to provide defendants with tools that enable them to cope with the economic dilemmas they face, to prevent recidivism and, in some cases, to conclude the legal proceedings without conviction and punishment.

VI. CONCLUSION

The decision to place a person on trial and convict her of a crime involving the acquisition of basic subsistence goods raises substantial difficulties. Despite the need to convict and deter, attaching the label of a "criminal" to a person and punishing her for an act of survival may sometimes be disproportionate and excessively harmful. Given that criminal law should be the last resort for dealing with any normative violation, its application in cases of food theft in the context of economic privation and existential need may not be warranted. Strict enforcement of the law in the case of poverty-stricken individuals, together with labeling them as felons and punishing them with criminal sanctions, is unjust and destructive for them and their families. The commission of a criminal offence may be an essential precondition for imposing criminal law, but it is certainly not a sufficient one. As asserted above, criminal law recognizes the necessity of adjusting enforcement to the circumstances of each individual case. For this reason, the law provides an assortment of tools so as to make it possible for law enforcement authorities as well as the courts to abstain from putting an offender on trial under certain conditions, to select an enforcement course

52 *Id.*, at 527.

53 Referral to a Community Court is not automatic. A pre-arraignment hearing judge at the Magistrates' Court identifies a case as potentially suitable for the Community Court before referring the parties to a probation authority evaluation (*ibid*).

more appropriate to the circumstances (such as placing offenders in the care of Community Courts), to acquit on the basis of defences recognized by the law (necessity or *de minimis*) or, at the minimum, to weigh the causative factors when considering the punishment. It is therefore appropriate for all agencies comprising the legal system to make rational and precise use of those tools so as to ensure that the social response will indeed fit the circumstances of the crime.