"WE HAD NEVER JUMPED FENCES BEFORE": THE CITY, THE WOMAN, AND THE DRIFTER IN THE YAAKOBOWITZ CASE

Leora Bilsky

This article goes back to the trial that enthralled the state of Israel in its second year of existence, the trial of David Yaakobowitz, known in public as the murder and rape in Meir Park, Tel Aviv. A brother and his half-sister who were strolling in Meir Park at night were attacked by a stranger. The brother, a married man, managed to escape but later died of his wounds. The sister was attacked and brutally raped but managed to fight off the attacker. The police brought criminal charges against the person who called the police. He was accused of the murder of the brother. He was not charged for the rape of the woman. The sister turned into the main witness for the prosecution. In the legal community, the *Yaakobowitz* trial stands for articulating the *mens rea* requirement in the crime of murder. To the public at large, the trial is remembered as a traumatic event, symbolizing the transformation of the first Hebrew city – Tel Aviv – into a modern city facing increasing crime problems. The trial opened in April 1950, and in November 1950, the judgment was read: the accused was found guilty for murder and was sentenced to death. On appeal he was acquitted of murder and convicted for manslaughter. He was sentenced to fifteen years imprisonment.

Studies in Law, Politics, and Society, Volume 49, 57–96

ISSN: 1059-4337/doi:10.1108/S1059-4337(2009)0000049006

The first two parts of the article tackle the trial through the age-old tension between the private and the public. Taking a "trial as performance" approach, I examine the dramatic conflict that took place on the stage of the court between the desire to expose the "secret" and the constraints imposed by "due process." I argue that it is not the legal precedent but rather the repeated failures to respect the constraints of law that made the trial into a didactic stage for the Israeli public. It served to teach the painful lesson of the danger of yielding to the desire to find the "whole truth" while disregarding procedural constraints as technicalities. While the first part of the article looks at the intrusions of law in the private domain, the second part looks at the invasion of the family into the center of the criminal trial. I argue that only in the judgment of the Supreme Court, a new understanding emerges of law as artifice, dependent on securing an insulated sphere from social forces. The third part further explores the trial as performance of identities. It focuses on the two "heroes" of the trial: the central prosecution witness – Naomi[1] – and the accused – David Yaakobowitz. Both are "streetwalkers", wandering the streets of Tel Aviv and challenging the social order of the time. The woman and the new immigrant pose a challenge to the Court of how to adapt the public sphere to respect their rights. They bring the social experience of discrimination into the light of day and demand that the Court bridge the gap between Zionist ideology (committed to equality of women and immigrants) and a social reality of exclusion. Feminist literature is employed to understand the difficulty of maintaining the distinction between private and public in respect to women (in sexual offenses in particular) and other marginalized groups in society. The article highlights the various ways in which the law participates in their exclusion by constraining their narratives and limiting the credibility of their testimonies. However, it also shows that while the Court is relatively successful in overcoming its initial failures to hear the woman, it remains unable to listen to the "drifter" till the end. To understand this difference, we need to go beyond feminist theory and understand the logic of law in the modern state. I argue that while the woman challenges social prejudices, her claim does not undermine the logic of law. She demands to be included on the same terms as men. She does not undermine the private-public distinction as such, only asks that her right to privacy be respected. On the contrary, Yaakobowitz, the accused, poses a much more radical challenge to the modern legal order. His way of life as vagrant constantly blurs the distinction between private and public and at times even inverts it. The Court uses the trial to perform its own identity as the guardian of boundaries and as such repeatedly fails to comprehend the narrative told by the accused. Comparing the two can shed light on the terms

of inclusion that the law can offer to the marginalized. Moreover, since the affair is located at the very "beginning of law" – the *Yaakobowitz* trial can help us re-think the role of law in forming (and performing) social hierarchies in a new society.

1. ON PRIVACY

> After considering the material before me, I have formed the opinion that it shall be permitted for the petitioner to examine the file under scrutiny. Deliberation on the case did not take place behind closed doors and there is no lawful prohibition to the examination … in addition I accept the position of the respondent, according to which in spite of the fact that a large portion of the details of the affair were published in the judgment … the file contains material whose revelation can cause unnecessary harm to the central witness … the examination considered will be contingent on an undertaking in writing … according to which the petitioner will not publicize anything that will damage the privacy of the victims and their families beyond the damage that already occurred by the court judgment. (Decision of magistrate Yigaal Marzel, 2006 in the matter of C.A 125/50 Yaakobowitz v. Attorney General)

My path to criminal case 125/50 was directed, and bound, by legal tradition, by the limitations arising from the right to privacy. These limitations are imposed ex post facto. At the time of "The Affair," the press was full of intimate details, as were the Court hearings and judgments. Now, fifty years later, my attempt to return to the case started with meeting a wall of privacy in place of the wall that was breached many years ago.

Nathan Dunewitz, a trial reporter and journalist, dedicates a chapter of his book, *The Accused: Dramas from the Court*, to the Gan Meir affair. He, too, opens his discussion of the rape and murder that took place in the year 1949 with the issue of privacy. However, the park and not the Court constitutes the locus of privacy in his story:

> The evening of the 21st of August, 1949 was hot and humid. Many Tel Aviv residents were outside of their houses … in Tel Aviv of those years there weren't air-conditioned apartments. Many lived in tiny apartments – often two or three families to an apartment- and in some there were shared washroom facilities. There was not even a bit of privacy … when hearts became heated and connections intensified, many of the youngsters would retire to the "bedrooms" of the city – distant places on the sands of the Tel Aviv beachfront or the public parks … Meir Park was a haven for forbidden relations … the locked gates didn't prevent visitors to Meir Park. They would jump and pass over the fence, give a hand or shoulder to their date, so she could pass the physical barrier on the way to the regions of love … here in Meir Park took place the most serious crime of the State of Israel's second year of existence. A youth was murdered by heavy blows and punches, and his girlfriend was beaten and raped. (Dunewitz, 2000, pp. 27–28)

In Tel Aviv of those years, the public space – the park – provided the privacy that did not exist in the private sphere of shared housing. As such, privacy, the yearning for privacy, the infringement of privacy, the absence of privacy are filters mediating between us and the affair that shocked the country. We fluctuate between two poles. On one hand, we encounter the park, as the domain of love, as a place of darkness and a liminal space between the lawful and forbidden. It was a domain governed by passions and *Eros*. Its existence was dependent on the secretive dark, on the placing of a barrier before the social and legal order of the day. The park, we hear, was a place for minor transgressions, for amorous affairs, an exit from the family framework. It offered a space on the periphery of the law, sheltered from legal intervention. But the park, it was rumored, was also a place witnessing more serious crimes and offenses. The murder and rape brought Meir Park under the gaze of the law. On the other hand, we encounter the Court, governed by the logic of rules and reason. The law is dependent on public process, on transparency and the light of day to fulfill its role: to determine guilt and innocence, to impose limits, to expel violence and to guard the citizens' right to free movement and to privacy. In between these poles stands the "affair" of the murder and rape in the public park.

As it turns out the young couple were half-brother and sister from the same father. There were rumors of incest between them. As such, the rape and murder in the park also raises the question of the line between the family and the law, between social-religious taboos and legal prohibitions. The shedding of the light of law on the events that took place that night helps to clarify the truth, to ascertain guilt, to place responsibility while also serving on a symbolic level to reassert boundaries and restore order. However, to fulfill its role, the Court must shine its light on Meir Park (both literally and metaphorically). It has to penetrate the dark pathways of the park, read anew the timeline of that night and try to reconstruct the crime committed on the periphery of law. This process squarely confronts all that was meaningful in Meir Park: the promise of privacy, the social need to preserve a space for love and passions, beyond the reach of the long hand of the law. To guard this "private" space, the Court must violate it, must undermine and change it, maybe irreversibly.

The Court's attempt to "shine light" on the events of 21 August, 1949 puts the legal system and the nascent Israeli Court to a difficult trial. It will force the Court to confront its own limits on finding out the "truth" while respecting the privacy of the individual. The Meir Park Affair, as I will attempt to illustrate, repeatedly exemplifies the pull of the law toward the domains of *Eros* represented by the park. It demonstrates the law's desire to

use its rationality, its rules and its laws on the entirety of the public sphere. In addition, it demonstrates the danger that such an attempt to clarify the Affair down to its minute details and secrets poses to the rule of law. I argue that from this dramatic confrontation between *Eros* and law, passion and prohibition, park and Court, grew a new understanding of the rule of law and a new commitment to due process in the young state. The trial offered a didactic theater of sorts demonstrating to the Israeli public the need for the law to limit itself so as to secure its effectiveness and legitimacy. In other words, the trial demonstrated that procedural limitations should not be understood as acquiescence to a foreign legal tradition (British rule), but as self-constraints undertaken by the Court to make the rule of law possible.

What is the relation between Meir Park and the Court, between the darkness of the park and the light of the public trial? How were the limits drawn in the matter of murder and rape in the nascent Supreme Court of the State of Israel in its second year of existence? How does this Affair help us rethink the role of the trial in negotiating the age-old tension between the private and public, between darkness and light and between truth and law? By adopting a ''trial as performance'' approach, I focus in the first part of the article on the repeated failures to establish a firm line between the two spheres and the growing anxiety these failures produced in the public. This method tries to look beyond the judgment of the Court, beyond the legal texts, and investigate the trial as event (Gross, 2001). I am interested in studying the interaction that took place between litigants, witnesses and judges in trying to draw the fragile line between private and public. The repeated failures at drawing this line stem from both sides: an omnipotent understanding of law and constant invasions of the family into the legal process. I argue that these failures, much more than the Supreme Court's precedent, enabled a transformation in the understanding of ''due process'' and contributed much to the legitimacy of the Court as a guardian of boundaries.

2. THREE FAILED BEGINNINGS

The *Affair* begins with failure – to be exact, with three failed attempts to investigate the incident. These are failures to find out what really happened that night in Meir Park while doing so within the constraints of the rule of law. Three people were charged with investigating the incident: the police officer, the examining magistrate and a judge of the District Court. All three attempted to arrive at the ''absolute truth'' to tell the

"full story" and to do justice – attempts that were doomed to fail. What can these failures teach us about the value of trial as performance?

2.1. The Police

The police officer who headed the preliminary investigation was Officer Avigdor Katznelbogen who had no prior training as an investigating officer. He was an administrator. On the night of 21 August, 1949, he was on rotating patrol duty when the first report of the incident arrived. He decides to manage the investigation himself. He collects the initial testimony from the main witness, Naomi, the woman who was attacked and raped. He investigates her in the hospital as she still lies bandaged and in pain, without full ability to speak, and with her hearing substantially weakened. Naomi's initial "testimony", which he composes as a legal complaint, is a document speaking in two conflicting voices. Here is a partial citation from Naomi's "testimony" hand written by officer Katznelbogen:

> We jumped the fence … we sat on the grass and I noticed that at the same time there were a number of other couples in the park, close to us there was nobody. We sat for about two hours **and during that time we made love. During that time I took off my bra and I put it in my pocket and immediately buttoned my shirt. To take off the bra I had to take off my shirt.** I didn't see any lone man around, neither two men, nor more than that. **Danny also lay on me and it turns out soiled me with his seed but I am certain that he did not insert his sexual organ in my sexual organ.** There was no sexual contact between us. At 11:30 p.m. I felt that someone was giving a number of powerful blows with a stick to Danny and immediately after that to me. Danny lay on the ground from the force of the blows and I lay beside him to see what happened to him. The attacker came behind Danny and at that time I sat almost across from Danny …. (Testimony of Naomi in the hospital, exhibit no. 5 in C.C. 1/50 Attorney General v. Yaakobowitz)

The initial document of Naomi's complaint preserves the duality between the seen and the hidden. The sentences I have emphasized in bold were actually crossed out by a pencil line in the original document. If we read the quotation without the crossed out portions, we recognize a familiar legal complaint of rape – a stranger jumps out from the darkness, strikes the man with a stick and later drags away the woman, attacks and rapes her (Estrich, 1987). All these are legitimate matters for the law to investigate. However, the erased lines tell a different story. They expose Meir Park as a domain of prohibited relations. The deleted sentences tell of intimate relations, of physical closeness between a young man and a young woman who were in reality siblings. These sentences give us a glimpse into the prohibited domain of the social taboo of incest. It tells of a sexual liaison between brother and

sister. These erased sentences were the basis for the unusual request of the prosecution to oppose the submission of the initial complaint document of the central witness for the prosecution. The defense attorney, however, pointed to the erased lines as an attempt to falsify a legal document and therefore placed decisive importance on the submission of the original document with the erased lines included.

During Officer Katznelbogen's testimony in Court, the improper way this testimony was gathered comes to light. It was taken in the hospital, while the witness lay bandaged and in pain. Naomi had difficulty speaking and was suffering from damage to her sense of hearing. Testimony was collected in a room full of other patients, without any semblance of privacy. In fact, we are not speaking here of the voice of the complainant recorded by the reporting officer. Rather, these were conjectures raised by the officer himself to which the witness was requested to respond in the affirmative or negative, to admit or deny. When asked about the chain of events prior to the attack, about the nature of her relationship with her brother Danny, Naomi refused to answer. She told the police officer that these were irrelevant to the investigation of the crime.

In court, Katznelbogen testifies to the method of the investigation:

> The words that were subsequently erased were not those of Naomi, rather my own words … before that there was a conversation between us: I said: You are two adults, at a certain time and place, is it possible that while removing the brassiere etc., he lay and soiled you with his sperm etc. Her response was: "These things are not relevant to the case." At my insistence: Is it possible or not possible; since this will be discovered anyway, the reply to my words "is it possible" was "maybe" or with a nod of the head. When I said she "agreed" with the statement, this is the form of acknowledgment I was speaking of. (Cross-examination of Officer Katzenelbogen, C.C. 1/50 Attorney General v. Yaakobowitz, Protocol 19.4.50, 37)

We learn that the police officer, the first to hear the testimony of the rape victim, begins his investigation with accusing the victim. This was no simple accusation of sexual permissiveness. The policeman accused Naomi with breaching one of the most ancient taboos, the taboo of incest that stands at the foundation of law (Butler, 2002).

Regarding the deleted lines, the Supreme Court writes later:

> All the emphasized words … are erased, and not only were they erased, but they were erased by Officer Katznelbogen –as he testified – either right away or immediately after he read them to Naomi … and he did it according to her own request. (C.A 125/50 Yaakobowitz v. Attorney General, 527)

The officer, lacking any investigative experience, did not restrain himself. First, when he failed to pass on the investigation to a certified investigator. Later, when he improvised an investigation and focused precisely on the aspects that are most sensitive to safeguarding the right of privacy of the victim, Katznelbogen's actions are motivated by the desire to hear the full story, regardless of whether it is relevant to the case or not. He asks to know the "secret," to understand the nature of the relationship that existed between the brother and sister. It is Naomi herself who tries to impose limits on the police investigation, to distinguish between the legal and the personal, the public and private, saying that these things are irrelevant to the investigation of the crime. She resorts to the only power of resistance left to her – the power to refuse. She refuses to sign the complaint written in her name until all the conjectures raised by the officer are removed. This is how her initial testimony with the deleted lines comes before the Court. The document of complaint speaks with two voices, telling both the legal story and the gossip story, preserving both the written and the erased sentences.

The District Court attempts ex post facto to create an appearance of "the rule of law" by its decision to ignore the deleted lines:

> We are not inclined to place import generally or specifically on these words, and we will relate to them as if they were not written. (C.C. 1/50 Attorney General v. Yaakobowitz, Verdict, 23)

In its summary of the deliberation regarding this evidence, the Supreme Court accepts the position of the District Court, while offering guidelines for future police investigations:

> In order to prevent a recurrence of this phenomena in the future and not to diminish the great efforts invested by the police, especially Officer Katznelbogen … we cannot look positively at the fact that the police did not find it proper, in light of the seriousness of the incident, to have the collection of the above testimony, even at this early stage of investigation, done by a more experienced police officer. (C.A 125/50 Yaakobowitz v. Attorney General, 528)

Notwithstanding this warning, the failure was not limited to the police investigation. Similar mistakes were later committed by the examining magistrate and later again by the District Court. It appears that these repeated failures were driven by the desire to tell the story in full, to find out the "whole truth" without thinking about the constraints of "due process" and the rule of law in any serious way.

2.2. The Examining Magistrate

In 1949, the second year of national independence, Israeli jurisprudence was still dominated by the legal inheritance of the British Mandate, and this included, the institution of preliminary investigation.[2] The head Magistrate's Court Judge in Tel Aviv, Eliezer Malchi,[3] administered the investigation of the Meir Park rape and murder. The preliminary investigation was characterized by repeated departures from the courthouse, by the judge's decision to leave the courthouse and travel up and down the pathways of the park and the surrounding streets of Tel Aviv. The temptation to go outside to the scene of the crime was great, as we are speaking of locations adjacent to the courthouse. As such, the legal deliberation also supplies us with a map of the streets of Tel Aviv in these early days.

After hearing the police testimonies of what occurred on that same night: Where did the attack take place? Where did the rape occur? What tools or weapons were used in the attack and so on, the Court goes out to visit the scene of the crime in the park. The outing occurs in the dark of night, in an attempt to re-construct what took place. The Court, with representatives of the prosecution, the defense and the accused (handcuffed) visit the park, from there go to the house where the flowery robe that later found its way to covering the exposed body of the rape victim was stolen from a laundry line. After that the Court retraces Danny's walk, from the park to his mother's house on Bugrashov St., where he collapsed and was taken by ambulance to hospital, where he later died. Another departure from the space of the courthouse occurs in relation to the testimony of the rape victim. While Naomi is still convalescing in hospital, Judge Malchi decided to hear her testimony in Hadassah Hospital behind closed doors, while the witness lies on a stretcher in the office of the hospital administrator. These "visits" to collect evidence take place a number of times (and in one instance, Naomi is brought to the courthouse by ambulance to give testimony behind closed doors) (Dunewitz, 2000, p. 53). Later in the investigation, the judge leaves the courthouse another time to the place where the accused David Yaakobowitz was apprehended, 14 Tahkemony Street, his place of residence. Following the map of the Court's travels re-enacts a constant wandering and walking in the streets and parks of Tel Aviv.

The preliminary investigation lasted three weeks, and at its end began the trial at the District Court. At the beginning of the trial, the defense counsel, Adv. Yitzhak Ben-Yemini,[4] requests to nix the entire preliminary investigation for faulty conduct that amounts to a violation of the right to due process. One deficiency claimed was the spatial deviations – the court's

various ''outings'' to the scene of the crime. The second procedural failing concerned a jurisdictional deviation. Judge Malchi effectively administered a trial instead of a preliminary investigation: he heard many witnesses, did not read the testimony back to the witnesses and did not have the witnesses sign their approval (as is required by investigatory procedure). Especially egregious is the matter of the central witness Naomi Stein, who was questioned in hospital and whose testimony was not read to her before she signed it. Interestingly, the two petitions contradict each other – the first requires the procedure to resemble a trial, and the second requires the procedure to resemble a police investigation. Either way, the public witnessed a reenactment of the police officer's transgressions, this time on the podium of the Magistrate's Court. It is a repetition of the initial failure of the police to engage in an investigation of the truth in a manner required by law. Similar to Officer Katznelbogen who put words into Naomi's complaint report, without her permission, and only erased two controversial lines when she refused to sign, so Judge Malchi has Naomi sign her testimony without reading it to her and without receiving her consent.

The police's first attempt to hear Naomi's voice was prevented due to overzealousness to air the whole story, including the story of the intimate relations between what turned out to be half-brother and sister. The second attempt to hear Naomi was carried out by an experienced judge but again failed due to the same overzealousness – the attempt of the judge to arrive at the unmediated ''truth.'' The defense's petition is accepted and the Court decides that the judge erred in carrying a full trial instead of being satisfied with the limited task of conducting a preliminary investigation.

The recurring failures of both the police and the examining magistrate stem from a joint misunderstanding of the procedural limitations mandated by law (procedure of question and answer, signing of witnesses, etc.) as merely technical restraints to the investigation of truth. This failure illuminates the lack of understanding of due process as intrinsic to the legal investigation. The agents of law refuse to obey legal constraints which they view as obstructions in the way to discovering the truth.

In accepting the defense counsel's claims and annulling the whole preliminary investigation, the District Court comments laconically:

> We cannot help but note with sadness the waste of time, effort, and money caused by the neglect of the examining magistrate. It is a great shame that the examining magistrate did not abide by the rules stipulated by law. (Dunewitz, 2000, p. 60)

2.3. The District Court

Supreme Court Justice Shimon Agranat, sitting on appeal of the District Court, comments:

> And here is a final general comment that carries some criticism of the judgment under appeal. It appears to us that the decision exposes, a little here and a little there, an attempt to excuse and explain what is not necessarily possible to excuse and explain. In a murder trial where the witnesses present at the time of the crime, are few or absent altogether, the prosecution case might contain gaps or unexplained matters. It is clear that in a situation like this it is not the job of the Court to fill the void, and surely, heaven forbid, to do so artificially … in other words, the role of the Court is to judge the accusation on the basis of the evidence presented in trial, and not to try and draw the full picture of the affair with all its details. (C.A 125/50 Yaakobowitz v. Attorney General, 520)

The Justice continues:

> We are not disapproving of the attempt to create what we call a "reconstruction" of all the circumstances leading to the murder … however, what we wish to emphasize is that the guilt of the accused is *not* always dependent on the success of this reconstruction … it is better for the court to conclude that its narrative is not complete and that the prosecution's version contains facts that are not sufficiently explained, than to determine a fact or offer a solution that has no corroboration in the evidence or testimonies. (C.A 125/50 Yaakobowitz v. Attorney General, 520)

The Justice offers a didactic comment about the meaning of legal judgment that goes to the heart of the relationship between legal truth and factual truth, between the desire to tell the whole story and the limitations of legal procedure. Justice Agranat adopts a modest judicial stance – he has no desire to be the omnipotent storyteller. It is possible and indeed necessary to arrive at a verdict – even when there are voids and gaps in the legal narrative. The role of law is not to tell the full story but to adjudicate, to rule on guilt or innocence by way of known laws and pre-established procedures. The Court can fulfill this duty even if the factual basis for the judgment is not complete. This comment resonates the initial position expressed by the rape victim to the investigating policeman – that there are certain things that should remain outside the domain of law, and it is not the role of law to try and explain them. Agranat points to the desire to furnish such an explanation as the root for the preceding legal failures. For Justice Agranat, the power of the law lies in the limitations it places on itself.

Agranat makes other didactic comments, all dealing with limitations and boundaries. The first concerns the distinction between a trial court and an appellate court. Justice Agranat explains that the distinction between questions of fact and questions of law greatly reduces the ability of the

appeal court to interfere in the factual findings undertaken by the lower court. Another distinction concerns the difference between legal deliberation and public debate. Here, Agranat warns the Court against the influence of prejudices and public hysteria that characterize the public's reaction to a "heinous crime" such as the one produced by the rape and murder at Meir Park.[5]

Underlying all these didactic comments is the attempt to create a distance, a difference, between the Court and the "reality" it is judging – a distance that enables the functioning of the judicial process. These are self-imposed limitations that the law undertakes to facilitate the trial. Justice Agranat's observations reverse the assumptions that guided the work of the legal bodies charged with the investigation of the crimes up to the appeal. While beforehand, the police, the Magistrate Judge and the District Court attempted to overcome the physical distance from the "events" by erasing the distinction between Court and park, these didactic comments teach the opposite lesson. According to Justice Agranat, the law requires distance, a separate space, rules of speech and special rituals to make a valid judgment.

How, if at all, did the legal narrative offered by the District Court deviate from proper jurisdiction as sketched by Justice Agranat? What are the obscure facts that he attempts to illuminate? What are the "gaps" that he tried to fill?

The District Court judgment ends with two riddles, unexplained facts that seem to undermine the validity of the conviction. First is the evidentiary riddle of how to explain that none of those who saw the accused immediately after the incident, when he was attempting to call for help, noticed anything unusual in his appearance. This is especially puzzling in light of the fact that both the murder victim and the rape victim were covered in blood. Second is the psychological riddle: How is it possible that someone who committed such an egregious act of rape would go and bring a robe to cover the exposed body of his victim and then would go out of his way and call the police and bring them to the scene of the crime?

These are two inexplicable gaps in the story which undermine the credibility of the guilty verdict and the Court feels the need to address them so as to relate the complete story without contradictions. The Court answers to the evidentiary riddle cognitively – all those who saw Yaakobowitz on that night were interested in the victim and not in him. Regarding the psychological riddle, the Court adopts the explanation offered by the civil prosecutor (Adv. Stein, father of the murder victim and the rape victim), that such is the course of action of a "sex psychopath" who assumes the fear of the attacked couple, and especially the woman, of being exposed. The court

explains that the accused probably worried that the rape victim would be found in the park and then the police would get involved. As a result, he brought her the robe and called for help of his own volition. However, in this case, the plan was compromised, as the male victim who left the park walking, later died, and the female rape victim saw no reason to hide her relationship with the murder victim and not to complain, since this was an innocent relationship between brother and sister.[6]

3. THE INVASION OF THE PRIVATE

The first part of this chapter examined the various deviations from the rule of law by the agents of law and the legal failures they produced. I argued that it is precisely these failures and not the judgment as such that illuminate the importance of the Yaakobowitz trial as didactic theater, wherein the young country witnesses, on a public stage, the various attempts to discover a "secret", and the danger to the rule of law of yielding to this temptation. Seeing the trial as performance teaches the importance of accepting limitations of due process not as externally imposed but as an integral part of the concept of law. However, the dangers to the rule of law arise not only from the desire to touch the "secret," but also from the fragility of the law. The trial had to withstand strong forces that threatened to overcome the legal deliberation – the forces of emotion, of the body and of the family. In the second part of the chapter, I examine the ways in which these forces that traditionally belong to the private sphere invaded the trial.

3.1. The Civil Prosecutor

As mentioned, in 1949, the jurisprudence of the State of Israel was based to a great extent on the legal tradition of the British Mandate, alongside remnants of the prior Ottoman legal tradition. We noted, for example, the institution of preliminary investigation inherited from British Mandate.[7] Another inheritance from the Ottoman law (which was influenced in this case by French law) was the institution of the "civil prosecutor," a private attorney representing the victim, alongside the public prosecutor acting on behalf of the State.[8]

In *Yaakobowitz*, the Court permitted civil prosecutors to appear on behalf of the victims: of the murdered man and of his widow. This permission allows not just the entry of the individual victim into the center of the

criminal trial, but actually an invasion by the family. The civil prosecutor, attorney Mordechai Stein, was the father of both the murder victim and the rape victim. The family relations of the private prosecutor to the victims reenacted on a public stage the dangerous blurring between family and law that lurked over the affair (as the initial complaint blurs suspicions of incest with crimes of rape and murder). How does this blurring of boundaries affect the trial? How does it affect the ability to fence in and differentiate between the public and the private, the legal and the familial? What is the effect of this "invasion" on the legitimacy of the Court?

I would like to focus on two petitions submitted by the civil prosecutor, which illuminate the problematic relationship between the family and criminal law. These requests were raised toward the end of the trial (after the prosecution and defense rested their cases). The first request was to change the name of the accused. The second request was to permit a confession that was extracted from the accused against his free will and through coercion. Both the State Prosecutor and the defense counsel opposed these requests, and subsequently, the Court refused them. However, from a cultural perspective, they expose the way the logic of the family posed a serious threat to Court order.

> *Change of Name:* Adv. Stein requested to amend the indictment by changing the name of the accused from David Yaakobowitz to his real Greek name Christus Michael Nikoliades. (C.C. 1/50 Attorney General v. Yaakobowitz, Protocol 11/10/50, 160)

With this petition, Stein sought to reveal to the public the true identity of the accused, a Greek Christian "passing" as a Jew. During the trial, it became clear to the police that Yaakobowitz, who claimed that he was a Greek Jew originally from Salonika, was actually a Greek Christian from Cyprus.[9] He enlisted in the British Army and arrived as a British soldier in Palestine where he married a young Jewish woman and changed his name.

The law places great importance on the name of the accused. In the common law system, the name of the accused becomes the name of the legal case, the way in which jurists refer to and cite the case as precedent (and indeed, the "Yaakobowitz case" starred on criminal law reading lists for many years). Revealing the non-Jewish name of the accused carried special significance in this trial as it raised the issue of inter-group rape, a situation in which it is easier to create empathy with the woman victim (from within her ethnic group). It helps depict the rapist as the threatening Other, and the invasion into the woman's body symbolizes an invasion of the boundaries of her ethnic group (Bilsky & Verbin, 2003, p. 391).

Moreover, at the time of *Yaakobowitz*, the law dictated a mandatory death sentence in murder convictions.[10] This was also an inheritance from the British colonial law. The conviction of Yaakobowitz was one of the first instances where the independent Israeli court was called upon to impose a death sentence on a Jew.[11] The revelation of the true identity of the accused as a Greek Christian could therefore help overcome the hesitation of imposing a death sentence on a criminal who belonged to the Jewish community. The defense counsel opposed the name change precisely for this reason: "I view this request as a procedure whose only goal is racial discrimination, since usually we hang the man and not his name" (Dunewitz, 2000, pp. 70–71).[12] This is imprecise since it ignores the importance of the name to the legal precedent. To this, the civil prosecutor Adv. Stein responds: "It is my desire only to establish a fact, which is important from a legal perspective." This is also imprecise, since the power of the name is especially important in a matter of rape and murder such as this that threatens the self-image of the Jewish Community.[13] The issue of the true identity of Yaakobowitz arose previously in his cross-examination, and while the prosecution chose not to request the name change on its own initiative, this was in spite of the fact that the whole legal case for the prosecution was built on exposing Yaakobowitz's lies about his whereabouts on the decisive day.[14] It is possible that the prosecutor understood that exposing Yaakobowitz as an imposter "passing" as a Jew would be one step too far. It would turn the trial to a public stage for denunciation of the Other. At the end of the day, the "truth" about Yaakobowitz's identity threatened to undermine the appearance of impartiality of the Court and the Judge rejects the request.[15]

3.2. Coerced Confession

Throughout the trial, the accused denied his guilt and claimed that he was not the man who attacked and raped Naomi Stein. At this late point, after the prosecution and defense completed their arguments, Adv. Stein requests to admit a "confession" by the accused, which was not given of his free will. During trial, the accused repeatedly complained of unfair treatment as a result of a forced hospitalization in a mental hospital and receiving injections by force. These complaints remained unsubstantiated. Submission of the "confession" thus obtained would have required the Court to address fundamental questions regarding the meaning of due process. It could have convinced the Court of the need to develop Israeli "Miranda Rules"[16]

regarding the admission of coerced confessions. The confession that the civil prosecutor requested to admit was given after a psychiatrist at Geha mental hospital administered ''certain injections'' to the accused. The State Prosecutor opposed the request to submit the problematic confession. The defense counsel, Adv. Ben-Yemini, also strongly opposed the attempt, which could create a hostile opinion of the accused. He blamed the Court for allowing the civil prosecutor to even make this petition at this late stage of the trial. A harsh exchange followed between Adv. Ben-Yemini and President of the Court Bar-Zakai regarding the court's ability to provide due process to the accused:

> Judge Bar-Zakai: The good sir will not educate the Court on how to administer laws.
> Ben-Yemini: It is not my desire to educate the Court. I am only defending Israeli law, as I would like to see it administered fairly.
> Judge Bar-Zakai: I am certain that in the days of the British, the good sir would not speak in such a way with the Court.
> Ben-Yemini: I am not insulting anyone, and as to the British, it is unlikely that they would allow someone to raise new requests after the closing of testimony.
> Judge Bar-Zakai: I was a Judge before the good sir was even a lawyer.
> Ben-Yemini: I am sorry to say, this piece of information does not fit the reality. (Dunewitz, 2000, pp. 72–73)[17]

This exchange reveals the latent forces of this trial. Judge Bar-Zakai symbolizes the continuity between the Israeli legal system and the law of the British Mandate. He was appointed Judge by the British and earned great esteem, for, amongst other things, his fine European manners (Dunewitz, 2000, pp. 61–62). In spite of the fact that he remained in his position after the creation of the State, Bar Zakai was not promoted to the Supreme Court. While the Judge requests to keep the English rules of politeness, the defense counsel inserts into the trial the straightforwardness and bluntness of the native born Israeli Sabra. Adv. Ben-Yemini raises a central point hovering in the air – whether the young legal system will be able to adhere to the English legal tradition – to preserve its commitment to due process not as rules of politeness, but as intrinsic to the rule of law. The Court was not satisfied simply with rejecting the defense counsel's petition. The Judge attempts to alter the facts, to create ex post facto a clean slate of the rule of law by sending a ''clarification'' to the press. According to this clarification, the Court informed Adv. Stein that he was prohibited to raise these issues and also instructed Adv. Ben-Yemini that answering would be out of place. The sensitive argument regarding the ability of young Israeli court to preserve the English tradition of due process disappeared from the statement as if it was not made. However, this exchange did not completely

disappear, rather it left its trace in the later disagreement between Justice Agranat and Justice Zilberg regarding the need to adhere to English rules of procedure that are based on prejudice against women.

The two petitions of the civil prosecutor have in common an attempt to lift the legal mask, to arrive at the "naked truth", to reveal the "true identity" of Yaakobowitz, and to expose his "confession." However, it is precisely these attempts that pose most danger to the integrity of the legal process. They undermine the possibility of creating a legal arena relatively isolated from emotions and social biases. Later, Justice Agranat warns against them in his didactic remarks. These are dubious "truths" since in the eyes of the law the damage they do outweighs the benefit. Both the prosecution and the defense, each for its own reasons, abstained from raising these issues. Only a member of the family finds it difficult to accept the artificiality of the legal separation between the private and the public, between body and soul. He makes these requests in search of the "whole truth" and thus undermines the very foundations of the legal process.

The civil prosecutor's request to admit the coerced "confession" of the accused brings the body to the center of the judicial deliberation. The question of the relationship of the body to its legal representation is raised frequently during the District Court trial. The difficulty of the Court in creating an artificial space, separate from the demands of the body, arises in *Yaakobowitz* first and foremost from the fact that the punishment looming above the trial is the death penalty – a penalty that inserts the fragile human body into the heart of legal deliberation and gives omnipotent power to the Court – to rule on life and death. In addition, Yaakobowitz twice attempts to commit suicide during the trial, when it becomes clear that the court is going to appoint him a lawyer against his will.[18]

The law views the legal players though their legal masks – the lawyer's role is of representation and as such he can be replaced. In contrast, Yaakobowitz demands to be represented only by Adv. Ben-Yemini. He demands, in other words, to view the lawyer as a unique individual. However, the body of the lawyer betrays him and undermines the dictates of "legal time" (a linear time, devoid of the needs of the body and hence controlled and predictable). The illness of Adv. Ben-Yemini, his failing heart, leads to repeated requests for extensions and delays. The fact that this was a murder trial pressures the Court in the opposite direction, hastening the trial in the name of due process. However, the refusal of Yaakobowitz to cooperate with other lawyers together with the reluctance to impose the death penalty on an unrepresented accused ultimately brings the Court to submit and agree to stay the deliberations for many months. Adv. Ben-Yemini passes

away close to the end of the District Court trial. The Court sentences Yaakobowitz to death and he appeals to the Supreme Court.

Heretofore, we have seen how the rationality of the private sphere, which places the interests of the family before that of the public, the body before abstract rule, emotion before due process, undermines the possibility of establishing and preserving an artificial legal sphere[19] controlled by rules of procedure and legal time. The suspicion of incest hovering over the affair undermines the ability of the trial to overcome the desire to expose the secret, to arrive at the full story. The looming death penalty, the first one imposed by the independent Israeli Court, undermines the possibility of shielding the legal process from the forces of the human body and inflamed emotions. Nevertheless, the biggest threat to the separation between the private and public arises from the fact that the rape victim and the central witness for the prosecution is a woman.

3.3. The Woman and the Beginning of Law

In the well-known novel of Italo Calvino, *Invisible Cities*, under the title "Cities and Desire," a story is told of the establishment of the city of Zobeide, a city created for the dream woman of men from different nationalities:

> They saw a woman running at night through an unknown city; she was seen from behind, with long hair, and she was naked. They dreamed of pursuing her. As they twisted and turned, each of them lost her. (Calvino, 1979, p. 45)

When they awoke, each man turned to look for the woman of his dreams but could not find her. Instead, they found each other and decided to build the city of their dreams:

> In laying out the streets, each followed the course of his pursuit; at the spot where they had lost the fugitive's trail, they arranged spaces and walls differently from the dream, so she would be unable to escape again. (Calvino, 1979, p. 45)

Calvino captures in this story the ambivalence of men toward woman and city. On the one hand, the city was created out of desire for the woman. On the other hand, the city was built to control the woman, to catch her and to imprison her.[20] Elizabeth Wilson summarizes the problematic history of the entrance of women into the public sphere of the city:

> Almost from the beginning, the presence of women in cities, and particularly in city streets, has been questioned, and the controlling and surveillance aspects of city life have always been directed particularly at women. (Wilson, 1992a, pp. 14–15)

At the center of *Yaakobowitz* stands the first Hebrew city – Tel Aviv – and the attempt of a woman to walk freely in its streets and parks without fear. How did Israeli law cope with the need to ensure an open public sphere equally accessible to both men and women? What is the role of the woman in the process of delineating the boundary between public and private in the trial? Does the woman successfully enter the public trial as an ''equal among equals''? Does the law succeed in ensuring her the right to freely wander the public spaces of town?

In literary criticism, it is common to understand the separation between public and private through the prism of gender. The public sphere is identified with man and the private sphere with woman. The trial is generally considered to be part of the public sphere. Nevertheless, it is a special public sphere, controlled by rules and scripts that structure the interactions of the participants. Its rulings, in turn, shape the public sphere outside it. As such, it is possible to see the trial as an intermediate sphere. The court is expected to correct disturbances in the public sphere and to do this on a public stage and according to specified rules of procedure. *Yaakobowitz* was one of the first cases to raise the issue of rape in the young State of Israel, a rape conducted in the urban sphere and exposing the ambivalence toward women entering it. The rape occurred in Tel Aviv, in a park named after its first mayor, Meir Dizengoff.[21] The incident, and the ensuing trial, exposed fears regarding the development of Tel Aviv into a large modern city, multi-ethnic and multicultural, with problems of anonymous crimes (LeVine, 2005; Mann, 2006; Schlor, 1999).

At the center of the trial was a woman asking the right to wander freely in the streets of Tel Aviv – at night, in parks. How can the young law cope with the independent figure of the modern woman? How does the law imagine the place of the woman in the first Hebrew city?

Naomi was the victim of a particularly brutal rape. The act of rape aims to turn the woman from a subject into an object, reducing her entire existence to that of her body. Here is how the accused testifies as to how he first saw Naomi (as noted, he claimed that he first saw her after the rape):

> I was on the sidewalk beside the park. Beside the gate, at the opening of the gate, I again heard moaning. I looked left and right and I heard more moaning. I understood where the moans were coming from and I went there. As I proceeded a few meters *I saw a white thing* on the ground … I got closer to there. *I saw the body of a woman*. I lit a lighter beside the body and I sat on my knees. I saw disheveled hair with blood and blood on the face. I asked ''What happened''? She answered ''Magen David'' [First Aid – Israeli Red Cross, L.B] I asked her again; but she did not reply. (Trial protocol, 125, emphasis added, L.B., C.C. 1/50 Attorney General v. Yaakobowitz, Protocol 25.5.50, 125)

In Yaakobowitz's testimony, Naomi is divided into the dismembered parts of her body. She is turned into a moan, a white thing, the body of a woman, to unkempt hair and blood. Her ability to communicate is limited and reduced to its barest essence – a call for help. The law is called on to reset the boundary, to return the tools of representation to the woman, to connect the parts of the body and to relate to the woman as a legal subject (Brison, 1997, pp. 12–39). However, as we have seen, the trial itself failed repeatedly to respect her privacy (in both the medical and the police investigations). Opposing these intrusions, Naomi tries to mark the difference between the private and the public with her own body. She refuses to discuss matters that appear to her irrelevant to the legal proceedings.[22] She attempts to mark these boundaries for the law after having suffered from one of the worst possible violations of respect for the boundaries of one's body – rape. In doing so, she takes to herself the voice of "the law" – rational, exact, self-controlled. In this way, she presents a double challenge to Israeli law: (1) To defend women from violations of the boundaries of their bodies; (2) to do so in a way that respects the privacy of the woman, even when the woman is "suspect," one who takes to herself the right to wander the streets and parks of the city at night.

In the following, I examine how the young legal system coped with the double challenge presented by Naomi by discussing three issues that played a central role in the trial:

1. The woman as legal personality.
2. The requirement for corroboration in sex offenses.
3. The woman as a "street walker".

4. A SEPARATE LEGAL PERSONALITY

One of the characteristics of citizenship in the modern age is the recognition of legal personality, the capacity to sue and be sued. The root of the word *persona* comes from the Greek word for mask. It conveys the paradoxical idea that the human face must be masked for the law to recognize it. In Israel upon the founding of the State, women were recognized as equal citizens regarding their political right to vote and be elected to the Knesset.[23] However, in light of the limits that Jewish religious law places on married women, and on the testimony of women in general, the Israeli legislator specifically recognized the legal personality of women in the Law for the Equal Status of Women of 1951.[24] Legal personality allows a ticket of entry

into the public sphere of the law. The limitations of Jewish law did not apply to Naomi as during the trial she was not a "married woman." Nevertheless, her entry into the trial was not without its problems. If we view the trial as performance, we realize that *Yaakobowitz* represents the first attempt of the Israeli legal system to cope with the concrete meaning of recognizing the equal rights of women.

The legal standing of Naomi throughout the trial remains unclear, hybrid, afloat frequently between the public and the private. As such, for example, her testimony during the first trial was given outside of Court, in the hospital and behind closed doors, because of the injuries from which she was suffering. However, even after she was released from hospital, her testimony was taken numerous times behind closed doors to protect her privacy. As a result, the law, intended to defend the woman, contributes to the identification of the woman with the body and with the private domain. The original complaint of Naomi which speaks in two contradictory voices – private and public – symbolizes Naomi's standing throughout the trial.

The ambivalence of the law toward the woman is already evident in the way the indictment shapes the legal platform. Two crimes occurred, murder (the man) and rape (the woman). However, the State chooses not to have Yaakobowitz stand trial on two separate counts. Rather, he is accused of murder, and the accusation of rape is swallowed from a legal standpoint by the murder charge.[25] Thus, the composition of the indictment turns the rape from a separate crime standing on its own, and intended to protect the woman, into an "extenuating circumstance," which turns manslaughter into murder. The indictment indicates that the rape of Naomi is not viewed as an end in itself but becomes the means to proving the murder of her brother Danny.[26]

The decision to try Yaakobowitz only on one count turns Danny into the sole victim in the eyes of the law while. Naomi (the rape victim) is not considered a victim from a formal point of view. Instead, she becomes the central witness for the prosecution. This legal construction of the more serious crime (murder) "swallowing" the less serious crime (rape) could have been acceptable if we were speaking of one and the same victim. However, in this case, the prosecution's decision to have Yaakobowitz stand trial only on the murder charge symbolically turns Danny and Naomi into "one body" for the purposes of trial.

One of the consequences of this legal decision is that Naomi is not entitled to separate legal representation at trial. As is known, in modern criminal law, the accuser is the State, represented by the general prosecutor, and the accused is represented by defense counsel. The state prosecutor speaks in the

name of the injured public at-large and not in the name of the individual victim. Nevertheless, as we have seen, at the infancy of Israeli jurisprudence, the existence of the institution of the civil prosecutor alongside the criminal prosecution facilitates a separate representation for the victims. Naomi and Danny's father, Adv. Mordechai Stein, is admitted as the civil prosecutor only in the name of his deceased murdered son but not in the name of his raped and living daughter. In this way, the trial contributes to the marginalization of Naomi's victimhood.

5. CORROBORATING THE WOMAN'S TESTIMONY

We saw that the decision not to indict Yaakobowitz for the crime of rape undermined the equal standing of the woman as a victim in the eyes of the law. Paradoxically, this decision also had an opposite effect, one that strengthens the standing of the woman in the trial. Viewing Naomi solely as victim of violence enables the Court to view the case as dealing with a crime of violence (instead of a sex crime) and thus reject prejudices about the woman that have been present throughout the history of rape trials. The decision to indict only on the murder gives the Court discretion to diverge from the accepted rules for rape trials to defend the woman's dignity and to give her voice.[27] Israeli jurisprudence inherited from mandatory law the common law rules of trial procedure, and amongst others, the legal doctrine that women's testimony in sex crimes requires external corroboration[28] (a requirement that was only revoked in Israel in the 1970s).[29] The requirement of corroboration for the testimony of the rape victim is related to the prejudice perceiving women as inclined to tell lies and make false accusations in sex crimes (to protect their "honor").[30]

The decision to formally accuse Yaakobowitz only of murder raises the question whether to apply the corroboration requirement to Naomi's testimony. The Court must decide whether to view the crime as a "sex crime" de facto, since the murder was perpetrated to commit the rape and as such to add the requirement of corroboration, or to eliminate the "corroboration" requirement since Yaakobowitz is not formally accused of a "sex crime." As there was no conclusive independent corroboration to the woman's testimony (no blood stains on Yaakobowitz's clothes or other objective evidence tying him to the murder), the decision whether or not to disregard the requirement of corroboration was cardinal to the final result of the trial. The Court, for various reasons, decides to overcome the

requirement of corroboration for the woman's testimony and in this way strengthens Naomi's standing as a credible prosecution witness.

To summarize, the technical decision of the prosecutor in designing the indictment solely on a murder count, took on important meaning and symbolism regarding the woman. On one hand, it turned her into a witness for the prosecution that is to say, as instrumental to the trial and not as an end in herself. On the other hand, it allowed the young Court the liberty to free itself from the clenches of previous prejudices and stereotypes regarding women that it inherited from the British legal tradition and to present the woman as an independent and trustworthy witness.[31]

In retrospect, the courageous ruling of Justice Agranat in relation to the need of Israeli law to liberate itself from prejudices regarding women did not become part and parcel of Israeli legal education. Similar to the erasure of Naomi's voice from the original complaint report, the first part of the ruling that deals extensively with the crime of rape did not enter the "reading lists" for criminal law classes. Instead, only the second part of Justice Agranat's decision that discusses the requirement of *mens rea* needed for a murder conviction was understood as a central precedent in the teaching of criminal law. The "Yaakobowitz judgment" entered all reading lists for the introductory criminal law course, though the first part of the ruling was ignored – and with it, the fascinating deliberation on the standing of women in the law. My re-visiting the case attempts a correction, putting what was placed at the periphery of the law at the center of my inquiry. This reading is enabled by looking at the trial as performance, to go beyond the legal text of the judgment in order to recreate the way in which the law was experienced by the Israeli public at the time.

6. THE WOMAN IN THE PUBLIC SPHERE

> It should be said … explicitly that Naomi Stein, as a witness, impressed us greatly. She is a smart woman, with a memory above average and with scientific knowledge … she has the ability to think reasonably, considers her words carefully and makes great efforts to be precise. We were also impressed with the objectivity with which she gave her testimony. In spite of the bitter experiences suffered by her body and soul, it was clear to see that she was not exaggerating anything … our conclusions regarding the credibility of Naomi … are that she is deserving of our full trust and we believe her testimony. (C.A 125/50 Yaakobowitz v. Attorney General, 524–525)

This is how the District Court describes the testimony of Naomi, and later, this approach is adopted also by the Supreme Court. The Court attributes the credibility of Naomi to her having characteristics normally associated with

men in Western culture – she is rational, scientific, objective, self-controlled, and precise. This is Naomi's ticket of entry into the public sphere of the law – by way of negating characteristics traditionally associated with women, such as exaggeration, hysteria, uncontrollable emotions, and silence.

The crime of rape is a crime of breaching or disrespecting boundaries. When a rape occurs in the public sphere, it is also a symbolic act of excluding women from the public sphere (the hostile) and sending them back to the private sphere (the safe). Naomi demanded to be on equal footing with men in the same urban space – the public park. The rape violently expelled her from it. The law is supposed to recreate the fences that were broken, to ensure that equality between men and women becomes a reality. The Court is called to ensure that one of the basic freedoms – the freedom of movement – also applies to women. At the same time, the trial is a public stage on which the Israeli public in general and the Tel Aviv public specifically were exposed to the dark secrets of Meir Park, instead of rumors of prohibited relations, of voyeurism, thefts, and attacks. While the trial as a legal text conveys the message of equal rights to women, the trial as event conveys the opposite message to women. The stories it conveys, the testimonies heard, work as a warning sign of what could happen to "good women" who have the audacity to demand the equal right to wander around parks at night.

How does Naomi cope with this double message of containment and exclusion, of acceptance and labeling? She tries to recreate the boundaries, to establish distinctions, refusing to yield to prejudices and stereotypes. Naomi refuses to give the police details regarding the nature of her relationship with her half-brother who was murdered, and requests to focus on her rape complaint. She refuses to sign the complaint report until all hints of "improper relations" with her half-brother are erased. Refusing to cooperate with the police investigation was the only option of resistance she had in her condition (injured, bandaged, lacking the ability to speak). This is however a silent resistance. At this point, Naomi does not enjoy the power to tell her own story of the violent attack and the rape. The mark she leaves on the legal text is that of erasure. These erasures hint at the existence of a different story but do not relate it in full. Now, at trial, she requests to tell of the rape in her own words. However, to do so, she will have to withstand a harsh cross-examination. On cross-examination, the defense counsel reenacts the first attempt by the police to discover the "secret," to hint at the forbidden relations and to "blame the victim." The defense tries to present Naomi as one who will do everything to protect her honor, even to fabricate an unfounded charge of rape. Naomi refuses to surrender to the

stereotypical script and attempts to represent herself as the "new Hebrew woman": independent, educated, and sexually free (but not a whore). This is how she replies to defense counsel's cross-examination:

> I met Danny at Shenkin park, Rothschild Boulevard, and in Meir Park the last time. Before that, we had not visited Meir Park … *Before that we had not jumped fences*. Beforehand, I only visited Meir Park during the day. It was not necessarily in public parks that we met. Meir Park was one of the places in which it was possible to meet. We spoke also about social affairs. I study biology at university. Under the bushes, there is no reason not to talk about these matters … I met with other guys like this and we spoke of similar philosophical topics. Also under the bushes and also at eleven o'clock at night. If I want it, it doesn't bother me if a guy kisses me, however, philosophical conversations would interfere in such a case … it all depends on the circumstances, the guys, and the desire to have a conversation. At a time of excitement it is difficult to talk about philosophical matters. I had experienced this kind of excitements with men … I did not know anyone sexually until the rape. After we jumped the fence, we first walked a little before we went to the bushes. Slowly we walked to the bushes. And we sat down. While we sat, neither of us lay down. We spoke about politics, family matters etc. Altogether I was in the park for three hours until the attack. (C.C. 1/50 Attorney General v. Yaakobowitz, Protokol 14.5.50, 96, emphasis added, L.B.)

Naomi views the parks of Tel Aviv as a public space open to women and men alike, a space in which one can enjoy philosophical conversations. She does not see a man and a woman alone in a park as necessarily implying sexual relations. The woman has a choice (sometimes sexual excitements, sometimes, philosophical conversations). The woman, from her perspective, is not confined to the private domain, and her actions in the public sphere cannot be understood solely in reference to her body or her clothes (removing her bra as an invitation to sex).

Her character as rational, independent, and scientific, which makes her a credible witness in the eyes of the Court, becomes the focus of the defense counsel's attack on Naomi's credibility:

> I am convinced that she is not of strong character, and she has a certain education. Her education and her personality are the central riddle in this trial. The young woman does not believe in God. She opposed the War of Independence [the 1948 war] on principle grounds and avoided enlistment. If I were to state that she is a liar, she is not an ordinary liar. These lies stem from a personality that announces: to me everything is permitted: not to believe, not to enlist – I believe in the holy untruth. (Dunewitz, 2000, p. 73)[32]

Unable to detect contradictions, exaggerations, or conflicting evidence, the defense counsel attempts to base his defense precisely on the traits of the "new woman" held dear by Naomi in her self-representation. He emphasizes that Naomi chooses not to swear on the Bible, that she chooses not to enlist for political reasons, that she is an opinionated woman who

decides for herself. In his closing remarks, these traits are evoked to tarnish her reputation and to present her as a unreliable woman. They are invoked to present her as someone who would not hesitate to lie to attain her goals.[33]

What is this overstepping of boundaries that Naomi is repeatedly accused of? What is the threat she poses to the societal and legal order? To better understand the subversive nature of her testimony, I will turn briefly to the theoretical writings on the development of the modern city, the figure of the *flaneur*, and then I will connect it to the Zionist ideology prevalent at the time.

7. THE FLANEUR AND THE CITY

Writings on modernity often deal with the reshaping of the public space (workplace, politics, and the urban space). The study of cities as a central aspect of modern life deals with the figure of the *flaneur*, or stroller. This character was presented in the poetry of Charles Baudelaire and explored in the works of Walter Benjamin, Virginia Woolf, and others. Benjamin views the *flaneur*, as one who is capable of giving a human face to the modern city. The *flaneur* feels at home in the street, and amongst the masses, he blurs the boundaries between the public and the private spheres and transforms the street into a hybrid domain between inside and outside: "The street becomes a dwelling for the *flane*ur; he is as much at home amongst the facades of houses as a citizen is in his four walls" (Benjamin, 1997, p. 37).

The modern legal response to the stroller is ambivalence. On one hand, he embodies the modern ideal of freedom of movement. On the other hand, his aimless wandering remains suspicious in the eyes of the law that is obligated to a modern rationality of purpose. This can explain why modern law codes, including in England, Israel, and the United States, still include the archaic offense of loitering.[34]

Feminist writers criticize the literary ideal of the *flaneur* as expressing a figure with male characteristics. They argue that in modern society, it is much more difficult to accept the female "*flaneuse*" (Wolff, 1990, pp. 34–50; Pollock, 1988; Wilson, 1992b, pp. 99–110). When a woman wanders the streets, she exposes herself to dangers, she is expected to give an explanation regarding the purpose of her walk. In other words, the same aimless wandering, when done by a woman, is viewed as suspicious, indicating sexual deviance. Indeed, the term "streetwalker" when applied to women is synonymous with prostitution. Women were long prevented from

participating in the same modern practice of wandering aimlessly in the big city. George Sand – who adopts the character of the *flaneur* for herself, can do so only disguised as a man. Virginia Woolf, in writing on the right to wander, is aware of the fact that strolling in and of itself is not available to women, her walk in the public sphere must be with a specified goal. Walking on foot, on the sidewalks, carefree walking alone, lacking any specific goal, just to see and be seen, when translated to the feminine, immediately bring to mind the figure of the prostitute. The loitering woman is considered sexually permissive, and looking for men.[35] These are precisely the types of insinuations that Naomi needs to cope with in the trial (beginning with the police representative and followed by the defense counsel). She walked in parks with her half-brother late at night. She took off her bra and undershirt. She is suspected, therefore, of crossing the most serious societal taboo of all, incest. Naomi fights for her right "not to explain" or "not to apologize" – she is fighting for public recognition of freedom of movement for women, for her ability to wander the streets and parks of Tel Aviv, at night, without being labeled as a "bad woman."

Naomi presents herself in her testimony as a modern city stroller. The verb recurring in her description of her meetings with her half-brother in the month previous to the rape is of "walking" or "going." In response to the question of what was the purpose of her walk, she says "We went for a walk without any particular purpose." She refuses to address "purposes" or "aims" of her wanderings and requests of the law to recognize that the wandering of a woman, in the streets, in the parks, between the bushes, at night, with a man, should not necessarily translate to a love affair. It can be a platform for philosophical and social conversation. She requests of the law to respect the choices of the woman and to defend her freedom to do so.

Yaakobowitz places the Israeli Court at the beginning of a challenging road to protect the freedom of movement of the citizen. However, Naomi (and Danny) are not the only wanderers in the affair. In effect, we encounter two "types" of wanderers in the Meir Park affair. The first type is illustrated by the wanderings of Danny and Naomi. They wander the streets of Tel Aviv for the three weeks before the murder and rape. Their wanderings lack any specified purpose, they are walking and talking, looking for private corners in public parks and in the streets. They have no private sphere of their own, so the city of Tel Aviv provides them this space. They speak of lofty and worldly topics – philosophy and politics – but also of personal and family matters.

Zionism as a modern movement was obligated to the modern values of equality, progress, and rationality. It encourages "wandering" in nature and

in the Israeli vistas, though it is ambivalent about wandering in the big city (Troen, 1991, pp. 10–36; Katz, 1986, pp. 402–424). The ''new Jew'' is supposed to be one who leaves the city to return to nature, connecting the Jew to the land, by farming and by way of walking the paths of the country.[36] It is possible that the urban wandering in parks serves as a sort of compromise between the conflicting forces at work in the Zionist ethos. Tel Aviv as the city of gardens was often idealized as in the poem by the Tel Avivian poet Nathan Alterman ''Meir Park In Tel Aviv''[37]:

> If we are lucky and the passing time/Will not suddenly tell us: stop/We shall walk, my friend/On the paths of Meir Park/Leaning on poles, in the evening/We will walk between green trees/As the sparrows of Tel Aviv fly by … /Above us wave the trees/illuminated by the twilight./We knew them as plants /and now their heads touch the sky And the old young city … Rise, like a raging park,/And there is no power that can uproot it. (Alterman, 1972, p. 395 My translation, L.B.)

Meir Park is presented in the poem as a tranquil and harmonious area, full of safe places to walk and reminisce. Not a place of forbidden desires, sins, and crimes related to the modern metropolis.[38] The park is a metaphor for the city. The rape and murder forces the Court to contend with the dark side of the park, with loitering as leading to crimes and misdemeanors. This type of wandering is perceived as a threat to law and social order. The affair exposes the court to this suspect wandering, the kind associated with the accused David Yaakobowitz.

At first glance, it appears that Yaakobowitz represents a mirror image of the wandering figures presented by Naomi and her brother. The central verbs in his testimony is also ''walking'' and ''going.'' He too claims that his wandering on the day of the crime lacked any specific purpose (''To Natanya I drove with no purpose''). He too walked on the very same streets on which Naomi and Danny strolled. Like Naomi, so too the accused was dressed in the clothes of the ''Sabra'' – khaki pants and shirt. However, the loitering of Yaakobowitz was suspicious in the eyes of the law, of a perverted character, bordering on the criminal. He represents a threat to law and order. Yaakobowitz is a new immigrant, wandering the land aimlessly, lacking permanent work, he speculates on commodities, and works in temporary jobs. He wanders the streets of Tel Aviv idly, sits in the coffee houses, drinks, and plays cards. At night, he wanders the parks. He wanders in the shadows of lovers. A Peeping Tom, as it turned out, he steals from wallets pictures of women, which he collects as a modern street-hunter, and hangs in his room. The wandering figure of Yaakobowitz raises on one hand the image of the urban *flaneur* as sketched by Benjamin,[39] but stands in

conflict with the Zionist ideal that values work, industry, and wandering as a symbolic conquering of the land.

In the *Yaakobowitz* case, the two types of wandering collide and reveal the different faces of Meir Park, and more generally, the two faces of Tel Aviv. On one hand, Tel Aviv as the realization of the Hebrew dream – a green and tranquil urban space. On the other, Tel Aviv as a developing metropolis, a place of sexual promiscuity and crime. The two types of wanderings also reveal a cultural clash that becomes apparent in the trial: between the figure of Danny, the Sabra, a man of the leftist youth movement (HaShomer HaTzair), and of the kibbutz communal settlements. His companion is the new Hebrew woman (educated, independent, opinionated). And on the opposite side stands David Yaakobowitz, a *Sephardi* immigrant, sitting in coffee houses, a card player, and a voyeur.

Being an immigrant and vagrant undermines the credibility of Yaakobowitz's defense in the trial. We have seen that it was not possible to find corroborating evidence tying Yaakobowitz to the murder. He attempted to distance himself from the scene of the crime by falsely claiming that he spent that same day on an army base.[40] However, at trial, it turned out that he spent that whole day at a coffee house in Tel Aviv. If we take into account the existence in the Israeli law book of the offense of loitering together with the fact that Yaakobowitz was an imposter, ''passing'' as a Jew, it is not hard to imagine why Yaakobowitz wanted to avoid the police. However, the Court is unable to connect Yaakobowitz's lies to the fragile existence of the *flaneur* at the margins of the law,[41] rather it perceives his false alibi as evidence of his involvement in the serious crime of which he is accused.

Walter Benjamin is well aware of the ambivalence of modern society to the figure of the *flaneur*. He writes, ''No matter what trail the flaneur may follow, every one of them will lead him to a crime'' (Benjamin, 1997, p. 41).[42] While every path leads him to a crime, does it lead him as a criminal or as detective? Benjamin notes that the literary fascination with the figure of the urban vagrant grows parallel to the rise of the literary genre of detective stories (Benjamin, 1989, pp. 37–38). ''If the flaneur is thus turned into an unwilling detective, it does him a lot of good socially, for it accredits his idleness. He only seems to be indolent, for behind this indolence there is the watchfulness of an observer who does not take his eyes off a miscreant'' (Benjamin, 1997, pp. 40–41). [43] The figure of the ''detective'', found throughout the literature on the vagrant, provides ex post facto a purpose to his loitering and as such inserts the vagrant into the new social order as one who has an important contribution to make – he defends society from anonymous crimes occurring under cover of the masses. However, the

proximity of the vagrant to the crime preserves the ambivalence toward him – he is the first to detect crimes, though at the same time, he is the first to be suspected of committing them.

The double (and contradictory) characterization of the vagrant as criminal/detective haunts Yaakobowitz. His main defense was that he happened to walk near Meir Park late at night, and heard the moans of Naomi. The voice of the woman drew him to the crime, and he entered the park. He responded to Naomi's plea to call for help. Only instead of calling for an ambulance, he had to call the police. Here, the problem is exposed. The idler is ambivalent toward to police, he is always under suspicion by them. Yaakobowitz hastens to say that he "has no business with the police." He denies any involvement in the crime. However, the vagrant is also the prime suspect (the harder it is to identify a person, the more suspicious he becomes). As such, in spite of the fact that others could not identify Yaakobowitz (like all vagrants he is swallowed by the masses), later, the suspicion of the police is focused on him. From detective and savior he turns into the primary suspect. His alibi is baseless and Naomi's testimony is found credible. According to Naomi's version, it was Yaakobowitz who attacked Danny, raped her, went to bring her a robe to cover her naked body, and later returned and brought the police. This is the version that the District Court believes and as a result Yaakobowitz is convicted of murder and sentenced to the most serious punishment of all – the death penalty.

The Yaakobowitz case forces the Israeli pubic and the Court to cope with a threatening duplicity – the value that Zionism attributes to wandering the land and to freedom of movement as part of the formation of the "new Jew," while at the same time, there is the societal threat posed by those who in the name of "free movement" turn vagrancy into a way of life. The legal result, therefore, is ambivalent. The court preserves the right to loiter in relation to the first type of city stroller (the Zionist *flaneur*) and is prepared to expand its protection to women *flaneuses*. At the same time, however, the judgment contributes to the condemnation and suspicion of the "new immigrant" depicted as lazy and lawless. His very loitering is deemed suspicious by the Court and is turned against him.[44]

The confrontation of the young Israeli law with the two types of *flaneur* allows us to shed new light on *Yaakobowitz* as it is remembered by the legal profession and taught in the law schools. As I noted, the *Yaakobowitz* case is taught in relation to the second part of Justice Agranat's ruling – the analytic section articulating the *mens rea* requirement for the crime of murder. Now, in light of our discussion of the threat to the law posed by the

figure of the vagrant, we are able to offer an alternative explanation for the Court's decision. Justice Agrant's analysis attributes purposes and intentions to the various crimes inherited from English criminal law. This project is presented by him as part of a progressive reform of the archaic common law tradition. Thus, the Israeli Court depicts itself as taking part in a modern order that distributes blame according to the subjective intentions of the criminal. Intentions, aims, and purposes are to become the central focus of legal investigation. The legal subject is assumed to be a person whose actions are the result of prior intentions and well-formulated "purposes." The figure of the vagrant, the loiterer, the wanderer undermines this picture of human nature. It thus challenges the self-conception of the Court as liberal and progressive. In the confrontation with the vagrant, the Court enacts the role of the guardian of the boundary between the private and the public. It claims to protect the freedoms of the individual by adding the demand of proving subjective intention as precondition for conviction. Indeed, Justice Agranat's breakthrough interpretation of the criminal code, adding a requirement of "intention" to murder, leads to the acquittal of Yaakobowitz from the murder charge and to replacing the death penalty with imprisonment. However, our cultural reading of the social context of the case reveals the inability of the law to rid itself from a tendency to criminalize the vagrant and to assure legal protection of the freedom of movement for people who live on the margins of society. The judgment fails to take notice of the existence of the vagrant at the margins of law and reads his lies against him. Only by looking at the trial as performance of both individual and social identities we discover how much class conflict and cultural clashes have shaped the Court's decision.

And what happened to Yaakobowitz after he served his sentence (10 years in prison after reduction of one-third for good behavior)? Dunewitz sarcastically comments: "Will he begin to work in agriculture? No way. Yaakobowitz is unemployed, and he continues to wander the streets at night, in the parks, and it appears also in the apartments of others. The police have an open file on him and are looking for him" (Dunewitz, 2000, pp. 92–93). On February 11, 1960, he is arrested on suspicion of vagrancy and break-ins. He is acquitted for lack of proof beyond reasonable doubt. The judge adds a warning to the police that they must be cautious in accusing someone of vagrancy lest they seriously undermine the freedom of the individual. Later on, Yaakobowitz is caught loitering in another park and is put on trial accused of breaking into a house. This time he is convicted (Dunewitz, 2000, pp. 92–93).

8. CONCLUSION: THE *YAAKOBOWITZ* TRIAL AS A THEATER OF BOUNDARIES

The *Yaakobowitz* trial is taught in Israeli law schools as an important precedent for articulating the mental requirement (*mens rea*) in the crime of murder. This reading focuses on the second part of Justice Agranat's ruling. In contrast, in its own times, the Meir Park affair was remembered as the brutal rape and murder of a half sister and brother. These were the topics covered by the newspapers of the period. In revisiting the trial, I attempted to return to this memory and locate the legal process within the wider social context by looking at the trial as performance of identities.

This reading reveals the steadfast struggle throughout the *Yaakobowitz* trial between the logic of law requiring transparency and light, distinctions and boundaries, and the logic of the park, a space of desire and freedom dependent on secrecy, darkness, and concealment. The conflict between the two forces did not remain outside the trial but was reenacted time and again on the stage of the Court. The trial as performance reveals the desire of the law to penetrate the murky regions: the dark paths of the park, the privacy of family relations and the mental world of the vagrant. Against the desire to discover the "whole truth," Naomi, the victim of rape, and the central prosecution witness, erects a symbolic barrier with her words. By refusing to answer the doctor and the police investigators on certain issues, she tries to mark the line between what is relevant to the law (identifying the guilty) versus what should remain beyond the law (family relations, the discourse of lovers, etc.)

The *Yaakobowitz* trial reveals that the law is not only endangered by external force. It is immanent, stemming from the desire of the law to overstep its boundaries and impose its logic on the whole social domain. It is also a result of the malleability of the law to the strong forces of family, emotion, and body. The *Yaakobowitz* trial demonstrates the difficulty of insulating the law from these forces, in particular when the death sentence is hovering over the trial. Paradoxically, the power of law is understood to lie in its limitations. This was the lesson that was painfully learned by the public after three public failures and was first articulated by the judgment of Justice Agranat from the Supreme Court. Reading the trial as performance allows us to revisit the Supreme Court decision and read it, as taking part in the formation of the Court's own identity as a guardian of boundaries and fences. This identity is constructed in opposition to the figure of the city stroller or drifter, the *flaneur* enacted by both the victim and the accused.

In the first year of the State of Israel, the Court was called to cope with questions of self-identity in relation to the British colonial heritage.[45] How should the public understand "due process" requirements – a foreign colonial heritage, or self-imposed constraints reflecting democratic government and liberal values? The heart of the debate between Supreme Court Justices Agranat and Zilberg was formed by this question. Justice Agranat tried to absorb the British legal tradition into Israeli jurisprudence while giving it a liberal and progressive interpretation. His colleague, Justice Zilberg, chose to emphasize the need to disengage from British law as part of the wider vision of national independence. Jurists educated in the lap of the common law heritage were prone to accept the English rules of procedure and due process as a matter of course. However, for the general public of the time, this acceptance was not self-evident. The *Yaakobowitz* trial became the stage on which the Israeli public watched the fierce struggle between the desire to overcome the limitation of law and its destructive results. Each failure in the legal process brought the Israeli public closer to understanding the limitations of criminal procedure and the rules of due process as constitutive of the rule of law. The voice of Naomi, the survivor, who asked to preserve the line between the private and the public – a voice that was heard at the beginning of the trial as evasive, lying, and manipulative – was transformed in the Supreme Court ruling into the voice of law.

However the Court's attempt to stake out a "golden middle," between the limitations of the rule of law and the public need to restore security to the parks, undermined the credibility of its judgment. Instead of showing unyielding commitment to due process and the rights of the accused, the Court chose a compromise. It turned murder into manslaughter. The sentence thus undermined the function of the trial as "didactic performance" of the rule of law. It left confusion in the hearts of the audience who came to Jerusalem to watch justice being done, as reported by the weekly "Ha-Olam Ha-Ze":

> The magic that the Supreme Court conducted during the three hours when it changed the murder clause, did not convince most young and veteran lawyers who came from across the country to learn the law … some of those present are unable to release themselves from the feeling that the court worked hard to find the golden middle between two extreme options: Hanging David Yaakobowitz or releasing him … one of the lawyers shook his head upon exiting the court: "In England they would have let Yaakobowitz benefit from the great doubt surrounding his guilt. However, here we think first and foremost of the public good: Sex crimes that flourished for a time in the parks of Tel Aviv have almost completely stopped after the death sentence." (Ha-Olam Ha-ze June 19, 1952)

NOTES

1. For reasons of privacy, I choose to omit the victim's full name and refer to her by her first name Naomi. At the time of the trial, this protection was not given. I am aware that in doing so, I participate in the problematic practice of using women first name; however, I think that by doing this ex-post, I better respect the line that Naomi attempted to draw during the time of the trial.

2. The preliminary investigation in those years was conducted according to the Criminal Procedure Ordinance (trial by way of indictment) *Laws of Israel vol. 1, ch. 36, clauses 13–27, pg. 446*.

3. Judge Eliezer Malachi began his tenure as a Magistrate Court Judge during the period of the British Mandate and after the creation of the State was appointed judge in Tel Aviv District Court. In the mid-1960s, he was involved in suspicions of receiving bribes and was put on trial in 1966 and was found innocent but resigned from his post.

4. Adv. Yitzhak Ben-Yemini, a former member of the Etzel, a pre-state Jewish Underground, volunteered to defend Yaakobowitz *pro bono*. He was an experienced attorney, aggressive and brilliant in the field of criminal law, who often clashed with judges. Ben-Yemini submitted an appeal in Yaakobowitz's name to the Supreme Court on both verdict and imposition of the Death Penalty but did not manage to represent him in the appeal as he passed away in March 1951. See (Dunewitz 2000, pp. 37, 83).

5. The press coverage of the time tells us that the trial was accompanied by an atmosphere of public hysteria about the growth of sex crimes in Tel Aviv. See, for example, August 28, 1949 ''Letters to the Editor'' of *Haaretz* (in Hebrew); Aug 31, 1949 ''*La-Isha*'' (in Hebrew).

6. In fact, the District Court ends its ruling mentioning the fact that Yaakobowitz, to his detriment, ''ran into a brother and sister, and not a pair of lovers.'' This sentence can be read as a sigh of relief from the court regarding the suspicion of forbidden relations. The dubious explanation of Yaakobowitz's actions that night resulted from another deviation from the rules of due process, accepting the testimony of Officer Shimon Behar on a similar incident he experienced in Meir Park where he was attacked while embracing his girlfriend. However, Behar's testimony should not have been admitted since he never positively identified the accused. Justice Agranat cautions against such deviations brought about by the desire to tell the full story and relying on inadmissible evidence (C.A 125/50 Yaakobowitz v. Attorney General, 537–538). ''The affair of the testimony of Shimon Behar exemplifies what we described in the first part of our judgment, as an attempt by the Court to make a full reconstruction of the story of the event – an attempt that did not turn out well as its foundations are in inadmissible testimony.''

7. See Note 2.

8. Admitting a civil prosecutor was to avoid conducting a separate civil proceeding at the end of the criminal proceeding and to concentrate all the proceedings resulting from one set of facts to one legal proceeding. This procedure remained in existence (at least in the book of laws) until the entry into force of the 1965 Criminal Procedure Law, *Laws of Israel*, 458, p. 161.

9. During the State Prosecutor's cross-examination, Yaakobowitz was questioned regarding these matters but denied them. He also attempted to emphasize his Jewish identity by pointing to his participation in Jewish customs and rituals.

10. The Death Penalty was abolished in February 1954 according to the Law to Amend the Criminal Law (Cancellation of the Death Penalty for Murder) 1954. The amended law does not apply to crimes covered by Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, 4 L.S.I 154 and certain other crimes such as treason. During the Knesset deliberations over the abolishment of the death sentence, name of David Yaakobowitz was mentioned in connection to the danger of false convictions.

11. Later, the Death Penalty was employed only in connection to crimes related to the Holocaust. At first, it was used against Jews accused of cooperating with the Nazis according to Nazis and Nazi Collaborators (Punishment) Law, 5710-1950. See, C. C 9/51 Attorney General v. Ingster, 5 PM, 152 [death sentence]; For example, C. A. 5/52 Ingster v. Attorney General (unpublished) [sentence reversed]; Later the law was invoked against Nazi perpetrators. C. C 40/61 Attorney General v. Eichmann, 45 P.M. p. 3; C. A. 336/61 Eichmann v. Attorney General, 16 P.D., 2033; C. C. 373/86 Attorney General vs. Ivan (Johan) Demanjuk 3 P.M., p. 1 ; C. A. 347/88 Ivan (Johan) Demanjuk v. Attorney General 47(4) P.D. p. 221.

12. Protocol version: ''I regret that a permission was granted to this lawyer to say what was said … as the father of the murdered … I request to erase everything he said … otherwise, racial discrimination …'' (trial protocol 11.10.1950).

13. For elaboration on the gap between myth and reality in the early days of Tel Aviv see Bilsky and Verbin (2003) and Berenstein (2004, pp. 143–162).

14. In fact, Yaakobowitz's conviction was built on two components – the belief in the testimony of Naomi and the baseless alibi of the accused.

15. It might very well be that ignoring the issue of ''passing'' in Yaakobowitz's life did not allow the court to fully grasp the context that could shed light on many of the actions of the accused. This was a man whose daily life was a lie and risks being exposed at any moment. Moreover, he was a vagrant lacking stable job. This fear of exposure can explain his attempt to avoid the police and to give a fictitious alibi. The lie regarding his identity turns into a daily issue of survival, and therefore, it is difficult to give his fictitious alibi the same weight that the baseless alibi of another person would receive.

16. Miranda v. Arizona, 384 U.S. 436.

17. The court's protocol provides a ''cleaner'' version of this exchange: ''The court in addressing Mr. Ben-Yemini: There is no need to respond. Mr. Ben-Yemini, in spite of this explicit remark, answers loudly: The court did not have to permit Mr. Stein to speak … the trial is being unfairly conducted. (protocol October 11, 1950)

18. According to the media, Yaakobowitz wept often, and there were times when he was unruly. See the weekly ''Ha-Olam Ha-Ze'' ''*A One Lira Fine*'' (in Hebrew) Edition 683, Nov. 28, 1950 and ''Ha-Aretz'' September 20, 1949.

19. On the relation between the dictates of the body and its undermining the integrity of the public sphere, see Arendt (1958, pp. 175–247) and Arendt (1973a).

20. For a discussion of the story in the context of vagrant women, see Mueller (2002, pp. 30–49, 31–32).

21. Gan Meir (the Meir Park), named after the first Mayor of Tel Aviv, was inaugurated on March 10, 1944, the birth date of Dizengoff and eight years after his

death. The delays in opening the Park have made Dizengoff write on 2 August 1936 a letter of protest to the municipality in which he demanded that his name be revoked. See Moria and Barnir (2003).

22. Naomi testifies on the investigation of Officer Katznelbogen as follows: "I was not interested in having him question me on matters unrelated to apprehending the accused. In my opinion, amongst his questions were things unrelated to the matter, for example: What happened between myself and Danny. To all the questions that were not relevant, for example questions regarding my family, I said that if there is a need to do so, I will answer in court." (Testimony of Naomi, District Court Protocol Sessions, supra, note 2, (May 17, 1950), p. 101).

23. Notice that women's right to vote and be elected to the Knesset (Israeli Parliament) was preceded by a struggle by women's organizations during the time of the Yishuv (pre-State Jewish settlement in Palestine).

24. Women's Equal Rights Law, 5711-1951, 5 L.S.I, p. 171 clause 1: "One law will apply for woman and man for all legal actions."

25. Yaakobowitz was accused of murder according to Clause 214 (c) of the Criminal Law Ordinance 1936, Palestine Gazette Extraordinary no. 652, p. 285. "Any person who willfully causes the death of any person in preparing for or to facilitate the commission of an offence."

26. The crime of rape in English law was originated as a property crime, not to protect the woman herself, but only the woman as the property of the man (Brownmiller, 1993).

27. It turns out that it is precisely her role as a "prosecution's witness" instead of the formal victim of the crime that allowed the court the discretion to disregard discriminating procedure and thus to protect her from experiencing a "second rape" during the trial.

28. For the requirement of corroboration in sex offences, see Sebba (1968, p. 67).

29. Clause 54 A (b) of the Evidence Ordinance (New Version), 1971, (1991 amendment) Laws of Israel 1057 at p. 197.

30. The Supreme Court quotes British law on the subject: "It is known that in trials dealing with sexual offences we view the complainant, the victim of the crime, as a person who is suspicious of the oath and therefore her testimony cannot be trusted, unless it is supported by further, independent evidence. The reason for this: we presume that the complainant, first and foremost aims to defend her honor, it is upon the law therefore to use extra caution regarding her testimony and not to view it as truth, unless there is external corroborating proof" (C.A 125/50 Yaakobowitz v. Attorney General, 542).

31. Justice Agranat notes in this matter: "We shall not assume in advance that the woman that the perpetrator raped, or is said to have raped, will not be a credible witness – due to the fact that, in order to defend her honor would go as far as to render false accusations on the accused, with full knowledge that her testimony is capable of leading to his being found guilty of murder and the imposition of the death penalty against him" (C.A 125/50 Yaakobowitz v. Attorney General 543).

32. A slightly different version is found in the Protocol. "The young woman … she is not like other young women, but one with a certain character and a certain education. She does not believe in God, on principle. I will prove that she is a liar by nature. As if for her, all is permitted. Here too, on principle, she was not ashamed to tell certain lies" – Defendant's closing brief (protocol, October 22, 1950, 164).

33. Defense counsel ascribes to Naomi demonic qualities of an "evil woman" who drags with her the helpless man: "Danny suffered from a certain sickness. Once he lost his ability to speak. And here on this fateful day she brought him to the place. Danny did not try to open the gate that was closed. She was there beforehand during the day. I think that Danny did not know this. She wanted to enter the park by jumping … wanted to be alone with him in a hidden place … She is a complicated personality. She thinks …" (Defendant's closing brief (protocol, October 22, 1950, 164).

34. These are the "loitering" and "vagrancy" laws. They stand in sharp contrast to basic principles of modern criminal law – of punishing conduct and not "status"; of punishing action and not "inaction," and so on. For a critical discussion of their origins and their function, see Sherry (1960, p. 557), Robinson (1962, p. 102, Note on Gary V. Dubin), Stephen (1964, pp. 266–275), and Poulos (1995, p. 379).

35. "Aimless strolling, 'Street Walking' per se, still conjures up connotations of prostitutions, although it fits the definition of flanerie precisely" (Mouton, 2001, p. 8). In the law, this association is even more apparent. Thus, for example, one of the criminalized figures under the vagrancy laws of the common law (in England, under British Palestine, and in United States) is the "common prostitute" as defined in article 193(a) of the 1936 Criminal Code Ordinance in Palestine – "Any person who - being a common prostitute, behaves in a disorderly or indecent manner in any public place."

36. Nature trips were a central element of youth movement activities in those days. Researches have traced the origins of this activity to German youth movements. Walter Laqueur, Young Germany – A History of the German Youth Movement (New Brunswick and London, 1984).

37. On "urban parks" generally and its implementation in the land of Israel, see Katz (1994, pp. 467–473).

38. Contrast this idealization to the article of Debra Bernstein (2004) (discussing the fate of "wandering" women immigrants who faced conditions of social isolation, poverty, and even prostitution).

39. Benjamin (1997, p. 54).

40.

> On the same day in the afternoon I travelled out of the city. I left Tel Aviv near "Beit-Hadar" there is a bus stop for soldiers. I drove in the direction of Beit-Lid [an army camp, L.B.] in order to meet a few soldiers I know, make business … I drove in a truck with other soldiers. I got to Beit-Lid square, on the crossroad between Natanya, Haifa … I turned to the café there. I sat there a few moments … then returned to Beit-Lid. From there I drove to "Base 21" … there I looked for my contact from whom I buy things … I met him in a building opposite the office building, I don't know what is there now. It was written "cantina" [canteen] there in Latin letters … I returned to Beit-Lid. I wandered around Beit Lid, beside the new immigrants camp. I returned to the road beside the cafe in Bei-Lid. From there I hitched a ride with a truck driving in the direction of Tel Aviv … I stayed in Even-Yehuda until about midnight … At midnight a military taxi passed by, not a pickup truck. I entered the taxi with two other soldiers. It was about half past midnight. We drove in the direction of Tel Aviv … from there we drove to Tel Aviv by Jabotinsky Street. We got to Dizengoff Street … the officer stopped the taxi and signaled

to us that we could get out. We got off … and I continued to walk on Dizengoff Street. (Protocol, May 25, 1950, 115)

41. Mandatory criminal law stated in clause 193 (e) of the Criminal Law Ordinance 1936 that whoever is found loitering with the intention of committing an illegal or unruly act will be convicted of vagrancy. The historical roots of this crime are found in the Vagrancy Act 1824 that relates to "known types of vagrants."

42. See also McDonough (2002, pp. 101–122).

43. See also Arendt (1973b).

44. During arguments on the sentence, the state prosecutor noted that Yaakobowitz had committed two previous vagrancy offences. See Dunewitz (2000, p. 89).

45. On the question of continuation and break with British mandatory law and Ottoman law, see Likhovski (2006, pp. 127–153).

ACKNOWLEDGMENTS

I thank my research assistants, Michal Saliternik, who helped in the beginning stages, and Rivka Brot, who helped throughout to bring this research to completion. Many friends and colleagues read earlier drafts, commented, and taught me a great deal. Special thanks go to Vered Lev Kenaan, Pnina Lahav, Assaf Likhovski, Dlila Amir, Menachem Amir, and Analu Verbin. I also thank Austin Sarat who sent me on this road to better understand the role of trials. The research was made possible by a grant from the Cegla Center in Tel Aviv University and a research grant from Amherst College.

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