From Michael Brown To Yosef Salamsa: The Racialization of Ethiopian Jews in Israeli Law

By

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A thesis submitted in conformity with the requirements for the degree of Master of Laws

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2018

Abstract

This thesis presents a comparative analysis of the racialization of Israelis of Ethiopian descent in the Israeli justice system. Located at the intersection of criminal law doctrine and Critical Race Theory, the thesis analyses Israeli search and seizure cases by comparing them to Fourth Amendment law cases in the U.S. I argue that the lack of a lexicon with which to express harms caused to racialized minorities in the Israeli context stems, in part, from a reciprocal relationship between the Israeli national and legal cultures. I will show how aspects of this relationship can be used to reform the legal system. As the first extensive legal research on racial disadvantage faced by Ethiopian Israelis in the criminal justice system, this thesis seeks to add to the conversation regarding the lived experience of vulnerable communities of colour.
Acknowledgments

I am deeply grateful to my supervisor, Prof. Sophia Moreau, that with her sharp intellect and immense knowledge, helped enrich this thesis. Traces of her kind guidance can be seen throughout this paper. I am grateful for the delicate way in which she has managed to help me transcend my intuitions about the marginalization of Ethiopian Israelis into sound arguments.

I would like to thank Prof. Anver Emon for his close reading of this thesis, for his inspiring teaching and scholarly work, and for his encouragement to pursue this project further and expand it into doctoral work.

My special gratitude goes to Dr. Yofi Tirosh of Tel Aviv University, for her unbounded support, and for setting for me an example of brave academic leadership and legal activism.

I am indebted to my family for their love and support. To my mother who is my greatest (and most consistent) supporter; and to Jay, for reading and rereading versions of this work and for breathing positivity into everything I do.

Finally, I would like to thank the individuals whose stories reside in this work. Some of them have lost their lives, yet their stories live on in the spirits of communities and social struggles.

(Inbar Peled)
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Figure 2: Recommendations of the Probation Services for minority youth (page 91)

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A Brief Introduction

For many observers, the catalyst for the Ethiopian Israeli protests of May 2015 was this: a short clip of Demas Pakedeh, a young Israeli soldier of Ethiopian descent, being beaten by a police officer for no reason other than standing in the middle of a road as the officer evacuated the area, following the discovery of a suspicious object. An Israeli story, if you like. This incident came as little surprise to anyone familiar with Israel’s socio-political climate. Just half a year earlier, the police arrested another young Ethiopian man, Yosef Salamsa, who was then beaten, electrocuted with a taser gun, and left shackled and bleeding in the backyard of a police station. Salamsa was subsequently released, but was mysteriously found dead a few months later, in August 2014. This was just a month before the death of Michael Brown in Missouri, St. Louis. Brown, an unarmed 18-year-old, who was shot and killed by a police officer, an incident that ignited civil unrest across the United States.

There are striking similarities between Brown’s shooting and Salamsa’s case. As I explore in detail throughout this thesis, the process of profiling, the police’s use of force patterns, and even the legal system’s response – culminating, invariably, with decisions not to charge the police officers involved – represent just a few of many such resemblances. And Salamsa and Brown are not alone. It may be that these incidences reached a peak between 2014 and 2016; it may also be that simply capturing such events on camera finally provides irrefutable proof of their occurrence. Either way, clashes between police and black communities of colour, in both Israel and the United States, are a reality that demands a new plan of action and resolution.

The recent protests by the Ethiopian-Israeli community were preceded, among other events, by the 1996 demonstrations of the community against the practice of destroying blood
donations made by Ethiopian Israelis. Despite the occasional establishment of ad-hoc committees to fight racism, activists claim that three decades of successive Israeli governments have learned very few lessons with regards to the phenomenon of ethno-racial discrimination. Drawing inspiration from the American protests, Ethiopian-Israeli protesters adopted the well-known “hands up, don’t shoot!” slogan and gesture. But some also shouted that they had “no other country even if racism is burning”, this statement alluding to the constant internal conflict created by their multifaceted identities as Jewish people of colour. Adopting the symbolic boundaries marking their citizenship, many Ethiopian Israelis rejected comparisons between the two protest movements, seeking instead to underline their pertinence to the Jewish collective. Indeed, the two countries do differ in their respective legal frameworks, the character of police responses, and the socio-cultural background that led to the protests.

This research begins with the story of Yosef Salamsa; but as the analysis of Israeli case law will reveal, Salamsa’s story is by no means either a new or an exceptional phenomenon. Through a detailed analysis of Israeli case law on search-and-seizure practices, this thesis seeks to lift the veil of singularity commonly draped over such cases, and explore the ways in which racialization mechanisms are supported by law. Located at the theoretical intersection between Criminal Law doctrine and Critical Race Theory, it seeks to give voice to the largely unspoken experience of vulnerable communities of colour in Israel.

In this thesis, I will explore the adequacy of current theoretical models to conceptualize the racialization mechanisms at work in search-and-seizure and police brutality cases involving Ethiopian Israelis. As the first legal research project to explore racial disadvantage faced by Ethiopian Israelis in the criminal justice system in general and in search-and-seizure practices in particular, it seeks to highlight the lived experiences of racialized minorities in Israel.
By pointing out the strengths and fallacies of such models, I hope to show the limitations inherent in suggestions of American exceptionalism in the practice of racial profiling and police brutality on one hand; and to highlight the mechanisms of denial with regards to institutional racism in Israel on the other. I will argue that full discussion of institutional racism in Israel is hindered by a combination of factors, connected to Israel's national culture and this culture’s reciprocal relationship with law. I will therefore suggest a model that espouses a broader cultural analysis for a reform.

As this thesis will discuss in detail, Ethiopian Israelis are largely segregated residentially, and all too often live below the poverty line. They face employment discrimination, and are stopped, detained and incarcerated by the police to a disproportionate extent. These statistics have led some commentators to point out that recent protests, which may have been catalysed by police brutality, were in fact an outburst, the consequence of subjecting a community to protracted political, social and economic disadvantage. While acknowledging the continued marginalization of the Ethiopian Israeli community, this thesis proposes a different direction from which to explore this state of disadvantage. By focusing on the role of racialization mechanisms in perpetuating disadvantage, I seek to challenge de-politicization strategies. The thesis as a whole, then, makes an effort to demystify narratives about immigrant poverty as an all-encompassing explanation for the disadvantage faced by members of racialized communities.

Why does the marginalization of racialized groups remain consistently beneath the Israeli legal radar? With few exceptions, the silence around these issues is common to both legal scholars and the judicial system. Chapter 1 of my thesis is specifically focused on resetting the stage for the discussion on racial disadvantage in criminal law, by presenting the major events that marked the marginalisation of Ethiopian Israelis, between 2008-2018, in education, health and employment.
Espousing the law and culture paradigm, I will show how the reciprocal relationship between the Israeli national and legal cultures prevents the voicing of claims relating to institutional racism. As a prelude to my discussion of the case law, Chapter 2 presents the problem of “naming” racialization in Israeli law.

Chapter 3 moves from the general triangle of law, governance and discrimination, and delves into theorizing institutional racism in the criminal law context. Specifically, I will review theoretical models developed in the American context to conceptualize police violence and racial profiling. Is it indeed all about race? Or, does race serve as a proxy for other cultural signifiers? In order to prepare the ground for an analysis of Israeli case law on the topic, I will critically engage with the core assumptions that form the basis of these models. I will use these models to better articulate the weight of legal doctrines against the socio-cultural norms that inform their implementation. I will suggest that a recent interpretation of search cases decided by the Israeli Supreme Court, together with Israel’s constant state of emergency regulations, have undermined the protection extended to racialized minorities. I will propose that while these models help ask useful questions about the narrative that enables and conceals racialization, they need to be supplemented by a broader cultural analysis.

Chapter 4 brings together cases concerning encounters between Ethiopian Israelis and the police. By addressing different parts of the legal process, this chapter attempts to show how laws, procedures and police protocols are used to enable the targeting of communities of colour, and then to silence the discussion of such targeting. Building on the critical perspective developed in the previous chapters, I will look at the ways in which Critical Race Theory analysis informs the analysis of the Israeli case law.
In order to move from the presumption of singularity with each of the Israeli case studies, I will turn to the American analogy in Chapter 5. Here, I will analyse formative moments in Fourth Amendment law, as it relates to racialized communities. I will then critically apply this framework to the shooting of Michael Brown. I will argue that a doctrinal triad – namely emphasizing reasonableness, integrating dangerousness, and relying on appearance – has enabled the racialization of minorities under Fourth Amendment law. I will propose that in light of Brown’s case, and its striking similarities to that of Salamsa and others, we should be focusing on reconciling the conflict of narratives between the lived experiences of racialized communities, police and law authorities.

In Chapter 6, I will point out gaps in current theoretical models regarding racial disadvantage in police search-and-seizure practices. I will offer a new perspective to address the complex intercultural nature of police-citizen encounters, namely the fact that civilians and officers belong to different professional cultures, and at times to different ethnic groups. As I will further argue in Chapter 7, existing outlines for reform are not necessarily adequate for the Israeli context. Finally, I will propose a model for rethinking the relationship between racialized minorities and the Israeli judicial system. Based on cross-cultural scholarship, this model seeks to explain the repression of racial discrimination claims in the Israeli judicial system.
More than 30 years after their arrival to Israel, Ethiopian Israelis are excluded and marginalized in most spheres of their citizenship. “They”, so goes a common narrative, are poorer, more involved in crime, less eligible for university education, and rarely hold key governmental positions. While the facts at the basis of such descriptions may be accurate, many accounts tend to overlook the role played by racism and other exclusion mechanisms when it comes to explaining the causes for Ethiopian Israeli disadvantage. The current chapter seeks to present Ethiopian Israeli marginalization through major affairs that took place over the years 2008 to 2018. It asks about the role of law in these events and seeks to use these to present a brief history of institutional racism claims conveyed by members of the community in three fields: Education, health and employment.

I will argue that Israeli law failed to address institutional racism in these cases for a triad of reasons, starting from Israeli national culture, through legal culture, to the reciprocal relationship shared by the two. Anchored in the paradigm of law and culture, my argument uses the theoretical framework provided by Mautner to discuss these cases.\(^1\) While the chapter does not purport fully to describe all of the ways in which racialization plays out in cases pertaining to Ethiopian Israelis, it seeks to begin to explain how such mechanisms work, and provide

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background to understand Ethiopian Israeli marginalization in criminal law in general, and in particular in search and seizure law, which lies at the center of this work.

1 Eternal Immigrants

The law and culture movement started flourishing in American academia during the 1990s. A common move for scholars adopting this paradigm is to build on a significant cultural phenomenon to offer a new insight to the analysis of a conflictual legal phenomenon, while suggesting a new explanation that arises from such interaction.² By using this genre of analysis, my aim is to show how discrimination claims voiced by Ethiopian Israelis are only marginally analysed by the courts as instances of manifested institutional racism.

I present the Ethiopian Israeli struggle for equality in education as a first example of such intersection of law and culture. It is a struggle often referred to by governmental functionaries as the plan for “optimal integration” in education, a loaded definition that for some, inherently posits the Ethiopian Israelis as an external factor that needs be integrated.

For many years, Ethiopian Israelis were “the responsibility” of the Ministry of Immigrant Absorption – the bureaucratic authority responsible for “olim” in modern Israel.³ Community leaders often resented the fact that parliament discussions into the community’s exclusion and marginalization were held at the Absorption committee rather than, for example, in the particular committees responsible for the various domains that see Ethiopian Israelis disadvantaged:

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³ The term “Olim” in Hebrew carries ethno-religious meanings, as Aliyah refers to Jewish immigration to Israel. Aliyah in Hebrew means literally “ascension” to Jerusalem and the Holy Temple.
education, housing, or law, to cite but some. In their view, this platform issue is not a mere technicality, but rather a reflection of the systemic pattern that casts Ethiopian Israelis as eternal immigrants, and dictates ongoing separation as the common practice when it comes to them. Arguably, such framing is especially important when we consider the state of some young Ethiopian Israelis, second-generation immigrants, who are over represented in prisons: a straight line runs between institutional segregation and disadvantage.

As of 2016, the Ethiopian Jewish community constitutes 1.7 percent of the Israeli population (144,100), of which 85,500 born in Ethiopia and 58,000 Israeli-born.\(^4\) Ethiopian immigration to Israel unfolded in three waves and two national, and rather heroic, operations: in the years 1984-1985 (“Operation Moses”), then in 1990-1991 (“Operation Solomon”), and from 2000 to date.\(^5\)

Meanwhile, an ongoing battle has been waged to bring to Israel several thousands of the remaining diaspora (6,000 according to some recent accounts), known in Israeli society as “Falash Mura”. However, Israeli authorities question the Jewish provenance of the group due to claims of their conversion to Christianity.\(^6\)

In the last few years, immigration from Ethiopia to Israel has been occurring at a very slow pace. In 2016, for example, only 214 new immigrants arrived from Ethiopia, 40 of which defined as olim, with 174 granted entry as a family union. Israeli courts have fully accepted the

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\(^5\) During “Operation Moses”, in the years 1984-1985, approximately 8,000 immigrants arrived. In “Operation Solomon” and the months before, more than 20,000 people arrived, and since 2000 up until today a few hundreds to 3,500 arrived each year. See Don Seeman, One People, One Blood: Ethiopian Israelis and The Return to Judaism New Brunswick, N.J: Rutgers University Press, 2009) [Hereinafter: One People, One Blood]

\(^6\) The term “Falash Mura” is considered a pejorative in the view of some of those belonging to this segment of the community, and according to historical accounts is a distortion of the words “Faras Mura” which referred to the converts.
governmental positions, whereby members of the so-called Falash Mura must meet certain criteria if they are to be granted entry to Israel.\textsuperscript{7}

2 Petah Tikva Case: Exclusion in Education

Given this background, it may be easier to understand the Ethiopian Israelis’ drawn-out struggle for substantive equality in education. In 2017, Ethiopian Israelis accounted for 43,000 of the pupils in the Israeli education system (pre-elementary school, elementary school and high school).\textsuperscript{8} Although the majority of pupils that year were Israeli-born (77.5%), the state of Ethiopian Israelis was immensely different than that of the overall population.

It is no coincidence, then, that a central case of discrimination against Ethiopian Israelis concerned equality in education. The legal procedure in the Petah Tikva case was brought by Ethiopian Israeli parents of 24 children who had been found no place up by the start of school year.\textsuperscript{9} Citing the children’s skin color as the cause for this failure, the parents asked the state to place sanctions on the institutes involved. These were informal-though-state recognized religious institutions, a common Israeli outfit that enables institutes to provide activities tailored for different religious communities, often the ultraorthodox community. The issue of Ethiopian Israeli admission to these institutions was “resolved” that year prior to the legal discussion, with the

\textsuperscript{7} See SC 5417/13 Angida Degitano V. The Minister of Interior (11.9.2014) (Isr.). Those defined by the state as Falash Mura are not eligible to immigrate to Israel as other under the Law of Return. Instead, a collection of government resolutions and court decisions sets the conditions for their immigration including, among others, a showing that they are from “Israel Seed”, that they are ancestors of Ethiopian Jews on their mothers’ side, and that they are registered in the community records which are kept in Gondar, Ethiopia, where a majority of the remaining community resides.

\textsuperscript{8} Maria Rabinovich, “Integration of Pupils of Ethiopian Descent in the Education System” (The Knesset Research Center, 14 May 2017).

\textsuperscript{9} SC 7426/08 Tabeka Justice & Equality for Ethiopian Jews V. Minister of Education & Petah Tikva Municipality (31.8.2010), para 2 [Hereinafter: Petah Tikva].
institutes admitting the pupils under pressure from the Ministry of Education, which threatened to hit their budgets. In fact, refusing the children admission and the ensuing last-minute proceedings at the start of school year had by then become a legal ritual that made the Supreme Court unusually intervene, in what had become a theoretical appeal, in legal terms. Just a year earlier, a committee appointed by the Ministry of Education (Bass Committee) had already discussed the issue of discrimination against Ethiopian Israeli pupils in Petah Tikva. The committee had noted that the unofficial schools had reasoned their refusal to admit said students with the fact that Ethiopian Israeli Jewishness was (supposedly) put in question by some interpretations and due to insufficient religious observance. Alongside these, the institutions had claimed that immigrant children struggled in socially integrating into the society of well-established families.

Tebeka, the Ethiopian Israeli non-profit organization advocating on behalf of the parents, argued that the particular pertinent cases were mere instance of a widespread phenomenon that sees Ethiopian Israeli pupils excluded from educational institutions, an exclusion that also manifests in assigning Ethiopian Israelis separate classes. What the appellants declined to mention, which would be extensively reported later in the local news, was that the educational practice reflected a much broader phenomenon of ethno-racial segregation in Petah Tikva. As one resident explained to a reporter, “the city has the blacks’ area and an area for whites.” The figures in the report authored by the municipality in 2016 revealed what the residents had already known: the city was divided. Most of the Ethiopian Israeli community reside in one area, while another area is almost “Ethiopian Israeli-free.”

10 Id., para 11.
11 Id., Para 8.
12 Id., pages 2-3.
The discussion surrounding educational segregation is also somewhat inseparable from the historical makings of housing compounds for the Ethiopian Israeli community. While the state extended absorption grants to some immigrations, its immigration policy for Ethiopian Israelis was a centralized one, delivered largely by concentrating the community in absorption centers and “treating” its members there. According to some researchers, this community-based absorption policy has constructed Ethiopian Israelis as the ultimate clients of welfare society.\(^\text{14}\) Governmental mortgages granted to members of the Ethiopian community have also pushed them to the social and economic periphery of central Israel.\(^\text{15}\)

The appellants in the *Petah Tikva* case, in line with the nature of the legal process, stuck to the sheer facts of the educational separation. They demanded that the court order to deny the budgets of institutes that practiced discriminating policies against Ethiopian Israelis – an expansion of the governmental authorities, considering that the Ministry of Education is only allowed to hit the budgets of discriminating institutions, rather than withdraw it completely.\(^\text{16}\)

### 3 Law and The National Culture

The appellants were restricted in challenging their exclusion beyond their ability to address its wider social context. In fact, Ethiopian Israeli pupils had no choice but to attend religious institutes. Many of the Ethiopian pupils are subject to conversion-to-Judaism procedures as the rabbinate establishment doubts their “Jewishness” and requires that they undergo strict conversion

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\(^{16}\) Id., page 3, para 2.
proceedings, complete with religious education.\(^{17}\) But the appellants, much like the Supreme Court, do not present arguments regarding the mere conversion process that is at the basis of the discrimination mechanism. The decision to refer immigrant Ethiopian Jews automatically to the national-religious education – a policy born in the 1980s-1990s without ever consulting community members themselves – may have reinforced the community’s link to the religious identity over their ethno-racial one. In the Petah Tikva case, the assumption about the necessity of conversion thwarts an in-depth discussion into institutional racism. In this sense, the verdict is an example of how law is a product of national culture. Mautner explains that according to this approach to law and culture, originating in German jurisprudence, statutes serve to reflect existing social practices, as opposed to creating them.\(^{18}\) The religious system that questions the Jewish provenance of Ethiopian Israelis has direct influence on their citizenship, but also on their exclusion from different citizenship spheres, such as education.

Instead of a discussion as to whether institutional racism existed in this case, the legal issue in the Petah Tikva case is presented through a common, well-rehearsed tension in Israeli law: multiculturalism versus individual rights for equality and dignity. According to this description, the dilemma sets the wish of cultural institutions such as the informal schools to maintain their unique character against the harm caused to the dignity and equality of pupils who find themselves excluded from these institutions. The court describes this equation and its ruling as follows:\(^{19}\)

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\(^{17}\) Id., para 3; see also “The Ethiopian Israeli Community: Status Report, Gaps and Discrimination claims”, Knesset Research Center, 2003), at 5.

\(^{18}\) See Mautner, supra note 1, at 841.

\(^{19}\) Petah Tikva, supra note 9, para 13.
“The Israeli legal system recognizes the right of different sectors in the population to maintain their uniqueness and cultural style as part of the multicultural character of Israeli society that respects both difference and uniqueness and allows them a place in the lives of ethnicities and communities. But while respecting that which is different and unique, the constitutional system obliges all sectors of society without exception to respect the foundational principles of the democratic regime that are at the basis of the state’s existence, and which apply to all Israeli citizens without reservations.”

However, multiculturalism seems to have very little to do with the conduct of the schools at hand. The court does not ask whether and why other immigrants (from the US, for example) are welcomed into these institutions, although they too have no religious background. The claim about the low observance of religious rituals in these pupils’ families seems to stem from bias, as it is unlikely that these schools necessarily knew the exact ways of each such family. In other words, the discourse around multiculturalism masks an important discussion that should have been held about anti-racism, which the court only addresses implicitly, if at all.

The next move of the court, once the uniqueness argument was addressed, is to say, for the first time in Israeli law, that the ban on discrimination in education draws on the constitutional right to dignity, and therefore is constitutional as well. The court rules:20

20 Id., para 19.
“The prohibition on discrimination in education, anchoring the duty to maintain equality in education, runs parallel to the constitutional right to human dignity. It touches the margins of human dignity as well as its core. Discrimination in general, and in education in particular, creates a sense of deprivation in a child towards whom it is directed. It harms a child’s sense of self, confidence, and self-worth. The core of discrimination may remain with them as a person and they may internalize experiences of rejection and social alienation when growing up.”

At the same time, the court rejects the appellant’s request to expand the state’s authority so as to allow it to revoke the budgets of discriminating institutes. It rules that the current means are sufficient to sustain an equal education policy.²¹

4 Cultural Accommodation as Distraction

The weight of the court’s rhetoric, and the precedence of its declaration on the constitutionality of the right for equality in education, may be misleading. The verdict does not actually address the mechanism that enables an ongoing exclusion of Ethiopian Israelis from the education system. This mechanism, I will argue, rests on two elements: one is the ethnocratic structure of Israeli regime that anchors citizenship in Jewish exclusivity and interprets Judaism in keeping with orthodox hegemony over any other religious stream. A similar claim with regards to the weight of the ethnocratic structure is made by Prof. Yifat Bitton, in the context of Mizrahi

²¹ Id., para 50.
Jews. Bitton draws in her analysis on sociological accounts—especially Shenhav’s—in order to argue that the ethnocratic structure is also Eurocentric. My argument, however, targets the Chief Rabbinate’s domination of this structure, which does not—so it seems—challenge the Jewishness of Mizrahim, yet questions the Jewish provenance of Ethiopian Israelis.

A second element of this mechanism is found in the stand advocated by the Israeli judicial interpretation to the principle of “cultural accommodation.” Israeli constitutional language offers no real solution to the question of balancing such accommodations with potential harms to equality and human dignity. As I will argue, such tension between unique accommodations and potential harms to dignity is a recurring distraction from the discussion about the existence of institutional racism.

5 Segregation: The Larger Context

The court’s ruling in Petah Tikva missed an opportunity to discuss the connection between exclusion and separation in more than one sense. As the court mentions, the appellants argued that on top of the open exclusion of Ethiopian Israelis from religious educational institutions, pupils of Ethiopian descent are assigned separate classes in some schools, so that the separation is not reflected in the school figures—which only represent the overall percentage of Ethiopian pupils per school. The history of the tension between segregation and equality in Israel is a complicated one: In the past, the Ministry of Education was criticized for intentionally “dispersing” Ethiopian

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24 Petah Tikva, supra note 9.
pupils by leading a policy of quotas for Ethiopian students in the formal schools, a policy deemed discriminatory even when seeking to advance integration.\textsuperscript{25}

The practice of segregating pupils of Ethiopian descent takes many forms. According to the Ministry of Education, as of 2015, there were still two schools with more than 70\% Ethiopian Israeli pupils, 10 schools were Ethiopian Israelis constituted half the pupils, while in 47 schools children of Ethiopian descent constituted third of the pupils.\textsuperscript{26} As of 2017, 16\% of Ethiopian Israeli pupils attend educational institutions where 30\% or more of the pupils are of Ethiopian descent. Separation is all the more prevalent in kindergartens, where 50\% or more of children in 78 of the kindergartens are of Ethiopian descent.\textsuperscript{27} In addition, it is hard to tell whether separation in classes is compounded, at least in part, by the high concentration of pupils of Ethiopian descent in some of the cities. In Kiryat Malachi, for example, the city with the largest percentage of Ethiopian population, pupils from Ethiopian descent account for 15.7\% of the city’s pupils.

The \textit{Petah Tikva} verdict exemplifies how law constitutes culture, as well as the way in which individuals and groups perceive their own identities. According to Mautner, the constitutive approach to law and culture, developed in American jurisprudence in the 1980s, views law as participating in the constitution of people’s minds, practices, and social relations.\textsuperscript{28} According to this constitutive approach, social relationships constituted by law become almost "natural", so that the subjects of law stop contemplating them. As part of this approach, law is also important where it is silent, e.g., the court’s silence about imposed conversion for Ethiopian Jews. This second

\textsuperscript{25} See Maria Rabinovich, supra note 9. See also see TA (Kfar Saba) 5244/02 Bugla V. Ministry of Education, TK-SL 2006 (3) 14118.  
\textsuperscript{26} Tammy Riklis, “Expressions of Racism and Discrimination Against Israeli Youth in the Education and Justice Systems” (The Coalition Against Racism in Israel, March 2017), at 33.  
\textsuperscript{27} Rabinovich, supra note 9. High percentage of Ethiopian pupils per class in schools escapes scrutiny since the number of pupils is measured per school (as opposed to kindergartens where it is reported per class).  
\textsuperscript{28} Mautner, supra note 1, at 841.
approach to law and culture is circular, of course – law creates culture, which in turn creates law. How law is applied is therefore crucial – the Supreme Court may denounce exclusion as unconstitutional, yet separation may continue the next day, as it does. In fact, organizations working against ongoing separation in the education system are toothless in their struggle against segregation mechanisms. And so, the same Ministry of Education that railed against the informal schools’ refusal to accept Ethiopian pupils continues, according to activists, to back up separate enrichment programs for Ethiopian Israelis.\textsuperscript{29} In light of the Petah Tikva decision, without a normative statement about the meaning of substantial equality as formed by the ethno-religious context, the court continues to legitimize separation.

6 The Barrier Within: Overcoming Institutional Racism in Education

Recent discussions on equality in Israeli education tend to focus on pupils’ eligibility for quality matriculation certificate, rather than on the learning experience of minority students or their sense of discrimination. The discussion here will address both the first and the latter issues.

In 2016-2017, citizens of Ethiopian descent made up 1.2\% of all students in Israel – a lower percent than their portion of the population, and an even lower percent of Ethiopian Israelis of academic education age – 2.5 percent. A majority of the students are females (72.5\%) who study in colleges (56\%), with only a minority studying in universities (30\%).\textsuperscript{30} These figures could only

\textsuperscript{29} See Or Kashti, “Educational Programs in Israel Still Segregating Ethiopian Israelis, Report Claims,” Haaretz (14 November, 2016); Inbar Peled, “It Is Not The Way: Educational Programs in Israel Still Segregating Ethiopian Israelis Despite the ‘New Way’ Governmental program” (The Multiculturalism and Diversity Clinic, Jerusalem, 2016). Activists claim that these programs were not successful and contributed to stigmatizing Ethiopian Israelis as a disadvantaged group. Keeping the programs in place, so they claim, has to do with the fact that they serve as a way to recruit donations from external bodies.

\textsuperscript{30} See Knesset Research Center, “Ethiopian Israelis in higher education – Integration and Application of the Academic Excellence Plan” (13.5.2018), at 1-4.
be partially explained by the relatively low percentage of quality matriculation certificates of Ethiopian Israelis (31% versus 57% in the general population),\textsuperscript{31} or the lack of proper accommodations in the Israeli SAT exams, which were claimed to be culturally biased.\textsuperscript{32}

As mentioned earlier, social activists have argued that imposed segregation stigmatizes minorities, humiliates them, and entails harms to their dignity. In legal proceedings, dignitary harms are often considered a side effect of breaching one’s rights, such that is not necessarily translated into monetary compensation. Yet figures show that the sense of discrimination experienced by pupils of Ethiopian descent may reflect the numbers. Mengisto and Horenczyk, reporting high rates of latent school dropout among Ethiopian pupils, determine the pupils’ sense of discrimination as the most dominant factor in explaining their dropout rates.\textsuperscript{33}

In other words, the legal failure to conceptualize the extent of the discrimination faced by Ethiopian Israelis comes at a high cost. In 2016, a Ministry of Education Report stirred things up when it showed that pupils of Ethiopian descent were three times more likely to suffer discrimination due to their skin colour, and two times more likely to face violence, either physical or verbal, from teachers.\textsuperscript{34} 12% of immigrant Ethiopian pupils in grades seven to ninth reported violence from teachers, while only 5% of their Israeli-born peers reporting such violence. In middle school, 31% of Ethiopian immigrant pupils reported being mocked for their skin colour, origin or religion, while only 13% of their non-Ethiopian Israeli-born counterparts reported such incidents.

\textsuperscript{31} Id.
\textsuperscript{32} Id., at 4. The average grade earned by students of Ethiopian Israeli descent was about 100 points lower than that of the rest of the population. However, such grades improved in repeated exams.
\textsuperscript{33} See Revital Blumenfeld, “Hidden Dropout of Ethiopian Israelis from the Education System (Walla, 27.5.16).
\textsuperscript{34} “Perceptions of Pedagogical School Environment Among First and Second-Generation Immigrants’ (Israel Ministry of Education, 2016).
Israeli-born Ethiopian Israelis reported similar rates of exposure to mockery for their skin colour and origin.\textsuperscript{35}

But the above research, which records pupils’ views on the educational climate, revealed another interesting finding: Despite being more likely to be humiliated or physically attacked in school, pupils of Ethiopian descent held a more positive view about relationships at school relative to their counterparts.\textsuperscript{36} This finding resonates the insight that opens this chapter - cultural-religious symbolic boundaries may prevent Ethiopian Israelis from speaking out against the institutional racism that they experience. These boundaries are imposed by the rabbinic institutions and reinforced by the courts, which treat them as a background factor. What has been done to tackle this grim state of affairs? According to research, not much. In this context, some have suggested that the concept “racism” is conceived in Israeli society as appropriated by the left side of the political map, and a threat to the identity notion of some sectors. According to them, many programs to battle racism in Israel fail as they evoke resent among some groups in the Israeli society.\textsuperscript{37}

In an emergency discussion held in the Israeli parliament following this explosive report, it turned out that no investigation had been opened into teachers’ conduct following these findings. To cite an activist participating in the discussion:\textsuperscript{38}

\textsuperscript{35} Id., Interestingly, immigrants from north America and Europe experienced the education system much like Israeli born youth.
\textsuperscript{36} Id.
\textsuperscript{37} See “Racism: Suggestions for the Education System” (Mandel Institute for Educational Leadership, 2015).
\textsuperscript{38} See discussion protocol number 146, the Fourteen Knesset, “Urgent Discussion: Severe Findings in a Ministry of Education Research on Violence and Discrimination Towards Ethiopian Israelis in the Education System”, The Knesset Committee for Immigration, Absorption and Diaspora Affairs (7.11.16), at 17.
“The research… concerns 5,564 pupils, grades fifth to ninth. That is, 1,817 minor pupils experienced physical or verbal abuse… we have heard of no teacher or staff member investigated… if an Ethiopian pupil would hit someone… you would have wasted no time opening a case against them in the police… it is severe. It is simple.”

The phenomenon where voicing an alternative narrative to the Israeli hegemonic ethos is suspected as treason has additional manifestations when it comes to other minorities in Israel. There is not a single sphere where the citizen of colour may express her discrimination claims without having to pledge allegiance to her cultural-religious identity. 39 Again, in the education system, any discussion into institutional racism has to skirt these symbolic boundaries.

7 From the Blood Affair to Segregating Patients: Ethiopian Israelis and the Health System

The first of many public outcries over institutional racism against Ethiopian Israelis actually unfolded in the health system. In 1996, a news reporter revealed that the Israeli Ministry of Health and emergency medical service MDA had been destroying blood donations from Ethiopian Israelis, out of infectious disease concerns, including HIV. 40 Especially disconcerting was the fact


40 See Don Seeman, “One People, One Blood”: Public Health, Political Violence, and HIV in an Ethiopian-Israeli Setting, 23 (2) Cult Med Psychiatry (1999) 159–195. See also “Black Israelis riot over insult to their
that Ethiopian Israelis had been given a blood donor certificate and blood insurance for a year, without being told that their donation had never been used. Following these revelations, nationwide protests erupted, with banners such as “one people, one blood”, “we are Jews like you”, but also “stop the racist apartheid”. 41

Following the public outcry, a national investigative committee concluded that the donor deception had been misguided. However, the committee declined to change donation procedures with regards to blood donations from Ethiopian Israelis.42 The ban placed on using blood donations from African-born citizens lasted another 20 years, until December 2016, when the procedure was finally changed. The blood controversy reflected a failure by the Israeli health system to meet the needs of different ethnic groups. It echoed exclusionary approach to Ethiopian Israelis, coupled with state paternalism. The medicalization of the issue hindered a true discussion into questions associated with the minority-majority relationship. Despite this severe crisis of confidence, the Ministry of Health has yet to initiate any steps to re-build the trust lost. A committee to battle racism commissioned by the Ministry recently wrote: 43

“The [blood] affair and its recurrence were left as open scar, considering that no institutional conclusions have been drawn, nor has any other procedure to promote healing, reconciliation, and prevention has taken place. The change of procedure has not dealt with the burden of the past…”


41 Don Seeman, One People, One Blood, supra note 5, at 152.
43 Id., at 56.
Controversies like the blood affair are of special significance when it comes to understanding the relationship between governmental institutions and the Ethiopian Israeli community. They also prove essential for developing an understanding of the mechanisms at work in cases of institutional racism. The blood affair was treated as a matter of “public health”, while HIV was portrayed as “immigrants’ issue”.44 As I show later, putting an issue down to the intricacies of immigration may be a means of skirting issues of institutional racism. Consider for that matter the portrayal of crime as an immigrant issue. Not unlike how police violence against black communities is sometimes stripped of its political dimensions as a by-product “of urban policing”, so was the blood affair stripped from its political dimension, with no exhaustive discussion into institutional racism. The blood affair revealed yet another characteristic of many of the public controversies surrounding claims to institutional racism: at no point was the blood affair subjected to legal proceedings.

Another health-related controversy that had the potential of making institutional racism part of the legal agenda concerned claims about imposing Depo-Provera contraceptive injections on Ethiopian immigrant women in the transition camps in Ethiopia, and later in Israel.45 A civil action was brought, claiming that the high frequency of the use of these methods attested to the state’s intention to control fertility in this community.46 According to the plaintiffs, the state’s attempts proved successful as birth rates in the community dropped significantly, to levels lower than those found in the general population. One release claimed that the women had been bullied into taking the injection, under threats of denial of entry to Israel.47 The civil action never

44 See Seeman, supra note 40 at 177.
45 CA 61121-01-13 Lasi and others v. HMO Klalit (“Lasi”), Statement of Claim, section 16 (on file with author). According to the plaintiffs, the birth rate of Ethiopian women dropped from 4.6 births in 1996 to 2.55 in 2010.
46 Id.
47 See “immigrants from Ethiopia: they threatened we won’t go to Israel if we refuse the injection”, Haaretz, 9.12.12.
culminated in a legal discussion as the plaintiffs withdrew it. According to their statement to the court, they had done so having learnt about an impending State Comptroller inquiry. 48 Indeed, a State Comptroller report concluded that there had been no a policy that preferred Depo-Provera. Activists criticized the report, citing the Comptroller’s failure to identify institutional racism in the Depo-Provera case. 49 Among other things, they noted that women injected with the contraceptive had never been interviewed, while the Comptroller had based his inquiry on a review of medical files and documentation. 50

A third controversy, again with the tension between claims of cultural rationalization and racism per-se at its heart, concerned the segregation of minority women from the general population in Israeli maternity wards. This discriminatory practice came to light in the context of the Arab minority. A scandal ensued when during a Knesset discussion, a Jerusalem hospital official confirmed the practice’s existence in Hadassah hospital, saying that “of course we will approve the separation of [new mothers] and an Ethiopian woman.” 51 In response, the hospitals denied that the policy stemmed from racism and reasoned it with “the patients’ own wishes”, while citing efforts to promote “cultural accommodation”. 52

The segregation of minority women is a relatively easy case when it comes to drawing the line between cultural accommodation and institutional racism. One may struggle to conceive of a value to justify such harm to the dignity and equality of minorities, as well as to the quality of the services provided to them, which, we may assume, is lower when such segregation is practiced. In

48 See the court’s decision to accept the plaintiffs’ withdrawal of the civil action. CA 61121-01-13 Lasi and others v. HMO Klalit (14.1.2014).
49 See State Comptroller Office, “Examination Summary: Contraceptive injections to Women from the Ethiopian Community” (27 October, 2015).
50 Lee Yaron, “The comptroller determined that contraceptive injections were not imposed, but declined to speak with the complainants”, Haaretz (28.1.2016).
51 Ministry of Health Report, supra note 42, at 58.
52 Id.
Israel, the question of religious-cultural accommodation that thinly masks racism is at the heart of the discussion into the rights of religious communities. The question often broached in this context is whether gender separation in the public sphere should be accepted in order to allow the orthodox community to integrate in higher education. As opposed to gender separation, it is hard to think of a value that may benefit from such maternity ward segregation, other than the “value” of ethno-racial separation. In addition, this practice carries no long-term advantages for the value of equality (For example, one argument for gender separation goes that it promotes the integration of Haredi community in the labor market). Lastly, one may suggest that some people support ethnic separation even if they lack any religious background, which could be proved empirically.

8 The Exclusion of Keses and Employment Discrimination

Employment rates of Ethiopian Israelis are only slightly lower then those of the general population, yet members of the community earn 28% less than the average Israeli.53

The employment state of older Ethiopian Israelis is unusual in the Israeli society in terms of the type of occupations. With regards to Ethiopian Israelis who immigrated after age 12, Fox and Brand found that in the years 2006-2011 50% of Ethiopian women and 17% of Ethiopian men were employed in cleaning and kitchen jobs (see figure 1 below). The authors suggest that beside

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53 According to the Israeli Bureau of Statistics, the net income for Ethiopian Israelis amounted to 11,294 NIS, whereas income in the general population amounted to 15,751 NIS on average. See “The Ethiopian Israeli Population” (Israel Bureau of Statistics, November 2017). See also Fox & Brand, “Trends in Education and Employment Among Ethiopian Israelis” (Taub Center, 23.6,2015) [hereinafter: Fox & Brand]. The employment rate of Ethiopian Israelis at the work age (25-54) increased significantly over the last decade and amounted to 72% in the years 2009-2011.
low education rates, it is possible that discrimination hinders the community’s full integration into the job market.\textsuperscript{54}

**Ethiopian Israelis Employed in cleaning and Kitchen Jobs**

**As percentage of the group, average for 2006-2011, ages 25-54**

As it turns out, discriminatory employment patterns did not spare even the spiritual leaders of the community, the Keses, who were at the center of a procedure that once again concerned the institutional racism largely left out of the legal discourse.\textsuperscript{55} The court discussed the question of industrial relationship between the Keses on one hand, and the state and religious councils on the

\textsuperscript{54} Fox and brand, Id., at 10.

\textsuperscript{55} See SA 2858-08 Rabbai Shai and others V. Religious Councils and the State of Israel (4.7. 2016).
other – the religious services providers in each Israeli municipality/local council. The Keses are the equivalent of rabbis in Israel – administering marital services, burial arrangements, etc., in their communities. Yet for decades, the state and religious councils refused to recognize them as such. As some religious councils wouldn’t hire Keses, the state hired them through other religious councils that would. As a result, when the Keses – having been denied their social benefits - finally demanded them, the state and religious councils both claimed that they could not be considered their legal employers. While discussing the nitty-gritty of the benefits’ calculation, the regional court betrays the story of Keses’ exclusion: 56

“In his Testimony Mr.…. explicitly notes that ‘religious councils were not thrilled about the idea of employing the Keses in their jurisdiction, while some of them bluntly stated ‘leave me out of it, I don’t want to be part of it,’ and therefore in some cases there were Keses who administered religious services in one religious council while receiving their paycheck from another, as the former was not willing to recognize them, for inappropriate reasons.”

What exactly were those inappropriate reasons? Though acknowledging the plaintiffs’ rights for benefits, the court neglects to explain what prevented the plaintiffs’ inclusion, even when the court’s account reveals some of the most offensive behaviours, such that are typically associated with racist biases. At one point, the court described how the Keses had been expelled to the corridor until finally kicked out of the council building. 57

56 Supra note 54, Para 26.
57 Id., Para 58.
“The affidavit of Rabbi… suggests that initially, the religious council only let him [the Kes] sit in the corridor while all the other workers had an office, which changed only after the media intervened. But even then they started to store stuff in his room, and later changed his room lock, and the head of council said there was nothing they could do, perhaps he (the Kes) could work in a synagogue.”

The court finally finds that the respondents breached the Equal Employment Law when they discriminated the plaintiffs due to their origin. Aware though they are of the humiliation and discrimination, the 78 pages verdict features no hint of the word “racism”. Nor does it deal with the question of institutional racism, perhaps because the current legal categories in Israeli law engage with an origin-based discrimination, but not with institutional racism. As Mautner explains, legal rules and norms create a separate cultural legal system, and the Israeli legal system has its discrimination doctrine tailored for individuals. As Bourdieu described it, the legal actors operate based on a specific habitus, which differentiates jurists from non-jurists.58

Is Israeli law better able to identify individual racism than to identify the phenomenon of institutional racism? More evidence is needed to establish an argument in this vein. However, the Keses affair certainly shows that the Israeli court is not fast to bring racism into the legal discussion. In the Keses case too as in Petah Tikva, the law is the product of a national culture that practices no separation of state and religion.

58 Mautner, supra note 1, at 863-865.
9 Multiculturalism in Israel: The Missing Piece of Ethno-Racialism

In 1998, the late critical sociologist Baruch Kimmerling succinctly described Israel as “A Multiplicity of Cultures without Multiculturalism,” adding, thereby, the lack of ideology that would bind Israel’s different ethnic and religious groups. Israeli scholars have attempted to decode this plurality, as well as the various ways in which policies of multiculturalism are used to guide the relationship between the state and minority communities. In Israel, much as in other Western countries, the tension between liberalism and multiculturalism has been the source of recurring questions about the validity of liberal multiculturalism as a normative theory. Thus far, religion and (to a lesser extent) language have been at the heart of the discourse on multiculturalism in Israel. Scholars, much like the Israeli public, have debated the religious accommodations given, for example, to the ultra-orthodox community in the form of gender separation or exemption from army service and the religious autonomy of the Palestinian community with regard to matters of personal law. These accounts reveal some of the fragility and contextuality of Multiculturalism: from decoding minority-majority relations, to the dilemma of internal minorities within marginalized communities, and all the way to the mere concept of minorities.

The discourse on multiculturalism in Israel is vast and rich. However, a specific facet is missing: an in-depth discussion of racialization operating within the framework of multiculturalism. I argue that the disadvantages faced by Ethiopian Jews raise a significant question for the study of the intersection between multiculturalism, religion and racialization: the rights of “racialized citizens,” i.e., minority groups both belonging to the Jewish collective and challenging it in a way that conflates race and religion as key concepts of the Jewish nation state. The case of the Ethiopian Jews also raises the issue of the boundaries of policies of multiculturalism, while reinforcing calls to focus such policies on structural inequality rather than on cultural difference.66

Anti-racism and multiculturalism are two distinct, yet interrelated, notions.67 In the American context, Gooding-Williams suggests that multiculturalism must be race-conscious because mutual understanding of difference in America is impossible absent attention to race.68 This seems almost intuitive: after all, a racialized minority, by definition, does not have an effective “exit right,” a fact which may actually worsen its multicultural entrapment.69

The context of Ethiopian Jewry invites a new set of questions for theories of multiculturalism: members of the community are part of the Jewish majority and do not claim group-differentiated

66 Vrinda Narain, “Taking “Culture” out of Multiculturalism” (hereinafter: ‘Taking Culture Out’) Can. J. Women Law (2013) [moving away from binaries about the yes/no multiculturalism policies on to the considerations countries should take when formulating their multicultural policies. According to Narain, in order to be effective such policies should address exclusions resulting from structural inequalities (and not just exclusion resulting from cultural difference). See also Anne Phillips, Multiculturalism without Culture (Princeton, NJ: Princeton University Press, 2007) [Arguing that critics and proponents alike exaggerate the unity, distinctness, and intractability of cultures, thereby encouraging a perception of men and women as constrained by cultural dictates).
rights in the form of religious or cultural exemptions. Past Israeli legislation of policies concerning the community has tended to focus on cultural accommodations related to holidays, symbolic gestures or adequate representation in the civil service. But multicultural policies in Israel have more than just rhetorical value: The discourse on multiculturalism may sometimes end up perpetuating bias. Following the May 2015 protests in Israel, the police instituted a plan to improve relations with the Ethiopian community under the banner of “multicultural policing” that included cultural training for police officers, recruitment of Ethiopian officers, and translation of compliance forms into Amharic. While some members of the community were involved in formulating these reforms, others rejected them, arguing, among other things, that folklore-based acquaintance with the community was no replacement for disciplinary treatment for racist tendencies in the police.

State-funded multicultural policies aimed at integrating the Ethiopian-Israeli community into the dominant social ethos sometimes exacerbate the dissonance between their religio-cultural identity as Jews and their ethno-racial identity as people of colour by perpetuating bias against the community. This is done by means of “cultural rationalization,” a practice that socio-anthropological research uncovers as means to justify disparities.

Sociological field work has shown that institutionalized explanations for ethno-racial disparities in Israel tend to emphasize “cultural gaps” and narratives that correlate immigration

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72 For an opposite view, that largely embraces the police plan concerning the Ethiopian community, see Nomi Levenkron, “Are Israel’s Police Really More Violent Toward the Ethiopian Community?”, Haaretz (September 2, 2017).

73 See Hertzog, supra note 14.
with crime. However, some critical sociologists argue that the current disadvantaged status of the Ethiopian community is the result of the state’s categorization of Ethiopian Jews as “welfare clients” based on their ethnicity. In the context of Bill 94 in Québec, Narain points out such policies’ circular nature: minority groups are pushed to frame themselves in particular ways in order to receive state benefits.

Karayanni has recently argued that the theory of Multiculturalism, typically taken as a call for pluralism, tends to mask the repressive reality experienced by vulnerable communities. Hence, what role might multicultural policies play in the context of the Ethiopian Jewish community? How would incorporating the concept of racialization or other aspects of CRT into the discourse on multiculturalism further enrich our analysis? These questions, I suggest, are strongly interrelated with the institutional racism claims with which we started: law enforcement bodies will many times turn to multicultural policies, as will be discussed in Chapter 6.

10 Conclusion

Ethiopian Israelis claims of institutional racism in various spheres of their citizenship are trivialized by the courts, which fail to reflect the extent of the social discriminatory reality. The paradigm of law and culture helps to trace the ways in which cultural and legal structures may hinder the voicing of claims of institutional racism.

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74 Inbar Peled, “Ethiopian Jews and The Israeli Probation Services: Identifying and Overcoming Barriers” (August 2017, Hebrew University Papers, The Multiculturalism and Diversity Clinic) [Hebrew].
75 Esther Hertzog, supra note 14. Hertzog, a pioneer anthropologist who lived in an Ethiopian absorption center as part of her research argues that Ethiopian immigrants were channeled into the niche of “welfare clients” through bureaucratic control in the absorption centers. According to Hertzog, ethnic images that were constantly associated with the immigrants served to foster their weakness and enabled the establishment of their status as “needy.”
76 See Narain, Taking Culture Out, at 124.
The symbolic boundaries of Jewish identity, imposed by the orthodox-rulled institutions and reinforced by the courts, mean claimants cannot voice the full extent of their institutional racism claims. The ethnocratic structure of the Israeli regime, coupled with the legal reliance on the regular balance of cultural accommodations and harms to dignity and equality, hindered the voicing of such claims in the context of the struggle for equal education. Second, the use of cultural competence reasoning to skirt discussions into institutional racism recurred in the context of institutional racism in the health system, with the segregation of new mothers at maternity wards. Finally, the Keses’ employment discrimination case reveals the courts’ reluctance to discuss institutional racism cases as such.
Chapter 2

Ethiopian Israelis: Between Law and Protest

The confluence of distinctive patterns of immigrant absorption, housing policies and ethnic ties came together to create segregated spaces for Israelis of Ethiopian descent. Consequently, at the interface between police and community, young Ethiopian men experience an ever-growing mistrust of the authorities, often feeling that they invariably constitute the “usual suspects.”

The 2015 protest was not the first incidence of dissent boiling over. In 1985, several thousand of the then new immigrants from Ethiopia protested against the Rabbinate’s demand that members of the community “convert” to remove any doubt about their Judaism. In 1996, 20,000 protesters took to the streets to protest the blood affair. Most recently, demonstrations were smaller but sometimes successful in spurring a wider public response. However, communities’ ability to give voice to claims of discrimination fluctuates, thus foregrounding how claims made by racialized minorities are suppressed in Israel.

It is curious that Israeli silence, both official and societal, persisted despite rising detention and incarceration rates of Ethiopian Israelis over the last two decades. Equally of interest is the fact that protesters are finally speaking out. In what follows, I offer some thoughts about both the silence and the protest at the intersection of legal and public struggles. I begin by presenting the characteristics of the latest protests and then locate them in the context of the struggle for legal equality. To do so, I will make use of Daphne Barak-Erez’ critical engagement with Felstiner, Abel

& Sarat, who famously defined the three stages in the development of a legal struggle: Naming, blaming and claiming.  

1 A Turning Point?

Policy researchers writing about the mid-1980’s demonstration described a quiet protest, in line with the essentializing image of Jews of Ethiopian descent as a disadvantaged yet quiet community, an image that was (again, purportedly) challenged for the first time in the 1996 demonstration - the first violent protest in the history of the community. Unlike the previous protest, 2015 brought a wave of dissent that was both violent and fragmented. Some described the Ethiopian protests as the result of a double crisis: an external one with regards the community’s relations with the government and an internal crisis of leadership within the community. These recent protests, then, were organized not through a centralized leadership but through closed groups using social media. As one activist disclosed to me, “Our new leadership is Facebook.”

The protests began in Jerusalem and spread to Tel Aviv and Haifa, culminating in casualties for both officers and citizens. The media reported extensively about the violent turn of the protests when some protesters shattered car windows and threw stones and bottles. A prominent community activist was quoted saying: “Apparently the streets of Israel must burn like they do in Baltimore, in order for someone to finally wake up.”

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81 Id., 30. I mean to say that these images and any engagement with them is ultimately trapped in some sort of essentializing view.
83 Id., 31
84 Statement of Gadi Yevarkan, head of the Campaign for Equality for Ethiopian Jews. See Toi Staff, “Ethiopian Israeli Protest against Police Brutality turns Violent, over a dozen hurt” (Times of Israel, 30.4.2015).
The question arises as to why the crowds took to the streets. Violent encounters between police and Ethiopian Israelis date back to the 1990s, when the majority of the community arrived in Israel. This is exemplified by Tapero Bahata, whose case is discussed in Chapter 4. Nevertheless, the media depicted 2015 as a turning point. A review of news articles from the last few years reveals that during 2014-2016 the media reported continual criminalization and state violence endured by Ethiopian Israelis through search and seizure practices. Curiously, these manifestations of profiling and brutality were to some extent similar to those occurring in the US, despite the great differences between the constitutional structures of the two countries (i.e. the absence of a constitution in Israel and the U.S.’s more-developed constitutional jurisprudence with regard to search and seizure practices). In Israel, such cases were characterised by racial profiling and various forms of police violence such as beating and tasering. In the U.S, such cases manifested a high degree of lethal force.

One explanation for the attention in both Israel and the United States is that these encounters with the police -- from Eric Garner to Tamir Rice to Demas Pekadeah — were widely-documented. While in Israel the documentation of police brutality is perhaps a new phenomenon with regard to Ethiopian Israelis, it is certainly not new in the U.S. In 1991, Rodney King was beaten by Los Angeles police officers. In Israel, Pekadeah’s may not have been the first documented incident but it was certainly a memorable one. Other stories of discrimination against Ethiopian Israelis re-emerged, providing background against which the public speculated about Pekadeah’s encounter with the police. Any interested person would have known about the Ethiopian pupils who were denied entrance to schools in Petach Tikva, the blood donation

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85 The examples of which are referenced throughout this thesis.
86 See the discussion in Chapter 6.
controversy from the 1990’s, and other incidents. The individual incidents were then melded into a collective cry. Special discussions were held in the Knesset, and media reports broadcasted.

2 On “Naming” Racism

As discussed in Chapter 1, claims with regard to institutional racism are only marginally discussed in Israeli law for three inter-related reasons having to do with the reciprocal relationship between Israeli national law and culture. Much like in the U.S., arguments about racial disparities in the justice system as proof of disadvantage do not carry much weight in Israeli judicial proceedings. By contrast, individual lawsuits are more likely to succeed, although these typically end with low compensation awards for plaintiffs.

The gap between the grave sense of discrimination expressed in the 2015 protests and the legal picture of few complaints and even fewer charges should alert us to an access-to-justice issue with regards to police brutality and racial profiling in Israel. It may be that Israeli society still struggles with “naming” the phenomenon, hindering the full extent of a community’s claims from being brought before the courts. Is the silence, then, a “naming” problem, pace Felstiner, Abel and Sarat? What is the relationship between barriers to “naming” and the 2015 protest?

Part of the difficulty to “name” derives from the fragility of the concept of racism. As will be discussed in Chapter 3, identifying racist motives for police stops or arrests is challenging. First, officers have better access to evidence that may disprove such motives. They also enjoy a presumption of professionalism in the view of other actors in the legal system (see the discussion

\footnote{As known from the US as well. See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010) at 106.}
on *Terry v. Ohio* in Chapter 5). Second, “naming” is inherently problematic when it comes to cases of institutional racism, where the discriminatory result cannot be traced back to a single perpetrator. As discussed in the context of employment discrimination of Keses in the religious councils, it became difficult to identify the state’s responsibility for discriminatory policies even when it was directly involved in creating them.

A discussion about the limitations of “naming” may prove useful when reform outlines are considered. One example is the proposed integration of the term “racial harassment” as a platform for tackling racist acts, as suggested by the inter-ministerial team fighting racism. It may very well be, however, that imposing an external definition without addressing the internal conflicts faced by minorities will not bring about the desired change in minorities’ ability to bring their claims.

3 Between Global and Local Ethnicity

Franklin Zimrin explains that the low visibility of the phenomenon of lethal police shooting until 2014 devolves from the level of government responsible for law enforcement – state and not federal. In Israel, a small country lacking a formal distinction between federal and state law, it is difficult to explain the silence of civil society prior to 2014 as resulting from political decentralization of power. I would argue that it is likely that other mechanisms prevented the voicing of Black communities’ claims. Ethiopian Israelis are officially considered part of the Jewish polity. The refusal to acknowledge discrimination against internal minorities may stem

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from a need to preserve Israeli societal ethos – the ideal of the Jewish polity as a united body with a shared mission. Sociological literature suggests that this ethos is shared not only by the government and the police, but at least to some extent, by some Israeli Ethiopians themselves who see their claims for equality as based in their Jewish identity, and not in universal egalitarianism.

In this context, Burstein and Norwich describe a widening internal split in the Ethiopian community between those who see themselves as Ethiopian Israelis who belong to the Israeli collective and those who consider themselves primarily as Ethiopian Jews – simultaneously belonging religiously and culturally yet detached from a state that rejects them. As a result of a misalignment between the protest’s causes and the plan for action, the argument goes, change was not achieved. They write:90

Drawing a direct causal connection between the Black Lives Matter movement and the Ethiopian protests is problematic. While non-relational diffusion under-scores similarities between the events and some replication, the Ethiopian community near-completely rejected the identity comparisons with African Americans and their US plight. These contradictions interfered with the potential success and longevity of the Ethiopian protest, weakening its development.

That symbolic boundaries shape the perceptions of individuals concerning instances of stigmatization and discrimination is repeatedly confirmed by behavioural studies.91 Guetzkow and Fast, comparing the responses of Ethiopian Israelis to stigma and racism with those of Palestinian-

90 Id. 41.
Arabs, find that they first see everyday stigmatizing encounters as part of their temporary position as immigrants and respond accordingly, that is, with greater attempts to integrate and prove their worth as individuals.\textsuperscript{92} Conversely, Palestinians view the line between them and the Jewish majority as relatively impermeable. Mizrachi and Zawdu consider these different Destigmatization strategies of Ethiopian Israelis as related to class, suggesting that middle-class Ethiopian Israelis have access to a wider range of cultural repertoires that include local Jewish identity as well as global Black identity.\textsuperscript{93}

The symbols of the 2015 protest may have represented the internal conflict described above, between a representation of Jewish nationalism on the one hand, and the global fight for minority rights, on the other. Consequently, one could find protesters waving Israeli flags and holding signs with the slogan “I have no other country, even when racism is burning” – a reference to a popular Israeli song, which plays on the similarities between ‘country’ and land’, where here ‘racism’ replaces ‘land’. Together with such as these, were signs with the words of Yosef Salamsa from his police investigation: “Have mercy on my heart, I am no longer alive”, which represented, simply, individual pain. But there were also slogans that would be considered atypical to many Jewish Israelis, such as one which contained “With spirit and blood we shall expel racism”, a paraphrase of a well-known Palestinian banner: “With spirit and blood we shall redeem you, Shahid [Martyr].”

What impact might this perceived multiplicity of voices in the protest had on the legal battle for equality for Ethiopian Israelis will be discussed in the next section.

\textsuperscript{92} Id, at 152.
4 Trapped between Naming and Claiming

In discussing the Naming-Blaming-Claiming model, Daphne Barak-Erez has suggested that the model represents a kind of legal utopia. Instead of describing the cases that fit the model, she focuses on instances where the full process of naming the legal issue, blaming and demanding remedy, has not occurred. Her approach to these situations encompasses various instances where one chooses not to claim; where blaming and claiming happen without naming; or naming and claiming happen without blaming, and finally situations where obscurity about who to blame predominates.

Applying this framework to the Ethiopian Israeli case may be useful for understanding the barriers against bringing claims for police brutality and racial profiling cases.

1. **Abstention from Claiming** — Barak-Erez describes this situation as one where potential plaintiffs are aware of the wrong caused to them, as well as of who is to blame, yet refrain from claiming. Such abstention, she argues, could be due to accessibility barriers, including financial ones. In the context of the legal and public struggle of Israelis of Ethiopian descent, it could be that continued marginalization and lack of legal or financial resources lead to fewer claims being filed. As discussed below, the prosecution’s policies related to complaints against police violence may further contribute to a low number of claims, as will a lack of knowledge about the legal process. Finally, of crucial importance to claims is Ethiopian Israelis’ dependence on the institution of the rabbinate as the sole authority

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confirming the authenticity of their Judaism. As long as such dependency endures, the community’s ability to forcefully advance its claims is limited. 95

2. **Blaming and claiming without naming** – this pattern is also very common in the Ethiopian-Israeli context. As described above, stigmatizing encounters are met by many Ethiopian Israelis with even greater efforts to integrate, rather than “naming” such encounters as racist.

3. **Naming and claiming despite social ambiguity about blame** -- Here Barak-Erez brings up the matter of *Ka'adan*, in which the Israeli Supreme Court accepted a claim made by a Palestinian couple which was refused a lease on land due to their identity as Arabs. The verdict was not widely applauded by the public, because many Israelis did not see much blame attached to the defendant’s discriminatory act. 96 Similarly, in the context of segregating Ethiopian Israeli mothers in maternity wards, the policy is not recognized as discriminatory by many Israelis, which makes asserting a right far more challenging.

4. **Ambiguity about blame** -- in this scenario, as Barak-Erez describes it, pursuing a claim is difficult because it is not clear who is to blame. This brings the discussion back to the challenges associated with institutional racism, but also to the overall question of criminalizing minorities which lies at the core of this work; the blind adoption of a narrative ascribing poverty and criminality to minorities may support institutional racism in ways

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95 Barak-Erez makes a similar point about the difficulty employees have making claims against their employers in light of high economic dependency. See Id., at 38.
96 Barak-Erez, Id., at 38-9. See also H.C. 6698/95, Aadel Ka'adan v. Israel Lands Administration, 54(1) P.D. 258.
that make it virtually impossible to identify a specific agent to “blame” for the marginalization faced by minorities.

An interesting question arising from this analysis concerns the relationship between failures of litigation and public struggle. It may very well be that the courts’ inability to fully conceptualize harms leads Ethiopian Israelis to abstain from “claiming” on a legal level, while at the same time provoking them to use non-legal means to advance their rights.

5 Conclusion

To date, the dissonance between Ethiopian Israeli identification with the Jewish state and its marginalization as a Black community may have prevented not only voicing the claims but also identifying their source in any form of racism, institutional or individual.

Exploring the Ethiopian Israeli protest at the intersection between legal and public struggles suggests that the patterns seen in the protest reflect the various failures associated with naming, blaming and claiming the harms caused to Ethiopian Israelis by police violence and profiling.

One main theme from the literature concerns Ethiopian Israelis’ rejection of the analogy to the American case. Such rejection may explain the failure of ‘naming” harms caused to members of the community based on their identity. The court’s reinforcement of symbolic religious boundaries, together with the internal struggle described above, may contribute to our understanding of the problem of “claiming” in Israeli search and seizure cases.

97 Id., 39-40.
In Search of a Lexicon:
Institutional Racism and the Role of Culture

Assessing the Israeli courts’ response to racial discrimination claims in the criminal justice system is a challenging task. In fact, the challenge stems in part from the confusion associated with the apparent ease with which the Israeli courts have awarded remedies to Ethiopian Israeli plaintiffs who brought tort claims in discrimination cases. The lower courts have awarded compensations to plaintiffs who filed libel claims after being called “stinky Ethiopian”,98 damages to a patron refused entry to a dance club due to his dark skin,99 and damages for restaurant goers referred to as “Kushim” (the Hebrew ‘N’ word) by a waitress in her server book.100 But when it comes to indirect forms of racial disadvantage, like the ones involving racial profiling, the Israeli legal system fails to identify the wrongs as well as the harms caused to individuals, and more often than not refrains from holding authorities and individuals to account.

The history of racial discrimination in the US demonstrates that the difficulty in addressing profiling as a matter of racial disadvantage is far from unique to the Israeli system. This chapter represents an attempt to flesh out what we mean when we talk about ‘institutional racism’ as an explanation to racial discrimination in justice systems. I begin by presenting some of the key

98 See for example, CA (Tel Aviv) 6833-10-12 Tapera v. Dvora Yosef (Nevo, 26.12.13), where the plaintiff, a security guard, was compensated with 35,000 NIS for being called a “stinky Ethiopian” by a client.
99 19963-08-12 Artia v. Dizengof Club (5.1.15). Artia, Ethiopian Israeli, sued after being denied entry to the Tel Aviv club. The media reporting on the case emphasized that Artia was a former combat soldier.
100 15-10-28562 (Tel Aviv) Mangisto & others v. Stela Beach (12.4.17). The plaintiffs were awarded 40,000 NIS in a lawsuit filed against a restaurant where the waitress had indicated the plaintiffs in the receipt and server book as “kushim.”
concepts along a continuum from racism to institutional racism. I will attempt to clear away some of the theoretical ambiguity surrounding racism, leading to a proposal to supplement our current thinking with a broader cultural analysis. I ultimately aim to answer the following question: how can we concretize the meaning of the label “institutional racism” in the context of the discrimination faced by Israelis of Ethiopian descent? In writing about ‘institutional racism,’ I focus on a specific stream of the literature regarding institutional racism, developed in the context of search and seizure cases in the United States.

1 From Racism to Institutionalism

That racialized minorities in Israel are bereft of a lexicon by which to express the harms caused to them is not only a product of Israeli national culture, as discussed in Chapter 1. A survey of the literature on racism reveals that the attempts to define racism are often trapped in a paradoxical perpetuation of the very bias they seek to reveal.

Sociologist Yehuda Shenhav defines racism as “attributing inferiority to a person or group on the basis of stereotypical traits defined in biological, social or cultural language.”

Blum contends that the word ‘racist’ itself has become a way of condemning too many wrongdoings, and that we ought to avoid a ‘conceptual inflation’ in our use of the term. Indeed, recent writing about racism describes it as a phenomenon that is no longer rooted in a so called “biological basis,” yet is no less dangerous, as the portents of this form of racism caution us. Philosopher Étienne

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Balibar, who is among those who conceptualized this phenomenon under the title “new racism”,
described it as enabling the existence of racism without race.  

Balibar’s work attempts to discern what is it exactly that is new about this type of racism
and whether it differs from “old” racism “tactically” or fundamentally. His answer alludes to
some form of totality which, he argues, characterizes new racism. Here racism can be embedded
in practices, discourse and representations, of which “all are intellectual processing of fantasies of
segregation or avoidance (a duty to purify the societal body and preserve the personal or group
identity against any closeness, mixture or invasion)”.  

According to Balibar, new racism helps give emotional baggage a stereotypical form. This
permits some form of fraternity to be created between those who engage in racist practices.
Paradoxically, this formation of racist practices also gives rise to a community of those subjected
to racist practices. Balibar describes this community as forced upon its subjects. Finally, he
determines that there is “no racism without a theory.” As a substitute for biological race, his
analysis gives a crucial role to the category “immigration” in forming new racism. Balibar
writes:  

Ideologically, the racism of our time, which is focused on an immigration
complex, is written into the framework of ‘racism without races’… the leading
motive in this racism is not biological descent but rather the rigidness of cultural
gaps. In first sight, this racism does not claim to supremacy over other groups or

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104 Id., 73.
105 Ibid.
106 Id., 74
107 Id at 76. Emphasis added.
nations, but ‘only’ attests to the damage in erasing the borders, the incompatibility between traditions and life styles. Taguieff rightly named this “segregating racism” (Racisme différentialiste).

It is tempting to make a blanket application of Balibar’s approach to the case of Israelis of Ethiopian descent. As argued based on the cases described in Chapter 1, a tension between segregation and inclusion characterizes the relationship between Israelis of Ethiopian descent and governmental institutions. And these cases reveal more than one of Balibar’s cautionary signals of new racism. Additional temptation to apply Balibar derives from the use of cultural rationalization as a justification for discriminatory Israeli educational policies and the use of the category “immigration” as a euphemistic substitute for race which then becomes a proxy for criminality for Israel’s police chief.\(^{108}\)

Yet, the advantage of the “new racism” is also its greatest weakness – it provides a too sweeping definition that must be supplemented with additional tools which enable us to discern ‘plain’ discrimination from racism. ‘New racism’ appears to also be insensitive to the questions associated with the rights of minority religious groups. As I argued in Chapter 1, “cultural accommodation” should not be confused with racism. We should also avoid equating all cultural accommodation with racism. In Chapter 6, I offer some preliminary thoughts concerning the line between cultural accommodation and institutional racism.

The challenge of defining racism may explain why it is not only the “old” discourse about racism that is caught between discussing “race” as an epistemological category and rejecting its

\(^{108}\) See infra note 128.
ontological stand. Replacing the discussions about “Race” and “racism” with those about “racialization” thus becomes, for many scholars, the way out of the dialectic between refuting and perpetuating racism. Shenhav writes:

Race does not truly exist but is rather socially constructed, a human invention. The invention and imagination of race express themselves in so called ‘racialization’, that is, the process of social construction based on a perception of race and its various signifiers. In this process, the biological (e.g., skin colour and the length or width of a nose), the social (e.g., poverty, country of origin and social status) or the cultural (e.g., religion, life style, family size and approach to technology) become natural, meaning to traits that indicate the unchanging essence of the group at issue. In other words, racialization is a process that interprets the cultural and the social in race or race-like terms, which attributes to the subject, the object or the cultural action a race-based essence. It should be emphasized: ‘race’ gets its meaning not from biology (e.g., genetic code) but from the social construction of biology (or of the genetic code) and from the cultural construction of non-biological traits (e.g., hygiene).

But does speaking about the action instead of the noun excuse us from the conundrum of using the term ‘racism?’ Part of the definitional trap stems from the challenge associated with both

109 Shenhav & Yona, supra note 100.
110 Shenhav & Yona, Id. See also Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, (Toronto: Queen’s Printer for Ontario, 1995) (Co-Chairs: D. Cole & M. Gittens), 40-4 [The Commission on Systemic Racism in the Ontario Criminal Justice System defined racialization “as the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life”].
refuting a phenomenon, and attempting to speak against such a phenomenon, without using the very concepts used by its instigators. Consider, as an example, the term “the Ethiopian Israeli community”. Some activists may reject this term for two reasons: First, we often use this term to refer to both Israelis who were born in Ethiopia and to second generation citizens of Ethiopian descent. Second, beyond the obvious essentializing aspect of imagined communities, the use of the word “community” ignores the great diversity within the population (e.g., between speakers of Amharic and Tigrinya, between former residents of villages and cities, etc.).

2 Institutional Racism in Context

The discriminatory aspect of the cases described in Chapter 1 did not manifest either in overtly racist language or with intent to discriminate. As will be demonstrated throughout this chapter, a similar problem arises in the context of discriminatory search and seizure practices flowing from the case law cited in Chapters 4 and 5. However, the behaviour of institutions is concerning nonetheless, and may be affected by racial considerations in more subtle ways. Such was the case of Stephen Lawrence, a young black student who was brutally murdered in a racist attack by a gang of white youths in London in 1993. An inquiry report following the event pointed to the presence of "institutional racism” in police treatment of the case; the report defined this institutional racism as:

111 The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin.

111 Sir William Macpherson, “The Stephen Lawrence Inquiry” (presented to Parliament by the secretary of State, February 1999), at 49.
It can be seen in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority groups.

With the foregoing as a basis for analysis, I now turn to describe the scholarship about institutional racism in the context of search and seizure practices. I will describe three models that will serve as theoretical ground for understanding the case law examined in Chapter 4.

3 Preliminary comments

Before turning to the theoretical models, a few additional preliminary remarks are in order. First, some accounts of racial discrimination in the justice system look at the question of institutional racism by focusing on cases of law breakers, while others intentionally focus on middle class, law-abiding citizens.\(^\text{112}\) The idea, as some scholars put it, is that by focusing on law-abiding citizens we can show just how flawed the system is. If even law-abiding citizens suffer racial discrimination, how bad must it be for the rest? For all its apparent conceptual advantages, this approach may prove inadequate for understanding racial profiling cases. The issue with law enforcement mechanisms, as transpiring ever more clearly in racial profiling cases, is that these mechanisms themselves turn citizens into law breakers by their very racialization, at times with no offence perpetrated, thus making the distinction between the law-abiding and offenders redundant. I therefore question this distinction and the consequent interpretation that alludes to it in these models.

\(^{112}\) See Capers and Carbado, infra notes 112 and 124.
Second, the models below were developed in the American context and should be imported to its Israeli counterpart with caution. In fact, one of my goals here is to explain the possible role played by the Israeli context in these cases, and how this context dovetails with a broader story about institutionalism. How was the Israeli ‘war on terror’ transformed into a war on crime? What were the interests at play in this transformation? The Israeli case may allow us to trace how citizenship and nationalization alike feed into our discussion of racialization.

4 From Segregation to Criminalization (or: is it all about race?)

This chapter opened by broaching a potential confusion between institutionalism and racism, alongside the general question: is ‘institutional racism’ a concept that adequately balances these terms, or does it ultimately miss the point? Is it all about race? On this point, and before delving into the specifics of modelling the police-citizen encounter, some writers urge us to explore the conditions that facilitate racialization. Such is the case, they argue, with residential segregation. Bennett Capers, for example, asks us to question perceptions that deem segregation the result of individual choice, socio-economic status or a vestige of historic intentional segregation.113

According to Capers, spatial separation allows to structure social relationships along racial lines and therefore becomes critical to our understanding of the link between policing, race and place.114 Beside its clear consequences, like limited equal access to employment resources, governmental resources or quality schools, segregation wreaks more insidious harms, associated with reducing individuals’ social capital, entrenching racial distinctions and endorsing harmful

113 Bennett Capers, “Policing, Race, and Place”, 44 Harv. C.R.-C.L. L. Rev. 43 (2009).
114 Id., 44.
norms. Certain methods of policing, according to this analysis, contribute to the segregation of minorities and therefore implicitly contribute to all of the above repercussions of segregation.

The spatial segregation of the Ethiopian Israeli community transcends the housing issue. It also seems to be the common thread running through a long series of racial incidents: the rejection by MDA (Israel’s ambulance service) of blood units donated by Ethiopian Israelis, the Depo-Provera contraceptive birth control administered to Ethiopian women new immigrants despite its adverse side effects, the segregation in hospitals of Ethiopian women in labor, religious institutions questioning community members’ Jewish provenance as the latter seek to get married, or the refusal to recognize the Kes, the community’s religious leaders.

As for the more ‘traditional’ forms of segregation, the Ethiopian Israeli population is concentrated in certain cities and neighborhoods. In seven such neighborhoods, Ethiopian Israelis make up more than a third of the population. While the issue of coerced segregation by religious institutions has attracted media attention and been litigated in the Supreme Court, covert separation mechanisms have been in place for the Ethiopian Israeli community in various forms: from special enrichment educational programs, through separate military training programs, to designated teacher training programs. Some of these mechanism remain to this day. In this sense, segregation serves as alternative cultural marker that substitutes colour – according to Capers, research shows that segregation based on place, as opposed to colour (i.e., between different

115 Id., 45.
116 See discussion in Chapter 1.
118 “Hadassah Hospital Official admits to separating Ethiopian women in labor”, WallaNews (14.4.16) [Hebrew]. See also the discussion on Petah Tikva case in Chapter 1, and supra note 9.
120 Or Kashti, supra note 9.
groups of white people), could also result in “othering”. The deployment of police forces in Israel reveals how racial segregation can become a self-fulfilling prophecy.

Paradoxically, when the police was facing claims about racial discrimination of Ethiopian Israelis, one aspect in the ‘police plan to improve their relations with the Ethiopian Israeli population’ was its intensified presence in neighborhoods of high Ethiopian density, a measure that manifested in ‘over-policing’, to use the criminological term. While intensifying its presence in areas densely populated by Ethiopian Israelis, the police has also been reportedly applying the principle of “racial incongruity”, by singling out members of this minority population when they appear in white and/or rich places, etc., thereby making them susceptible to racial profiling. This tension between over-policing and racial incongruity will prove key in understanding the cases in chapter 4.

The various forms of spatial segregation inflicted on the Ethiopian Israeli community are all the more significant when compared to the Arab population, Israel’s national (and largest) minority, which is largely segregated as well. As opposed to the Ethiopian Israeli population, members of the Arab community actually report under-policing and neglect as pervasive as to overshadow their strict and discriminatory treatment by the police. Occasionally, and accidentally, Ethiopian Israelis also share some of the marginalization aimed at other vulnerable communities of colour, like asylum seekers and immigrants.

A recent survey shows that 42% of Ethiopian subjects thought that the police stopped people in their own surroundings for no reason, compared with 20% of the Arab interviewees and

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121 Capers, supra note 112.
15% of the control group. 50% of Ethiopian subjects also thought that the police fights crime “more than required”, while 37% of Arabs thought the police it is not doing enough to fight crime. The tight relationship shared by segregation and criminalization should at the very least alert us to the various cultural signs at play in racial profiling and police brutality cases.

5 Racial Profiling, Police Brutality and the New Wave of Critical Race Theory

An example of an attempt to tackle the question of racial disadvantage as institutional phenomenon is offered by Devon Carbado, who suggests a provisional model for some of the causes of ‘blue on black’ violence. According to the model, six conditions enable police brutality against racialized communities. The model inherently ties between racial profiling and police brutality. Some of these conditions are sociological by nature (e.g., the frequency of surveillance and contact of the police with vulnerable communities, police culture, etc.) while other conditions go down to the structure of the justice system (e.g., legal doctrines such as qualified immunity). Based on this short description alone, one may ask what frequency of surveillance is needed for search and seizure practices to yield structural discrimination, and

124 Devon W. Carbado, “Blue-on-Black Violence: A Provisional Model of Some of the Causes,” 104 Geo. L.J. 1479 (2016). Carbado suggests the following six causes: (1) social forces converging to make African-Americans vulnerable to ongoing police surveillance and contact, (2) The frequency of this surveillance and contact exposes African-Americans to the possibility of police violence, (3) police culture and training encourage violence (4) legal actors in the civil and criminal process translate violence into justifiable force, (5) the doctrine of qualified immunity makes it difficult for plaintiffs to win cases against police officers, (6) the conversion of violence into justifiable force, the qualified immunity barrier to suing police officers, and the frequency with which cities and municipalities indemnify police officers reduce the risk of legal sanction police officers assume when they employ excessive force.
whether or not all these conditions are necessary or equally significant. I will return to these questions in my conclusion.

Carbado’s work connects with a stream of scholarship which reveals racial disadvantages as they are reflected in the American jurisprudence of search and seizure.\textsuperscript{125} As a critical race theorist, his work is predicated on a set of understandings with regards the causes for racial disadvantage: (a) the judicial system often assumes law enforcement personnel to be colour-blind with regards to individuals’ race; (b) racism is ingrained in the fabric of some institutions; and (c) rights-based remedies are not necessarily useful in resolving disadvantages that stem from institutions’ approach to colour.

Carbado focuses on the moment of racial identification as a constitutive instance. Fourth Amendment jurisprudence provides insight into the structure of this moment. Numerous accounts describe how constitutional law doctrines were gradually consumed, de-facto reducing the protection offered for minorities. \textit{Terry V. Ohio} is famously interpreted in this context as the verdict whereby the US Supreme Court effectively abandoned the probable cause requirement in favor of an open-textured test that expanded the meaning of “seizure”.\textsuperscript{126} While seemingly allowing more police acts to be considered as seizure, the \textit{Terry} decision also opened up the door for an expansive stop and frisk policy that often targets minorities. This was made possible, so goes the theory, due to the colour-blindness presumption. The exact weight of these legal doctrines


\textsuperscript{126} See \textit{Terry v. Ohio}, 392 U.S. 1 (1968) [hereinafter: \textit{Terry}]. The court ruled in Terry that stopping a suspect without probable cause is not a violation of the Fourth Amendment prohibition on unreasonable searches and seizures.
against socio-cultural norms that inform their implementation has yet to be realized in these accounts.

In Israel, as discussed earlier in light of Capers’ account, residential segregation makes Ethiopian Israelis more vulnerable to police surveillance and contact. Anecdotal evidence also indicates a police atmosphere that propagates hostility towards minorities, starting from the top ranks. One needs not look further than the remarks made by General Commissioner of Israeli Police Ronni Alshech (2016), positing that “over-policing is only natural” when it comes to Ethiopians, due to statistics linking them to higher crime rates as members of an immigrant community.127

Evidence of police culture that enables violence can also be found in Israel’s State Comptroller report on police violence, which suggests that the police failed to implement disciplinary sanctions against violent officers.128

But perhaps most striking is the similarity between the developments in search and seizure doctrines in the US and Israel. In the absence of Israeli codified constitution, Israel’s Supreme Court interpreted the few existing foundation basic laws of the country to form a constitutional “shield” against human rights violations. In such way, the Israeli Basic Law: Human Dignity and Liberty was interpreted to command constitutional protection on persons subjected to search and


128 See “The Systemic Treatment of Police offences” (Special Report, The State Comptroller office, 2017). The comptroller found that the systemic treatment of police violence in Israel, “presents a foundational problem.” According to the report, most complaints against officers are dismissed in the very preliminary stages, and only in a minority of the cases the Israeli Police Internal Investigations Department decides to investigate police officers as suspects and bring criminal or disciplinary charges. Thousands of cases in different levels of severity are not treated on a disciplinary level or on a systemic level, and lessons from grave violence cases conducted by officers are not learned. The comptroller further found that in the majority of cases, the police did not suspend police officers despite charges brought against them, and that in some cases convicted officers remained in duty.
seizure practices. It was only in 2006, however, that the Israeli Supreme Court made it possible to exclude illegally obtained evidence.\textsuperscript{129} Despite this seminal decision, only rarely have the courts applied the law to exclude evidence.\textsuperscript{130} The \textit{Ben Haim} case was the road not taken to change this point of balance. Discussing a series of cases where the police had obtained evidence in warrantless searches, the court concluded that “consent searches” could only be legal once a person’s informed consent to search was obtained. In \textit{Ben-Haim}, by interpreting the meaning of informed consent for the purposes of searches, the court established a common law-based authority for the police to conduct “consent searches.”\textsuperscript{131}

Much like \textit{Terry}, \textit{Ben Haim} was a verdict full of constitutional rhetoric; much like \textit{Terry}, civil rights activists argued that it legitimized the practice of illegal searches against minorities.\textsuperscript{132} As will later turn out, for example in the \textit{Salamsa} case, discussed in chapter 4, consent searches are in practice the unexamined police routine that only rarely stands trial.\textsuperscript{133} I will argue that the \textit{Ben Haim} decision undermines the protection extended to minorities and enables, together with Israel’s emergency regulations, a further racialization of minority communities.

In the context of police brutality, bringing complaints against police officers often proves a lost battle, and here is why: one common practice is for police officers to file a complaint – of violence – against citizens who claim to have been harmed by the same police officers. For this

\textsuperscript{129} CA 5121/90 Issacharov \textit{v. the Chief Military, Advocate General}, PADI Journal 61 (1), 461 559 (2006)
\textsuperscript{130} CrimC (TA) 1084/06 \textit{State of Israel v. Farhi} [2007] 15, at 13 (unpublished) [excluding a DNA evidence that was illegally obtained, yet admitting other evidence that the same DNA evidence led to].
\textsuperscript{131} See Asaf Harduf, “Cloak of Rights, Substance of Justice: Rhetoric and Realism of Criminal Adjudication”, \textit{Din V’dvarim} (Haifa L. Rev) [making the claim that the Israeli Supreme Court protects human rights only when the price is known to be low, such as in Ben-Haim case].
\textsuperscript{132} See also Akhil Amar, "Terry and Fourth Amendment First Principles" \textit{Faculty Scholarship Series} 949 (1998) [suggesting that the “good Terry”, among others, embraced a broad definition of "searches" and "seizures," and allowed warrantless seizure while the “bad Terry”, among others, failed to define “search and seizure” broadly enough. See discussion in Chapter 5].
\textsuperscript{133} See Harduf, supra note 131, at 36.
reason, an internal regulation of the Ministry of Justice asserts that charges for attacking a police officer will only be brought against a citizen if it was proven that said citizen has not been attacked by the police. This may sound reasonable - but in practice, the Israeli Police Internal Investigations Department (“Machash”), which is the body in charge of investigating such claims, relies on evidence provided by the officers, resulting in a majority of complaints against officers concluding with no charges.

A critical race theory analysis may suggest that the frequency of surveillance as facilitated by spatial segregation and the normative judicial umbrella that shields search and seizure practices in Israel seem to join hands in enabling the recasting of violence as justifiable force. Incidents of harming and killing of black people, according to this analysis, are not the exception, but rather a feature of the legal structure. A policy prescription will be found in eradicating the practice of profiling: if members of vulnerable communities are not stopped, they are also less likely to get killed.

Carbado’s model leaves room, however, for an analysis of the variety of social forces that make communities of colour more vulnerable to ongoing police surveillance and contact. At this point, his work can be supplemented with Michelle Alexander’s New Jim Crow analysis. Alexander draws a straight line from the American history of slavery, through the Jim Crow (original) laws, to the invisible ways that saw the mass incarceration of African-Americans facilitated in 21st-century US, hence the ‘New Jim Crow’. In other words, her argument is that

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137 Michelle Alexander, The New Jim Crow, supra note 86.
Jim Crow laws live on in institutional racism. Waging ‘the war on drugs’, she argues, worked to conceal racial aspects of a social struggle that led to mass incarceration. In the Israeli context, similar questions may arise, like what is the narrative that was at work in enabling, and then concealing, the racialization of the Ethiopian Israeli group.

Under emergency regulations kind of reasoning, Israeli law allows security guards to stop, search and detain people on public transportation, even with no probable cause. The authorizations conferred by the law were extended further in a recent amendment, which gave the law its nickname: “The Frisk and Search Law.” The law was criticized by the Association for Civil Rights in Israel and other human rights activists, claiming that the amendment rendered the Ben Haim decision void, as the law extended the power of police officers to stop and search without asking for or acquiring consent, or even a justifiable reason. In February 2016, Ethiopian Israelis protested the law, expressing concern that racial profiling of community members would become even more prevalent.

On its face, the Frisk and Search Law was legislated for security reasons. But the discussions leading to its legislation in the Knesset’s Constitution, Law and Justice Committee revealed the fragility of this narrative. In a document detailing the state’s position on the legislation, the committee’s legal advisor explained that “this is a matter of fast-tracked legislation… a first aid measure to address a grave security situation.” Despite this framing, the

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138 See Authorities for Protecting Public Safety (Amendment No. 5 and Temporary Provision) Law, 5776-2016.
139 According to the Amendment, “should a police officer have a reasonable suspicion that a person is about to conduct a violent offence against another person, the officer may search the body of the person in order to examine whether the person carries a weapon”. Another regulation, legislated in 2017, asserts that a deputy chief of a police district may announce a specific place as such where bodily searches are allowed without cause.

140 Toi Staff, “Knesset Okays cops to stop and frisk without reasonable suspicion”, The Times of Israel (2.2.16).
authorizations were legislated within a criminal law procedure, rather than under a separate ‘emergency temporary order’ as had often been the case before. At the same time, however, the police argued in the Knesset that the law was needed in order to fight the allegedly rising epidemic of knife crime among the country’s youth. Another example brought in the discussions by the police described the stabbing of a police officer in Damascus gate (east Jerusalem), alluding to security considerations. Eventually, the Knesset rejected the proposal to amend only the security-related authorizations, and have a later, separate discussion on authorizations within the criminal law.

Here are some interesting facts about knife crime: (1) in the Israeli law, knife possession in public is an offence carrying five years prison,¹⁴² (2) Discovering a knife in a person’s possession is often the consequence of searching their body or car, (3) The recent decade has seen the Israeli Supreme Court declare juvenile knife crime “a state-wide epidemic”, thus stiffening the sentences for offenders,¹⁴³ and (5) 18.5% of the population in Israel’s juvenile prison is Ethiopian Israeli.¹⁴⁴ Has knife crime rhetoric acted to shape the profiling laws of Israel in a way that has enabled the racialization of Ethiopian youth?

To a large extent, what is missing in some of the theoretical models is a clear causal link to pull together the various circumstantial evidence of racial discrimination. Critique in this vain was voiced by commentators who claimed that the discussion on institutional racism tends to be simplistic, under-theorizing as it did the mechanisms by which institutions discriminate, or to

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¹⁴² Section 186 of Israel’s Penal Code, 1977.
¹⁴⁴ According to an interministerial team established in the Ministry of Justice to address racism against Israelis of Ethiopian origin. See “Eradicating Racism against Ethiopians – Summary Report,” supra note 87.
ignore the diversity of groups.\textsuperscript{145} The perennial answer to the question about the roots of discrimination remains racial categorization. It therefore misses the option – which Capers’ account speaks to – that racial categorization is the indicated rather than the indicator, i.e., that racial categorization is a substitute for a long line of other signifiers, such as place and culture, and therefore leaves us with a narrow answer to the types of harms discussed in racial profiling and police brutality cases. There is an inherent difficulty to explain why it is that the same rules apply to different groups but ‘behave’ differently when it comes to different minorities – e.g., why would search and seizure practices look different for Ethiopian Israelis compared to the Arab Israeli minority, a decidedly marginalized group of Israeli society.

6 New Institutionalism and the Social Theory of Racial Discrimination

Could institutional racism function as more than a label for the problem of racial discrimination? Haney Lopez suggests that it could, and provides outlines for using it as a theory of social behavior. According to Lopez, judges with the Los Angeles Superior Court have discriminated against Mexican Americans when nominating grand jurors. Institutional analysis suggests why: the justices uncritically followed a script requiring the nomination of personal and professional acquaintances.\textsuperscript{146} Lopez emphasizes that it is not only what the judges took into account (the


similarity between the jurors and judges) but what they failed to consider – the protocols and laws designed to regulate their activities. Drawing upon the writing of Charles Lawrence and others, Lopez’s concept about racial beliefs attempts to decode how taken-for-granted beliefs may influence legal procedure.

His starting point is theories of racism as rational action. These are not necessarily helpful in conceptualizing racial discrimination, as racism often - and perhaps predominantly – occurs with no specific invocation of race. In the Ethiopian Israeli context, this preliminary assumption seems accurate, even if almost taken for granted. I began by saying that only a specific kind of claim is voiced in Israeli law with regards to the racial discrimination of the Ethiopian Israeli community. Take for example the segregation issue: it is extremely challenging to show that at the base of educational governmental programs lies a desire to discriminate, simply because many times it seems like government officials have internalized a perception whereby such enrichment is called for, due to the “cultural gap” between Ethiopian Israelis – and everyone else. Or consider the case of a mohel (circumciser) who remained in position despite using Ethiopian babies for circumcision training, while citing them on live TV as “cannon fodder”.147 It is extremely challenging to prove that the mohel kept his position thanks to institutional racism in the Israeli Ministry of Health, rather than due to the general, religiously-motivated under-supervision of circumcisers in Israel. Lastly, in the context of police treatment of Ethiopian Israelis, in the cases described in chapter 4, there is rarely any evidence of explicit racism and yet the most extreme means of force are taken, resulting in some of the most severe harms. Indeed, models of direct discrimination, or even suggestions of ’status production’ being the main goal of the encounter,

147 See “Israeli Rabbi Uses Ethiopians, Sudanese Infants for Circumcision Training, Report Shows”, Haaretz (29.11.16).
seem to offer very little help. In some cases, like the Salamsa case, it could be that police officers were themselves members of other minority groups.

So far, I have discussed the need for a theory that injects the institutional racism label with content. One central distinction that Lopez makes concerns purposeful racism, motivated by intent to discriminate harmfully, versus institutional racism, which is directed or undirected racial status-enforcement, influenced in an unrecognized manner by racial institutions. Lopez differentiates his analysis as cognitive, unlike Freudian-based accounts, without excluding them.

Essentially, Lopez suggests that even when (racial) scripts do not manifest, paths – which define the range of legitimate behaviours, emerge. Albeit fine, the distinction between paths and scripts may help to include the structure of citizenship as projecting implied instructions about how law enforcement should address incongruity. This thinking requires that we consider what an environment as such demands of police officers and what really dictates their behaviour. At the same time, it remains unclear how we may distinguish in practice between ‘path’ and ‘script’, or what the hierarchy is between these two. The theoretical ambiguities surrounding intuitional racism may prompt us to ask whether the problem lies in the lack of theory to conceptualize institutional racism, or rather in the conceptualization of the wrong problem. I will venture to suggest that while the above models are helpful in describing some symptoms of racial discrimination, they need to be supplemented with a broader cultural analysis, to better conceptualize the harms inflicted on minorities.

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149 Lopez, 1811.
150 Id., 1808.
So far Israeli jurisprudence has not produced a body of law on racialization. In fact, marginalization of vulnerable communities of colour is so far below the legal system radar that racialization is not even named, even when it is clearly faced by its subjects. As discussed in Chapter 2, this is especially surprising considering the disproportionate percentage of Ethiopian-Israelis who are stopped by the police, prosecuted in the courts and incarcerated. The cases discussed in the current chapter speak to this state of repression: although racialization is arguably the motivating force in all of them, the racial component of the legal claim is not litigated but rather remains in the ‘juridical unconscious.’ To paraphrase Felman, that which, although hidden from the legal eye actually drives its processes.151

Some of the cases discussed herein attracted massive media attention as they coincided with the protest waged by Ethiopian Israelis in May 2015, and according to some commentators, even catalysed those protests. Other cases while not garnering any attention at all, provide insight into the most pressing symptoms of racialization in the Israeli justice system. Considering the recent media attention, it is surprising to see how small the number of actual court decisions on the issue there are. This is for a few reasons. Police search and seizure practices are one of the most covert ways in which an individual is deprived from liberties. Many times, police stops occur without the case ever being litigated, nor do police stops necessarily culminate in detention. Yet, their influence on the construction of identity among minorities is enormous. A legal regime that

works to define and categorize on an individual level also influences processes of identity formation on the collective level. Carbado describes his interaction with the police as “identity work,” a process within which one develops the double consciousness imposed on minority members. Paradoxically, the more his rights are infringed upon, the more “black” he “becomes.”¹⁵²

1 A Methodological Comment

Most cases discussed in this Chapter would not have appeared in the legal databases, simply because they did not reach a discussion in court. The reasons for that vary: it could be that the Police Internal Investigation Unit declined to investigate the case, or that a civil lawsuit led to an award settlement behind closed doors and to the consequent withdrawal of the claimant’s complaint. In some cases, such as these of Pekadea or Adama described below, the complainants will arrive to the court as defendants or detainees because the police officers who allegedly attacked them accused them with an assault on a police officer. But for the work of a rigorous defense attorney, they will be joining the statistics of criminality that goes unnoticed. The scope of this thesis did not allow me to thoroughly discuss a greater number of cases. However, the volume of Israeli media reports should alert us that the scope of this phenomenon is much greater than what currently meets the (legal) eye.

The following contains complaints pertaining to encounters with the police, as well as court protocols and decisions. Items that made the news, both in print and on TV and radio are also included. Conversations with attorneys and complainants were integrated into the analysis. The

variety of materials will hopefully allow a more complete picture to emerge of what happens in the different parts of the legal system.

2 “Hands up: Don’t shoot!”\textsuperscript{153}: Yosef Salamsa

i. The Facts

Yosef Salamsa, 22, was found dead at a cliff in the city of Binyamina on July 4, 2014. Two days earlier, he had left on a lunch break from work and never came back. His body was found following a police search and his death was declared a suicide. Salamsa would soon become a symbol of the Ethiopian-Israeli protest. Four months prior to his death, Salamsa was stopped and arrested by police following a fake burglary complaint made by his neighbours. Salamsa’s family argues that upon their arrival at the scene, police officers used unreasonable force against him, electrocuting him with a taser, then kicking and dragging him to a police car.\textsuperscript{154} Salamsa was then left shackled at the backyard of the police station without having been interrogated and was moved to medical treatment upon the efforts of his family who had arrived at the station.

Salamsa’s death preceded by four months another encounter with police that created enormous public uproar in the United States: the death of Michael Brown, who was shot to death by Officer Darren Wilson in August 2014, after being involved in a theft case in his hometown of Ferguson, MO.\textsuperscript{155}

\textsuperscript{153} “Hands up, don't shoot” is both a slogan and gesture that originated after the killing of Michael Brown, as witnesses claimed that Brown had his hands in the air. Salamsa was reported to have been lifting his hands as sign of surrender as well.

\textsuperscript{154} See “Eradicating Racism against Ethiopians,” supra note 87; See also \textit{The U.S State Department Annual Human Rights Report} (2016), at 24.

\textsuperscript{155} BBC, “Ferguson protests: What we know about Michael Brown's last minutes” (25.11.2014).
II. The Complaint and *Machash* Investigation

On April 2014, the Salamsa family submitted a complaint to the Police Internal Investigation Department (*Machash*), the body in charge of investigating civilian complaints against the police. The complaint was filed over Salamsa’s protests as he feared that the police might try to get back at him for doing so. According to the Salamsa family, this is indeed what happened. In June and in July, a few days before his death, police officers visited the family allegedly to threaten them and to scare Salamsa into dropping his complaint.\(^{156}\) In July, two weeks after his death, the family received a letter that the case had been closed due to lack of cooperation on the part of Salamsa.

On November 19, 2014, four months after Salamsa’s death, an inquiry into Salamsa’s complaint was renewed at the behest of the family. The findings revealed that the police officers did not warn Salamsa prior to using the taser;\(^ {157}\) but that the visit of police officers to his home following the complaint was in accordance with the law. Another finding was that although suspected of burglary, this was never indicated in his detention report. Instead, the police report alleges that Salamsa was detained because he had attacked a police officer. Despite these findings, the head of *Machash*, in concurrence with the Solicitor General decided not to bring charges against the officers.\(^ {158}\) In addition, the decision requested that some of the issues be passed on to the disciplinary department. For “lack of evidence”, charges regarding misuse of the taser were not brought. The police published an official notice that Chief of Police, Ronni Alshech had decided not to conduct proceedings against the officers involved.

\(^{156}\) “The system”, an Israeli newsmagazine on television, broadcasted a recording where the officers are heard saying to the family “if we do not sleep, you will not sleep”. This recording was included in the Salamsa family’s appeal.


Following Salamsa’s death, speculations were made with regard to the circumstances of his death. Among other things, the location where his body was found did not fit the scenario of a fall and suicide. So did the fact that a pathological examination found a diagonal wound caused by a sharp object on Salamsa’s neck. A Japanese knife that was photographed at the scene was not given to the pathologist and disappeared from police possession.

iii. The Appeal

In May 2016, the Salamsa family brought an appeal to the Legal Advisor to the Government against the decision to close the case, while demanding that charges against the police officers involved be brought.\(^{159}\) The appeal stated that the neighbour’s complaint of burglary was false, that a recording of the conversation between the police with Salmsa indicates that there was no warning prior to the use of the taser, that eyewitnesses to the scene claimed that there was no provocative force toward the police displayed by Salamsa and that the police, when confronted with a recording of that night’s events claimed not to remember the details of the arrest. In October 2017, the Legal Advisor to the Government decided not to change the decision by the head of Machash and the Solicitor General, concluding that there was no evidentiary foundation for charges against the officers. The Legal Advisor mentioned that one of the two officers had resigned from the police and that there was no evidence showing that Salamsa’s death was the result of a criminal offence. Despite rejecting the appeal, the Advisor found that the officers falsely reported

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\(^{159}\) Appeal against the decision not to prosecute the deceased Yosef Salamsa (submitted to the Attorney General, 31.5.2016) [hereinafter: Salamsa’s appeal].
having warned Salamsa and mentioned that the police should examine its procedures on the use of tasers and on holding detainees outside a police station.

IV. The Process of Profiling

How did a neighbours’ dispute end with a civilian being tasered? According to the police, the officers responded to a burglary. The correlation between ethnic profiling and police brutality has been discussed in the previous chapter. The events that led to profiling Salamsa as a potential burglar shed light on the circumstances in which such profiling is born to begin with. The ‘100’ Emergency Call Center record contains the conversation between the neighbour and the police:

Woman: ... “**Some Ethiopian** who is probably using drugs, like from *Shaar Menashe* (a psychiatric hospital – IP) is going crazy here, violently.”

Officer: “What, did he run away from *Shaar Menashe*?”

Woman: “Something like that. I don’t know, he is making a mess here, starting with people, they’ll come down and hit him. Come fast though.”

…

Woman: “Here he is trying to break into the *Naamat* daycare center.”

Later on, it was discovered that the neighbour knew both Salamsa and his friend and was trying to make them leave a bench in a public garden where they were drinking and making noise.

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In their appeal, the Salamsa family wondered whether it made sense for a person to continue sitting on a public bench after committing burglary so that they could wait for the police or for a person with mental disability (as per the description given to the police) to commit burglary at all. The police, so it seems, did not bother asking any of these questions. It is hard not to notice that the second word used by the neighbour is “Ethiopian.” Supposedly, this is a good way for the officers to identify the man whom the neighbour is referring to, but at the same time, it is decidedly less effective in a neighbourhood that contains many Ethiopian families such as the one in which Salamsa lived.

The Salamsa case shows how binary the criteria in *Machash* investigations tends to be. Was the taser gun activated, was there a warning, was the incident interrogated after the fact? These are the types of questions that are asked. But the question as to whether the officers were “in the right” is rooted within a cultural context that goes to the heart of the identification process, preceding questions about the use of force. The problem, in other words, is not only that the police did not warn Salamsa before tasering him: it was that tasering him was their first response without interviewing a suspect who was not seen to be carrying a weapon. In fact, eye-witness testimony shows that the officers arrived on the scene with weapons drawn. The witnesses also said that when the police arrived, Salamsa got off the bench to signal his surrender – but was immediately tasered.\(^{161}\)

It is hard to tell how the officers interpreted Salamsa’s act of getting up from the bench. Part of the difficulty is the lack of evidence proving a racist motive behind the officers’ behaviour: There is not, for example, an explicitly racist statement that would indicate the state of mind of the

\(^{161}\) Id., pages 8-9.
police. Moreover, given Israel’s multiculturalism, the officers involved may themselves have been members of a minority group. Interestingly, Yosef Salamsa’s sister said in an interview that “apathy is racism too” referring to the time the legal advisor took making the decisions regarding her deceased brother. This statement captures some of the limitations in our current definition of racism and the legal encounters with it. I will later turn to discuss why might it be the case that the Israeli approach limits itself to the motives underlying the behaviour of the officers, as opposed to the stereotypes they hold, and why this difference may be of importance.

V. Stun Guns and Reasonable Force

The use of a taser in this case merits attention. One of the officers’ arguments was that the taser was used in self defense, following violence initiated by Salamsa. Interestingly, the police in one of its press statements said that there was no significance to the question of not issuing a warning before using a taser since such a warning is not legally obligatory. However, the protocol with regard to taser gun usage asserts that such warning is, in fact, mandatory. The protocol defines three cases wherein taser gun use is permitted: as part of reasonable use of force when initiating detention, as self defense, or when confronting resistance on the part of a detainee. But without explicitly subjecting the protocol to the Basic laws that determine individual liberties in Israel, it is very easy to read the protocol as giving almost automatic authority for using taser guns whenever potential subjective danger arises – a situation that is even more likely when racial bias is involved. Other mechanisms in the protocol that were meant to limit the use of tasers, such as the duty to

162 Avi Blecherman, “The cops moved on with their lives but my brother is gone”, Local Talk (22.6.2015).
163 See also Blum, “Racism”, supra note 101 at 206 (emphasizing the difference between “racist” motives and stereotypes that incentivize racist actions).
report taser usage or the duty to conduct an inquiry into an incident when a taser gun was used were not followed in Salamsa’s case. Machash also does not collect information on police use of taser guns since their integration into police work in 2009.¹⁶⁵

But use of force did not only express itself in the use of taser. Consider leaving Salamsa bleeding and vomiting as result of the taser use in the backyard of the police station for more than half an hour. The decision of the Chief Legal Advisor to the Government said very little about what seems to be unreasonably cruel treatment of a detainee. The Advisor’s one statement in this regard was that there is a need to refresh the procedures on holding civilians outside the police station. The protocols on taser gun use on the one hand and the Legal Advisor’s decision on the other combine to translate excessive violence into justifiable force. The violation of Salamsa’s rights as a detainee received almost no attention in the decision not to prosecute. Among the violations, the mere stop is arguably illegal; the excessive use of force and that the arrest was conducted without adherence to elementary legal obligations such as reading the arrestee his rights are additional causes for concern.

VI. The Assault on a Police officer ‘Defense’

Salamsa could not give his own version of events nor answer police allegations that he had used force against one of them. As aforementioned, the phenomenon of mutual complaints lodged by citizens and police officers is well known. There seems to be a disproportionate amount of cases of assault on police officers (APO) brought against Ethiopian-Israelis. The findings show, for

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¹⁶⁵ In 2017, The Association for Civil Rights in Israel appealed to the Supreme Court to order that the Police Internal Investigations Department collect data on taser gun use (SC5260/17 Israel Civil Rights Association v. The Police Internal Investigations Department; the appeal is pending). Out of 186 complaints following the use of taser gun by the police until 2016, only 12 cases were investigated. Charges were not brought in any of the cases (Imri Sadan, “200 cases and no charges: The Failed Battle Against Taser Gun,” Wallanews, 8.1. 2017).
example, that in some cities – many of which are in the center of Israel – the number of APO cases attributed to Ethiopian-Israelis is much higher than their percentage in the population.

In Gedera, Ethiopian-Israelis comprise 6.2% of the city population, yet 41% of the charges of APO cases is attributed to them. In Rehovot, Ethiopian-Israelis are 5% of the population, yet the number of APO cases against them comes to 33%.

The issue of police assault charges is of special importance in the context of Salamsa’s case, since he was supposedly detained for burglary but was held in custody for an assault on police officer despite the use of force by the arresting officers.

According to protocol, the police’s own use of force was supposed to be have reported by the police officers themselves which in turn would have brought on an immediate investigation by Machash. However, the officers in this case neglected to report such use.\(^\text{166}\)

In light of this, it is clear that the police officers’ conduct mandated a legal inquiry. Why then was the Salamsa family complaint not investigated until after his death? Machash claimed that Salamsa did not cooperate with their investigation.\(^\text{167}\) Defense attorneys and commentators have previously pointed to the weakness shown by Machash in conducting their investigations. They also point to the inherent fallacy of having Machash, a legal body attached to the Ministry of Justice investigate the police. Take, for example, the well-known practice on the part of Machash of not initiating investigations except in rare cases. That is, if the complainant does not show up to deliver testimony, Machash will do very little to locate that person or to find alternative testimonies.

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\(^{166}\) Salamsa’s appeal, Supra note 159, at 15.

\(^{167}\) Sharon Fulber, “Machash closed the criminal case against cops who shot Salamsa with Stun gun”, Haaretz (14.2.2016).
3 Daniel Kassahun and the New Vagrancy Laws

What would have happened if Salamsa’s case had gone to trial? The case of Daniel Kassahun\textsuperscript{168} is a mirror of Salamsa’s, a rare example of the significant conversation we could be having on racial profiling and police brutality. Kassahun’s case begins with a question central to debates on racial profiling: What is behind a police officer’s request for an individual to identify himself? At the core of the trial court’s opinion is a discussion of the demand for identification that is required under Israeli law. Unlike Salamsa’s case where the moment of identification is almost automatic and arguably translates into immediate use of force, the Kassahun case provides insight into what might be beneath the surface in such cases. Quite subversively, the court in Kassahun engages in an unorthodox interpretation of the demand for identification, interpreting it in light of the Basic Law: Human Dignity and Liberty. It is also an extraordinary case since the court pays attention to Kassahun’s Ethiopian origin as a factor influencing police decision making, even if not framing the case as one manifesting racial discrimination.

i. The Facts

On August 19, 2011, a police officer, together with three police volunteers, two of them minors, were on a routine patrol in Pardes Hanna, a small town in northern Israel. Around 4 AM, the patrol heard loud music coming from behind a synagogue. Tracking the sounds, the patrol noticed a car playing loud music and around it were 20-30 youths who were, as later described by the court, of Ethiopian origin. The police officer turned to Kassahun, one of the youths who was sitting in a corner away from the group. Kassahun refused the police officer’s request to present his ID and

\textsuperscript{168} Crim 57956-04-13 State of Israel v. Kassahun (17.6.2015) [hereinafter: Kassahun].
after a second try by another volunteer, the officer notified Kassahun that he was being detained. Kassahun then ran away to the City Hall with the volunteers in pursuit. One of them tried to shackle him, but Kassahun resisted, hitting one of the volunteers on the chest to break free. After issuing a warning, the volunteer sprayed Kassahun’s eyes with pepper spray. Kassahun was then shackled. Nevertheless, Kassahun was able to bite the elbow of one of the volunteers. Next, a three-car police backup arrived to complete the arrest. Kassahun was charged with threatening a police officer, interfering with an officer on duty, aggravated assault of a police officer and aggravated assault.

He faced trial.

II. The Trial

During the trial the defense argued that the detention was illegal and based on discriminatory enforcement motivated by racism. Among other things, the defense brought as evidence that the volunteer who used the pepper spray called the defendant’s friends “troublesome Ethiopians.” The court also rejected a claim brought by the volunteer who claimed that Kassahun had a bottle of vodka next to him, as this claim was not supported by the evidence, not even by the other officers involved.\(^{169}\)

A significant part of the discussion in court centered on the police demand to identify. The court ruled that despite allowing an officer to request one’s identification documents, the law is not a carte blanche for detentions that are not grounded on reasonable suspicion. The court stated:\(^{170}\)

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\(^{169}\) *Kassahun*, Id., at 15, 20.

\(^{170}\) Id., at 19.
“An officer turning to a person and asking one to identify by presenting an ID, thereby limits his freedom to move freely even for a short while and, therefore, such an act should be seen as detention by law.”

The court offers an unorthodox interpretation of the law that de-facto may have emptied of all meaning the demand to present papers. The Israeli Supreme Court still has not changed its forty-year old ruling according to which the law entitles an officer to demand to see an individual’s ID without having suspicion of an offence.¹⁷¹

Although not explicitly portraying the relationship between racial profiling and police brutality, the court manages to address both these phenomena. While condemning the use of the pepper spray by the volunteer (which is illegal under Israeli law), the court determined that the defendant’s resistance to arrest cannot be seen as an attack as long as the defendant only used reasonable force to release himself from detention. This assertion of the court is made despite the fact that the defendant was beating a police volunteer, suggesting that it should be considered as part of his resistance to his own arrest. While rejecting the police claims, the court accepted the defendant’s claim of abuse of process, an argument only rarely accepted in Israeli criminal law.

Indeed, the decision on the part of the Hadera court to grant Kassahun a full acquittal is extraordinary. At the basis of the court’s acknowledgment of abuse of process, there seems to be an understanding of the context in which the police identification, detention and arrest were conducted. Although the court does not name any of these procedures as ‘profiling’ nor directly assess the defendant’s claim to racial discrimination, it does refer to the use of the ethnic origin of the youth by the officers, stating:

This case concerns four officers, two of whom are minors who came upon the scene following noise. However immediately with their arrival, when they noticed a group of youths of “Ethiopian origin,” they forgot why they were there to begin with, abandoned treating the noise issue and instead started treating those present – ‘troublesome Ethiopians’, as Eyal (one of the police volunteers – IP) called them. As aforementioned, if the officers had treated the noise event for which they had come, the case would have never have been born.

This decision impinges upon the Salamsa case in that according to the partial evidentiary picture that we have (the Salamsa case was never tried), the Kassahun verdict delivered in June 2015, shortly after the Ethiopian-Israeli protest broke out and possibly had to do with the public atmosphere at the time. Yet one may ask does the court’s response testify to the rarity of the verdict or does it prove that in the right cases, the system does function effectively by preventing such cases from proceeding to the later stages of being prosecuted or even sentenced? Common wisdom on the part of both attorneys and defendants may suggest a different conclusion. After all, it did not stop the Attorney General’s office from prosecuting the case despite the use of pepper spray, the involvement of unauthorized volunteers in the arrest, or even the problematic stop itself.

4 Damas Pakedeh: The Spectacle of Violence in Court

The video documenting the beating of Damas Pakedeh by a police officer became one of the symbols of the 2015 Ethiopian-Israeli protest.\(^{172}\) Regrettably, there have been other cases of police violence against Ethiopians, but none have become so ingrained in Israeli collective memory as

\(^{172}\) The video is available online at: https://www.youtube.com/watch?v=-txCOMZive4.
this one. The public rage may have had to do with the fact that Pakedeh was a soldier, a status which was supposed to signify Pakedeh’s inclusion in the Israeli polity. Only that this spectacle of documented violence against Ethiopian-Israelis made them feel they may never be considered as included in Israeli society, no matter how compliant they are with its citizenship requirements. The legal battle over Pakedeh’s case so far has been a back and forth affair between his attorneys, public opinion and the Attorney General’s office: Two Attorneys General and three Supreme Court judges have so far declined to bring charges against the officer involved. Pakedeh brought a civil claim against the police which is still unresolved.

I. The Facts

On April 26, 2015, Pakedeh was making his way home from the army base where he served to the Jessy Cohen neighborhood in Holon where he lived, one of the city’s most neglected neighborhoods. In a home surveillance video, Pakedeh is seen walking his bike down a residential street that the police had blocked off because of a suspicious object. Pakedeh is pushed back once by a police officer and then a second time before the officer knees him, punches him in the face and puts his hands around his neck. Pakedeh appears to have thrown a punch at the officer after he was struck. The officer and a volunteer who joined him then throw Pakedeh to the ground in a vacant lot and continue to push him as he gets to his feet and refuses to stay down. At the end of the video, Pakedeh is seen picking up a rock as if to throw it at the officer who appears to have his hand on his gun. He drops the rock and the video cuts out. The day after the incident Pakedeh in media interviews shared that the police officer also threatened to “put a bullet in his head,” yet the claim was never investigated since charges against the officer were not brought. Pakedeh argued that the officer acted out of racial bias.
ii. The Procedure

The legal battle around the video echoed the public one held on TV. Both the police officer and Pakedeh filed mutual complaints of assault. Shortly afterward, the Ethiopian-Israeli protest began. In June 2015, the Attorney General, upon the recommendation of Machash and the Solicitor General announced his decision to close the case against the officer. The case against Pakedeh was also dismissed. The decision stated, however, that the findings were to be forwarded to the Police Disciplinary Department for consideration.

The decision not to prosecute the officer was greeted with public outrage. The Attorney General based his decision on evidence that Pakedeh was the first to use physical force. The AG also commented that due to the fact that the officer had been released from duty, there is less public interest in exhausting the criminal procedure.

As of November 2016, almost two years after the incident, a decision had still not been rendered on Pakedeh’s complaint. He then appealed to the Israeli Supreme Court, demanding that charges be brought against the officer. In January 2017, the newly appointed Attorney General, Avichai Mandelblit announced that he would reassess the decision made by his predecessor who had mistakenly assumed that Pakedeh was the one to use force first. The police officer was not penalized for his alleged use of force because he had been released from duty for reasons unrelated to this incident.173 A month later, the newspapers reported that an out-of-court settlement was offered to the officer – that is, an agreement to admit wrongdoing without charges being brought

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173 Infra note 175, at 6.
against him. In April 2017, the officer submitted an appeal to the Supreme Court, claiming that the decision to reassess his case was unauthorized and discriminatory.

iii. The Supreme Court Decision

The Supreme Court avoided making any substantial assertion on the use of excessive force and, needless to say, made its decision without an explicit discussion of racial bias or negligence to discuss such bias by the Attorney-General or Machash. Instead, both the appellants and the Court focused on procedural claims with the officer arguing that the AG decision to reassess the case was unauthorized, that the officer was the one discriminated against as other officers had used unreasonable force yet faced only disciplinary proceedings, not criminal ones. Moreover, the officer also held that attributing racist motives to him was both mistaken and irrelevant.

Pakedeh argued that the AG decision to offer the officer a settlement was unauthorized due to the public interest in seeing the case prosecuted. Against both the appeals, the state argued that the AG’s decisions were at the consideration of the prosecution and that the Court should not intervene.

The court decided to reject both appeals, asserting that due to flaws in the prosecution, the decision to reassess prosecution of the case was authorized, especially in light of the vast public interest. As for the decision to offer the officer a settlement, the Court declined to intervene yet commented:

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174 Sue Surkes, “Deal offered to cop accused of beating Ethiopian soldier”, The Times of Israel (20.3.2017).

175 SC 3070/17, 3123/17 Doe V. the AG and others (28.2.2018).

176 Id., at 6.

177 Id.
…Without making any determination with regard to the circumstances that caused the event and the use of force on behalf of the officer, the tape touched an ‘exposed nerve’ in Israeli society in a way that proves beyond doubt that the public has vast interest in the event and its consequences, and that perhaps a different decision on the part of the prosecution might have been in order.

Despite this statement, the Supreme Court decided not to intervene.178

iv. Discussion

Chapter 3 presents the question of framing racial disadvantage as stemming from institutional racism and discusses the value of injecting the term “institutional racism” with actual content. I have suggested that we ought to consider the different weights exerted by the two components of the term: institutionalism and racism. I argue that invoking racism as the basis of a discrimination claim in exchange for institutionalism and vice versa may prevent true accountability for discriminatory acts by both individuals and authorities. The case of Pakedeh may complicate this question in some interesting ways.

First, in Pakedeh as with the other cases presented so far, the claim of racial discrimination is implicit though marginal, perhaps because the advocates were aware of courts’ decisions similar to the one conveyed by the Supreme Court in Pakedeh. Although the argument of racial discrimination floats above the case, the court strictly avoids addressing the issue of racism. Critical Race Theory famously explains this silence as the court’s presumption of colour blindness

178 Id., at 17.
on the part of the police. It is actually the analysis of the Hadera court in Kassahun, which begins connecting the dots between racial profiling and police brutality and between both of these and institutional racism. Although the court does not name any of these phenomena nor suggest a theory of accountability in such cases, its intervention seems to be a step in the right direction.

However, presumption of colour blindness is not only the view of the courts in the Israeli justice system. In preparation for writing this chapter, I randomly asked criminal defense lawyers about the Pakedeh case which was documented and broadcasted on Israeli television in 2015. I inquired: Was racism the reason why Pakedeh was beaten? The surprising answer, even from lawyers who represent Ethiopians in police brutality cases was that “it was a violent officer.” In other words, Ethiopian-Israelis may find themselves facing disbelief, even on the part of their own defense lawyers, when making a claim of racial discrimination.

5 Tapara Bahata: Profiling in a Time Capsule

More than 20 years after being shot and killed by the police, Tapara Bahata represents an open wound for many Israelis of Ethiopian descent. When members of the community took to the streets in recent demonstrations, their signs carried the name of Bahata, together with Yosef Salamsa and others who died following encounters with the police.

Because the legal proceedings in Bahata's case took place between 1997-1998, very little information regarding the case is publicly available. My request to the court to make the court records public – including the findings following the investigation into the circumstances of his
death – is currently pending. The following is based on media reports, together with conversations with the attorney who represented the family of the deceased.\textsuperscript{179}

\begin{itemize}
  \item[i.] The Facts
\end{itemize}

Bahtah, 23 years old, worked as a security guard for a living. On July 7, 1997, he was returning by cab, to his home in Beer Sheva after a meeting in Ofakim, a small development town in the south of Israel. Bahtah, son of a family of 10, had attended the meeting to discuss his public housing options with a government official. During the cab journey, Bahtah, according to the driver, appeared to be stressed. The driver apparently overheard Bahtah using the phrase “wiping out.” That, and the gun Bahtah had in his possession, worried the driver; he stopped his car at the entrance to city of Beer Sheva, where he saw a team from the Civil Guard. One of the police volunteers asked Bahtah to step out of the car; Bahtah panicked, and ran by foot to his friend’s house. A pursuit ensued. The police would later claim that Bahtah took over the apartment, barricaded himself inside, and shot a bullet in the air. Bahtah’s friend provided a different version of events, implying that this was not the situation at all; on Bahtah’s arrival to the apartment, the friend reported, he simply went to buy cigarettes outside, returning later to discover a drama unfolding in his apartment.

In the meantime, senior police officers gathered around the building. Bahtah’s family and friends, who asked to speak with him, claimed that they were denied permission to do so. Learning about the unfolding situation, the district chief of police ordered the officers outside not to enter

\textsuperscript{179} Shimon Ifergan, “Why didn’t they shoot his leg? My son’s body was teared as if he was a terrorist,” Mako Magazine (20.5.2015); “Police officers that shot and Killed Tapara Bahata will not be charged,” Haaretz, 22.8.2011; Phone interview with former attorney Guy Byron, 23.4.18, 24.7.18; phone interview with reporter Shimon Ifergan, 24.7.2018.
the apartment unless Bahata exited. He asked the officers to hold action until he was able to make his way to Beer Sheva from the center of Israel. But when he arrived at the scene, he found the apartment door open and Bahata dead, his body shot 19 times.

The tragedy of Bahata’s family did not end here. Six years after Bahata’s death, his younger brother committed suicide following an encounter with the police. Israel, the brother, was caught up in an argument with a technician, who then called the police. One of the officers who arrived at the scene of the argument claimed that Israel resisted the arrest and attacked him. Israel denied this, but was nevertheless arrested subsequently. Charges were brought against him; after receiving a summons to appear before the court, he hanged himself in the family’s backyard.

ii. The Proceedings
Machash’s investigation of the Tapara incident was criticized by the press. Claims were made that Machash investigators only arrived at the scene hours after the shooting; that the “investigation” amounted to a request from each of the eight officers present in the apartment to write their own version of the events; that none of these officers were ever investigated again; and that finally, a re-enactment of the event by the officers was only conducted three weeks afterwards.

At the request of the family, an inquest was convened to investigate the circumstances of death, under a special order governing cases of unnatural death and death in custody. The judge accepted the officers’ written testimonies, in which they claimed that they had heard Bahata cocking his gun, and therefore had a right to self defense.

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180 According to Investigation of Death Circumstances Law-1958 (Isr.).
III. Discussion

Despite the very partial evidentiary picture at hand, a few comments can be made with regards to the procedure followed in the Bahata matter. First, the Machash investigation of the case took place a few months before a special committee was established by the Ministry of Justice to reform Machash, at the time a relatively young investigation body established just five years earlier. Among others proposals, this committee recommended that Machash hire civilians and not officers as its investigators.\(^{181}\)

Second, in so far as one can accept the claims with regards to the investigation as correct, one question appears to be especially pressing: what need did the police officers have to enter the apartment, despite the police chief’s order instructing them otherwise, and given they had no knowledge of anyone in immediate danger or under threat?

Third, it would be difficult to ignore the impact that profiling had on the results of this case. If the taxi driver was afraid of Bahata, why didn’t he ask to stop the car or even tell him that his behaviour made him uncomfortable? It is difficult to find another explanation – other than ethnoracial profiling – for the fact that the police chased Bahata leaving the scene of a crime that, as in the cases of Salamsa and Pekadeah, never occurred.

This case also teaches us something about the role of played by mistrust in the construction of relationships between police officers and civilians from minority groups. Sometimes, people run from the police out of fear, informed by previous encounters with officers and not because they are dangerous. Until police officers understand this, cases such those of Bahata and Adama (see below), will continue to occur, even with all other differences between the cases taken into account.

\(^{181}\) See supra note 128.
A duty to deescalate, as will be discussed in the context of the Michael Brown case, would arguably have created a better balance between public safety and crime prevention interests in such cases.

Surely, although data to this extent is not available, it could be that the officers assumed, based on the taxi driver's account, that Bahata was on his way to “wipe out” someone, and that they even feared that someone was trapped in this apartment. However, it also seems that all evidence to the contrary had been dismissed, that is, any evidence that would have refuted their initial act of profiling.

In a sense, this case is a capsule of racial profiling cases as they occur today, with regards to racialized communities in both Israel and the U.S. The judgment call of a civilian, based on a biased profiling, develops into the profiling made by an officer; a minority member runs away, in fear of the police but instead arousing their suspicion and reaffirming the inescapable self-prophecy of his racialized identity; the excessive use of force ends the encounter, as the police fears for its own; and finally, such fear – and the accompanying violence -- is legitimized by the court.

6 Shmuel Adama and Dangerous Escapes

The following is based on interview with Shmuel Adama and his attorney, media publications, and a civil lawsuit filed against the police.182

i. The facts

182 Dana Yarkatsi, Ethiopian Israeli beaten and Electrocuted: ‘The police works like the mafia,” WallaNews (1.5.2015); Phone interview with Shmuel Adama, 29.7.2018; Statement of Claim, Adama v. Israel Police (submitted to Tel Aviv trial Court, 2014); Avi Itzkovitch, “Sues the Police: They Electrocuted me”, Mynet Rishon Letzion (Local Newspaper), 9.4.2014.
In January 2012, Shmuel Adama, then 22, was returning from a night out in his hometown, Rishon Letzion. When the car he was in ran a red light, a police vehicle started to chase their vehicle. The driver stopped at some point and fled from the car, as did Adama. A police officer managed to catch Adama and then electrocuted him with a taser, once pointing to his back and a second time as he fell to his knees. As he lay on the ground, Adama’s hands and legs were handcuffed.

According to Adama, one of the police officers then kicked his head. He was unconscious for approximately an hour and a half before waking up in the police station. In a prison cell, bruised and bleeding, Adama was asked to raise his hand. When he said that he could not, the taser was pointed at him again, as another officer forced him into lifting his hands. A "click" sound was heard. As would be learnt later, Adama had broken his clavicle.

Adama claims that his request to be treated in the hospital was ignored. Instead, he was taken to the interrogation room. After his interrogation at the Rishon Letzion police, Adama, wounded and bleeding, was released without medical treatment and was not taken to his home. He collapsed in the middle of the street, where he was found by a passer-by who drove him home. Following the event, Adama needed two operations, and now has a permanent disability.

II. The Proceedings

Following the event, Adama attended the police station, where he was asked to fill out a complaint form. Adama claims that upon completing the form he was encouraged not to submit it. “They told me, "You know what you are doing?" [They] tried to say that I should not do it and threatened me.” Adama’s claims cannot be confirmed, as Machash closed the case. The police refused to

183 Phone interview, supra note 81.
address any of the claims publicly, instead providing the following statement to the press: “This is recycling claims from three years ago. The case was closed by Machash.”

In 2014, Adama submitted a lawsuit against the police for half a million shekels in compensation. Proceedings began but were soon stopped, as the sides reached a settlement. Adama, with claims of severe physical abuse leading to his permanent disability, received compensation of 50,000 NIS, 1% of his original demand for compensation.

ii. Discussion

8,200 Israelis of Ethiopian descent live in Adama’s hometown of Rishon Letzion, where this story took place. In the recent years, they have reported segregation enforced against them in their city, and being stopped and abused by police on numerous occasions. Most recently, city inspectors were documented attacking an Ethiopian Israeli sitting on a bench with his dog. In the video – which was circulated extensively on social media – the inspector is seen sitting (literally) on the civilian and pressing him to the ground. The cause for the stop: the inspectors believed that the civilian had stolen the dog, which subsequently was confirmed to belong to him.

Most telling is the fact that the number of cases brought against Ethiopian Israelis for assaults on officers amounted in the years 2012-2015 to an average of 18.5% of the cases, in a city...
where only 3.3% of the residents are Ethiopian Israelis. Adama described to a reporter the pattern of ethno-racially based harassment by police in Rishon Letzion.

“This is about skin colour. It is not the first time this happens. I live in an area where not many Ethiopians live, so even if I go downstairs to my car, and detectives or blue [uniformed] police pass by, they think I am trying to break into my car. They ask me what I am doing there. I tell them I live there, so they ask for I.D. If I cross a main junction, suddenly detectives will stop me and search me in front of everyone for drugs. Because I am black, I have drugs? I never go near these things.”

The absence of a thorough investigation of this matter by Machash does not allow for a full evaluation of Adama’s claims. However, it is nothing but astonishing that a case that ended with an award settlement in civil court – and therefore must have some kind of evidentiary basis – was not pursued by Machash, neither criminally or procedurally. Moreover, an evidentiary basis for investigation could have been assumed, even on the basis of the very physical testimony in this case. To the extent that Adama’s claims can be confirmed, they bring up grave questions regarding the excessive use of force, including the use of a taser gun. The numerous reports claiming to police violence in Rishon Letzion should have alerted Machash and the Ministry of Justice to a phenomenon that merits a special inquiry beyond this case.

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187 CBS, “Population of Ethiopian Descent in Israel – Data for the Sigd Holiday” (Central Bureau of Statistics, 2016). Police data on assaults on police officers according to region (on file with author) The number of charges was provided by Israel Police; this data was then crossed with information on the number of Ethiopian Israeli residents by the Ethiopian Jews association.

188 Yarkatsi, supra note 181.
7 Israelis of Ethiopian Descent and the Criminal Justice System

Israeli authorities, the police included, do not publish an ethnicity-based breakdown of detentions, incarcerations or prosecution rates. The rationale, so it is often argued, is that the authorities “treat all citizens alike.” But this approach, which could be described as another manifestation of sweeping colourblindness, has so far prevented an accurate representation of racial disadvantage in the Israeli justice system. One recent, temporary digression from this policy was the work of an inter-ministerial team established by the Ministry of Justice (MOJ) to assess racism against Israelis of Ethiopian origin. The team has re-examined legal cases brought against Israelis of Ethiopian descent, and has suggested reform outlines. This work culminated with a detailed report published in July 2016. However, data with regards to incarceration and detention rates of Israelis of Ethiopian descent has not been made available since.

Here is what we do know: 3.5% of the criminal charges brought in 2015 were against Israelis of Ethiopian descent – twice their size in the population. For Israeli Ethiopian youth, the statistics are even more skewed: 8.5% of indictments – four times their size in the general population. Data pertaining to detentions that did not end with charges is not available and is likely to be higher.

The incarceration rates of Ethiopian youth are disproportionally high as well. 18.5 percent of the inmates at the “Ofek” juvenile prison facility, as of June 2016, were Ethiopian – ten times

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189 See Israel Police, Annual Report 2016 (Hebrew), <www.police.gov.il>. Interestingly enough, while the police refused to provide data with regards to the ethnic distribution of arrests, it does so explicitly for what it calls “foreigners”, meaning non-residents (page 36), and according to religion, i.e., Jewish and non-Jewish (page 54).

190 See discussion on colourblindness in chapter 3.

191 See Eradicating Racism against Ethiopians – Summary Report, supra note 87.


193 See Or Kashti, “20% of the minor defendants in juvenile court are of Ethiopian descent”, Haaretz (15.1.2015).
their size in the total population.¹⁹⁴ That the incarceration of youth of Ethiopian descent is disproportionately high is also clear from a recent inquiry conducted by Israel's Public Defender Office, which revealed that 88% of Ethiopian Israeli youth defendants serve actual prison time – twice the rate of Palestinian-Arabs, and three times more than youth of the general population.¹⁹⁵

Young Israelis of Ethiopian descent are also disproportionately incarcerated during their army service, mandatory in Israel for men and women alike. According to IDF, as of 2013, 30% of Israelis of Ethiopian descent had been imprisoned at least once during their service; 38% of men had been in army prison at least once, and nearly every fourth soldier of Ethiopian descent had been imprisoned more than once during his or her army service.¹⁹⁶

The Public Defense office has also found that the probation services were less likely to recommend the release of Ethiopian Israeli youth from prison, that is, relatively to the general population and to any other minority group.¹⁹⁷ In fact, the findings below show that three (19%) of the Ethiopian-Israeli defendants in the examined cases had received positive recommendations from the probation services (i.e., in support of their release), while two were sentenced to prison despite receiving positive recommendations. Conversely, 55% of the Palestinian-Arab youth assessed received positive recommendations from the probation services, and 74% of the youth

¹⁹⁴ See Eradicating Racism against Ethiopians – Summary Report (Ministry of Justice, July 2016); See also U.S State Department Annual Human Rights Report (2016), at 26 (addressing racial disparities with regards the community).
¹⁹⁵ Data by attorney Rachel Danieli, state supervisor of youth representation in the Israel Public Defense Office (email, 15.1.17).
¹⁹⁶ Gili Cohen, “IDF: Soldiers of Ethiopian Descent have difficulties integrating and often drop out,” Haaretz (30.10.2013).
¹⁹⁷ Danieli, supra note 193. To complete this picture, as of 2013, the highest number of youth that was referred to the probation services was of Ethiopian descent - almost three times the rate of non-Ethiopian youth. See Ministry of Social Affairs and Social Service, Social Services Survey 2014 (October 2015), 176-177. 55 of every 1,000 youth of Ethiopian descent were referred to the probation services - 2.7 more than the rest of the population.
population that were neither Ethiopian nor Palestinian received positive recommendations. These findings were controlled for variables such as age, institutions, level of risk, and family status.\textsuperscript{198}

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Recommendations of the Probation Services for minority youth.  
*Source: State Public Defence Office, 2015*

While governmental data generally provides little experiential knowledge of the actual barriers faced by minorities in the criminal justice system, conversations with defense attorneys who have represented Ethiopian Israelis shed light on the role of ethnicity in the criminal justice system. As I have written elsewhere, these defense attorneys describe, for example, the various challenges faced by their clients of Ethiopian descent in the probation services – the body responsible for assessing the potential risk posed by a defendant or detainee, and one’s future prospects in the event of release.\textsuperscript{199} These challenges include the systematic overestimation of presumed dangerousness; language barriers, including the lack of adequate translation to Amharic.

\textsuperscript{198} Id., Ministry of Welfare. See also Dana Yarkatsi, “Data Reveals: Nearly 90% of the minor defendants of Ethiopian descent serve prison sentences (WallaNews, 20.9.16).

\textsuperscript{199} Inbar Peled, “Israelis of Ethiopian Descent and The Probation Services: Identifying and Overcoming Barriers” (unpublished, the Multiculturalism and Diversity Clinic, Hebrew University 2017).
for adult defendants; the absence of drug and alcohol recovery centers for Amharic speakers; and
the lack of alternatives to house arrest, due to the community’s structure (e.g., the fact that the
community is concentrated in one area makes it difficult to place a defendant in a distanced house
arrest, etc.). A defense attorney describes:\textsuperscript{200}

> Judges and probation officers are influenced by the environment and the violent
cases they hear about. The law requires the presence of a reasonable suspicion in
order to arrest, but Ethiopians will be arrested even without suspicion. I had a case,
for example, where my client was arrested based on a knife found in his house
kitchen. The judge released him under a restraining order… there is something very
stereotypical about it.

Macash, the body in charge of investigating complaints against the police,\textsuperscript{201} does not
report the ethnic distribution of complaints as well, as is clear from its response to the Knesset’s
request to receive such data:\textsuperscript{202}

> “… Machash as an enforcement body is blind to the colour, nationality or gender
of the complainant, witness or officer. Machash sees inherent difficulty in
addressing a person by his origin, and the question whether it is appropriate and
right to structure such tagging into an enforcement system raises questions legally,
ethically and otherwise. Therefore, Machash does not make mention of the [ethnic]
origin of the complainant (or the suspect officer) in the complaint, and the system
does not have a technical way of doing so.”

\textsuperscript{200} Id., at 13.
\textsuperscript{201} Macash investigates complaints which carry a minimum one-year prison sentence. Other complaints are
automatically referred to a police disciplinary department.
\textsuperscript{202} See Knesset Research Center, “Police Violence Towards Different Groups in the Population” (submitted to MK
Nonetheless, an independent inquiry of the Ministry of Justice revealed that between 2012-2015, 2.4% of the complaints to Machash (271) were made by Israelis of Ethiopian descent. In 57% of the cases, the complaint was brought directly by the complainant, while in the other cases it originated from another source. The MOJ reports that 22% of these cases (59) ended with charges against officers, or with a recommendation to take disciplinary action against these officers. However, the percentage of cases referred to disciplinary procedures is high; such procedures often end up with nothing more than a warning (see discussion in Chapter 6). Following its findings, the MOJ published recommendations concerning the different enforcement bodies. Among other things, it recommended the establishment of a governmental unit to coordinate the struggle against racism, which has been established in the beginning of 2018.

8 Carbado’s Model and The Israeli Cases

I. Creating Vulnerability

I now draw on Carbado’s model to discuss some of the causes that make the Ethiopian-Israeli population more susceptible to cases of racial profiling and police brutality. As suggested in Chapter 3, disadvantaged neighborhoods are often sites that mark the borders of racial profiling

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204 Ibid.
205 Id.
206 This unit has completed it first year, and recently reported that police officers will be equipped with body cameras during 2018; that community courts are gradually established in areas with a high concentration of Israelis of Ethiopian descent; and legal reform, offering public-funded representation for suspects who claim to have been violently attacked by police officers, is on its way. See The Anti-Racism Governmental Unit, Annual Report – 2018, at 15-16, 38.
and police brutality. From the Jessy Cohen neighbourhood in Holon in the case of Pakedeh to the backyards of Pardes Hanna in Kassahun to the housing projects in Binyamina in Salamsa, it is hard to imagine any of these cases occurring in a well-off quarter in Tel Aviv.

While ascertaining the connection between the public sphere and the frequency of profiling and police brutality may be complex, data on charges of assault upon police officers is revealing as these statistics signal the frequency of police-citizen encounters, if not the frequency of police assaults upon citizens. Consider, for example, the data with regard to Pardes Hanna where the Kassahun case took place. In 2015, there were 208 prosecuted cases of assault upon police officers. Thirty-four cases or 16.3% involved Ethiopian-Israelis. Yet the Ethiopian community accounts for only 3.9% of the population.207 Or, consider Holon where the Pakedeh case occurred and where 1,343 cases of assault upon police officers were reported. Forty-six or 3.4% of the cases were brought against Ethiopians. While that is a relatively small figure, the Ethiopian population of Holon constitutes only 0.9% of the total city population. Charges of assault upon police officers by Ethiopian-Israelis in Holon are four times greater than their population size. The numbers are especially striking in cities where the percentage of the Ethiopian population is relatively high: in Gedera, 138 cases of assault upon police officers were brought in 2015, of which 56 involved Ethiopian-Israelis. This constitutes 40.6% of the assault cases in a city where Ethiopian-Israelis comprise just 6.2% of the population. That is, Ethiopian-Israelis are charged with assault 6.5 times more than frequently their percentage in the population.

Carbado suggests that the policy of ‘Broken windows policing’ makes African-Americans vulnerable to ongoing police surveillance and contact. According to the theory, the practice is

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207 Police data on assaults on police officers according to region, supra note 185.
expressly predicated on the view that police officers should enforce minor criminal infractions in minority neighborhoods and surveil these communities for signs of disorder.\textsuperscript{208} In \textit{Salamsa}, this is the alleged burglary of the \textit{Naamat} day care facility, in \textit{Pakedeh}, the suspect was hardly breaking any law, although in Israel, regulations with regard to public safety and prevention of terror are almost sacred. So sacred, that some talkbacks of citizens who watched the documented case responded by saying that the officer was beating Pakedeh to “defend him from the suspicious object.” Kassahun’s only crime was that he was sitting in the public sphere where music and alcohol were being consumed. All of these suspects ended up being electrocuted, shackled, arrested, or beaten.

\section*{II. Mass Criminalization and Revenue Generation}

Critical theorists have suggested that criminalizing such behaviours leads to mass criminalization of vulnerable communities.\textsuperscript{209} It is actually the lack of seriousness of such acts that makes them susceptible for criminalization. The burden of proof is so low that wide berth is left to the discretion of the individual police officer.\textsuperscript{210}

Consider the discussion about the consumption of alcohol in public in \textit{Kassahun} where one of the volunteer officers claimed that Kassahun had a bottle of vodka beside him. In Israel, the Alcohol Law opens up room for profiling vulnerable communities. After 9 PM, an officer is allowed to ban (and spill) alcohol if the officer assumes that such consumption may cause a

\begin{footnotesize}
\begin{enumerate}
\item Carrado, “Blue-on-Black Violence,” supra note 124, at 7.
\item Carrado at 8. See also Sara Sun Beale, “The Many Faces of Overcriminalization: From Morals and Mattress, Tags to Overfederalization,” AM. U. L. REV, 54 (2005), 747, 750–52. Carrado defines mass criminalization as the criminalization of relatively non-serious behavior or activities and the multiple ways in which criminal justice actors, norms, and strategies shape welfare state processes and policies.
\item Id., at 10. It is precisely because such crimes are non-serious or vague, goes the argument, that police officers have little difficulty in establishing the requisite probable cause that justifies an arrest for committing them.
\end{enumerate}
\end{footnotesize}
disturbance to public order. Is the consumption of wine by well-off couples at a picnic by the sea disruptive of public order? Does the consumption of beer by young Ethiopian-Israelis sitting on the bench disrupt the public order? Marginalized youth are not able to afford drinking in a pub, nor do their neighborhoods have pubs to go to (even assuming that participants are above the 18-year old drinking age in Israel). In Kassahun, the concern that drinking laws raise is not just the vast discretion they provide to police officers, but also that such discretion was in the hands of volunteers who were themselves minors. Regarding his own case, Kassahun told a news reporter that Ethiopian-Israelis in his neighborhood are subject to predatory policing as part of revenue generation:

“In the evenings we sit in the neighbourhood, smoke, drink, and have some laughs. We don’t bother no one. The cops would come and try to search, give us fines for garbage, as if we are throwing dirt. We go to the grocery store, immediately an officer comes in and asks for ID. I just see a police car and I start running, even if I did not do anything – I have no energy. I feel that the police, not the criminals, threaten my security more than anything. Before the protest it was even worse, the border police or officers would always stop us. There are no criminals here, our biggest trouble is the cops.”

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211 See Israel Public Intoxication Law (2010). Before 9 PM, an officer is authorized to spill the contents of an alcoholic bottle in case it could be reasonably assumed that “drinking the intoxicating drink may cause a disturbance to public order or harm the public safety or its security.” Although consuming alcohol in public is allowed after 9PM, the law authorizes a police officer to ban the consumption of alcohol in case of a concern for a disturbance to public order.

212 Yoel Hertzberg, “We Saw ‘Troublesome Ethiopians’, said the volunteer cop”, Hottest Place in Hell website (14.7.2015). See the discussion on revenue generation in the American context in Chapter 6.
Kassahun’s statement may remind the reader of the revenue generation practiced by the Ferguson, MO Police Department. In the aftermath of Michael Brown’s death, the US Department of Justice found that the Ferguson police were pursuing such practices against African-Americans.\(^{213}\) Equivalent data on similar practices by Israeli police is not available. However, anecdotal evidence indicating this requires thorough investigation. It is also no coincidence that the complainants are found on a bench in a public park or in the backyard of a synagogue. They are in a public space while middle-class people can pursue the same recreational activities in their protected homes.

The cases also reveal something about how the mechanism of criminalization works. The citizens involved do not have criminal record, but are treated as “criminals” and very quickly become part of the statistics on detainees and arrestees of Ethiopian descent. In Salamsa’s case, it was reported after his death that the police came to his home a few weeks prior to the incident and searched for drugs – none were found. Living on the wrong side of the neighborhood means that one may be easily “produced” as a law-breaking citizen.

It is extremely hard to point to the role that stereotypes play in constructing the encounter between the police and Ethiopian-Israeli citizens. Yet, the evidence does show signs of racial bias: consider the neighbour’s call reporting Salamsa that quickly translates into a report on an armed Ethiopian burglar, the non-existent bottle of vodka in the Kassahun case (because Ethiopians, so goes the stereotype, are likely to get drunk) or the description of “troublesome Ethiopian” for youth having fun, or the assumption that Pakedeh was first to use physical force even though the video plainly shows a different reality.

\(^{213}\) United States Department of Justice Civil Rights Division, “Investigation of the Ferguson Police Department” (March 4, 2015).
9 Conclusion

Against this social context, it is easy to understand how search and seizure doctrines in Israel limit the ability of citizens to defend themselves against unreasonable searches and seizures. This is accomplished in at least the following three ways: First, stopping by pretext is possible under identification laws that are only rarely interpreted to require an actual suspicion as suggested by the court in Kassahun. Second, the intersection of search and seizure laws with taser gun usage creates an almost automatic connection between stopping and shooting members of vulnerable communities because taser gun usage is interpreted as being allowed as part of an officer’s reasonable use of force. Third, the intersection between search and seizure practices and the drinking law provides another way to expand the authorities’ use of force as well as giving them the opportunity to profile minorities which further increase the chances of members of such communities being subjected to police brutality.

In other words, based on these cases alone: A police officer is allowed to stop a person without any suspicion, ask for that person’s identification, detain that person for raising suspicion in so far as that person resists the stop, then the officer may use a taser gun as part of an officer’s discretionary use of force and then defend himself by claiming that the use of force was both justified and a response to imminent danger, i.e., the detainee’s physical resistance, with the detainee potentially becoming a suspect of assault upon a police officer and having very little to say in their own defense.
Chapter 5
Search and Seizure: Between Israeli and American Law

From an outsider’s perspective, the stories of the clashes of Ethiopian Israelis with the Israeli police may seem like an isolated phenomenon. Each such recurrence of alleged profiling and police violence is evaluated separately and presented time after time as a singular instance of violence, set against the image of professional police work. In Pakedeh’s case, a police officer was attempting to push him back due to suspicious object, or even out of concern for his own safety. In Salamsa’s case, the Attorney General dismissed a testimony alleging that Salamsa had his hands raised in surrender, while implicitly preferring the officers’ explanation that Salamsa had violently attacked one of them. The latter, so goes the explanation, were only doing their duty, responding to a burglary complaint.

There are striking similarities, however, between the Israeli cases and the American ones, which were seemingly reaching a peak in both countries during 2014-2016. In both Israel and the US some of these incidents were documented in videos that gained worldwide attention. Consequently, it became significantly harder to deny claims of the kind made in the case of Tapara Bahata 20 years before. My aim in this chapter is to set the background for the Israeli legal script. By turning to the American analogy, I hope to move from the appearance of singularity into a broader understanding of the racialized experience in search and seizure cases. The distinctions between the Israeli and American legal systems will later help me crystalize the legal challenges, as well as the opportunities for reform.

What is law’s role in constructing racialization in Fourth Amendment jurisprudence? This chapter begins with a survey of seminal Fourth Amendment cases. My selection of cases alludes
to formative moments in the development of Fourth Amendment law with regards to racialized communities. I will then use this framework to discuss the American case of Michael Brown’s shooting. This will later enable me to go back to the Israeli case of Yosef Salamsa, and to suggest further insight into the case, based on this comparative view. Building on this analysis, I will ask how both these stories are related. Is the development seen during the years 2014-2016 related to the particularities of Israeli history, and to what extent, if at all, could we trace the Ethiopian Israeli story to the global movement of black resistance or to the globalization of some search and seizure practices?

1 Fourth Amendment Case Law

i. Terry and Fourth Amendment First Principles

The declared target of the Fourth Amendment is to guarantee protection from governmental searches and seizures that are deemed unreasonable under the law.\textsuperscript{214} Critical scholars have pointed out, however, that the law in this area actually serves the opposite outcome: namely, it enables the continued criminalization of racialized groups.\textsuperscript{215} The Supreme Court’s decision in \textit{Terry} (1968) is therefore considered by some critical scholars as the genesis of the stop-and-frisk policy in the US. Yet the decision seems to resonate beyond the American context.\textsuperscript{216} \textit{Terry} may just be the

\textsuperscript{214} \textit{U.S. Const. amend. IV}. The Fourth Amendment reads: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

\textsuperscript{215} See infra 221.

prototype of how some societies choose to construct the relationship between the police and minority populations.

I mentioned in chapter 4 that in the aftermath of Salamsa’s case, many wonder why a burglary complaint ended with a tasered young man. A similar question arises in the context of Michael brown’s shooting in the US: how did a police stop, triggered by either jaywalking or petty theft, end with a dead young man? Some of us find the answer to the above in the legal formula advanced by the Terry decision, which replaced the demand for a probable cause to arrest with a reasonable suspicion and allegedly opened the door for the stop and frisk policies. And indeed, the decision is certainly made of profiling scenario materials: as described by the court, two men are walking down a street, striking a cop as suspicious. The court mentions that the suspects were walking back and forth, whispering to each other, and seemingly looking for trouble, so to speak.217

As a result of this description, officer McFadden’s decision to approach Terry and his companions is considered “a legitimate function of investigating suspicious conduct.”218 The court does not mention, however, that both Terry and the co-defendant in this case are African-American, even though the court is aware of the concern that its decision may have implications for minority communities. In the words of the court:219

The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices

217 See Terry, Id., at 6.
218 Id., 22.
which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.

*Terry* is where the court famously preferred the police professionalism ethos over an in-depth consideration of the potential hazards to the liberty and dignity of minorities. Until *Terry*, the courts interpreted the language of the law as requiring a probable cause to arrest in order for a search and seizure to be considered reasonable. *Terry* changed this balance by establishing the ‘reasonable suspicion’ test, as the court stated:

…We cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is, in fact, carrying a weapon and to neutralize the threat of physical harm.

The court concluded that the fourth amendment was not violated where a stop was based on a police officer’s reasonable suspicion that a person had committed a crime (whether in the past, present or future) and that said person might be armed and dangerous. The reasonableness analysis emphasized so-called objective standards.\^220 However, this definition shared by both American and Israeli law proved to be both over-inclusive and inherently susceptible to biases, as was argued with regard to police conduct with both Brown and Salamsa. The question of how such

\^220 See Maclin, Race and the Fourth Amendment, infra note 221, at 338.
reasonable suspicion is formed was answered by the court with another ambiguous test, when the court decided that such suspicion would depend on the particular circumstances of the case.221

The logic informing Terry soon became the rule that governs Fourth Amendment jurisprudence. The voluminous writing about Terry emphasizes that the importance of the decision far transcends an approval of a stop-and-frisk policy, and that it in fact provided the basis for an ever-growing violation of human rights.222 The survey of the cases below shows how the protections initially provided by the Fourth Amendment were gradually weakened. The permission to stop based on a reasonable suspicion ultimately became the ‘permission to stop without cause’. Evaluating Brown’s case through such prism helps to focus on unasked questions, like why Brown was stopped, or how legal and desirable such stops are as a matter of social policy. In fact, the question of whether or not this was a justified police stop was never explicitly discussed in the Department of Justice Report that evaluated officer Wilson’s conduct (‘Wilson Report’).223

That the dilemma in search and seizure cases is also related to selective law enforcement practices was perhaps not entirely clear to begin with. Back in the late 1990s, scholar Akhil Amar presented the duality of the Terry decision, weighing what he then called ‘the good Terry’ against the ‘bad Terry’.224 Amar’s starting point for this discussion is that although Terry expanded the definition of ‘search’, it also made more searches possible. Amar argued that an interpretation whereby every search and seizure required a warrant and a probable cause was not in line with the

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221 Terry, at 21-22.
223 “Investigation Into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson”, United States Department of Justice (March 4, 2015) ['Wilson Report '].
constitutional text, history, and structure. Instead, he argued, all searches and seizures must be reasonable. Amar’s reasoning was that warrant-based searches, that ultimately put this power at the hands of judges, were actually more dangerous than reasonableness, due to their immunity to after-the-fact scrutiny.\textsuperscript{225}

Following Amar’s line of thought, it is easy to see why the emergence of reasonableness as Fourth Amendment’s touchstone initially seemed like a good way to safeguard human rights within Fourth Amendment law. However, the thought that reasonableness would somehow translate into safeguard from human rights violation has been proven unrealistic. Three decades of Fourth Amendment critical scholarship revealed that the reasonableness requirement simply leaves too much room for biases to slip in, on the individual as well as institutional levels.\textsuperscript{226} Similarly, Carbado argues that not only did Terry authorize a stop-and-frisk policy, it was also problematic in that the court did not expressly prohibit police officers from using reasonable suspicion to stop-and-question people when officers had no concerns for their safety or anyone else’s.\textsuperscript{227}

ii. From Garner to Scott v. Harris: Between Reasonableness and Dangerousness

Terry did much more than open the door for stop and frisk. Once it was determined that a reasonable suspicion was enough for an officer to stop a civilian, the weight shifted to discussions around reasonableness. As will be exemplified, reasonableness as well became equated with an

\textsuperscript{225} Id.
\textsuperscript{226} Amar at el. expresses this notion best when he says that “Reasonableness also implicates race - a complete Fourth Amendment analysis, the good Terry insisted, must be sensitive to the possibility of racial oppression and harassment”.
open-ended principle – dangerousness. *Tennessee v. Garner* (1985) was yet another case triggered by a burglary complaint. 228 15-year-old African-American Garner was shot dead by a Memphis police officer who chased him as he was fleeing the burglary scene. Garner was unarmed. 229 It later emerged that he had stolen 10 dollars and a purse. Applying *Terry*, The Court of Appeals held that the killing of a fleeing suspect is a "seizure" for the purposes of the Fourth Amendment. The court concluded that a pursuit of a fleeing suspect did not allow the use of deadly force – and that the officer had no reason to believe that Garner was armed or dangerous. But the court also defined an exception to this rule, asserting that deadly force would be permitted where "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."

One of the considerations that informed the court’s decision in *Garner* was the seriousness of the felony. However, as was to emerge later in Michael Brown’s case, the decision in *Garner* enabled the expansion of *Terry* even to the fleeing suspect scenario. An officer may stop a suspect based on a reasonable suspicion, and “seize” this suspect while fleeing in so far the that officer senses a danger to his life. And seizing can mean killing.

The problem arises since this ‘dangerousness test’ is arguably susceptible to racial bias. Looking at the Garner case may help us understand what goes wrong when the mere pursuit of a fleeing suspect is confounded with assuming one’s dangerousness. Consider the case of Tapara Bahata, who is chased for an offense that even the police officers are not sure about. Evaluating Bahata’s dangerousness is largely based on the concerns of a random taxi driver. Going by Garner’s precedent, Bahata’s pursuit should never have happened. And, the question of what

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229 The police in *Garner* acted according to a Tennessee state statute and official Memphis Police Department policy authorizing deadly force against a fleeing suspect.
qualifies as felony or misdemeanor is not without its historical background. There was time when all felony crimes were punishable by death.\textsuperscript{230} It seems that in thinking of ways to reform criminal justice systems, we must consider what circumstances justify inflicting harm.

While the above dangerousness test continued to play a role in the court’s considerations, it became clear that the other side of the Garner decision – the severity of the felony – had been abandoned. The court in \textit{Scott v. Harris} (2007) determined that a high-speeding motorist fleeing from the police might be considered dangerous.\textsuperscript{231} It also concluded that the result of running the motorist off the road, culminating with him becoming paralyzed – would not be considered unreasonable seizure. Scholars criticized this decision, arguing that estimating one’s dangerousness was in the eyes of the beholder, i.e., that certain subgroups perceived this incident as less dangerous – and consequently saw the use of force differently.\textsuperscript{232}

\textbf{iii. Stopping based on Appearance}

Thus far, we have seen two significant doctrinal developments that got us where we are now: one is that the ‘probable cause’ requirement was substituted with the reasonableness principle, which currently overlooks the Fourth Amendment law. Next, reasonableness was equated with dangerousness in a way that opened the door for racial biases, and without securing defense

\textsuperscript{230} Common law permitted the use of force, including deadly force, against a fleeing suspect, until the Garner decision. See J. Simon, “Tennessee v. Garner - The Fleeing Felon Rule”, \textit{St. Louis L. J.} 30 (4) 1259.


\textsuperscript{232} Justice John Paul Stevens, the lone dissenter, argued that the videotape evidence was not decisive as the majority claimed it to be. Referring to himself and his colleagues, he has mentioned that the case should be decided by a jury, instead of "being decided by a group of elderly appellate judges." An experiment done by law professors who showed the video to various groups confirmed Stevens’ intuition, finding that although the majority interpreted the fact as the court did, certain sub-groups did not. See Kahan, Dan M. and Hoffman, David A. and Braman, Donald, “Whose Eyes are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism“, 122 \textit{Harv. L. Rev.} (2009).
mechanisms to prevent the application of such biases, e.g., by fully considering the severity of the offense or by neutralizing biases with regards to dangerousness. A third doctrinal development occurred when it became possible to stop not only when a theft or robbery was in progress, or when a person was allegedly jeopardizing others on the road – but also when a person’s appearance attracted the attention of a police officer.

Police stops based on appearance were initially frowned upon by the court. In Brignoni-Ponce (1975) the Supreme Court held that stopping a vehicle solely on the basis of the driver’s appearance as one of Mexican descent was a violation of the Fourth Amendment. The court reached its decision despite the identity of the passengers in the vehicle, who had entered the country illegally. This soon changed: A year later, in the Martinez-Fuerte case, the Supreme Court ruled that setting up checkpoints on public highways leading to the Mexican border was not in violation of the Fourth Amendment. The court also ruled that the stops were constitutional even if largely based on apparent Mexican ancestry. Brignoni was decided in light of growing concern over undocumented immigration from Mexico.

Traffic stops based on racial appearance were legitimized under Fourth Amendment law even outside the context of immigration. In fact, the Supreme Court has ruled in Whren v. US that any traffic offense constituted a legitimate legal basis for police stops. The subjective intentions of the police, including police motives underpinned by racial stereotypes or bias, were simply declared irrelevant. Again, the clarity of evaluating the severity of the felony was forsaken. The

235 See Johnson, Kevin R., "How Racial Profiling in America Became the 'Law of the Land': United States v. Brignoni-Ponce and Whren v. United States and the Need for Rebellious Lawyering", 98 Geo. L. J. (2009), at 1009. It will later turn out that justice Brennan’s warning in his dissent, suggesting that the decision "empties the reasonableness requirement of the Amendment", was ahead of its time.
237 Maclin, supra note 125, at 337-338.
court reasoned its decision in that the constitutional basis to discuss discriminatory laws was the Equal Protection Clause and not the Fourth Amendment analysis. As per Critical Race theorists, *Whren* is where the court effectively created the “driving while black” (DWB) exception to the Fourth Amendment rule, which cleared the way for the profiling of black drivers. Given that most drivers routinely violate traffic laws, goes the argument, officers have a green light to engage in race based pretextual stops.

Currently, racialized communities in the US are vulnerable to police targeting in at least two significant ways: being stopped for a reasonable suspicion that could be based on one’s perceived dangerousness; or being stopped as a member of a minority group for any perceived traffic offense, even if finding such offense is the result of a police officer’s mistaken judgment. Scholars have pointed how the decision in *Whren* gave officers license to use race as an unofficial proxy for suspicion, that is, as long as the official articulated basis for the stop was a documentable colorblind violation. Adama’s case discussed in the previous Chapter teaches us that a similar process is enabled in Israeli law as well.

iv. Reasonableness, Dangerousness, Appearance: The Doctrinal Triad

The three doctrinal developments described above – emphasizing reasonableness, integrating dangerousness, and relying on appearance - all define the current boundaries of Fourth

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238 Id., 810.
240 Heien v. North Carolina, 574 U.S. (2014) [A police officer’s reasonable mistake of law can provide the individualized suspicion required by the Fourth Amendment to justify a traffic stop].
241 See Carbado, supra note 125.
Amendment jurisprudence. This chronicle of jurisprudence sets the stage for understanding the subtle ways by which racial profiling and police brutality are enabled. But the implications of these developments go beyond explaining what goes on in courts. These legal understandings also influence how police officers choose to conduct themselves, knowing that they will not face trial, due to the protections provided to them by law. An officer may effectively stop a person who seems suspicious; such suspicion may be based on one’s perceived dangerousness even if it is the product of racial bias; finally, an officer who identified a dangerous suspect may use deadly force – and kill – if the suspect attempts to flee. The shooting of Michael Brown is a case in point.

2 The Shooting of Michael Brown

On August 9, 2014, black teenager Michael Brown was shot dead by Officer Daren Wilson. The killing sparked a civil unrest as well as a national debate that reverberates even in Israeli discourse, with regards to the Ethiopian local community. For many, Brown’s story epitomizes all that went wrong in the American justice system with regards to the black community – another killing of an unarmed youth. For others, this was an unfortunate but inevitable death of a suspect. Some go as far as to put Brown’s confrontation with the officer down to a perpetrated theft, although the facts do not necessarily support such narrative.

From Terry to Brown, both these narratives – police professionalism and police profiling and brutality -- hover above the Fourth Amendment analysis. Such narratives play a significant role in forming the two reports authored in the aftermath of Brown’s death.

This chapter opened with the story of Terry, yet the decision provides only a partial picture of the legal challenges associated with the search and seizure of racialized minorities. The fact is
that many such cases, like Salamsa’s and Brown’s, never reach an indictment. Their significance also lies in what they signal about access to justice with regards to racialized minorities in the criminal justice system, as discussed in Chapter 2. Brown’s case never went to trial and what we know about it is screened and projected through governmental reports, all telling very different stories about what might have occurred. I describe the case through the prism of Fourth Amendment jurisprudence and in light of the reports, as well as journalistic accounts. I will suggest that in light of the three-pronged decision-making process of the Fourth Amendment, the result in the Brown case was almost detrimental. I will use these insights in chapter 6 in order to shed light on what might have happened in the Israeli case of Yosef Salamsa.

I. The Facts

Michael Brown was shot and killed on August 9, 2014, by police officer Darren Wilson, in Ferguson, Missouri, a suburb of St. Louis. Brown was stopped by Wilson together with his friend, 22-year-old Dorian Johnson, when the two were walking down Canfield road. Within a few minutes, the stop escalated into an altercation, at the end of which Brown was lying dead on the road. Johnson managed to escape. Cars that were passing by, and local neighbours, claimed to have seen the confrontation. In the era of constant documentation and surveillance, this story remained outside of camera’s lens. The two versions about what happened in the approximately two minutes that ended with Brown’s death are largely represented by the witness interviews of Wilson and Johnson, and the way in which the Wilson report saw them. 242

242 See Wilson Report, supra note 222. In addition to both the DOJ reports, the analysis here is based on documents released by the prosecution office to the public, including the grand jury transcripts on the matter of Brown, autopsy reports, and the prosecution office press releases together with journalistic accounts.
The following is not disputed: once their paths crossed, Brown and Wilson were involved in some sort of a physical struggle, with Wilson in his police vehicle. Johnson, Brown’s friend, claims that following a short exchange between Brown and Wilson, it was Wilson who strangled Brown and that as a result the two got into a “tug war”. Wilson claims it was Brown who tried to enter his car and punched him. There is also no dispute that Brown ran from the confrontation after two shots, and that Wilson chased him; next, Wilson shot Brown at least six times from a distance, one of which in his head, leading to his death; Johnson and some of the other witnesses claimed that Wilson kept shooting as unarmed Brown was running, until eventually Brown stopped and raised his hands. According to Johnson, Brown asked Wilson not to shoot him. Wilson kept shooting. Conversely, Wilson and some other witnesses claimed that wounded Brown stopped running at some point, turned around and started “charging” at Wilson, according to the latter - furiously. Brown’s body, and this is undisputed as well, lay in the hot summer sun for four hours, much of which uncovered, as the residents of Canfield looked on.

As far as known, legal accounts have so far chose not to review these testimonies so as to analyze the moments that preceded Brown’s death. Instead, such accounts have tended to describe the tension between the two reports authored by the Ministry of Justice (DOJ) as an example of the way in which the system is working as it is “supposed to” – meaning, biased but intentionally so. I would like to suggest that there is value in looking at the two narratives presented by Wilson and Johnson and at the ways in which Fourth Amendment jurisprudence has worked to support the narrative provided by Wilson.

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243 Johnson’s interview with the police transcript (August 13, 2014).
II. The Reasonableness of Profiling

Much of the legal debate surrounding the shooting of Michael Brown has centered on the altercation between Wilson and Brown and focused on questions such as who initiated the first violent act, who used profanity, why was the first shot fired, or whether Wilson actually shot Michael Brown while the latter had his back to him, running. But the DOJ report largely started its countdown of the relevant events a few critical minutes later than it should have done. In the aftermath of the decision not to indict Wilson, journalists and activists asked why Brown and Johnson had been stopped to begin with. As more details emerged of what happened behind the scenes of the indictment process, this question’s significance became ever clearer.

One of the narratives circulated in the days following the shooting was that on the day of his death, Brown had been involved in a strong-arm robbery from a supermarket store, occurring before his altercation with Wilson. In fact, on August 13, the police untypically, released a video allegedly documenting Brown stealing a packet of ‘cigarillos’ from the store. This was the same day when the police released Wilson’s name - who had been kept confidential despite four days long public protest - as the police officer who’d shot Brown. In the video, Brown, who was at the store together with Dorian Johnson, is seen pushing the store clerk with his hand, in what was later to underpin the claim that this was a robbery (as the use of force moves us from the realm of theft to robbery). Commentators have later argued that the police release timing was not incidental, designed to portray Brown as a dangerous criminal, likely to be involved in a violent attack on a police officer.

Wilson gave a few statements and interviews to both law enforcement bodies and news outlets. Part of the difficulty in assessing Wilson’s credibility is that he was not requested by the police to give any written statement prior to his first interview, 48 hours after the shooting, which gave him plenty of time to come up with a statement, subsequently submitted in the presence of his lawyer. Anyone who has represented in criminal cases would be sure to tell that this is a privileged position for anyone suspected of killing. In that first version, given to a fellow police officer, he actually said that he had not known about the stealing at the time of the encounter, according to said fellow officer. However, to the officer from St. Louis station who was investigating the case, and by the time of the interviews Wilson gave some two hours after the incident, he told of the stealing as part of the causes for the stop.\footnote{State of Missouri v. Darren Wilson -- Grand jury hearing, volume 5 (September 16, 2014), at 99.} When Wilson was questioned before the Grand Jury in September 2014, he already had an elaborate account of knowing about the stolen packet of cigarillos and the description of Dorian Johnson as wearing a black shirt, which eventually influenced his decision to stop the two. Wilson repeated version was eventually that he had recognized the two from the radio call and therefore stopped them and called it in the dispatch, thinking that backup would arrive shortly and all he needed was to stall the two “for 30 seconds”. Ferguson police station, one may note, is two miles from Canfield Drive (where the incident took place, so help was to be expected shortly).

Not only did Wilson claim to have known about the stealing when appearing before the grand jury, he also described it as a major factor in his decision to stop the two, saying:\footnote{Id., 209.}

“When I start looking at Brown, first thing I notice is in his right hand, his hand is full of Cigarillos. And that’s when it clicked for me because I now saw the
Cigarillos, I looked in my mirror, I did a doublecheck that Johnson was wearing a black shirt, there are the two from the stealing. And they kept walking, as I said.”

The DOJ report fully accepted Wilson’s version of events. This is despite the fact that the Ferguson police chief himself, who had initially said that Wilson had been responding to a call about the convenience store robbery, later revised his statement, suggesting instead that Wilson had approached Brown because the latter had been “walking down the middle of the street, blocking traffic.”

In 2017, long after the decision not to indict Wilson had been delivered, documentary filmmaker Jason Pollock revealed new evidence on the matter of Brown. It then turned out that the police had another piece of video from 11 hours before the alleged robbery. In the video, Brown is seen visiting that same store. He places an item on the counter, which is then ‘sniffed’ by two of the store clerks. A third clerk then places some store merchandise in a bag on the counter, which appears to contain cigarillos and soda. Brown walks away but after a brief discussion hands back the grocery bag. Pollock has argued that what happened at the store was simply that Michael brown exchanged marihuana for store merchandize – a well-known practice in this part of town. This was denied by the prosecutor’s office and the store’s attorney, who both refused to attribute any significance to that version of the events. If Pollock’s version of events is true, then not only was Brown stopped for jaywalking, he was also killed for a crime that never happened. At the very least, this video shows that Brown had previous acquaintance with the store that should have been

249 Trymaine Lee and Michele Richinick, “Police: Michael Brown stopped because he blocked traffic”, MSNBC (15.8.2014)
considered by the police. It would later turn out that contrary to prosecutor’s office claims, the question whether that was a robbery or not was crucial for evaluating police responsibility for the shooting under Fourth Amendment law. Such alleged conflict between Wilson’s versions, which was even confirmed in a statement of the prosecutor’s office, is typically the prosecutor’s duty to question. However, Wilson was never questioned on this matter during his grand jury hearing. If it were the case that the gap was sourced in Wilson’s lie, this would have been assumed to influence the estimation of Wilson’s credibility, but instead it was never addressed, not even in the DOJ’s report.

Whether Brown was stopped for jaywalking or because of the robbery call, no one – not even Dorian Johnson – was explicitly arguing that Brown was stopped, simply, for his colour. But as Wilson would later describe, Ferguson police officers tended to see this part of town as dangerous. In fact, Wilson himself describes feeling isolated and outnumbered despite his gun and car, while being out in the neighborhood. Even if we accept Wilson’s later version of recognizing Brown and Johnson as the suspects in a robbery, it is quite clear that he sees these young men – suspected with stealing a 40$-worth packet of cigarillos – as extremely dangerous. According to his testimony, he calls for backup immediately after encountering the two.251 His response seems disproportional, especially considering that at no point was there any information pointing out that they were armed.

To the extent that Brown and Johnson were profiled, their profiling carried heavy implications. In terms of the Fourth Amendment, there was nothing illegal in such a stop. Terry gives a police officer the power to stop without ‘probable cause’, but jaywalking provides a legal

251 See Wilson’s statement, supra note 245 at page 5: “And, then after that I put the vehicle in reverse, backed up about 10 feet to… attempted to open my door. Prior to backing up I did call on the radio. I said “Frank 21, out with two, send me another car”.
ground for racially biased stops. In fact, the DOJ report on the Ferguson Police Department (hereinafter: ‘Ferguson Report’) showed that 95% of those cited in the city forjaywalking were black.252

“Walking while black” is in some ways just part of the trend we have mentioned above, of using minor traffic offences to stop black people under Fourth Amendment law. Stopping Brown and Johnson over an alleged robbery is of course much easier to justify. But let us assume that Brown was not involved in a robbery - in this case, there is no defense mechanism to prevent an officer from stopping on the sheer basis of appearance. In a city of 20,000 residents, one may think that the police – who had the footage from the store – could have identified Brown and summoned him for his 40$ worth alleged robbery at a later point. Yet since reasonableness gained the upper hand over warrants, we are left with an outcome that is anything but reasonable.

In other words, even if that petty theft/robbery occurred, it should not have been punishable by the death penalty. If so, why does the Wilson’s narrative support such an idea? Why is the punishment for petty theft a death penalty and how was Fourth Amendment jurisprudence used to construct Wilson’s line of defense?

III. On Dangerousness, Racialization and the Crime of Being “Big”

Brown’s case may offer an example of how reasonableness and dangerousness have become interchangeable under Fourth Amendment law. Brown was portrayed by his friends and relatives on the one hand, and by Wilson on the other hand, as a well-built guy. His friends, Dorian Johnson

including, called him “Big Mike”. One of his uncles, when talking with journalists, described him as a “gentle giant”. Throughout his hearing, Wilson used several nicknames and descriptions to portray Michael Brown, from “big” to famous wrestler “Hulk Hogan”. These descriptions allowed Wilson to argue that despite Brown’s clear power inferiority, in light of him being unarmed and on foot, and notwithstanding the fact that Wilson was chasing him, Brown was somehow a walking threat to Wilson’s life. Being described as “big” becomes a justification for the officer’s perception of threat. At one point, Wilson’s description of the minutes leading up to him shooting Brown in the head feature a creature of majestic characteristics: “…just coming straight at me like he was going to run right through me”. In another instance, Wilson describes Brown as demon-like. These statements by Wilson made commentators observe that phobic fantasies of demonized monstrous black criminality were once again standing at the center of the national political imaginary.

While rumors about Brown started circulating following the police narrative of alleged robbery, much less criticism of Wilson’s image managed to make it into the transcripts of grand jury hearings. This is despite the fact that the only other place where Wilson has worked as a police officer before is the nearby town of Jennings, known to have had a police department so steeped in racial discrimination and conflicted with the black community that the city council finally decided to disband it. Everyone in the Jennings police department, including Wilson, was fired.

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253 Grand jury transcripts, at 212. Wilson is quoted saying: “…the only way I can describe it is I felt like a five-year-old holding onto Hulk Hogan”.
254 Id., 228
Of particular interest is the description revealed in the grand jury hearing, according to which a complaint against him was made before in a racial context.\textsuperscript{258}

The complaint’s account sounds disturbingly familiar. Starting with a story of profiling, it continues with claims of verbal violence towards an African American and ends with actual severe violence. Then another narrative wins: a complaint on behalf of officers that the suspect in stealing has run away. While it could certainly be that the investigation was closed for cause, it is disturbing to review the grand jury transcripts and discover that not once does the prosecution raise further clarification questions about this incident.

IV. Fleeing Felon and Missouri Use-of-Force Force Statute

I argued that the narrative that criminalized Brown later allowed law enforcement authorities to present his death as inventible outcome. There is much more to be said, however, with regard to the ways in which this was done. The Missouri \textit{Use-of-force Law} (1979) has infamously allowed officers to use force "to effect the arrest or prevent the escape from custody [of a person]."\textsuperscript{259} In other words, officers were allowed to shoot in order to kill a suspect without ever being threatened. A revised version of this law states that police force can be exercised in response to perceived threat. Under Missouri law, some commented even recently, the officer was the “judge, jury and

\begin{footnotesize}
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\item \textsuperscript{258} Grand jury transcripts, volume 5, at 183-184. The officer shared that "there was a complaint made against him and two other officers... that was ultimately found to be unfounded, to describe officer Wilson and two others’ attacks, an African-American male who was just walking down the street in the city and used racial slurs towards him, beat him up so badly that he had bleeding on his brain. What was found to have actually happened was this gentleman was breaking in and was inside officer Wilson’s car. The three officers who were duty at the time went outside and tried to detain him, he ran away. When they chased him, I don’t know which one of them tackled him on the ground, he hit his face on the way down... his injuries were consistent with what the officers described and that there was no bleeding of the brain.”
\item \textsuperscript{259} Missouri Use-of-force Law (1979), MO Rev Stat § 563.031 (2015).
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\end{footnotesize}
However, the prosecution in Brown’s case has presented the grand jury with the old version of the 1979 law, the very one overturned by the aforementioned American Supreme Court’s decision in Tensee v. Garner. Only very late into the hearing, just before Wilson’s testimony was heard, did the prosecution mention to the grand jury that it had made a mistake. The prosecution, however, seemingly made an effort to underplay the revision’s implications and did not at any point fully explain what would the meaning be of such change, even in response to one of the jurors’ questions.261

While the first part of Wilson’s claims with regard to the altercation is hard to refute based on objective evidence, the second part – where Brown runs away from Wilson – warranted the DOJ’s attention and a true discussion in trial court. In order to justify his shooting once Brown started running, Wilson would have needed to establish that he perceived a threat to either him or others, under the Garner Precedent. Claims with regard to misrepresentation of the state of law were so material that a grand jury member in the Brown case filed a 2015 lawsuit, seeking a court order to allow him to speak publicly about the Brown case. Among other things, this juror claimed that the prosecution had misrepresented the law before the grand jury.262 Some commentators suggested that this was a crucial misunderstanding: If Brown could have been considered a felon due to the alleged robbery, then shooting him as a fleeing felon, if we accept Wilson’s claim, could have been justified under Missouri old Use-of-Force law, even without having any threat posed by

260 Ken Midkiff, “The police should not be judge, jury and executioner”, Missourian (May 14, 2018).
261 See “The Last Word with Lawrence O'Donnell – "Rewrite" segment (Television)”. MSNBC (November 26, 2014) [arguing that the prosecution made it impossible to indict Wilson].
262 It was also argued that Prosecuting Attorney Robert McCulloch publicly misrepresented the panel’s viewpoint after it chose not to indict Officer Darren Wilson. See Patrick Robert, “Michael Brown case grand juror sues St. Louis County prosecutor, asking to speak out on case”, St. Louis Post-Dispatch (6 January, 2015).
Brown. Note that what happened at the store was defined as “stealing” in the police dispatch, and only became a robbery in the police statements to the press.

It is unclear whether the jury relied on the Garner ruling or on Missouri old law in making its decision (although the juror’s lawsuit certainly raises doubts pertaining to the accuracy of the laws presented to jurors). However, the DOJ’s report on Brown’s case seems to quote Garner as a basis to justify Wilson’s use of force. It is here that it becomes clear why a line of defense that insists on Wilson’s knowledge of the robbery is so significant. The report reads:

“All officer may use deadly force under certain circumstances even if the suspect is fleeing. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”

One may ask whether Brown’s pushing the store clerk could be considered an infliction of serious physical harm, but at this point the Fourth Amendment provides Wilson with another almost unbeatable tool. In general, police officers enjoy a broad leeway with regards to their use of force. As the DOJ’s report mentions, a central ruling, Graham v. Connor (1989), has urged giving the police “an allowance” to make split-second decisions. In the words of Justice Rehnquist, reasonableness “must be judged from the perspective of a reasonable officer on the scene, rather

263 Wilson report, 91, 97.
than with the 20/20 vision of hindsight.” However, it seems that the DOJ report has not given enough weight to the court’s instruction to consider the facts and circumstances of the case: Even if one is convinced by Wilson’s version according to which Brown was “charging” him and not surrendering, how was unarmed Brown posing a threat for an armed officer with his vehicle nearby? Who else might Brown have been posing a threat to in light of the nature of his alleged crime – i.e., stealing cigarillos?

V. Use of Force and Police Perceptions

In an interview with ABC News after the shooting, Wilson is asked whether there was anything he would have done differently. Wilson answers he would not. He says:

“I was doing my job. I followed my training. The training took over. And that’s it.”

In describing to the grand jury what such training might entail, Wilson also explained why it is that he did not opt to use any of the other, non-lethal means to detain Brown. In short, Wilson dismisses all of the other non-lethal means that he could have used. Assuming the factual

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265 The Court rejected the notion that the judiciary could use the Due Process Clause, instead of the Fourth Amendment, in analyzing an excessive force claim.


267 Grand jury transcript, vol 5, page 7. Wilson explains; “… I was just trying to keep him off me and get him back. Um, I tried to go for my mace. I couldn’t reach around my body to grab it and I know how mace affects me so if I used that in that close proximity I was gonna be disabled per se. and, I didn’t know if it was even gonna work on him if I would be able to get a clear shot or anything else. Um, then like I was thinking like picturing my belt going around it, I don’t carry a taser so that option was gone and even if I had one with a cartridge on there, it probably wouldn’t have hit him anywhere. Next, I go to my asp. I couldn’t get on it… it sits behind me I couldn’t reach it. And I was in a car I couldn’t expand it. I have a flash light I carry in my bag. My duty bag was on the passenger seat. I want willing to give up more of my vehicle and my body to him to lean over and grab it and turn away from him. Um, I thought I was already compromised enough. I drew my firearm. I pointed at him. “stop I’m going to shoot you is what I ordered him to get on the ground…”.
basis to his assertions is true, it remains extremely unclear why Wilson would not do the simplest thing: drive a few meters forward to gain advantage over the two pedestrians, call for backup, step outside the car – and then, if he still felt there is no other way to stop the allegedly serious criminals (who stole a packet of cigarettes) – use whatever non-lethal means he may have.

There is reason to believe that Wilson actually thought that he was indeed following his training. In his testimony before the grand jury, he went as far as claiming that he’d been picturing a use-of-force triangle during the shooting.\textsuperscript{268}

“… I remember actually, I picture a use of force triangle in my head when this first happened and I was going through the progression of what I could do as far as the use of force continuum is concerned”.

Reviewing St. Louis’ standards of use of force actually reveals some interesting details with regard to Wilson’s conduct. Indeed, as Wilson suggests, the St. Louis County has a Use-of-Force continuum. Although St Louis’ continuum is not publicly available, a standard Use-of-Force model allows the use of firearm only when an officer is faced with a reasonable belief of an immediate threat of death or serious bodily injury. This is different from a less lethal force such as electronic weapon or ASP baton used where an officer is faced with physically aggressive or assaultive behaviour coupled with immediate likelihood of injury to self or others. Arguably, the latter is the situation that Wilson was faced with in Brown’s case.\textsuperscript{269}

A few more details about the county’s Use-of-Force policy merit attention. St. Louis does not have an instruction to its officers on de-escalation. There is in fact no requirement made of

\textsuperscript{268} Wilson’s testimony before the grand jury, transcript vol 5, at 274.
officers to de-escalate a situation so as to prevent harm to life. There is also no ban on chokeholds or stranglehold, nor is there an explicit requirement for officers to report or intervene when witnessing excessive force exerted by a colleague. There is, on the other hand, a requirement from a police officer to identify as such before a suspect, state their intent to shoot and verbally warn before shooting at a suspect, “whenever possible”. Interestingly, the instructions in St. Louis County ban police officers from shooting at moving vehicles or from moving vehicles. An officer is also required, “if possible”, to submit a memorandum in his chain of command should his firearm discharge within 24 hours, – which Wilson failed to do. Lastly, the instructions in St. Louis assert that “Deadly force will be a last resort and will only be exercised when all reasonable alternatives have been exhausted or appear impractical.”

Looking at the St. Louis County, it is clear that the instructions give officers ample leeway. Wilson supposedly breached one of the instructions by shooting out of the car, but no one made an assertion with regards to that. The instructions are articulated in such way that no ban is truly enforceable.

Such instructions may actually represent the prevalent mood in many police departments with regard to the constitutionality of the use of force. Consider, for example, what the Law Officer Magazine has to say about the legitimacy of excessive use of force by police officers under the Fourth Amendment. Right after reviewing the legal framework and discussing the court’s decision on the matter of Graham v. Connor, author Laura L. Scarry writes the following:

“Unfortunately, some law enforcement trainers incorrectly state officers should exhaust every reasonable option before using deadly force. Some trainers assert officers should react to an offender’s aggression with the minimum amount of force necessary to achieve the lawful objective in deadly force situations. Under
the Fourth Amendment, these assertions are just plain wrong. The Fourth Amendment does not require police officers to exhaust all other options in a deadly force situation before resorting to deadly force; to require that of police officers in stressful, rapidly evolving situations leaves them vulnerable to serious injury or death.”

This statement, of course, contradicts many of the Use-of-Force policies in police departments across the US. It also seems to misinterpret the concept of “objectively reasonable” use of force (any other interpretation would mean that a police officer must put his life before any other lives of those involved at a crime scene). Despite that, the author is right to assert that the Supreme Court did not charge officers with a duty to use the least harmful means.

3 Conclusion

The similarities shared by the American and the Israeli cases are striking. Not just because of the unbearable gap between the fatal results on the one hand and the severity of the crimes allegedly committed on the other – a petty theft in Brown’s case, a burglary in Salamsa’s case. Not just because these crimes, so it seems, never actually happened. Not even because of the disregard they show to human life and dignity – Salamsa lying outside the Binyamina police station, vomiting and bleeding, or the uncovered dead body of Brown on Canfield Drive. And not only because both stories arguably begin with the profiling of black men. The similarities are striking because the law provided minorities in both countries with very little tools to tackle profiling and police brutality, while facilitating the legitimization of the use of force. In rethinking the narratives of Wilson and Johnson, we must ask whether a third narrative exists: one that neither presents Brown’s shooting as execution, nor describes him as criminal. Instead, such narrative will have discussed the correlation between segregation and criminalization, contemplate how the frequency
of stops contributed to Brown’s encounter with Wilson, and most importantly -- ask if a duty to
deescalate would have prevented Brown’s death and what might such duty include.

The next chapter will ask whether we are right to place such onus on legal doctrines, versus
socio-cultural norms, in explaining the occurrence of these cases; are institutional racism-related
models helpful in understanding them? And in what ways might the Israeli case nevertheless
present a different set of questions than the American one?
Chapter 6

Search and Seizure: The Missing Perspective

This chapter aims to point out gaps in current theoretical models regarding racial disadvantage in police search and seizure practices. As exemplified in chapter 5, American case law manifests a paradoxical consequence: the law that was allegedly intended to protect individuals from unreasonable search and seizure has arguably failed in achieving its goal. Instead, the presumed reasonableness of police officers, the suspected dangerousness posed by racialized minorities and an over-reliance on appearance became some of the tools through which racial profiling is enabled and police brutality justified. The above interpretation of Fourth Amendment law is congruent with the claims of Critical Race theorists about legal colorblindness, where apparently neutral legal doctrines are interpreted by the courts to further marginalize minority groups. As shown in the previous chapters, racialized scripts develop within a context of shared societal assumptions and stereotypes about minorities. These scripts promulgate a repertoire of police behaviours, from profiling to the use of excessive force. Such behaviour patterns are then legitimized by the court’s interpretation through the systematic expansion of exceptions to constitutional protections. A reciprocating process is thus created whereby the court’s interpretation feeds into the racialized scripts in a circular movement that perpetuates the disadvantage minorities experience in the criminal justice system.

While contemporary critical analysis of the Fourth Amendment does unmask some of the conditions for racial disparities, it is also incomplete. This chapter seeks to take a step beyond this
analysis by exploring the role assigned to the law in current explanatory models through a comparative view of the Israeli and American case-law.

I will argue that current models fail to address the narrative clash that characterises the relations between police officers and civilians. This conflict is not only the result of police culture or of legal doctrines and court’s interpretation. It is also an outcome of the complex intercultural nature of the relationship between police and marginalized communities. I suggest considering the fact that police officers and citizens hold different positions associating them with different cultures (civilians and officers), and often also belong to different ethno-racial groups. By “intercultural nature,” I refer to more than just the hierarchy of authority distancing law enforcement officers from civilians. Both groups differently perceive any encounter between them. These perceptions are influenced by belonging to the minority or majority, by their perceived vulnerability, and by the degree of trust each side feels for the other. These factors cause officers and minority citizens to interpret an incident differently. The escape of a suspect from a crime scene, for example, or a stop during a late night stroll are fraught with different meaning depending on the participant. In light of this “culture-clash”, I offer an alternative approach to search and seizure practices in intercultural contexts in chapter 7.

This chapter begins by explaining the role assigned to law in current models. Next, I ponder the benefits of a comparison between Israel and the US. Finally, I argue that the conflict of narratives between officers and civilians can be better understood within a broader cultural analysis.
1. Understanding Search and Seizure: The Role of Law

Analysis of both the Israeli and American case-law has shown that Fourth Amendment law may have become one of the mechanisms through which systemic racism occurs. Yet, this explanation may give a disproportionate weight to the legal statute, and very little significance to the individual bias at the background of such rule. And biases are protean; they vary from one case to the next. It is difficult to know whether officer Wilson’s perception of a threat was susceptible to racial bias (which may explain why the officer perceived Brown as a “demon”, etc.). We do know that whatever perception of threat Wilson may have had, it created—together with ambiguity regarding the rule about a ‘fleeing felon’-- a platform to justify the use of force against Brown. Similarly, it is not easy to discern whether the officers in Salamsa’s case assumed that as an Ethiopian he would probably be carrying a knife or saw him as an immediate threat as he raised his hands to surrender. It is also hard to tell whether the officers in Kassahun’s case assumed that he and his friends fit the officers’ stereotypes about Ethiopians consuming alcohol and creating a nuisance. We do know, however, that whatever fear the officers may have experienced, they decided to use force prior to having any knowledge of suspect having a weapon. In other words, the critical analyses of Fourth Amendment law negate the law’s effectiveness in exhausting rights but does so by focusing primarily on the legal framework as a target for reform. Hence, the explanatory power and potential of such analysis as a basis for transformation are trapped in legalities.

It might be useful to draw a distinction between the enabling role of law in these cases and the justifying one. The first type occurs where the law allows for the intrusion of racial bias, e.g., when the courts do not prohibit officers from considering a person’s group-identity as a cause for a traffic stop. A second type of case concerns justification, i.e., the fact that a police officer can use the Garner exception to justify shooting a civilian with the claim that she felt threatened.
Arguably, the first type of case is theoretically avoidable but the second type—where the ‘state of exception’ becomes the rule—seems more problematic. Both scenarios can only be understood in their cultural context. Reforming the law by itself would arguably be of little help in a case of an after-the-fact justification, since the law does not inherently cure that which is culturally enabled.

Critical analysis of search and seizure practices can also be lacking in that it fails to address the genuine concerns of police officers for their safety, commonly characterized in the criminological literature as “police vulnerability”. Zimrin comments in this context that police use of lethal force is statistically correlated with the frequency of civilian gun use: If there are more gun holders amongst civilians, the theory holds, the threat to police officers’ lives is higher. The claim is that the availability of guns therefore plays a role in constructing the police’s perception of threat. Unlike the U.S, Israel does not foster the possession of private guns, although many current and former military personnel possess them. Lethal police shootings occur largely in the Arab community. Members of the Ethiopian community typically report police use of beating or tasering. The lower frequency of lethal shooting of members of the Ethiopian community masks the extent of the phenomenon of more general brutality: so long as lethal results are prevented, police profiling and brutality continues. This finding may not only convey something about the perceived level of threat experienced by police officers with regards to different communities. It

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271 Zimrin, supra note 125, at 92.
272 During October 2000, 13 Palestinian civilian protesters were killed by police shooting. According to media reports, since then and until 2015, the police was responsible to the lethal shooting of 51 Palestinian civilians.
273 As far as known, direct lethal shooting leading to the death of Israelis of Ethiopian descent occurred twice since the 1990s, once in Bahata’s case, described in Chapter 2, and a second time with regards to Aharon Mekonen, a civilian shot by an officer during chase after an offender. Charges were brought in Mekonen’s case against the officer, but he was acquitted. See Criminal Case (Ashkelon) 5969/01 Israel v. Ben Harush (27.4.2003). However, there were claims about civilians’ death that came following a police encounter, for example when the complainant committed suicide, allegedly after being abused by the police.
also may signal that one’s perception of threat ultimately has a relationship to the minority group being confronted: i.e., that Ethiopian Israelis are less likely to be perceived as life-threatening by police officers, hence the low percentage of lethal shooting.

If the broken promise of Fourth Amendment law contains a lesson, it might be that nothing in the inherent structure of law -- not even an explicit constitutional protection -- guarantees that a specific law will advance minority rights. This also seems to be true for procedures regulating police work. Body cameras are a case in point. These have been offered as a solution to needed reform in many policing systems (see discussion in chapter 7). Yet, recent accounts argue that these cameras are sometimes used by officers to hide their wrongdoing by claiming to have a reliable account of controversial events.\textsuperscript{274} Changing the procedure without tackling root biases on both the individual and collective levels therefore seems to provide only partial solutions.

In sum: In this section, I have attempted to demystify the role of law in the racialization of minorities in search and seizure cases. Rather than stressing legal doctrine and the courts’ role in perpetuating bias, however, I introduced questions about the importance of narratives in the formation of racialized scripts.

2. Comparing Israel and the U.S: What’s to Gain?

That both the U.S and Israel provide such a broad basis for comparison may cast doubt on the claim that the former is indeed so unique in the way it deals with the Black community regarding detention, incarceration and use of force. Zimrin presents this dilemma by asking whether police

\textsuperscript{274} Kami M. Chavis, “Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation”, 51 \textit{Wake Forest L. Rev.} 985 (2016).
lethal force manifests American exceptionalism or instead is a “by-product of urban policing."²⁷⁵ Presenting the question this way seems to be a reduction of the terms of the debate -- civil rights. Both these explanations miss the point that police violence is rooted in the particularities of a country’s political climate, constitutional structure and intercultural relations. This section provides a very preliminary comparison of the Israeli and American search and seizure practices. One main challenge in drawing such a comparison derives from the lack of data. The meagre literature on minorities in Israeli criminal law and the nearly complete absence of legal articles on Ethiopian Israelis in particular, means that the data is partial and often obscure. The following is largely based on insights from the case law together with reports regarding police conduct and prosecution policies.

³ The Search and Seizure Regime: From Lethal Shooting to Revenue Generation

Lethal shooting is one prominent aspect where American and Israeli law differ. One simple explanation is found in doctrine. In Israel, much like in the U.S, shooting a fleeing felon is prohibited with the exception of a threat to the life of the officer. Only that the Israeli court interpreted the concept of “threat” not to include an officer’s subjective perception of threat. In fact, Israeli officer Sahchar Mizrachi, who shot and killed a burglar, was sentenced to 30 months in prison, although the burglar attacked him with a screwdriver at some point during their altercation. The Supreme Court concluded that the officer shot the suspect in order to stop him and

²⁷⁵ Zimrin, Id., supra note 125.
not out of danger to the officer’s life or body. Following the case, legislative initiatives were brought, to date unsuccessfully, to reform the law so that it exempts from liability officers who shoot a fleeing felon.

As discussed above, another, and murkier, explanation for the different levels of lethal police shooting in the Israeli Ethiopian community has to do with the officers’ perception of threat. Although both U.S and Israeli police are considered ‘well-armed’, carrying a gun in Israel is not a right (certainly not a constitutional one) and is only licensed under strict restrictions. We may, however, think of other factors that influence the perception of threat of police officers. The Jewish identity of Ethiopian Israelis could be one reason why firearms are not typically directed at members of the community, although Tasers often are. By contrast, members of the Arab-Israeli community were shot and killed on several occasions. In the context of the Ethiopian community, special attention should be given to the issue of suicide following custody, which was reported in several instances – at times, following police violence.

Certainly, implications of search and seizure regimes go beyond the narrow, but important, question of lethal use of force. Critical Race theory in the U.S has revealed search and seizure as one tool for revenue generation. This scholarship has exposed the use of criminal law as an overarching regime that replicates socio-economic ranking. As discussed in chapter 4, Kassahun, the young Ethiopian man subjected to profiling, claimed that in his Pardes Hanna neighbourhood, police officers ‘fine’ youth for petty offences such as littering, smoking in prohibited areas, etc. To the extent that reports on such practices are found reliable this calls for a through inquiry of

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276 SC 8133/09 Mizrachi v. Israel (10.3.2010).
277 According to the police, Salamsa committed suicide four months after his detention. The brother of Tapara Bahata, whose case is discussed in chapter 5, committed suicide following investigation by the police.
278 See Butler, supra note 125.
revenue generating where large minority populations reside. Moreover, revenue generating is not without its psychological justification and rationalization – using racialized minorities as a source of revenue is yet another form of othering. To overcome it, we must also make an effort to figure out what such othering entails and how might it stop. Conceptualizing search and seizure as a regime that has implications not only for criminal and constitutional law but also socio-economic consequences may allow us to understand such practices in their broader cultural context.

4 Impediments to Prosecuting Police officers

Israeli law poses a very unique set of questions regarding the barriers to prosecuting police officers for brutalizing minority members. Such prosecutions are relatively rare. In light of the Michael Brown case, this may appear familiar. Indeed, very few American police officers faced trial for the lethal shooting of unarmed black men, let alone were convicted for their actions. In Israel indictment of police officers is not the responsibility of a grand jury but is rather authorized by the Department for Police Investigations (‘Machash’). This department in the Israeli Ministry of Justice was formed in 1992 as an independent body from the police, for the purpose of investigating officers for alleged offences which carry a minimum one-year prison sentence.

In the last few years, Machash has struggled to establish itself as an independent investigatory body. It faced criticism on one hand from minority communities who view it as

279 According to criminologist Philp Stinson, between 2005 and April 2017, 80 officers had been arrested on murder or manslaughter charges for on-duty shootings. During that 12-year span, 35% were convicted, while in the rest cases were pending or ended without conviction. See Philip M. Stinson, "Charging a Police Officer in Fatal Shooting Case is Rare, and a Conviction is Even Rarer" 80 Criminal Justice Faculty Publications (2017).

biased, and from police officers who see it as a sort of fifth column, on the other. Machash chief investigators were originally veteran police officers. Only in recent years has the department attempted to recruit young investigators and now claims to be completing the makeover.

Data from Machash is perplexing: in 12 years, the number of charges stemming from excessive use of force decreased dramatically. In 2006, Machash brought 86 use of force charges by police officers, and in 2015 it brought seven such charges – a 92% decrease (See appendix 2). Police authorities explain this change as proof of success in its training which made officers much less susceptible to engage in unlawful use of force. In fact, in 2015, the same year the beating of Demas Pekadeah was broadcast on national T.V, Machash closed nearly half its cases (43%) without investigating officers under warning. In only 102 cases of 6,320 were criminal charges brought. In an additional 85 cases officers were subject to disciplinary proceedings. All of the remaining cases were closed for various causes: “no blame” (111 cases), “insufficient evidence” (194 cases), “lack of public interest” (132 cases), or “perpetrator not found” (16 cases). While an appeal mechanism of Machash decisions exists, such appeals have demonstrably little chance of success (0 to 3 percent average in three recent years).

Data regarding cases closed without investigation is not published by Machash. There are good reasons to believe this data may be of interest for minority groups, such as the fact that

283 Special report, at 227.
284 Id., 192.
285 Id.
286 A complainant may appeal the decision of Machash to the Attorney General’s office or to the legal advisor to the state according to the issue, but during the years 2013-2015, out of 1,179 appeals submitted only 1% were accepted (Special Comptroller Report, at 187), 3% in the year 2016 (Machash summary report 2016, at 15), and 0% of the appeals accepted in 2017 (Machash summary Report 2017, at 4).
287 Special Comptroller Report, at 193. A freedom of information request to receive from Machash the information with regard to violence complaints was denied for technical reasons (Adm. Appeal (Jerus. 17719-10-15 Glider v. Machash, 19.6.2016). The court discussing the request commented about the importance of such information but
most of the cases described in Chapter 4 would probably not pass the Machash threshold for prosecution. In fact, we know that some of them did not. Salamsa’s case, for example, was closed because of a complainant’s lack of cooperation with the investigation. The case was archived until it was reopened under pressure from his family and the media. A special report by the Ministry of Justice team for battling racism criticized this practice of Machash: the department does not make efforts to locate a complainant who failed to show up to give his testimony as a matter of policy.\textsuperscript{288}

The same holds true for Kassahun’s case. As discussed, Kassahun stood trial after Machash approved charges against him despite his claim to have been attacked by the officers.\textsuperscript{289} The trial justice in the matter of Kassahun found that although investigatory materials were in Machash’s possession a month after the incident, it was only two years later that the Machash attorney actually read them – only to confirm charging Kassahun.\textsuperscript{290} In the words of the trial court:

“To sum up, Machash did not investigate this case at all. And let it be clear: This is not about a defendant whose claims utterly contradict the police position. The defendant’s claim has found support in Daniels’ statement that he sprayed the defendant with pepper spray although he was not authorized to do so. Despite that, Machash did not explore the defendant’s claims and has not tested the implications of unauthorized pepper spray use. And I ask: if these circumstances do not justify investigating the officer, or at least the police volunteer who used the spray, then what does?”

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\textsuperscript{288} MOJ Report, at 28-29.

\textsuperscript{289} See infra note 290. According to the protocol regarding mutual complaints between civilians and officers, this should have led to an inquiry of his claims prior to bringing charges against Kassahun.

\textsuperscript{290} See Kassahun decision, Supra note 168, pages 34-35.
Most importantly, the prosecution policy of Machash as seen from the reports mirrors the Ethiopian Israeli lived experience of profiling and police brutality. A revenue generating practice is unlikely to be discovered this way: Machash does not initiate investigations; it only responds to complaints.

Having veteran police officers leading an organization charged with investigating fellow officers certainly raises concerns. Reports published by Machash may provide additional insight into the culture against which such concerns should be interpreted. A yearly summary report from 2015 defines the department’s role as follows: 291

“...The constant friction of police officer with the public in complex events... creates a fertile ground for complaints, whether on the basis of authentic feeling that the citizen was harmed by the officer, and whether in attempt to gain manipulative leverage to advance the interest of a citizen that became involved with the law... it is easy to imagine the power of chilling effect and deterrence in summoning (for investigation) an officer who did his job lawfully and because of the mere words of a citizen, is forced to deal with a criminal investigation with all of its implications... Machash is the professional floodgate to prevent such side dangers... according to the worldview in Machash, the profession of policing requires friction with officers, we ought not tag every use of force during a mission like public safety as an offence, and we should not ascribe to every deviation... a criminal label, as opposed to disciplinary”.

Machash’s self-image as the “floodgate”, and not, for example, the civil watchdog is very telling. So is the clear value judgment that prioritizes disciplinary means over criminal ones. It is important to note that Pakedeah’s case, one of the most high-profile cases Machash had in a decade – was referred to disciplinary proceedings. However, the internal police department in charge of such proceedings closed the case due to a “lack of public interest”.292

Machash provides a good case study for those seeking to reform the American system by moving from state prosecutors and grand juries to special prosecution and specialized juries for offences conducted by police. The Israeli experience may teach that as long as the organizational culture does not support them, institutional reforms will not be successful, despite the formal independence of an investigatory body. Changing the culture could include redefining the goals and values of the department. Inter alia, civil rights could be foregrounded instead of a “floodgate” preventing intrusions to police professional work; a pro-active spirit might be initiated rather than a passive response to complaints; and, a specialized tracking and integration of data from police stations, minority groups, etc., could be incorporated into working methods.

A significant question, yet one that rarely comes up in the context of Machash would be whether the organization itself promotes diversity in its own ranks, thereby showing its own understanding of the value of diversity. Hiring minorities typically is also known to help bringing significant voices into the conversation, e.g., such that could have experiential knowledge as for the claims of a minority member to have being hurt based solely on ethnic or community status. While Machash prides itself on enrolling 15% ‘minorities’ in its ranks, it nevertheless does not specify which minorities are referred to and in what positions.293

My suggestion is that the search and seizure regime should be viewed in its entirety, from profiling to revenue generation. Impediments to prosecuting police officers in both the US and Israel should be assessed in light of organizational cultures (such that of Machash), social understandings (e.g., frequency of gun use), and the interrelations between the majority and different minority groups (the latter including Palestinian-Arabs and Ethiopian Israelis, for example).

5 The Narrative War

The Michael Brown case provided a good representation of the conflict of narratives with regards to police encounters with racialized minorities. One side – to the extent it acknowledges a problem does exist -- sees such violent incidents as a price one must pay for modern day effective policing, while the other sees this as the exception that became the norm and which has legitimized the criminalization of minorities. Reconciling narrative wars becomes especially hard when their representative symbols are gone, much like for the two incidents of civil unrest in both the U.S and Israel discussed here.

Consider the police response stand with regards to its treatment of excessive use of force on behalf of officers. For the police, fewer charges in use of force offences simply mean a success in the eradication of excessive use of force. This answer is given despite the growing number of complaints and media reports showing that excessive force is in use in Israel with regard to marginalized communities. The full extent of the issue then manifests itself in public surveys showing that minorities, especially Ethiopian Israelis, mistrust the police (see Chapter 2).
Indeed, narrative clashes exist not just between the police and members of marginalized communities, but also with regards to each of the governmental bodies involved, from Machash to the courts. For example, Machash considers the extremely low number of appeals after decisions not to prosecute as testimony for the professionalism of the department’s decision-making process. For Machash, a citizen who made a use-of-force complaint on the part of police officers during an investigation but who did not take the initiative in filing an official complaint against an officer is suspected of “an attempt to gain manipulative leverage” in his investigation. By contrast, social activists representing marginalized communities in Israel see this data point as yet another expression of the rubber stamp nature of the Attorney General’s involvement in supervising these decisions.

The meaning of this practice to the work of investigating police officers is extremely significant, as it translates to the dismissal of thousands of complaints every year. In the case of an arrestee or detainee still in custody reporting being brutalized by officers, Machash will open up a case. Yet, if the person was already released at the time when the complaint is brought, Machash will not attempt to locate a complainant to give testimony. Unless the complainant insisted on giving his version, the case will typically be closed. This could include a ‘normative’ citizen who had been detained, perhaps for no reason, and who has very little incentive to return to the police station and give testimony pertaining to violent mistreatment. In other words, such conflicts over narrative have an impact that goes beyond the dichotomy of the relationship between a police officer and citizen and extends to other circles as well - the judiciary, Machash, the probation...
services – clashes in each of these bodies carries significant weight to the way in which policies are executed.

Understanding these conflicts as a feature of the justice system may help to explain the relatively small number of charges brought against police officers every year. Analyzing the reports published by Machash also shows that even those few use-of-force claims that end up as charges pertain to extreme cases of sadistic brutalization – such as pouring hot water on a detainee or an unprovoked beating. Due to their anonymous nature, the descriptions of the complaints are in turn stripped of any ethno-racial dimension.

6 Conclusion

Current critical analysis of racial disadvantage in search and seizure practices in the U.S offers a useful analogy to the Israeli situation. At the heart of such an analysis lies the understanding that the narrative endorsed by law enforcement authorities is at times a mirror image of the lived experience of communities of colour such as Ethiopian Israelis who report being repeatedly racially profiled and brutalized by police forces.

Models attempting to conceptualize police encounters with citizens seek to inject the label of “institutional racism” with content. Carabado’s work importantly highlights the connection between racial profiling and police brutality while considering both legal doctrines and social forces at play. In Israel, much as in the U.S, ethno-racial profiling is enabled by the frequency of surveillance and contact in neighbourhoods with a large percentage of Ethiopian Israelis, together with laws that require citizens to present their identification documents on demand.
Parallel to the Fourth Amendment, a regime supporting search and seizure practices developed in Israel, that is partially fuelled and justified by the emergency laws in force due to the security situation. Police training, despite including some cultural competence aspects, does not prevent violent incidents. Officers involved in violent encounters with citizens often submit a counter-complaint against the citizen. Machash reports a “conspiracy of silence” between police officers who may have committed offences and a culture of “having one another’s back” in case of an incident with a citizen. The number of charges of assault on police officers brought against Ethiopian Israelis is disproportional to their population.

The various governmental bodies involved in the judicial system all work under the aegis of the Ministry of Justice. Despite the apparent independence of Machash, the major investigative body in charge of police investigations, a series of factors serve as obstacles for police violence complaints: reading Machash reports arguably reveals biases in its policies, which may be rooted in hiring policies, and is reinforced by the organization’s internal culture, all of which lead to a low number of use-of-force charges against officers.

Together with the literature on ‘police violence’, some scholars advance a perspective that considers the phenomenon of ‘police vulnerability’ which they argue influences officers’ perception of threat. Some therefore also argue that a new agenda for the police should not necessarily focus on legal reforms, but rather use non-criminological tools to change police culture.

Despite striking similarities between the Israeli and American legal systems, comparing search and seizure cases in both countries also demonstrates that the special features of the Israeli system – e.g., a different indictment process and specialized prosecutors – fail to prevent the

outcome where a legal system effectively works to justify the use of force against racialized minorities. This may have a certain relevance to reform proposals in the U.S (See chapter 7). In so far as one accepts that Israel and the U.S enable racial disadvantage in similar ways, one also ought to demystify the role of law in search and seizure practices.

Current models are deficient in that they replicate current scripts that conceptualize both police and citizens as standing against each other behind two sides of a barricade. I suggest that breaking out of the racialized script requires that we address the narrative conflict for what it is – a cross-cultural clash. The term culture is not used here as some cultural competence proponents use it: a folkloric metaphor, but rather as the entrance to a discussion of the differences preventing a successful reform. Culture in this context also refers to the civilian-officer relationship, regardless their ethno-racial backgrounds.

This is to say that a differentiation must be made between a narrow understanding of culture as the differences arising from “cultural gaps” between groups, and a broader understanding of culture as a theoretical tool that helps analyse (1) why systems and individuals work as they do, (2) why certain narratives prevail over others; (3) and why laws are interpreted differently for different minority groups. This analysis assumes a reciprocal relationship between culture and law, as opposed to a one-dimensional description of law as designed to oppress racialized minorities. To paraphrase Etienne Balibar, we ought to fight racism in a way that does not replicate if not racism itself, then the conditions that give rise to it. An accurate description of the relationship between civilians and officers is also more helpful in articulating a potential reform, as I will suggest next.
Charges of Unlawful Use of Force against Israeli Police 2006-2015

*Source: State Comptroller Report
Data: Israel Police
One difficulty to address racial profiling and police violence as stemming from racial disadvantage is shared by both the Israeli and American systems. The analysis of the Israeli case law highlights that processes of racialization in Israel are made possible by institutional factors working at all levels of the justice system, from police officer on the street to the judiciary. The analogy of Fourth Amendment law helps to lift the veil of singularity on the Israeli cases and broach questions about policing racial minorities in multicultural societies. I have argued that current theoretical models pertaining to search and seizure practices, while providing useful tools to think of racialization in this context, fail to address the cross-cultural nature of police interactions with citizens. I would argue that a broader cultural analysis may enrich our understanding of the case law and provide a platform for reform. This chapter begins by presenting some of the existing outlines for reform and their potential adequacy for the Israeli context. Section 2 discusses the need to transform some of the background assumptions in our treatment of search and seizure cases. Next, section 3 uses a model for cross-cultural lawyering to rethink the relationship between racialized minorities and the justice system in Israeli law. Section 4 concludes.
1 Current Reform Models

In his account of the racial disadvantage faced by the black community in the American justice system, Paul Butler comments that “although there is a national consensus that there is a race problem in criminal justice, there is no widespread agreement on what the problem is, who bears the main responsibility for it, or how it might be remedied.”298 In the Israeli context, with no adequate control group, arguing about a reform to a problem that has not even been discussed is challenging. The reasons for this undertheorizing are many: a data problem with regards to racial disadvantage, prosecution policies that prevent voicing claims with regard to racial discrimination in the justice system, and the particularities of the Israeli context, which lacks a history of enslaving black communities. Instead, Israel presents an enigma where a supposedly unified Jewish collective overlooks discrimination against one of its sub-groups.

While some legal scholars have called to “put back law on the table” in order to reform justice systems that manifest racial disparities, others have criticized the emphasis on law, and called to have culture as the focus of our attention instead. Indeed, suggestions for reform tend to revolve around “stopping the shooting” (or tasering in the Israeli context), changing the wording of search and seizure laws, or forming an external critique body to supervise the prosecution in its decision-making with regard to racialized minorities or their racial bias complaints.

The literature on police reform in multicultural societies shows that it is not only in the Israeli context that the scope of suggestions to reform is limited.299 Writing on police reform in the Canadian context, which shares the characteristic of multiplicity of cultures, Guy Ben Porat claims

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that recommendations for police reforms that concern multiculturalism and minority groups usually fall into six categories: (1) diversification of human resources; (2) cultural sensitivity training for police officers; (3) formal antiracism policies within the police; (4) review and revision of operational practices that may lead to "systemic discrimination"; (5) liaison between the police and minority communities; and (6) inclusion of minority group representatives within the membership of the police’s governing authorities. Ben Porat’s framework seems to capture many of the challenges associated with such reform outlines, including their repetitive nature. I will borrow the above conceptualization to discuss reform attempts in the Israeli context and the respective barriers to their implementation.

i. Diversification

Broadly articulated, diversification of the work force is focused on changing the hiring patterns of an organization so that they include a variety of identities including genders, ethnicities, religious backgrounds, and disabilities. A primary rationale for diversification, other than advancing equality, has been that diversity also contributes to organizational competitiveness. This notion was popularized in the thinking of companies that, at times, define diversification as a “double bottom line,” a way to increase profits and show moral value to investors.301

Israeli law contains a specific statute pertaining to adequate representation of Ethiopian Israelis in the public service.\(^\text{302}\) However, Ethiopian Israelis in positions of influence over racial justice are too few to make a difference in the police, at Macash ranks, and in various other governmental institutions. Although the Israeli police is committed by law to diversify its workforce, the implementation of such laws has so far left a lot to be desired. The laws on adequate representation of Ethiopian Israelis in the public service are a classic example of the limited impact of legislation reforms on institutional practices, when such reforms are not followed by a change in the institution’s culture.\(^\text{303}\) That the government does not regularly make such data available to the public makes it even more difficult to raise claims of discrimination with regard to adequate representation. In 2012, 574 Ethiopian Israelis were members of the police force (2%).\(^\text{304}\) Although slightly higher than their percentage of the population, the data do not show the positions held by these members. In the Ministry of Justice, the body that is largely in charge of supervising diversity policies in the Israeli public service, the numbers do not look any better. In 2015, 30 Ethiopian Israelis were employed by the office (0.5%), 13 of which at the Attorney General’s office, one in the Public Defender’s Office, and the rest in administrative and other roles.\(^\text{305}\)

Adequate representation is a relatively easy reform target. Unlike a change in training practices, numbers are a catchy news headline for fast decision-makers. Research has shown that representation reforms do not necessarily tackle some root problems: minority police officers may

\(^{302}\) See Expansion of Adequate Representation for Persons of the Ethiopian Community in the Civil Service (Legislative Amendments) Law 5772-2011 (Isr.); The law expanded the existing duties regarding adequate representation to other public bodies such as large corporations and municipalities.

\(^{303}\) See Israel State Service Law (Appointments)1959. Section 15 (a) requires the adequate representation of workers from various sectors of society, including Ethiopian Israelis. According to the law, the government may designate positions for members of underrepresented groups who have shown qualifications similar to other nominees.

\(^{304}\) Knesset Research Center, “The Integration of Ethiopian Israelis in the Public Service” (Submitted to the Israeli parliament, October 2012), at 2.

not want to be recruited in their own communities, and fear that such recruitment could be
detrimental to their promotion. Moreover, such reforms may have limited impact, as minority
officers may comply with an existing police culture in order to show “professionalism”.
306 In the Ethiopian Israeli context, we may expect a decrease in the recruitment of community members to
the police, in light of recent cases of police brutality towards Ethiopian Israelis. The last point of
available data is from 2012, showing a decrease of 31% in the number Ethiopian Israelis in police
service relatively to the previous year. 307

A legislative duty to professionally accommodate an ethno-cultural group is proven
unsuccessful in so far as it is decoupled from a change of culture that addresses issues of mutual mistrust, threat and fear between officers and civilians. I will later argue that it is here that the difference between providing “cultural accommodations” and developing cross-cultural strategies reveals itself.

ii. Cultural sensitivity

As for cultural sensitivity trainings, these recently became a commonly traded currency in police
ranks. Following the May 2015 protests in Israel, the police introduced a plan to improve relations
with the Ethiopian community, citing “multicultural policing” and including cultural training for
police officers (together with the recruitment of Ethiopian officers and translation of compliance
forms into Amharic). 308 While some members of the community were involved in formulating
these reforms, others rejected them, arguing, among other things, that folklore-based acquaintance

306 Ben Porat, supra note x, 15-16.
          (February 2, 2016).
with the community was no replacement for disciplinary treatment to tackle racist tendencies among police officers.\textsuperscript{309} “Multiculturalism”, by now a loaded term in view of some minority communities in Israel, has all but lost its original meaning as a normative theory that calls for sounding different cultural voices in society. This goes hand in hand with other trends in Israeli law, one of which being a focus on cultural accommodations that concern holidays, symbolic gestures, or adequate representation in the civil service.\textsuperscript{310}

As discussed in Chapter 1, Multicultural policies in Israel have more than just rhetorical value: The discourse on multiculturalism may sometimes end up perpetuating bias. Moreover, state-funded multicultural policies aimed at integrating the Ethiopian-Israeli community into the dominant social ethos sometimes compound the dissonance between their religious-cultural identity as Jews and their ethno-racial identity as people of colour, by perpetuating bias against the community. This is done by means of “cultural rationalization”, a practice that socio-anthropological research uncovers as means to justify disparities.\textsuperscript{311} My conversations with police officers and other key informants in the Israeli justice system ahead of this research have taught me that cultural training is sometimes waged by the organization to argue that measures are taken to address minorities “complaints”. However, what happens instead is that the focus shifts from the racial biases of role players in the justice system to the existing or imaginary “cultural gaps” between bodies of the justice system (the police, the probation services) and the civilian members of minority groups. While developing an understanding of the culture of various communities served by the police should not be dismissed, the approach taken on some of these initiatives

\textsuperscript{309} For an opposite view, that largely embraces the police plan concerning the Ethiopian community, see Nomi Levenkron, “Are Israel’s Police Really More Violent Toward the Ethiopian Community?”, \textit{Haaretz} (September 2, 2017).
\textsuperscript{310} See discussion in Chapter 1.
\textsuperscript{311} See Esther Hertzog, supra note 14.
should be carefully examined, e.g., by constantly involving minorities in the process of forming and revising such policies. It may very well be, considering the formation and execution of some of these training programs, that these end up perpetuating biases instead of fighting them.

iii. Anti-Racism Policies vs. Cultural Sensitivity: The Case of Racial Profiling

Anti-racism policies typically involve work on biases through police training, as well as developing report mechanisms that require the police to create databases of their encounters with minority communities. When pitted against “cultural sensitivity” trainings, it is understandable why the police might choose the latter as a means for reform: Cultural competence training turns our attention to minority groups as the ultimate “other”. 312 It can allow police officers to maintain their positive views of themselves and is arguably much easier for both the organization and the officers to process.

With racial profiling arguably marking the beginning of many police encounters with civilians, it seems like a good place to begin thinking of both the potential and limitations for a reform. In Israel, the governmental inter-ministerial team to fight racism has recommended what can be described as anti-racism policy, namely a procedure to regulate police’s self-identification requests from civilians. 313 Having an explicit policy on these issues seems valuable: As clearly

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312 “Cultural competency” (or cultural competence) is defined as the awareness, knowledge and skills that professionals develop through ongoing learning processes with the aim of improving the service they give to members of different cultures. In Israel, cultural competency is used interchangeably with ‘cultural accommodation’ to describe such tools. See Lum, D, Culturally Competent Practice (Pacific Grove, CA: Brooks/Cole, 1999).

313 See MOJ Report, supra note 87, at 83-84.
suggested by Kassahun’s case, the Israeli legislator has left ambiguous the issue of identification laws.

The American and Canadian approaches to the issue of racial profiling represent the tension between cultural accommodation and anti-racism as two overall policies to fight racialization. As I have written elsewhere, Ontario Human Rights Commission (OHRC) published in 2016 its recommendations for battling racial profiling.\textsuperscript{314} The commission’s three main recommendations included the establishment of an independent institution to monitor and enforce systemic discrimination in policing, the formation of a police database documenting civilian stops, as well as use-of-force incidents and questioning concerning immigration status. Lastly, it was suggested that institutions monitoring police forces will inform complainants in racial bias cases of their rights.\textsuperscript{315}

In the U.S, Portland Police plan from 2009 could be seen as representing a different approach. Similar to the Canadian model, it was suggested that a database be created, documenting police stops.\textsuperscript{316} However, the plan also featured several strategies, including diversification of the police force, developing skills and police training on issues of race and class, and a shift to “client service” approach to the public, complete with ongoing cultural competency training. In addition, the plan focused on forging a connection based on mutual trust between the police and community leaders.\textsuperscript{317}

\textsuperscript{315} Id., at 10-11.
\textsuperscript{316} Portland Police Bureau, "Plan To Address Racial Profiling" (Updated August 2009), https://www.portlandoregon.gov/police/article/230887
\textsuperscript{317} Supra note 313.
Israeli police have so far neglected to implement the suggestions to tackle racial profiling with anti-racism policies such as the documentation of police stops. Such approach, coupled with police culture, may be part of an Israeli premise of security needs with regards to other minority populations that are perceived as national threat. But again, the formation of these policies also emphasized multicultural policing as the implementation of cultural competency training. However, such partial adoption of reform methods has meant that only an artificial change was suggested, without delving into the core issues that stand in the way of a successful reform. While the governmental plan for the integration of Ethiopian Israelis was, according to the government, formulated with the participation of community leaders, some organizations – such as the Ethiopian Jews association - have rejected the plan, arguing that it fails truly to represent community needs.

I would argue that the most pressing need in thinking of a reform for the Israeli system is a thorough review and revision of operational practices that may lead to systemic discrimination, a work that the inter-ministerial team at the Ministry of Justice has certainly set in motion. I suggest that an in-depth change of perception is needed if a successful reform can take place. The next section will describe core principles that may provide a background to rethink such reform.

2 Transforming Our Assumptions

Undertheorizing racialization in the Israeli justice system comes with a very practical heavy price: Lack of theoretical platform for reforms. As discussed above, reform initiatives have so far centered on the police as the forefront of the state’s encounters with racialized minorities. Even these efforts have reflected a strong emphasis on cultural training, while arguably neglecting anti-
racism policies and declining to implement a recommendation to document police stops. I would like to argue that this choice, embedded in Israeli Police reform outlines, should be conceptualized in a broader context of the individuation of minorities’ rights. As explained below, such conceptualization is shared by other, not necessarily cultural or ethno-racial, minority groups.

i. Minority Rights Between Individuation and Social Construction

At the basis of the individual understanding of disability, for example, lies an assumption of disability as neutral and objective; Sagit Mor explains that based on this perception, policymakers formulated accommodations on individual basis, namely, without changing the system. Instead of an overall reform of the system, accommodation is afforded to the individual by creating unique services for people with disabilities, in isolation from the general public. 318 This way of seeing minorities conceptualizes their rights while stripping them of their group-characteristics, and de-politicizing the discourse around the advancement of such rights. Michael Oliver has developed the distinction between the individual model and the social construction of disability. 319 The social model of disability deems key the role of society in both forming and addressing disability.

The analogy between theorizing racialization and disability studies is surely limited, yet my goal here is to highlight that current suggestions for reform are largely focused on “fixing the minority individual” (by getting to “know the other” better, for example), instead of knowing ourselves as a society where police officers serve at the frontline of citizenship, responsible for maintaining and guarding the social ethos, even if largely unaware of this role. Such individuation

of minority rights is also clear from the legal reduction of cases of institutional racism into individually-based formulations, such as “discrimination based on origin”, as exemplified in Chapter 1.

Cultural competency trainings replacing much needed anti-racism policies are therefore a reflection of the tension at play between individuation and acknowledging the social construction of racialization. Any reform outline will have to strike an adequate balance between the individual model and its social counterpart. Creating a different regime of cultural accommodations for Ethiopians may also potentially conceal the fact that racialization in Israel concerns a variety of other vulnerable communities of colour, such as migrant workers and refugees.

ii. Minority Participation

Minority participation seems to be key in formulating the individual-social balance. Israeli police have yet to acknowledge racial profiling as an existing practice in Israel. Shifting from denial onto explicit acknowledgment of the phenomenon may be possible in so far as community consultations are held. Any outline for reform must be the outcome of collaboration between police and civilians; to be exact, civilians mean actual people on the streets, and in neighborhoods where minorities are concentrated. It is they who will have had actual encounters with the police, living as they do in segregated neighbourhoods, and numbering inmates and detainees, rather than social organizations’ representatives alone.
iii. State’s Responsibility

Formulating a reform also requires understanding the full extent of state’s responsibility in cases of racial profiling and police brutality, beyond the legal accountability that so rarely rests with the state due to the actions of its agents, like police officers or Mahash (Police Internal Investigations Department) investigators. Responsibility in this regard also means the state’s role in forming segregated neighborhoods that perpetuate inequalities and prevent social integration in a way that allows police policies that target minorities to flourish, particularly in the over-policing of some of Israel’s neighborhoods. A second facet of state’s responsibility manifests in Mahash’s approach to these cases, where the investigatory body in charge of civilian complaints neglects to address questions of racialization. A third facet of state’s responsibility is legislating the identification laws that categorize as “criminals” those who, at the midst of an ethno-racial encounter with the police, refuse to identify themselves or even dare to betray a hint of resentment at such requests. A fourth facet of state’s responsibility is the larger social context in which Ethiopian Israelis have been cast as the clients of Israeli social welfare system. Though somewhat murky, there is a common thread running through the 1990s immigrant absorption centers for Ethiopian Israelis and current police policies: from segregation to racialization by means of cultural rationalization.

I suggest that viewing police-civilians encounters as socially constructed, the outcome of state’s responsibility and in light of the need for basing reforms on minority participation, suggests that search and seizure cases in Israel are no individual, singular, problem, but rather a recurring social phenomenon that takes place at this particular cultural context, which should be weighed with cross-cultural tools.
3 Cross-Cultural Approach to Systemic Racism

Why did the encounter between Darren Wilson and Michael Brown end the way it did? What happened at the encounter between the Israeli officers and Yosef Salamsa? Answering these questions requires the development of tools to facilitate conversations between institutions and civilians. While current reform models focus on ex-post view of such cases, I would argue that reform efforts should also include looking at the factors that form the interaction between civilians and key players of the justice system: From police officers, through probation officers, to investigatory bodies and the courts. My analysis is grounded in cross-cultural literature that was developed in the context of cross-cultural lawyering, and incorporates cross cultural knowledge into an analysis of how we think about legal cases, clients, and the legal system as whole. 320

I base my discussion of cross-cultural practices on a model developed by Bryant and Peters. At the core of the model lies an understanding of the legal practice as a double cross-cultural experience. 321 Bryant and Peters suggest that even when the client and lawyer share an ethnic or gender identity, their interaction is still intercultural, due to the cultural differences that arise in light of the legal culture of the lawyer. This fact is complicated by both the global movement that creates intercultural situations and the multicultural character of some areas in the world. 322 Bryant and Peters therefore suggest five habits as skills to address such intercultural situations. Their work undermines both the appearance and assumption of neutrality in client-lawyer relations. In what follows I use the framework set forth by Bryant and Peters to highlight the encounters of key players in the justice system with civilians as drawing on their cross-cultural

320 Jean Koh Peters & Sue Bryant, “Five Habits for Cross-Cultural Lawyering”, in Race, Culture, Psychology and Law (Kimberly Barrett & William George eds., 2005), at 57.
321 Ibid.
322 Id., at 48.
nature. Yet my analysis differs from theirs in several respects: it focuses, for one, on the differences arising from the different professional cultures, and purposefully avoids assuming supposed differences arising from ethno-racial cultures, so as not to essentialize minority group members. Second, I seek to use this model as a theoretical rather than practical tool to rethink suggestions for reform and their adequacy. My main objective is to show how such cultural clashes manifest in different interpretations for similar acts, and the ways in which this fact is disruptive to any attempts to reform the system. Third, in adopting a client-based model I suggest to adopt the assumption whereby civilians should be treated as clients of the justice system, the police included, rather than on the spectrum dichotomy of friend/enemy.

i. Habit 1: Degrees of Separation and Connection

The first habit focuses on identifying points of similarities and difference between lawyers and clients, and analysing how these influence the justice system.323 Beside ethno-racial background, such points could include gender, family status, education, religion, and other characteristics. One of the assumptions that inform this model goes that the degree of distance or proximity of a lawyer from her client due to the above characteristics could influence the relationship. Analogizing from the model to a police officer-civilian encounter, an officer could experience hostility towards a member of minority group, but also close connection that might influence his decision-making process. Viewing the relationship between minority groups and police officers through this lens may allow us to see how group-belonging - one of the characteristics listed above – can influence a civilian’s ability to convey her claims. Bryant and Peters refer to it as the difference between

323 Bryant and Peters, supra note 318, at 51-52.
individual and collective cultures. As mentioned in chapter 2, it could be that the strong sense of belonging of Ethiopian Israelis to the Jewish collective prevents them from voicing more claims against police brutality and affects their access to courts. Gender matters too: The American experience in racial discrimination cases of blacks has shown that a majority of suspects in police shooting cases are young black men.\footnote{Calvin John Smiley and David Fakunle, “From “brute” to “thug:” the demonization and criminalization of unarmed Black male victims in America” 26 (3-4) J Hum Behav Soc Environ (2016) 350–366.} In the Ethiopian Israeli group too, young men count for a majority of the detainees and arrestees out of the community.\footnote{See discussion in chapter 4.} Recording differences and similarities this way can be expanded to the level of representative figures. Take for example the police chief who argues that “it’s only natural to suspect” Ethiopian Israelis as late immigrants, and against such backdrop, consider minority views on the existence of racial profiling.

The significance of considering these differences does not lie in its statistical input. Addressing difference situates this part of the model against the prevailing assumption of colourblindness. These differences may help formulate a legal rule that asks why it is that the perception of threat of a police officer is such, or if minority members might take off running when approached by a police officer, even if involved in no crime.

ii. Habit 2: Expanding the Analysis: ‘Rings in Motion’

The second habit, titled ‘rings in motion’, calls to expand the analysis of similarities and differences to other points of representations in the justice system, from the probation officer, through the jury and prosecutor, to the judge.\footnote{Bryant and Peters, supra note 318, at 53-54.} Bryant and Peters comment that lawyers would...
often attempt to negotiate their client’s message to these various legal actors, culminating with the hiring of experts who explain and translate such messages to the court. This habit asks to explore the area of congruence between a client’s “story” and the judicial system’s view of it, which in turn influences the perceived credibility of a given client. Legal strategies will therefore focus on increasing the court’s understanding of the full extent of the client’s legal claim.327

Applying this habit to our thinking of the Israeli justice system’s response in racial discrimination claims calls to explore the conduct of the various bodies involved in addressing police-civilians encounters. Instead of attempting to explain the client’s behavior to the courts, I suggest using this habit as an invitation to explore the different stories that minority members and other key players in the justice system tell about search and seizure practices. Some relevant questions would be: what is the current narrative in Mahash about police encounters with minorities, and how does it influence prosecution rates? Do probation services tend to attribute higher dangerousness to Ethiopian Israelis? Do courts tend to confirm such assessments? We have no clear answer to any of these questions.

Exploring similarities and differences at the system level may allow us to ask in what ways the Israeli justice system, through its various institutions, shares the values and assumptions of police culture. For example, the court may adopt a view of the police as professional, much like in Terry v. Ohio, or the premise that the use of force was justified since the citizen arguably used physical force, as in Pekadeah’s case. This picture can be further complicated if we look at the sub-cultures involved; consider, for example, the culture that allows an investigatory body such as Mahash to serve as “floodgate keeper” against interventions in police work; or the culture that

327 Id., 55-56.
legitimizes the Israeli Supreme Court policy of not intervening in the prosecution consideration, despite evidence showing faults in the conduct on the case. Surely, this is a broad interpretation of the concept “culture”, but its merit is in exposing that decision makers act in an environment that is far from neutral.

Under this habit, each decision-maker in the justice system must ask herself whether the decision-making processes are influenced by such differences. Such analysis may reveal that the various players at the Israeli justice system became so acculturated to a legal culture that represses racial discrimination claims that such claims cannot be voiced. A possible remedy based on this analysis lies in thinking of how we can shift the law’s perspective to encompass more claims of racialized minorities.

iii. Habit 3: Parallel Universes

This habit concerns identifying alternative explanations for a client’s behaviour, and prefers the multiplicity of such alternatives. Such thinking seems of special importance when a lawyer experiences judgmental feelings about a client. It seems that in the context of police encounters, adopting such habit might be extremely challenging - in light of time limitations on police work - but also highly rewarding. For an officer, whose encounter with a suspect civilian is informed by the untested assumption that they are dealing with a criminal, the chances of developing a judgmental approach only increase when the civilian is a member of a minority to which the officer does not belong.

This habit may be applicable to enhance our understanding of both police and minorities in search and seizure cases. While both narratives in the case of Michael Brown were forcefully
argued, it could be that a third narrative existed. It might be that a perception of threat that was influenced by racial bias, and not direct discrimination and malicious intent to harm, prompted an officer to shoot an unarmed young black man. Similarly, a minority member may be running off from the police, much like Shmuel Adama and Tapara Bahata, out of fear rather than due to guilt. Lastly, an investigatory body like Mahash, while investigating police violence complaints, should consider alternative explanations for the low amount of use-of-force claims made by civilians. For example, it could be that racialized minorities are concerned that as racialized minorities, they will not be believed; it may be that they see the legal system’s response to similar claims, and wish to maintain their belonging to the Jewish polity at all costs.

Following this habit, we may advise as remedy the incentivising of minority members to report harms, given that in cases where no such reports are given, alternative explanations exist. The hope that such concerns be met with meticulous reporting on the circumstances of every stop leading to detention or arrest is yet to be realized. In fact, in Israel, the opposite might be true. Even an additional rule, dictating that when police officers engage in a use of force, an automated complaint will be issued at Mahash, was unsuccessful; in Salamsa’s case, it was argued that the officers simply had not reported the use of force. New efforts to encourage minorities to file such complaints should be made, perhaps by learning from the experience of successful investigatory bodies in other contexts, such as victims of sexual harassment, where awareness and legitimacy of complaints have grown in recent years. This too may point to the connection between legal responses to racial discrimination claims and the birth of social movements discussed in chapter 2: Where the legal systems have failed to voice racialized minorities claims, a protest was born.
iv. Habit 4: Red Flags and Remedies

According to this habit, the lawyer needs to remain constantly aware of her communication with the client and avoid using routine responses, while seeing whether the interaction works and if adaptations are needed. Culturally sensitive communication needs to consider (1) scripts that describe the legal process; (2) introductory rituals; (3) client’s understanding; and (4) culturally specific information about the client’s problem.

Applying this habit to the civilians-officers contexts, it seems that much of what goes wrong in search and seizure cases is the ritualistic script that we witness time and again: a police encounter that includes racial profiling followed by use of force, mutual complaints brought by the police officer and civilian, and often a dismissal of a citizen’s complaint. Changing the script would entail focusing on the opening ritual: first by asking whether profiling actually satisfies any operational need. To the extent that it does, it would be useful to dedicate a portion of police training to unpacking common scenarios in related contexts, and prepare alternative responses for them.

V. Habit 5: The Camel’s Back

This habit suggests looking at our own faults and identify factors that contribute to our negative responses towards members of different cultures. In other words, the authors advise is simply to take a moment and contemplate our own biases. In the police-civilians context, we ought to develop awareness of the fact that police working with minorities are susceptible to biases for a

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328 Id., 57-58.
329 Ibid.
330 Id., 59-60.
number of reasons: (1) the frequency of surveillance in minority neighborhoods means that police officers visit these areas often and may more easily develop biases due to the repetitive nature of the encounter; (2) research has established that stressful situations, such as those faced by officers, are a fertile ground for biases to flourish; and (3) the different culture held by officers and civilians may contribute to their different interpretations of a given act. Altogether, this habit can be applied to a wider circle of legal players, including probation officers, judges and other functionaries in the legal process.

4 Conclusion

An exploration of current reform models and their application to the Israeli system showed that the Israeli reform attempts have largely preferred cultural training over anti-racism policies. Such notions go hand in hand with an individuation of minority rights, as opposed to viewing harms caused to minorities as a result of social construction. That the Israeli police has yet to acknowledge the harms associated with racial profiling to minorities has to do, among other things, with the very different interpretations given to this act by both Ethiopian Israelis and police officers. In light of the difficulties associated with some of the reform outlines described, I have suggested transforming our background assumptions with regard to search and seizure practices, by shifting the focus from the individual to society, and by acknowledging state’s responsibility to the harms of racial profiling and assuring minorities’ participation in outlining reforms. I have suggested using cross-cultural scholarship as a theoretical tool – rather than a training tool - to unpack the relationship between the justice system and minority communities. Such analysis
suggests asking how individuals and institutions in the justice system become acculturated to repressing racial discrimination claims.
Conclusion

By the time I started to write this thesis, I had heard numerous testimonies about racial profiling and police brutality against minorities in Israel. As an advocate for minority rights and a person of colour, I was intimately aware of the burden carried by members of racialized minorities, as well as the silence that surrounded it. Embarking on my project, the gap between the lived experience of the people I met and worked with and the legal reality seemed astonishing. My searches of legal databases revealed that “seminal cases” directly discussing institutional racism, racial profiling and police brutality against Ethiopian Israelis were a rarity. So too any scholarly discussion about the Ethiopian Israeli community. Strangely enough, decades of Israeli critical legal scholarship have yielded zero articles about one of the most incarcerated minorities in the country. Ethiopian Israelis, as I was to learn, are one of the most marginalized communities in Israel, yet the group that is voiced the least in legal discourse.

This dissonance was the starting point for my project. If my clients are right, then what is the source of their silencing? Indeed, even before delving into the world of criminal law – where Ethiopian Israelis often find themselves among the “usual suspects” – I had found that governmental institutions in various arenas of citizenship have failed to develop the tools necessary to both prevent and fight institutional racism. Consider, for example, that it took the Ministry of Health 20 years before it changed its discriminatory policy of destroying blood donations made by Ethiopian Israelis; and that this eventual change in procedure was the result of technological improvements in blood sampling. Or consider the fact that covert segregation mechanisms in the Israeli education system remain in place for Ethiopian Israelis, under the cover of a justification that confuses budget considerations with cultural rationalization. Or that the Keses, the spiritual
leaders of the community, were forced out of the religious councils with the acquiescence of the state.

I suggested that several characteristics of Israeli law and culture prevent Ethiopian Israelis from voicing claims of institutional racism. Among other reasons, Israel's ethnocratic regime structure means that an Israeli person of colour does not have a single sphere where she may express her discrimination claims without first having to pledge allegiance to her cultural-religious identity. This coercion of the symbolic boundaries by religious institutions is thus reinforced by the courts in a way that prevents an in-depth discussion of racialization.

A consideration of the reciprocal relationship between law and culture helps highlight the variety of avoidance strategies taken by the Israeli courts to circumvent discussion of institutional racism. One such strategy is turning to “the argument from multiculturalism” and to the accompanying duty of cultural accommodations, whereby the court or the governmental institution in question confuses plain institutional racism with the religious identity of institutions, or the “cultural” wishes of majority groups to separate themselves from minorities. Another strategy is for the courts to simply avoid using language related to racism, a strategy made easy by the narrow legal categories that reduce institutional racism into individually-based formulations, such as “discrimination based on origin.”

This appropriation of multiculturalism may help us understand why it is that ethno-racialism is also the missing piece in Israeli scholarship on multiculturalism. In this sense as well, awareness of the racialized disadvantage faced by Ethiopian Israelis may open a window to a larger phenomenon faced by other communities of colour in Israel. While Israeli scholarship, importantly, has discussed the marginalization of Mizrachi Jews, much less has been written about the ethno-racial aspects of discrimination against migrants and refugees, the unspoken experience
of Asian communities, and the struggles of the Hebrew Israelites, some of whom have resided illegally in Israel since birth.

In order to fully understand the knowledge gap, I have used the theoretical framework provided by a specific stream of Critical Legal Theory, doctrinally concerned with search-and-seizure practices and normatively occupied with injecting the label “institutional racism” with actual content. I have found that in the Israeli context, nationalization and citizenship feed into the discussion on racialization in a climate where a war on terror can transform into a war on crime.

Looking at cases from both Israel and the United States, I found that both these legal regimes share striking similarities. Much like African Americans in the US, Ethiopian Israelis are spatially segregated and over policed. The two systems rarely, if at all, bring criminal charges against officers accused of violence against minority groups. And the citizen-police encounter at the center of these cases have disturbingly common features. But unlike the US, Israel does not have a history of slavery; its specialized prosecutors in police violence cases and professional judges may have been expected to ensure a system that is more immune to “blue on black” violence. Some may say that indeed it is: The fact that police brutality against Ethiopian Israelis mote often ends with tasering and brutalizing than it does with killing may be attributed to the frequency level of gun use, and to the perceived vulnerability of the police. It could also be connected with that same symbolic boundaries, that tie Ethiopian Israelis with the Jewish polity but do not fully protect them. In other words, we may be wrong to emphasize law over culture both in theorizing and outlining reform. Israeli police reform outlines, much like the institutional response with which this thesis opened, have so far preferred cultural training over anti-racism policies. I contend that this repeated choice reflects more than mere theoretical confusion, and is
strongly connected to the tendency to individuate minority rights, as opposed to turning to the social reality that leads to their infringement.

In June 2018, I presented a preliminary version of this research to a group of Israeli graduate students, who also happened to be police officers. The research was greeted with both fierce objection and thoughtful comments. My audience rejected the suggestion that institutional racism existed in the ranks of the Israeli police force. A repeated response from the officers was to say that the courts and researchers do not face the intense violent encounters that officers must contend with. I propose that we do not ignore the narrative clash that these statements – just like this research – touch upon. To truly promote diversity in Israeli society, we must begin to have uncomfortable conversations on racism and racialization. Hopefully, this work is a small step in this direction.
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Copyright Acknowledgments

Figure 1: Ethiopian Israelis Employed in cleaning and Kitchen Jobs (Hadas Fox & Gilad Brand / Taub Center)