

Responsibility Determination as a Smokescreen: Provocation and the Reasonable Person in the Israeli Supreme Court

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In a move that strengthens the political and normative power of the Israeli courts, and especially that of the Supreme Court, the Israeli judiciary has construed the statutory definition of murder in a manner that allows the courts, while determining criminal responsibility, to conduct an additional, disguised procedure of labeling and normalizing. Courts have construed “lack of provocation,” which in Israel is an element of the offense, as requiring the defendant to convince the court that he killed while provoked, and that the reasonable person would have been likely to act similarly. Since the courts never, in fact, find that the reasonable person would have killed when provoked, this dual standard allows courts to determine that any defendant, who killed under provocation, whether or not he is convicted of murder, is not a reasonable person.

Through this labeling and normalizing process, the legal system develops its own quasi-psycho-social discourse of normalcy, titled “reasonableness,” with which it evaluates and labels defendants’ personalities, acting much like a (Foucauldian) disciplinary institution. However, unlike other disciplinary institutions, the judiciary labels, normalizes and disciplines through its judicial decisions.

This paper demonstrates these theoretical claims through the close reading of one case decided by the Supreme Court (in which one gay Palestinian man had killed another who publicly accused him of collaborating with the Israeli authorities), and proposes an alternative doctrine of provocation (one free of reasonable people and labeling processes).

I. INTRODUCTION

The criminal prohibition against murder, as against any offense, authorizes the judicial system to determine the defendant’s liability for alleged criminal

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conduct and where relevant, to set a penalty. However, in Israel, it is the Criminal Code that is the exclusive source of criminal offenses as well as of the judiciary's powers in judging them. Criminal courts, including the Supreme Court, have no more power than is specifically accorded them by the code.

Israel's Criminal Code, while empowering criminal courts to apply the law to the defendant's conduct and *mens rea*, does not empower them to pronounce upon the "conformity" and "normativeness" of the defendant's character, attitudes and dispositions beyond the specific issue of the alleged crime before the court, or to use cases as platforms for proclaiming the courts' moral notions of "reasonableness." It *does* empower the courts in a few specific offenses of negligence, to determine what conduct was reasonable under the circumstances of the case. Such offenses are widely regarded as problematic exceptions to the spirit of the criminal law, and even then, the legislative permission to determine the reasonableness of a specific piece of conduct does not allow the courts to determine that an individual is or is not a reasonable person. This distinction is fundamental to the rule of law.

The criminal courts thus have no more power than that afforded them by the Criminal Code, which, in all but negligence offenses, consists of the power to find whether or not the defendant in fact committed the prohibited conduct attributed to him (or her) with a wrongful state of mind (and then to punish accordingly). Nevertheless, despite this uncontested view of judicial limits, the Israeli judiciary has constructed the statutory definition of murder in a manner that allows the courts, while determining criminal responsibility, to conduct an additional, disguised process of labeling and normalizing.

This judicial construction strengthens the legal system in its power struggle against the mental health profession and against local disciplining institutions. Perhaps more importantly, it strengthens the Israeli Supreme Court in its power struggle both in the general social context and within the legal system. This concealed labeling and normalizing process enables the legal system to develop its own quasi-psycho-social discourse of normalcy, entitled "reasonableness," with which it evaluates and labels defendants' personalities, and which it imposes on society at large in the form of normalizing. Performing these social functions, the legal system acts much like a discipline institution. However, unlike other discipline institutions, the judiciary labels, normalizes and disciplines through its judicial, legal decisions.

The specific manner in which the process of determining criminal responsibility is utilized to facilitate and conceal this labeling and normalizing also secures the Supreme Court's unacknowledged, self-proclaimed right to interfere with the lower courts' findings of fact. Concurrently, it guarantees the Supreme Court exclusive control over the law's normative standard of "reasonableness." It is, therefore, hardly surprising that the Supreme Court, defending its privileged position, would reinforce the structure that enables it both to engage in this labeling and normalizing process, and to maintain the specific mechanism of its concealment.

In the following discussion, I analyze a single criminal case that came before the Israeli Supreme Court, which exemplifies my argument. But first, I briefly introduce the relevant Criminal Code provision, the judicial doctrine governing provocation, and the logic and site of my ensuing critique.

II. THE LAW, THE LEGAL DOCTRINE AND THE CRITIQUE

Section 301 of Israel's Criminal Code provides that:

With regard to Section 300 [stating that "murder" is "premeditated homicide"], a person will be considered to have killed another with premeditation, if he decided to kill him, and killed him in cold blood, without goading immediately prior to the act, and in circumstances in which he was able to think and understand the results of his actions, and after he prepared himself to kill the other, or prepared a tool with which he killed the other.¹

The Supreme Court has construed Section 301 as requiring three cumulative elements: the decision to kill, preparation to kill, and the absence of provocation (which was read into the words "in cold blood, without goading immediately prior to the act"²). "Provocation" was constructed as consisting of two cumulative components, one subjective and the other objective. "Subjective provocation" refers to the defendant's actual mental state at the time of the killing—that the defendant actually killed as a result of provocation. "Objective provocation" refers to the reasonable person's likely response, were he placed in the same circumstances. This is established through a judicial judgment as to whether the reasonable person, placed in the defendant's shoes, would have been likely to kill as a result of the provocation.

Israeli criminal law scholars have unanimously criticized this doctrine, as well as the Supreme Court's usage of its reasonable person standard, for a number of reasons.³ The sweeping use of any uniform "reasonable person" model, argue the critics, is inherently unfair to certain distinct social groups (such as young people).⁴ Nor is there an "average" Israeli person who could fairly be used as a role model (a "reasonable person standard") for the entire population. The judiciary's

¹ For the history of this section, see Yoram Shachar, *Premeditation and Legislative Intent*, 2 MEHKAREI MISHPAT 204 (1981) (in Hebrew).

² I use "goading" as translation of the Hebrew *hitgarut*; *kintur* is commonly translated as "provocation."

³ See Sh. Z. Feller, *Negligent Homicide—An Abnormality in the Criminal Law*, 12 IYUNEI MISHPAT 581 (1986) (in Hebrew); Miriam Gur-Aryeh, *Negligent Homicide*, 12 MISHPATIM 257 (1982) (in Hebrew); Mordechai Kremnitzer, *Intent and Premeditation as Murder: The Lack of Provocation*, 1 CRIM. L., CRIMINOLOGY & POLICE 9 (1985) (in Hebrew); Shachar, *supra* note 1.

⁴ On the other hand, to create specific "reasonable persons," with the characteristics of specific social groups, would clearly defy the purpose of equal implementation of the criminal law.

“reasonable person” sets a higher normative standard than that actually governing most people’s lives. In requiring people to adopt such higher norms of conduct, which are not demanded by the Criminal Code, the Court oversteps its authority, judicially legislating retroactive offenses and thus breaching the rule of law. Furthermore, the reasonable person standard is used by the judiciary to evaluate and condemn not only defendants’ rational actions, but also their instinctive, unconscious ones. The application of this tort law standard to criminal law also blurs crucial distinctions between these two areas of law. Some critics feel that the notion of a reasonable person standard may be appropriate for professional conduct, but not for non-professional criminal conduct. All agree that provocation, as a question of *mens rea*, should be determined exclusively by reference to the defendant’s actual state of mind. For decades, the Supreme Court has ignored this critique.

My own critique, as presented in this paper, does not focus on the use of an “objective” standard to determine provocation, but rather on the specifics of the doctrinal mechanism used by the judiciary.

Unlike some other legal systems in the common law world, in which “provocation” is an affirmative defense, Israel’s criminal law constructs “absence of provocation” as an element of the offense. If there must be a dual standard, the prosecution should have to prove that the defendant did not act while provoked *and* that a reasonable person in his shoes would not have been likely to kill as a result of provocation under the circumstances. But, in fact, the judiciary has ignored the negativity of the statutory requirement of “*absence* of provocation,” applying the dual-aspect provocation doctrine to “provocation,” thus placing the double burden on the defendant.

The courts find that provocation interfered with defendants’ cold-blooded conduct (thus precluding “premeditation”) only when convinced by the defendant that he or she in fact killed as a result of provocation *and* that the reasonable person would have been likely to kill under similar circumstances. The prosecution is thus not required to prove both subjective and objective “lack of provocation” but merely one of the two,⁵ and—in practice—that the reasonable person would not have been likely to kill in those circumstances.⁶

⁵ See Criminal Appeal 46/54, *The General Attorney v. Segal*, 9 Pad 393; Criminal Appeal 396/69, *Benno v. The State of Israel*, Pad 24(1), 561; Criminal Appeal 686/80, *Siman Tov v. The State of Israel*, Pad 36(2), 253 (all in Hebrew).

⁶ Another way of presenting this critique is this: Officially, the judiciary constructed the dual standard for “lack of provocation” to mean: “not (reasonable person provocation *and* defendant provocation).” This equates to the conjunction “(not reasonable person provocation) *and* (not defendant provocation)” —an offense element that the prosecution should be required to prove. Instead, the court requires the prosecution to merely prove the disjunction “(not reasonable person provocation) *or* (not defendant provocation),” as if the original phrase was “not (reasonable person provocation *or* defendant provocation).” In other words, the judiciary’s logical error is in substituting intersection for union. (I am grateful to Sharon Byrd and to Laura Kolb for helping me grasp this point).

Defining the reasonable person, Chief Justice Shamgar, explained (in the early 1980s) that the reasonable person was not:

an imaginary, ideal creature, optimally fulfilling expectations about the correct and desirable behavior of a cultured, restrained person. The court evaluates the defendant's actions realistically. [Nevertheless,] one should not conclude that the courts are completely free from the natural inclination to incorporate into their evaluation of the reasonable person's expected response an additional element: a fraction of the desirable, such as finds expression in judicial policy adopted by them. The reasonable person is not a product of statistical averages, but rather a sample, made up of *the attributes of human beings who represent the values and conceptions of our society*.⁷

In determining the reasonable person's "expected response" in any given circumstance, the Court does not consider empirical data or professional testimony, but relies solely on its own judicial expertise. Not considered "fact-finding," but rather a normative decision, such a determination is not within the exclusive domain of the lower court and can be reexamined and overruled on appeal. In fact, such determinations frequently are appealed, and the Supreme Court is the highest court of criminal appeal. It is, therefore, the Supreme Court that determines the reasonable person's expected response in any given situation, and thus fully controls that creature's characteristics and patterns of behavior, as well as the norms and standards he reflects and refracts.

Surveying the Israeli Supreme Court's criminal decisions, Yoram Shachar found (in 1990) that under almost no circumstances had the reasonable person ever lost his temper to the extent of being likely to kill as a result of provocation.⁸ Shachar's conclusion was that the Supreme Court simply did not allow its "reasonable person" to lose his head and kill under provocation, even in those very circumstances in which real (Israeli) people did and, in fact, do so.⁹ *The Supreme Court's reasonable person does not kill in hot blood, under any circumstances*. (Significantly, in a later Supreme Court decision from 1997,¹⁰ in which the reasonable person was finally found to have been likely to kill as a result of provocation, it was when, after hours of frantic search, gun in hand, he found his long-estranged wife, whom he had severely abused, in another man's car. To date, this seems to be the only case in which the reasonable person was judged likely to

⁷ *Siman Tov*, Pad 36(2) at 264 (emphasis added).

⁸ Yoram Shachar, *The Reasonable Person in Criminal Law*, 38 HAPRAKLIT 78 (1990) (in Hebrew).

⁹ *Id.* at 93.

¹⁰ Criminal Appeal 3071/92, *Azualus v. The State of Israel*, Pad 40 (2), 573 (in Hebrew). The case returned to the Supreme Court twice more, and the decision was somewhat qualified. For full discussion see Orit Kamir, *Reasonableness Killed the Woman*, 6 PLILIM 137 (1997) (in Hebrew).

kill in hot blood. That decision seems now to have been silently disowned by the Court).

Given this operation of the “absence of provocation” doctrine, the defendant’s actual “hot blood” and his killing due to provocation, i.e., the “subjective” element, has been rendered completely redundant: whether or not the defendant actually killed because of provocation, it is whether the reasonable person would have likely killed that determines “absence of provocation.” And since the reasonable person never kills when provoked, judicial discussion of the objective element is also all but superfluous. Thus, murder is actually determined by the evaluation of the two other components: the decision to kill and preparation for the killing.¹¹

Critical scholars ask why the Supreme Court maintains the objective element of provocation, given its obvious flaws. The Supreme Court’s (quite plausible) reply is that but for that “objective element,” hot-blooded defendants who do not attempt to control their violent rages would be encouraged to indulge in their character flaws as a means of getting away with murder. Acknowledging the judiciary’s logic, this paper poses the following question: Why maintain the “*subjective* element” of provocation? Why not eliminate it altogether? What purpose does this element serve, when it clearly does not, and structurally cannot, influence the determination of a defendant’s criminal responsibility for the homicide at issue?

I suggest that the dual-aspect provocation doctrine, while not affecting the legal determination of criminal responsibility, provides space for the unacknowledged, separate process of labeling and normalizing, while concealing this process in the shadows of the legal determination.

In a typical murder case, the defense brings ample proof of subjective provocation, while the prosecution, citing ample precedents, compellingly argues that the reasonable person would not have been likely to kill due to provocation under the same circumstances. The court then accepts the defense’s proof and finds that the defendant did, in fact, kill as a result of provocation. However, it also finds, in line with the precedents cited by the prosecution, that the reasonable person would not likely have killed were he placed in the defendant’s shoes.

The *comparison* between the defendant, who actually killed due to provocation, and the reasonable person, who would not have done so under the same circumstances, shows the defendant to be an “unreasonable” person. Thus, even if he is not convicted of murder (because one of the other elements of the offense was not proved), the defendant is still stigmatized by the court as “unreasonable.” His character and disposition, the norms he lives by, perhaps even his social milieu are all reviewed and pronounced unworthy and undesirable.

¹¹ The Supreme Court also requires so little “preparation” (as little as pressing the victim’s throat for a few seconds prior to the actual killing, or grabbing a knife or a gun) that critics object that this statutory element has also been voided of content by the Court. The “decision to kill” element is satisfied, to some extent, by the common law presumption that a person intends the natural outcomes of his conduct. This grounds the critique that murder is not distinguished clearly enough from manslaughter.

Judged by the court against “the attributes of human beings who represent the values and conceptions of our society,” the defendant is declared lacking in these attributes, and thus not a member of that representative group.

This process is clearly not about determining criminal responsibility: it reviews the defendant’s psychological, moral and social constitution rather than his specific homicidal conduct. It is a labeling process, distinct from the legal determination of his guilt or innocence. The site of this labeling and normalizing procedure is not the court’s legalistic-philosophical argumentation, but the subtextual narrative underlying the judicial text. The labeling and normalizing occurs in the comparison between the actual defendant and the hypothetical reasonable person, which itself occurs in a fictional narrative that is merely hinted at and not fully explicated by the court; it is left to the reasonable reader to flesh out, based on his or her embedded skills in reading stories.¹² The judicial decision’s implicit narrative, featuring the reasonable person, both accommodates and effectively conceals the labeling and normalizing process.

III. PUNISHMENT VS. DISCIPLINE, FACT-FINDING VS. MATTERS OF LAW

In his article *The Dangerous Individual*,¹³ Foucault recounts the growing influence of psychiatry over legal discourse and the legal process during the nineteenth century. Proponents of “anthropological psychiatry” argued that madness, at least in its most extreme forms, constituted crime, and a grave threat to public safety, thus casting psychiatrists as the sole experts capable of discovering such dangerous disease, and of defending public safety. This, of course, came at the expense of the legal system’s prestige and power, hence the legal system’s reluctance to endorse the newly discovered “illness.” Gradually, however, the legal world came to accommodate the “science” of psychiatry, and to acknowledge psychiatrists’ expertise in relation to crimes that, lacking any recognizably “reasonable” motive, baffled legal logic. Offenders who were labeled “mad” by the psychiatrists were exempted from criminal responsibility and from the reach of the legal system. Eventually, psychiatric logic and discourse extended to cover the whole range of criminal conduct. Whereas previously, in the enlightenment era, a “criminal” was a person who committed socially prohibited conduct and, thus, was

¹² Two such skills are crucial. Firstly, faced with a binary opposition, the skilled reader intuits that there must be a contrast between the two components. If one of the components is “the reasonable person,” the other will be assumed to be “the unreasonable one.” Secondly, the skilled reader instinctively fills in the gaps regarding the characters presented by the text. Thus, although the reasonable person is not explicitly presented as a heterosexual Jewish man of average education, the skilled Israeli reader reads these attributes into the narrative’s gaps. Thus, when compared with the reasonable person, the defendant is read against the image of a heterosexual Jewish man of average education, and if he happens to differ from this in any way, his “different” attributes in themselves stand out as potentially unreasonable.

¹³ MICHEL FOUCAULT, *The Dangerous Individual*, in POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS, 1977–1984, at 125 (Alan Sheridan et al. trans., Lawrence D. Kritzman ed., 1988).

deserving of punishment, following the psychiatric revolution, a “criminal” was an individual whose bad conduct marked him as socially dangerous. The criminal was tried and punished not so much for his actual conduct, as for the social dangerousness it manifested.

The popularity of “anthropological psychiatry” faded by the end of the nineteenth century, to be succeeded by the psycho-sociological treatment of criminality, which was much more in line with conventional legal principles. Nevertheless, Foucault contends that “anthropological psychiatry” and its image of the dangerous individual left its imprint on the psyche of the legal system.¹⁴

In light of this analysis, I suggest that through the dual-aspect doctrine of provocation, the Israeli legal system labels defendants who killed under provocation as “dangerous individuals,” i.e., “unreasonable people.” It thus constitutes itself as the professional system that can identify “dangerous deviants” and protect the public against them. In this way, the individual judged “undesirable” by the judiciary becomes a deficient outcast who endangers society. Through this process, the legal system marks the boundary between “us” and “them”—members and outcasts, sheep and wolves—and aspires to determine society’s value system and moral fiber:

[P]rovocation can cause a reasonable person to kill, but it most certainly does not cause the unreasonable person to kill, as an unreasonable person will certainly react in an unreasonable manner. The purpose of the law is to protect against unreasonable reactions and the outcomes of evil, *viewing the unreasonable reaction as proof of a man’s wickedness.*¹⁵

The phrase “unreasonable person” is used, in the natural law language of good and evil, to constitute a would-be-natural category, and to label the unreasonable individual as evil incarnate, to be confronted and subdued by the court.

The legal system has no interest in proclaiming defendants to be wholly deviant and complete outsiders, since they would then be considered “mentally ill” and beyond the legal system’s reach, which in turn would empower the competing psychiatric system and *its* discourse to explain them away, label them, treat them, and defend society from them. The legal system wishes to brand these individuals, denouncing them as deviant outsiders, but without compromising its own power by handing them over to the rival, psychiatric institution. Pronouncing them “unreasonable” through the dual-aspect doctrine of provocation seems the perfect solution.

Furthermore, by labeling these defendants “unreasonable,” the legal system sends Israeli society the normalizing, disciplining message that anyone who behaves, thinks and reacts like them may similarly be pronounced to be unreasonable, i.e., normatively deviant (even if not legally guilty of murder). This

¹⁴ *Id.* at 144–45.

¹⁵ *Segal*, 9 Pad 393 at 416 (Goitain, J.) (emphasis added).

normalizing function and its overwhelming effect on contemporary social reality was described by Foucault, in *Surveiller et Punir*, as the binary opposition of the rule of law. The eighteenth century “legal-monarchist,” centralized power systems gradually gave way to a new network of power mechanisms made up of localized “disciplinary institutions” (such as prisons, schools, hospitals, armies, youth organizations, etc.). As Alan Sheridan summarizes:

It is these micro-mechanisms of power that, since the late eighteenth century, have played an increasing part in the management of people’s lives through direct actions on their bodies: they operate not through a code of law, but through a technology of normalization, not by punishment but by control, at the levels and in the forms that go beyond the state and its machinery. As the action of these mechanisms has increased, there has been a corresponding decline in the capacity of the judiciary to serve power as a channel or a system of representation.¹⁶

These smaller, localized disciplinary institutions enforced new power relations and alternative notions of judgment and punishment, not just on “deviant outlaws,” but also on the entire population. Through the incessant regulation of individuals’ every move and the exemplary denunciation of nonconformity, they effectively discipline communities into conformity. In the contemporary world, “the whole indefinite domain of the nonconforming is punishable.”¹⁷

Disciplinary punishment, Foucault explains, does not aim at redemption or oppression, but instead serves to place personal behaviors in the public arena, where they are compared and evaluated. It distinguishes between individuals by reference to posited minimal, average, and optimal standards, hierarchizing their possibilities, qualifications, and “nature.” It determines the boundaries that define “difference” and “otherness,” setting the limits of “normalcy.” This normalizing regime of disciplinary punishment

is opposed, term by term, to the judicial penalty, whose essential function is to refer, not to a set of observable phenomena, but to a corpus of laws and texts that must be remembered; that operates . . . not by hierarchizing but by quite simply bringing into play the binary opposition of the permitted and the forbidden. . . . The disciplinary mechanism secreted a “penalty of the norm,” which is irreducible to the traditional penalty of the law.¹⁸

¹⁶ ALAN SHERIDAN, MICHEL FOUCAULT: THE WILL TO TRUTH 183 (1980).

¹⁷ MICHEL FOUCAULT, *Discipline and Punish*, in FOUCAULT READER 169, 194 (Paul Rabinow ed., 1984).

¹⁸ *Id.*

Within this frame of reference, my discussion of the dual-aspect doctrine of provocation suggests that in response to the “decline in the capacity of the judiciary” to enforce the liberal state’s legalistic-centralist power system, the Israeli legal system has incorporated the alternative, competing power structure of the disciplinary institutions. While determining criminal responsibility is officially a function of a legalistic, punishing, centralized institution, the judicial system utilizes its “reasonable person” standard as a concealed mechanism of disciplining and normalizing, which exhibits all the functions ascribed by Foucault to the disciplinary institutions. This type of power dynamic “is opposed, term by term, to the judicial penalty,” but it serves as a survival mechanism, operated by the judiciary in a social reality where the exercise of power is most effective when it normalizes public behavior, disciplining nonconformity.

Since the normalizing process is embedded in the judicial decision’s implicit narrative, it is established as purportedly self-created and self-inflicted by the reader, and is thus rendered elusive and unscrutinized. As such, it may be far more powerful than an explicit, argumentative statement.

The judiciary’s institutional dual functioning in judging and labeling, punishing and disciplining, empowers the legal system at the expense of both the psychiatric discourse (which is deprived of potential labeling opportunities) and the localized disciplinary institutions (which are bypassed). Concurrently, the dual-aspect determination of provocation enhances the Supreme Court’s control over the legal system, allowing it scrutiny over the lower courts’ findings of fact (particularly regarding defendants’ *mens rea*).

If provocation were to be determined exclusively by reference to the subjective component (as proposed by many legal academics), the legal system would lose its disciplining, “reasonable person” device (which relies on the comparison between subjective and objective provocation). Additionally, such a practice would empower the lower courts to determine the issue of provocation solely on the basis of their fact-finding. The Supreme Court, as a criminal court of appeals, would be all but precluded from scrutinizing the issue of provocation, as well as the lower courts’ findings of fact.

If provocation were to be determined exclusively by reference to the objective component, the legal system would similarly lose its disciplining, “reasonable person” device, since the court would no longer compare the defendant with the reasonable person. The Supreme Court would then be the final judge of provocation (which would be a matter of law, not of fact). But this structure, like the former one, would deny the Supreme Court access to the lower courts’ findings of fact. The existing, dual-aspect provocation doctrine offers the Supreme Court optimal control.

While placed in binary opposition to the defendant’s conduct, the reasonable person’s hypothetical conduct is also used by the courts as a semi-empirical evidentiary tool to assist them in establishing whether the actual defendant killed due to provocation. The reasonable person’s hypothesized mental response is supposed to shed light on the defendant’s actual one and offer the court insight into

the defendant's *mens rea*. When the court is convinced that the reasonable person would not have killed as a result of provocation, it may find it hard to believe that the defendant did so. The reasonable person's hypothetical conduct is thus treated as a semi-factual element: but it is a paradoxical, purely fictional, "factual" element, since it is considered a matter of law and, as such, is controlled by the Supreme Court.

By determining that the lower court erred in deciding how the reasonable person would have responded to the given circumstances, the Supreme Court may—and does—conclude that this error might have led the lower court to a mistaken conclusion about the *actual defendant's* mental state, i.e., about whether he satisfied the subjective condition of provocation. Such potential error justifies the Supreme Court's review of the lower court's fact-finding on this issue. It is then a small step for the Supreme Court to further find that the lower court's stated error(s) may have generated a misconstruction of the defendant's "decision to kill" (and perhaps even his preparation), thus opening the entire fact-finding process to review on appeal.

This subtle amalgamation of paradoxical fictions legitimizes the Supreme Court's overturning of factual findings, signaling to the lower courts that the justices' watchful eye follows them even in this territory. This mechanism further allows the Supreme Court to cross the fine line between "legal matter" and "factual matter," while maintaining the conceptual distinction between the two. This distinction seems important in legitimizing the judicial process by maintaining its complex image as applying highly professional skills (the treatment of legal matters) to objective facts (found in the encounter with first-hand evidence).

IV. THE STATE OF ISRAEL V. MUHAMAD JUNDI¹⁹

On a Saturday night in 1986, Muhamad Jundi stabbed Assad Altehami to death in a brawl. The judicial treatment of Jundi's case exemplifies the critique presented above, revealing the full significance of the dual-aspect doctrine in a multi-cultural society. Since the relevant documents are all in Hebrew and mostly hidden away in the court archives in Jerusalem, I begin with the facts of the case, constructed from those documents.

According to a pre-sentencing report from the Adults' Probation Authority, Muhammad Iben Salama Jundi was the oldest of eight siblings in a Muslim family living in a refugee camp near Hebron in the West Bank. He was twenty-four years old, of "mediocre" intelligence and "a childish character, demonstrating a shallow and concrete thinking capacity." His childhood was characterized by "gross educational, mental and social neglect." His schooling was minimal. His criminal

¹⁹ Criminal Appeals 402/87 and 411/87, *The State of Israel v. Gandhi*, 42(3) Pad 383 (Israeli Supreme Court decision). Due to the court's difficulty pronouncing and writing the defendant's Arabic name, Jundi, in Hebrew, the defendant is judicially referred to as Gandhi; his very name is thus "cleansed" and transformed.

record consisted of eight convictions for serious crimes (mostly break-ins and robberies) and several periods of substantial incarceration. He had operated as an informer for the Israeli security forces, and was therefore gravely concerned about his safety.

At the time of the killing, Jundi worked as a security guard in downtown (Jewish) Jerusalem. Being a Palestinian, he was never furnished with firearms, and always carried a switchblade instead.

The friend who accompanied Jundi at the time of the killing was nineteen year old Muhamad Awlad, known as "Mustafa," whose fifteen-member family lived in extreme poverty in a small village near Hebron. Mustafa was raised and schooled away from home by charity organizations, but failed in his studies and was expelled at the age of fourteen. Since that time, he had worked randomly to help support himself and his family.

The criminal event took place in Jerusalem's Independence Park, a popular meeting place for homosexual men, Jewish and Palestinian alike. As such, it is also a locus of violent crime, gay-bashing and police patrols. Some gay men visit the park frequently, and much of their social life revolves around it. A (Jewish) prosecution witness, Amram, testified that: "I roam around, I don't answer to anybody. I go wherever I want, I'm there [at the park] every day. I don't harm anyone. I do my thing and then I go."

Palestinian homosexuals who frequent the park are perceived by their Jewish counterparts as distinctly more honor-driven. The Palestinians are said to prefer the "male" position in a sexual relationship, perceiving the "female" ("passive") role ("maniac" or "maniac" in Arabic) as demeaning and humiliating. They are highly sensitive to their manly honor, feeling obliged to defend it upon insult. The term "maniac" is a grave offense that constitutes an unbearable affront to a "real man's" honor. Jewish homosexuals consider the Palestinians in the park violent and militant.²⁰

According to Amram, Jundi was an active homosexual, well known in the park: "I know him from the park, where he grabs kids and fucks them. He threatens them with knives." Amram testified that, at the time of the killing, Mustafa ("a kid"), was not known to the park's community. According to the defense, Mustafa was a handsome young man, arousing jealousy among the park's regular visitors. According to Jundi, he and Mustafa had been "friends" (lovers) for a month prior to the time of the killing.

From Amram's and Toni's testimony, it appears that on the night of the event, several of the park's "usual crowd" (Jewish and Palestinian men) were hanging out together on a bench in the park. ("Toni" was a Palestinian witness for the prosecution). These men seem to have all had personal and sexual relations with each other for years.

²⁰ This conclusion is based on my random interviews of Jewish homosexuals who frequent the park.

According to their testimonies, the witnesses were all under the influence of drugs and alcohol at the time of the killing, not an unusual occurrence for them. Amram testified that the deceased “arrived drunk from his home” that evening, and according to Yaakov Levy’s testimony, Jundi was also at least partially drunk at the time of the killing.²¹

According to Jundi’s defense, the deceased, Assad Telhami, worked as a prostitute in the park. (This testimony was ignored by the court, since it was an unverified rumor). Jundi testified that Assad “was a very, very close friend of mine.”

On the night of the killing, Jundi and Mustafa were walking along a path in the park. They passed a bench on which Assad was sitting with Amram, Levy, and Toni. “When we passed by them,” Jundi testified, “we said hello, and Toni asked me for my jacket.” (Toni claimed to be sick and cold—though he could have borrowed a jacket from one of the others on the bench). Jundi answered that it was not his jacket to give, and asked Mustafa if he wanted to give Toni his jacket. Mustafa refused, joking that he would lend it to him the next day.

As Jundi and Mustafa left, Assad called after them. According to Levy “he cursed a lot, very filthy, too much.” According to Jundi, the curses included the expressions “maniac,” “fuckers,” “your mother’s cunt,” “whore” and “your sister’s cunt.” He suggested, and Mustafa agreed, that they should go back “to clarify things with Assad.”

According to Levy, Toni and Amram, Jundi called on Assad to approach him, saying either, “Hey, man, come meet me here,” or “If you are a man you will fight me now.” Assad’s reply might have been “Whoever wants me comes to me” (according to Levy). Another witness (Toni) remembered that Assad “jumped up and cursed Jundi again . . . ‘fuck your mother,’ ‘maniac,’ curses like these.” According to all the witnesses, Assad then said something like, “I’ll show you for what you did to me,” reminding Jundi that he, Assad, had already attacked Jundi once before, in prison. Assad also said “I’ll screw you” (Levy’s testimony).

When asked by the defense whether Assad meant that he would screw Jundi physically (“as if he, Assad, were the man and Jundi the female”), or merely meant to threaten “in the sense that I’ll teach you a lesson,” the witness answered, “I don’t know—what can I tell you, one or the other.”

Then Jundi and Mustafa approached the seated Assad. “We said to Assad: ‘Did we talk to you? Did we ask you anything? Why are you interfering in something that is none of your business?’” At this point, according to Jundi:

Assad kicked me in the balls with his foot and things heated up between us. And I asked Assad ‘why are you hitting me?’ and caught him by his shirt and pulled him about a meter away from the bench, and then Assad hit me with his fist in my stomach, and I have an ulcer, and I hit him

²¹ The lower court determined that the defendant was not drunk enough to be considered to have acted involuntarily. A critique of this finding is beyond the scope of this paper.

back and we wrestled and my friend Mustafa started hitting him with his feet and I got agitated and took out my knife and pushed the button and opened it and started stabbing Assad wherever I could. . . . I felt pain, I have an ulcer and I get [medical] treatment in Beer Sheva. I was in too much pain and was getting too agitated. . . . I didn't want to kill him, I didn't mean to kill him, I didn't even mean to stab him. . . . I defended myself. My strength is not like Assad's, the deceased. . . . Sir, I didn't know what I was doing and I got agitated.

The two rivals "went crazy," to use Levy's words, and Jundi "came on like a madman; he went crazy with the knife."

Jundi then fled to his grandfather's house and immediately asked to find the Mukhtar (the community's most respectable elder) in order to organize a Sulha (reconciliation ceremony). "In Hebron," he explained, "even if I merely say [something offensive] to a man . . . [and certainly if] we fight with our hands, I open his skull, I have to go and ask for a Sulha from his parents so that the families won't hurt each other."

V. LOWER COURT: FACT-FINDING AND JUDICIAL ANALYSIS

On the whole, the court adopted this version of the events in the park. Considerable portions of this narrative and the supporting testimonies appear in the judicial decision. But most interesting are the narrative components that were left out of the judicial texts, remaining buried in the court's archives. The court did not mention Jundi's sexual orientation and the nature of his relationships with Mustafa and Assad, the nature and norms of the "Independence Park community", or the distinct retribution code governing Jundi's traditional society in Hebron. The cultural-normative significance of the events in this complex, tense, multi-cultural context was never addressed by the court. Jundi was not presented in the judicial opinion as a Muslim (Hebron resident), homosexual, Palestinian informer, or a member of Jerusalem's Independence Park community. Jundi's rising anxiety as a collaborator with the Israeli security forces, when publicly confronted by Assad, his humiliation, having been challenged and dishonored in the presence of his young new lover, his deep-rooted honor-based mentality, his complex, perhaps confusing emotions towards Assad and the other members of the gay community: none of these issues were explicitly incorporated into the story composed, discussed and validated by the court.

Here is the court's sterile, neutralized, laconic narrative of the relevant background facts and of the event itself:

Four young men were sitting prior to the event on a bench in Independence Park, passing the time, conversing and singing. The four were the deceased and the prosecution's witnesses: Halled (known as "Toni"), Yaakov Levy and Amram Amzaleg. According to Toni's

testimony, he was feeling unwell and bothered by a chill in the air. The defendant and Muhamad approached, strolling together on an adjacent path. Toni addressed the defendant, whom he knew, asking him for his jacket. The defendant refused and the two continued their stroll. As they were walking away, the deceased, who also knew them and resented the refusal of Toni's request, began to curse and swear at the defendant, hurling at him grave curses in Arabic.

Additionally, referring to a previous incident that occurred when they were both in prison, the deceased said to the defendant: "I already hit you in prison, I'll hit you again for what you did." Following this, the defendant turned and called for the deceased to approach him, but the deceased replied that if the defendant was interested, he (the defendant) should come closer to the bench.

As the defendant and Muhamad approached and reached the bench, the defendant grabbed the deceased man's left shoulder. The deceased then hit the defendant in the testicles or the stomach, and from then on a violent fight ensued, in which the main participants were the defendant and the deceased, with Muhammad [Mustafa] helping the defendant by hitting the deceased.²²

Crucial background details were clearly omitted. Charged phrases (such as "maniac," or "if you are a man you'll hit me now," or "I'll screw you as I did before") were replaced by the court with "neutral" expressions (such as "I will hit you"). A reasonable reader, unfamiliar with Independence Park's reputation and with the full range of the actual testimonies, cannot infer the full socio-cultural context from the judicial text.

I suggest that under the "reasonable person disciplining regime" enforced by the Supreme Court, even in this preliminary, fact-finding stage of the judicial process, the lower court applied the "reasonable person prism" in constructing the relevant characters and events. By excluding from legal consideration the unique homosexual and Palestinian features of the defendant, the unique features of the deceased, and the criminal event as described above, the court used its fact-finding power to determine the boundaries of both the legal discourse and "legitimate" social values and concerns. In marking these boundaries through the selective "translation" of the defendant and the criminal event into official, legal discourse, I suggest, the lower court was guided by the Supreme Court's vision of the reasonable person. Jundi's "normatively deviant," nonconforming characteristics—that he was a homosexual Palestinian from Hebron who hangs out with the stoned, multi-ethnic community of Jerusalem's Independence Park, "grabbing kids and fucking them," and that he was an informer with a rich criminal record who carries a jack-knife to defend his life—were intuitively found to be "too deviant" from the norm, and were thus automatically "deleted." Jundi's

²² *Gandi*, 42(3) Pad at 386.

“unreasonable” logic and claims (such as that he acted in self-defense, because the deceased had challenged his honor, and thus also his ability to defend himself and survive) did not “register” in the legal documentation.²³ In obliterating Jundi’s most blatant departures from the “reasonable person” norm, the court’s portrayal of him and his conduct is (always already) confined by the reasonable person’s lurking, disciplining silhouette.

At first glance, it would seem that the judicial stripping away of his “unreasonable” characteristics would work in Jundi’s favor, diminishing his apparent deviance. In fact, the contrary is true. Stripped of its “deviant,” homosexual, Palestinian aspects, Jundi’s conduct appears to be inexplicable, unjustifiable and inexcusable—and, thus, to be both unreasonable and criminally culpable.

The court’s weeding out of “normatively deviant” elements leaves the criminal event with a very meager plot line: the defendant, verbally aggravated by the deceased, chose to return to confront him, initiated a violent brawl and, using a weapon on an unarmed man, intentionally killed him by repeated stabs. Devoid of the sexual-political tension between the defendant and the deceased, and the socio-cultural significance of the deceased’s deliberate, public, offensive assault on the defendant’s honor in the presence of a new, young lover, the defendant’s response to a verbal insult seems bad-tempered and irrational, manifesting the violent, dangerous character of a wild, unsocialized man. It further seems to indicate decision (he intended to kill Assad), preparation (he reached for his jack-knife and opened it), and lack of objective provocation (even if Jundi was provoked, a reasonable person would not have been provoked to kill under the same circumstances). Jundi must thus be judged to be an unreasonable person, criminally responsible for premeditated murder.

The meager story narrated by the court portrays the classic, exemplary scenario in which, according to Israeli common law doctrine, the defendant could and should have continued on his way. Not having done so, Jundi did not merely act unreasonably, but he is also guilty of murder. Stripped of his *unreasonable traits*, he was left with utterly *unreasonable conduct*, perplexing and unacceptable to the legal system, to be condemned by it in both its (legitimate) judging and its (concealed) normalizing capacities.

Furthermore, the court’s internal censorship in the shadow of the reasonable person precluded the need to address the socio-normative concern at the heart of this case: How should Israeli legal discourse, and Israeli society at large, address the moral and legal implications of its diverse, multi-cultural nature?

²³ Interestingly, Jundi’s lawyer, who repeatedly addressed the homosexual context of the event in his examination of the witnesses, soon understood from the court’s reaction that this line of defense would not be effective; in his concluding remarks he ignored the point completely. Catering to the court’s normative evaluation of the occurrence, he pragmatically applied internal censorship, thus assisting the court in the elimination of any traces of unreasonable features.

But in an unpredictable act of open rebellion, the lower court refused to follow this clear path. It found that Jundi did intend to kill Assad and prepared for the killing. But declaring that the reasonable person standard and the doctrine of objective provocation were unsuitable for this case, it chose to apply only the subjective measure of provocation, and not the dual-aspect doctrine. Finding that Jundi did in fact kill due to provocation, the court proceeded to find him guilty of manslaughter rather than of murder. By not comparing the defendant with the reasonable person, it further refrained from labeling him “unreasonable,” and from sending the usual normalizing, disciplining message.

In an unusually confrontational manner, the lower court thus explicitly questioned the usefulness and fairness of the Supreme Court’s reasonable person standard. Although not explicitly focusing on issues of sexual orientation and ethnicity, it clearly acknowledged the existence of diverse cultural communities, declaring that the reasonable person standard does not and should not apply to such a heterogeneous society. In so doing, it challenged the legitimacy of the Supreme Court’s long-standing position.

It seems that . . . the subjective element of provocation was amply proven. But was the objective element similarly proven? Can we determine, giving the defendant the benefit of the doubt, that ‘a member of the community’ [literally: “a member of the settlement”]²⁴ placed in the defendant’s situation “could have lost control and responded in a lethal manner, similar to that of the defendant?”

Sadly, it is very difficult to define the character and image of the contemporary “community,” even without special reference to the defendant’s specific community. The contemporary tendency . . . is to minimize the objective test of provocation; English-defined “coolness” is clearly no longer applicable. The character and image of a “member of the community” is very different for the civilized, educated person, and for the uneducated person whose “culture” consists, partly, of watching violent films on television and an “eat and drink” mentality. Is the “member of the community” the “man on the street,” and can we, even today, attribute to the term “community” the same cultural meaning it carried before the establishment of the state and during its first years of existence?

Given all of these concerns, given the cumulative weight of all the elements of provocation as detailed earlier, and given the speculative, hypothetical nature of the reasonable person standard [in its literal wording, the judicial decision here refers to the Supreme Court’s phrase

²⁴ The phrase “a member of the settlement” was used to refer to the Jewish community prior to Israeli statehood, in Mandatory, British-ruled Palestine. By using this phrase as if it were interchangeable with “a reasonable person,” and treating it literally, the lower court clearly points to the absurdity of the concept.

“could have lost control,”) doubts began to creep into our minds whether we can really find—in the unique circumstances of this case—that a reasonable, or average person could not have lost self control and responded in a lethal manner similar to that of the defendant.²⁵

VI. FINAL ACT: THE SUPREME COURT’S REINFORCEMENT OF ITS DOCTRINE AND ITS INSTITUTIONAL CONTROL

Clearly realizing the significance of the lower court’s provocative opinion, the Supreme Court’s Chief Justice, Meir Shamgar, overturned the lower court’s reasoning, while neutralizing its rebellious significance by deliberately misconstruing it:

The lower court deviated here from the test set forth in our decisions and I find its opinion, with all due respect, unacceptable [T]he court chose to apply an inappropriate test which led it to the mistaken conclusion that the objective aspect was proven here as well as the subjective one—but in my opinion this is not so, and thus provocation was not established.²⁶

The lower court did *not* find “that the objective aspect was proven here,” but rather declared that the objective standard should not be applied. Shamgar’s misconstruction makes it conveniently easy to ignore this challenge and to present it as a judicial error on a matter of law.

Nevertheless, the Chief Justice did *not* overturn the lower court’s final decision, and did *not* find Jundi guilty of murder. In a long, meticulous decision, he chose to topple the lower court’s opinion, review the facts of the case, find that the defendant’s “decision to kill” was not proved by the prosecution beyond a reasonable doubt, and determine that for *this* reason, Jundi was guilty of manslaughter, not murder, while still implying that Jundi was an unreasonable person (through the insistent usage of the dual-aspect provocation doctrine). Clearly, Chief Justice Shamgar was not interested in convicting Jundi of murder. He was interested, rather, in labeling Jundi unreasonable, securing the dual-aspect doctrine of provocation, reinforcing the image of the reasonable person, and disciplining the lower court. In the following discussion I expand on several of the intriguing elements of Shamgar’s decision.

I suggested earlier that the dual-aspect doctrine of provocation enables the Supreme Court to interfere with the lower courts’ findings of fact. Shamgar’s opinion offers an exemplary case in point. The logic of his argument is that the lower court erred in not realizing that the reasonable person in Jundi’s position would not have killed. A review of the lower court’s treatment of the defendant’s

²⁵ Lower court decision, (unpublished), at 18–19 (on file with the author).

²⁶ *Gandi*, 42(3) Pad at 392–94.

actual, subjective provocation reassured the Supreme Court that the lower court's error regarding the reasonable person's response did not undermine the accuracy of its finding that Jundi did, in fact, kill as a result of provocation. However, its consequential review of the rest of the lower court's fact-finding suggested that by focusing unduly on Jundi's subjective provocation, the lower court was distracted from noticing that the prosecution had failed to prove, beyond a reasonable doubt, that he actually intended to kill Assad. Lacking sufficient proof of such a specific intention, Jundi could only be convicted of manslaughter, not of murder.

Among the many significant messages sent by the Chief Justice to his courts, one is particularly intriguing. Clearly, Shamgar is warning the judiciary not to meddle with the dual-aspect provocation doctrine, and not to challenge the Supreme Court's policy regarding the reasonable person. But while blocking this route, Shamgar offers the lower courts an alternative route to convictions for manslaughter, rather than murder, in cases where they wish to do so: Instead of focusing on provocation, as Jundi's court did, judges should focus on the decision to kill, and are encouraged to set very high (if not impossible) evidentiary standards. Shamgar thus deviates significantly from established common law doctrine, which relies heavily on the presumption that a defendant intends the natural outcomes of his conduct. He is apparently willing to sacrifice this fundamental doctrine in the interests of suppressing mutiny and pacifying the rebels.

Shamgar dedicates much of his judicial text to the detailed portrayal of the reasonable person. Developing his previously constructed formula, Shamgar reestablishes the concealed labeling and normalizing process. Having quoted the passage from his opinion in *Simon Tov* that I quoted earlier in the text at footnote 7, he went on:

The legislator does not differentiate between a reasonable worker and a reasonable banker, but rather determines the behavioral norm of an average, reasonable person who is imaginary, and conveys a combination and integration of the characters composing the texture of the said academic norm. . . .

This is a theoretical standard, created by the court by a quasi-integration of "is" and "ought." The court creates for itself a theoretical image, which reflects the predicted behavior of the reasonable person in our society. In other words, we do not compose an objective standard by collecting data about acceptable standards of behavior in any given society or group, but rather our objective standard relies on a court-created theoretical configuration, shaped by the court as an image, which is, admittedly, fictive, but also human, i.e., this is an image that could fail when dealing with a particular situation. Clearly, this image is rooted in contemporary society and not in historical social realities. This, however, does not imply that in creating this image the court must helplessly accept the vile, repulsive conducts and lifestyles, at any given

time, of certain groups, or of people of certain background or temperaments. Nor does it mean that the court may not include among the characteristics of its mental creation elements of a desirable, civilized, cultured norm.²⁷

The reasonable person that Shamgar describes is composed of “is” and “ought,” fact and norm, would-be empirical data and the judicial system’s “desirable” social reality and norms. Shamgar’s “reasonable person” is the fictional personification of the court’s normative standard, applied to the image of an empirical “sample” of contemporary conducts and lifestyles. Yet, the Chief Justice discloses, the “empirical” aspect does not include data regarding every part of society, nor does it represent every existing community. “Collecting” and composing the data that it processes into the “factual” aspect of the reasonable person standard, the court carefully selects certain communities, while disregarding and excluding others. Only those conducts and lifestyles of “human beings who represent the values and conceptions of our society,” as constructed by the judiciary, are assembled by the court and admitted into the “sample” composing the reasonable person’s “factual” component. It is to this “is”—this selective “empirical data”—that the court then applies its “ought,” “a fraction of the desirable.”

The selective, subjective normative prism described by Shamgar, which acts as a precondition to the judiciary’s “fact-finding” process in the construction of the reasonable person, operates in a similar way in every judicial fact-finding process, and is hardly a revelation to anyone even remotely familiar with any legal system. The significance of Shamgar’s statement (besides its explicit disclosure of that which is usually vehemently denied by the legal system) lies in his pronounced policy that, in the construction of the judiciary’s personified, normative standard, certain vile and despicable *communities* are deliberately excluded because their lifestyles are unacceptable. It does not require much imagination to infer that Jerusalem’s Independence Park community is likely to be among those excluded, and that the reasonable person standard, therefore, although applied strictly to its members, is not meant to and does not contain such people’s lifestyles. In other words, Shamgar demonstrates that regardless of his actual conduct in the criminal event at issue, and regardless of his criminal responsibility, Muhamad Jundi is inherently an unreasonable person.

Shamgar’s explicit portrayal of the reasonable person reveals that the makeup and structure of this fictional creature (the application of court-pronounced norms to judicial “fact-finding”) are identical to those of any judicial decision. The reasonable person *itself*, regardless of its specific operation in any specific legal context, is a *personified judicial decision*. Any sentence containing the reasonable person is, thus, a judicial speech act. That act is not, however, a ‘*juridical*’ one (in the Foucauldian sense); it is an act of labeling, normalizing, and disciplining,

²⁷ *Id.* at 391–93.

preconditioned to label specific communities as “deviant,” and to discipline Israeli society by pronouncing members of such communities “unreasonable,” i.e., nonconforming. The reasonable person constructed by Shamgar is the result of a personified labeling-normalizing-disciplining process formulated as a judicial decision. This process is concealed in juridical legal texts and operates, unacknowledged, within the texts’ implied narrative, unconsciously composed and self-applied by the readers in their interaction with the texts.

Menachem Brinker suggests that certain fictional sentences and texts contain statements, which are taken by readers to convey clear, meaningful assertions that are operational in the real world.

We may find a perfect speech act in the following [fictional] sentence narrated by a mother to her child: “Dirty Joshua never washed, until one day nobody agreed to play with him.” [Such sentences induce the] recognition that certain speech acts performed exclusively through fictional narrative, operate as conventional speech acts [in the real world].²⁸

Such fictional-real speech acts may be disciplining mechanisms, normalizing the reader into a standard of cleanliness, or a standard of sexual orientation and certain culturally structured life-styles.²⁹

In Shamgar’s formulation of the reasonable person, Israel’s Supreme Court has perfected its incorporation of a disciplinary power mechanism into its juridical, legally-established function, utilizing the judicial decision’s literary and narrative potential to the fullest.

VII. AFTER *JUNDI*

Shamgar’s reasonable person formula in *Jundi* has been frequently cited and is the standard text in this area of law. Never explicitly contested or reexamined, this is still the law of the land.

Chief Justice Aaron Barak, who succeeded Meir Shamgar in the early 1990s, developed Shamgar’s notion of the reasonable person in two ways. In his judicial decisions, Barak made more frequent use than his predecessors of the phrase “reasonable community,” referring to a community of reasonable persons. Concurrently, he liberated the reasonable person and his community from the confinement of judicial texts, presenting them in many public talks and interviews and making them known to the previously unsuspecting laymen.

²⁸ MENACHEM BRINKER, *BEYOND THE IMAGINARY: MEANING AND REPRESENTATION IN FICTION* 70 (1980) (in Hebrew).

²⁹ Interestingly, Brinker finds that the more “meager” the allegorical character, the more effective and clear is the conveyed message. Significantly, the reasonable person is designed to be as meager a literary character as possible.

In the political climate of Israel in the second half of the 1990s, this triggered fierce criticism, mostly from *Shas*, an orthodox Jewish party whose constituency is composed of Israeli Jews who emigrated from Arab-speaking countries. *Shas* protested that Barak's "reasonable community" excluded its own constituency, and vehemently targeted this fictional creation as racist and elitist.

Offended and threatened, the Supreme Court responded with a professional attitude, not fully listening or understanding the passionate criticism, which was conveyed in political, non-legalistic language. The Supreme Court labeled the criticism as a vicious political declaration of war on the judiciary's autonomy and on Israeli rule of law. Nevertheless, even the Supreme Court had no choice but to notice *Shas's* (then) increasing political power, and to accommodate it. Chief Justice Barak thus reluctantly retreated, denouncing the judicial use of the phrase "reasonable community."

As this discussion demonstrates, the public criticism targeting Barak was misplaced (as he was not the author of the fictional character, but merely the person who made him publicly known), and Barak's retraction was insignificant.³⁰ Shamgar's "reasonable person" efficiently continues to label and exclude those communities not appreciated by the Supreme Court.

VIII. POSTSCRIPT

Having criticized the Supreme Court's provocation doctrine and its application of the reasonable person standard, I should offer an alternative solution. I have presented this solution elsewhere³¹ and will only sketch its outline here.

I propose that the "without goading" requirement in Section 301 of the Israeli Criminal Code be read as requiring two cumulative examinations: a preliminary, explicitly normative one; and a secondary, purely subjective one.³² The first is whether, based on the relevant evidence and governing doctrine, the issue of "killing due to provocation" should, as a matter of social norm, be raised and reviewed in a given case at all. The answer to this question, which is a "matter of

³⁰ The vicious, personal, politicized attacks on Chief Justice Barak, and on his Supreme Court, have often been repugnant; in the delicate Israeli social context, they may pose a threat to the rule of law and even to democracy. I condemn such attacks, and this academic critique should not be read as offering them sympathy or support. However, not even the highly charged political situation should silence legal academic critique. Such silence would betray democracy and academic commitment.

³¹ Kamir, *supra* note 10.

³² This proposal was inspired by the traditional (now revised) treatment of provocation in England, as defined by Viscount Simon in *Holmes v. DPP* [1946] A.C. 588, 597: "The distinction, therefore, is between asking 'Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did? (which is for the judge to rule) and' assuming that the judge's ruling is in the affirmative, asking the jury: 'Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did, and if so, did the accused act under the stress of such provocation?'"

law” (and not of “fact”), must explicitly identify and consider society’s relevant normative standards, thus inviting public debate and critique. Such transparency is necessary if legal academia, diverse communities, and political groups are to interact in the democratic process of molding the ruling social norms.

My personal conviction, which I believe accords with the fundamental principles underlying Israeli society and law, is that vengeance for injured honor, or for a person’s wounded sense of entitlement to another’s person, are so utterly condemned by any acceptable social standard that they cannot, under any circumstances, constitute even a partial excuse for lethal violence; such injuries should therefore not count as ‘goadings.’³³

Thus, for example, the judiciary should determine that if a man killed his long-estranged wife (whom he had abused) and the man in whose car she was riding, after hours of search, gun-in-hand, the circumstances do not permit consideration of the legal issue of “killing due to provocation.” The judiciary should proclaim that, in such circumstances, the defendant’s “provocation” manifests nothing other than vengeance for his injured honor based on his sense of entitlement to his estranged wife’s person and life. Such entitlement is grounded in a male-supremacist, patriarchal value system, which is deemed dangerous, discriminatory, and unacceptable by contemporary Israeli society, and by its legal system. The defendant’s subjective “provocation” should therefore be disregarded by the courts in much the same way as they disregard the “provocation” felt by a man who, provoked by the knowledge that women were “whoring” and offending God and his commandments, sets a bordello on fire, or a brother who, “provoked” by his unmarried sister’s shameful, unchaste behavior, kills her by running her over.

In Jundi’s case, the court would need to study the specific circumstances of the event and determine whether Jundi’s subjective provocation was grounded in anything other than his injured sense of honor. The court would have to consider not merely the homosexual, multi-ethnic scene, but also whether, in Jundi’s specific circumstances as a Palestinian informer, whose “manhood” was publicly challenged, a lack of response might be interpreted as extreme weakness and as a lack of ability to defend his life, thus creating a potentially life-threatening situation for him. This was Jundi’s argument of self-defense, which was unequivocally rejected and silenced by the lower court.

If there is reasonable doubt as to whether, had Jundi not returned to confront the deceased, his life as a collaborator with the Israeli authorities might have been endangered, then the court would be permitted to consider either a full self-defense argument, or the possibility of partially excusing provocation. Such treatment of the case would invite public discussion about the correct legal response to difficult, charged aspects of Israeli social reality. The lower court’s exclusive use of

³³ See Orit Kamir, *Honor and Dignity Cultures: The Case of Kavod [honor] and kvod ha-adam [dignity] in Israeli Society and Law*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS LAW 231* (David Kretzmer & Eckart Klein eds., 2002); Kamir, *supra* note 10.

subjective provocation did not invite such public debate any more than did the Supreme Court's stigmatizing declaration of Jundi's unreasonableness. In fact, it may have exhibited a patronizing attitude, of the "boys will be boys" variety: "homosexual Palestinian collaborating boys will be homosexual Palestinian collaborating boys," and cannot be expected to overcome their primitive, honor-based, murderous urges. But Jundi, the homosexual Palestinian collaborator, should have been held to Israeli society's social norms, as specified clearly by the court. His conduct should have been defined by the court accurately, based on full acknowledgment of his social situation, and should then have been judged against the governing social norms, equally applied to all.

If a court determines that the issue of provocation should not be considered in a given case, this will end the discussion without subjecting the defendant to a comparison with the hypothetical response of the reasonable person. The rejection of a defendant's provocation argument would refer solely to his *conduct*, not to his personality, and would thus be an open *normative* position, and not a labeling process of *normalizing*.

Only when it is concluded that "killing due to provocation" may be judicially considered, would the court apply itself to the second, factual, subjective question: whether, based on the established facts of the case, there is reasonable doubt as to whether the defendant did kill as a result of provocation.

Embracing Jeremy Horder's critique³⁴ and applying it to the Israeli legal context, I would suggest that the element of "goading" should no longer be restricted to the traditional, common law notion of "provocation," which is deeply associated with (male) rage. This privileging of what is traditionally considered provocation promotes an honor-based value-system and advantages men who are driven to violence by their elevated sense of honor.

If provocation or goading are to be accepted by courts as mitigating factors, they must include loss of control caused by grief, sorrow, fear, depression, despair, compassion, love and a variety of other human emotions. Broadly interpreted, provocation or goading would allow the court to consider, in Jundi's case, the normative question whether loss of control caused by fear and/or despair is normatively partially excusable in a situation such as the one at issue. If so, the court would be permitted to examine the evidence to determine whether Jundi in fact killed due to loss of control based on these emotions.

This formulation of the legal prohibition against murder would help bridge the gap between the process of determining criminal responsibility and the actual judicial treatment of murder cases. It would minimize the courts' unauthorized and concealed process of labeling, normalizing and disciplining, and obliterate the reasonable person, who is bad for minorities, women and other living things.

³⁴ JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 192 (1992).