

Rape by Deception and the Policing of Gender and Nationality Borders

Aeyal Gross*

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I. INTRODUCTION

In 2012, the Israel Supreme Court handed down its decision in the appeal of Sabbar Kashur,¹ who had been convicted of rape by deception regarding the perpetrator’s identity and of indecent assault. The conviction had been based on a section in the Israel Penal Law that defines rape as consensual sexual intercourse with a woman if her consent was obtained by deception regarding the perpetrator’s identity or

* © 2015 Aeyal Gross. My thanks go to Itai Hermelin, Tami Katsabian, Elkana Leist, Amit Pundik, Hedi Viterbo, and Amalia Ziv for their helpful comments and suggestions; to Yehuda Goor, Nadav Dishon, and Peter Teishev for their excellent research work; and to Dana Rothman-Meshulam for her excellent editing and language skills. Earlier versions of this Article were presented at a seminar sponsored by the Taubenschlag Institute of Criminal Law at the Tel Aviv University Faculty of Law; the criminal law workshop at the Carmel Academic Center; the workshop Queer Perspectives on Law II at SOAS, University of London; and in the An Other Sex 14 conference held at Tel-Aviv University. I thank the participants in these forums for their helpful comments and especially to Leora Bilksy, Sarah Lamble, and Hedi Viterbo, who commented in some of these forums as discussants. Also thanks to Alex Sharpe for the cooperation and engagement. The author can be contacted at aeyal.gross@gmail.com.

1. CrimA 5734/10 Kashur v. State of Israel [2012], Takdin (Isr.), Nevo Legal Database.

the nature of the act.² Kashur had been convicted for deception relating to national identity, with the court of first instance ruling that he had “falsely” represented himself as a Jew and with regard to his personal status. His indictment and conviction generated intense public and legal debate around questions of sex, nationality, and the link between the two.

That same year also saw the partial lifting of the publication ban on a case that had culminated in conviction for rape by deception relating to the perpetrator’s identity where the charge had been for gender impersonation.³ This was the second instance in Israel of a conviction in such circumstances. The earlier incident, which had generated greater public uproar, was the matter of Hen Alkobi, who was charged and pled guilty in 2003 for attempted rape by deception relating to the perpetrator’s identity and for false impersonation. The conviction was based on a set of facts describing the intimate relations between Alkobi, a young man who had been born with female genitalia but lived as a man at least some of the time, and a number of younger girls.⁴ In Britain, three similar cases were tried in 2012 and 2013 and ended in convictions.⁵ These cases followed an earlier conviction in similar circumstances in the early 1990s.⁶ Furthermore, in the United States, two similar cases were tried in the mid-1990s,⁷ but discussion of cases of this type seems to be missing from much of the recent literature on rape by deception.⁸

2. Penal Law, 5737-1977, Special Volume LSI 1, § 346 (1977) (Isr.).

3. Judgment on Application No. 7, CrimC 2372/07 Gross v. State of Israel [Jan. 1, 2012] (Isr.).

4. Sentencing Judgment, CrimC (Hi) 389/02 State of Israel v. Alkobi (Sept. 7, 2003) (Isr.) (unpublished).

5. See *infra* notes 47-56 and accompanying text.

6. R. v. Saunders, [1992] EWCA (Crim) (unpublished) (on file with Cornell University Library) (Eng.); R. v. Saunders, (1991) Crown Ct. (unpublished) (on file with Cornell University Library) (Eng.). For a discussion of the *Saunders* case, see Aeyal Gross, *Gender Outlaws Before the Law: The Courts of the Borderlands*, 32 HARV. J.L. & GENDER 165, 172-73, 199-200, 207-08, 212-15 (2009); Anna Marie Smith, *The Regulation of Lesbian Sexuality Through Erasure: The Case of Jennifer Saunders*, in LESBIAN EROTICS 164, 164-79 (Karla Jay ed., 1995) (providing a detailed analysis of the *Saunders* judgments); Anne Marie Smith, *The Hegemonic Regulation of Butch Performance: Regina v. Saunders*, in BUTCH/FEMME: INSIDE LESBIAN GENDER 177, 177-90 (Sally Munt ed., 1998).

7. State v. Wheatley, No. 97-1-50056-6 (Wash. Super. Ct. May 13, 1997); People v. Clark, No. 1994CR003290 (Colo. Dist. Ct. Feb. 16, 1996) (order for sentencing) (explaining that Sharon Clark was the name given to O’Neill at birth). For a discussion of these cases, see Gross, *supra* note 6, at 171-72. For a discussion of the O’Neill case, see Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN’S L.J. 226 (1998) (detailing the facts of the case and trial).

8. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013). For a critique of Rubenfeld’s view, arguing for expansion of the notion of rape by deception, see Tom Dougherty, *No Way Around Consent: A Reply to Rubenfeld on “Rape-by-Deception,”* 123 YALE L.J. ONLINE 321 (2013), <http://www.yalelaw>

In this Article, I will discuss questions that arise with regard to the use of the rape-by-deception charge in cases relating to issues of identity—gender and national—and crossing its boundaries. I will not explore the entire range of criminal law issues that this offense raises.⁹ Rather, I will consider how the case law on nationality impersonation and gender impersonation can shed light on how the gender-national order is preserved against boundary crossing by the criminal law rules governing rape by deception regarding the perpetrator’s identity. The prohibited boundary crossing is dual in nature: it is manifested both in the challenge to the stability and “naturalness” of the identity categories that lie at the base of the gender-national order (specifically in the context of intimate relations), as well as in actually engaging in relations that this order perceives as problematic. I will point to how the case law on gender and nationality boundary crossing punishes those who deviate from the identities they are assigned. I will show how a comparative examination of the case law on gender and nationality boundary crossing in the context of rape by deception reveals the performativity not only of gender identity, but also of national identity, as well as the part played by criminal law, in both these contexts, in maintaining the boundaries of these identities and penalizing attempts to cross them. This is particularly so, as the analysis will show, in circumstances in which the boundary crosser “passes” for a member of a privileged identity that is reserved only for those who “truly” belong to it.

The Article begins in Part II with a discussion of the recent cases involving gender identity and which resemble earlier such cases in factual setting.¹⁰ The consideration of how gender boundaries are preserved in these cases leads into Part III and its discussion of how nationality boundaries were preserved in the *Kashur* case. In Part IV, I will consider the performative dimension of national identities and the link between the gender-sexual order and national order. Finally, in the

journal.org/forum/no-way-around-consent-a-reply-to-rubenfeld-on-rape-by-deception. See also Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1 (2014); Patricia Falk, *Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 YALE L.J. ONLINE 353 (2013), <http://www.yalelawjournal.org/forum/not-logic-but-experience-drawing-on-lessons-from-the-real-world-in-thinking-about-the-riddle-of-rape-by-fraud>. For other responses, see *Collection: Responses to Jed Rubenfeld’s “Riddle of Rape-by-Deception,”* FORUM, YALE L.J. (Dec. 6, 2014, 12:07 AM), <http://www.yalelawjournal.org/forum>.

9. Amit Pundik, *Ben Mirma LeKfi’a: Al Averat HaOnes BeMirma Legabei Mihut Ha’Ose* [*Between Deception and Coercion: Rape by Deception in Respect of the Perpetrator’s Identity*], 36 TEL AVIV U. L. REV. 215 (2013) (Isr.).

10. I have already discussed the earlier gender “impersonation” cases elsewhere. See Gross, *supra* note 6.

Conclusion, I will point out the paradox that emerges from the analysis of these cases, namely, the resort to state criminal law in order to attain justice in the area of sexual freedom.

II. THE CHARGE OF GENDER IMPERSONATION: CASE LAW IN THE UNITED STATES, ISRAEL, AND THE UNITED KINGDOM

Recent cases of gender impersonation accusation in Israel and the United Kingdom have followed the same pattern as previous cases. From the previous cases, the one which included the most detailed legal discussion was the *Alkobi* trial in Israel which raised a number of issues relating to the concepts of impersonation, consent, and gender identity. Hen Alkobi was convicted of the offenses of false impersonation,¹¹ indecent assault, and attempted rape under the Israeli penal code provisions prohibiting sexual acts if consent to them was obtained by deception regarding the perpetrator's identity.¹² As I have noted elsewhere,¹³ the problematic nature of Alkobi's conviction for these offenses stems from its grounding on a conception that holds biological sex to be determinative regarding a person's true identity and accords gender identity secondary status. Feminist and queer thought,¹⁴ particularly the work of Judith Butler,¹⁵ refers to gender as a performative act subject to a social regime that expects from us particular gender behavior that derives, allegedly, from biological sex. The *Alkobi* case and similar cases in the United Kingdom and the United States are instances of the punishment of someone who deviated from this gender norm, which is conceived of as natural, while ignoring the fact that there was no more "truth" or less "performance" in Hen Alkobi's presentation of himself as a young woman than when he presented himself as a young man.¹⁶

In sentencing Alkobi, the trial court asserted that the bill of indictment had laid out "a set of facts that is exceptional and rare in our parts, which seems to be unprecedented in Israel and in foreign countries."¹⁷ As mentioned above, however, in the 1990s, prior to the

11. Penal Law, 5737-1977, Special Volume LSI 1, § 441 (1977) (Isr.).

12. *Id.* §§ 348(a), 345(a)(2).

13. See Gross, *supra* note 6, at 178-79.

14. For an introductory survey of queer theory and its connection to feminist theory, see ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* (1997).

15. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

16. Gross, *supra* note 6, at 182, 192.

17. Sentencing Judgment, CrimC (Hi) 389/02 State of Israel v. Alkobi (Sept. 7, 2003) (unpublished) (Isr.).

Alkobi matter, two cases with very similar circumstances had been tried in the United States and one in Britain. Common to all four cases was that the accused offenders were young people living in the geographic and, perhaps, social peripheries of their respective societies, in small cities or towns, far away from the big cities and subcultures that are allowed to flourish there. In this sense, all four cases told a story of queer life outside the global cities. But regardless of whether they do, indeed, reflect life beyond these global urban centers, the resemblance amongst the cases is indicative of the “global” or, perhaps, “translocal”¹⁸ character of their stories; that is to say, they integrate local accounts that occur outside the big cities but recur globally.¹⁹

In the overwhelming majority of cases of the accusation of “gender impersonation” for the purpose of engaging in sexual intercourse, including the newer cases that I will discuss further on in this Part, a person whose biological sex is female is charged with impersonating a man and having sexual intercourse with women. In this context, the relevant court decisions can be understood as seeking to protect women from what is conceived of as sexual injury, by criminalizing sexual intercourse that is allegedly not fully consensual. Yet paradoxically, despite the fact that this conception is anchored in a feminist aspiration to protect women, its application in these instances—as I will show further on—could, in fact, reflect a paternalistic and even patriarchal notion of the need to protect women’s sexuality, in terms of both how female sexuality is conceived and the conservative conception of sexual relations, which punishes relations that are considered nonnormative.²⁰

18. Tom Boellstorff, *The Perfect Path: Gay Men, Marriage, Indonesia*, 5 GLQ: J. LESBIAN & GAY STUD. 475, 480 (1999) (coining the term “translocal”).

19. See Gross, *supra* note 6, at 226.

20. For a discussion of how the sentencing judgment in *Alkobi* expressed a conception of women as deserving of protection and a discussion of the feminist stance that calls for such an understanding of the cases, see Gross, *supra* note 6, at 202-07. Dana Pugatch, in her study on rape by deception (conducted prior to the *Alkobi* and *Kashur* cases and which does not deal with the question of accusations of gender or national impersonation), stressed the need to protect women and, although acknowledging that her approach can be criticized for being “victimhood feminism,” claimed that broad protection is vital for ensuring women true sexual freedom. Dana Pugatch, *Criminalizatzya Shel Ginuney Hizur Mekubalim? Mirma, Ta’ut Hakorban Vehascama Le’inyan Averot Min [Criminalization of Accepted Courting Etiquette? Deceit, Victim’s Error, and Consent in Sex Offenses]*, in MEGAMOT BEPLILIM [CRIMINAL TRENDS] 149, 182 (Eliezer Lederman ed., 2001) (Isr.). In one exceptional case, a military court convicted an officer who had performed oral sex on two male soldiers while they were blindfolded, while misleading them into thinking that it was a female soldier performing the act. In this case, however, although originally accused of indecent assault, the officer was not charged with any sexual offense, but rather convicted in the framework of a plea bargain for the far lighter offenses of wrongful behavior in a public place and improper behavior, in violation of section 216(a)(1) of the Penal Law, 5737-1977, Special Volume LSI 1 (1977) (Isr.), and section 130 of the Military Justice Law, 1955, SH

Critics have noted how versions of feminism that analyze the issue of sex through the prism of male dominance of women are likely, in their analysis, to reproduce the very hierarchy that feminism criticizes and also to produce women as victims.²¹ However, and again paradoxically, convicting of rape those accused of impersonation reinforces their role in this hierarchy as men who caused sexual injury to women, while at the same time, establishing that presenting themselves as men was improper impersonation. The fact that the convicted offenders in the cases discussed here lived at least part of the time as men and engaged in sexual relations with women exposes not only that the law constructs the events to create a need to protect women, but also that the criminal sanction is directed at anyone who, in addition to crossing gender boundaries, assumes a privileged gender identity to which he is perceived as not “truly” belonging. It appears that from this perspective, “impersonating” men is even worse than “impersonating” women. In this respect, as I will show, the accusation of “impersonating” a Jew in the *Kashur* case can be analogized to the accusation of “impersonating” a man in the *Alkobi* case and others like it. In both contexts, the person accused did not simply engage in “impersonation,” but *sought* to belong to an identity that is perceived of as privileged in Israeli society.

The *Alkobi* decision reappeared in the courtroom as a precedent cited in the Israel Supreme Court judgment that is principally responsible for developing the doctrine on sex and the concept of “by deception.” In 2008, the Court handed down its *Saliman* decision in the matter of Zvi Saliman, a man who had presented himself to various women as a senior official in, alternatively, the Housing Ministry or the state-owned housing company Amidar and had promised them public housing in exchange for sex. The Supreme Court affirmed the Tel Aviv District Court’s conviction of Saliman for rape by deception relating to the perpetrator’s identity, ruling that “when a man or woman falsely represents himself or herself and, by deception, has intimate relations with someone who, had he known things to be as they were, would never have considered sexual intercourse with that person,” there is room for a criminal conviction.²²

No. 189, p. 171, respectively. MilC 134/96 Military Prosecutor v. Captain Y.A. (1996) (unpublished) (Isr.); MilA 241/96 Captain Y.A. v. Military Prosecutor [1996] (unpublished) (Isr.). For a discussion of this case, see Gross, *supra* note 6, at 195-96.

21. See, e.g., JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 104-347, 356-63 (2008); WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 21-29, 43-47, 52-95 (1995).

22. CrimA 2411/06 Saliman v. State of Israel [Aug. 17, 2008], Nevo Legal Database, para. 100.

Justice Rubinstein referred to the *Alkobi* case in his opinion, and after discussing the different stances in the case law and literature, he held that

as a society and in reality, it is difficult to accept criminal law regulation of ‘morally flawed’ interactions between two individuals. Yet it is clear to all that it is vital that there be some boundary beyond which we are not prepared to tolerate certain behavior that violates protected values, and the non-intervention of the criminal law amounts to leaving victims without protection.²³

Rubenstein further stated:

This is not excessive paternalism, but rather the protection of human dignity, a woman’s autonomy over her body and her sexual freedom, for it is the deception that in fact violates autonomy, and the criminal prohibition is intended, beyond the actual prohibition of rape, also to prevent that very deception.²⁴

Only one other indictment has been filed in a case similar to *Alkobi* in Israel, known as the *Jane Doe* case.²⁵ Although the legal proceedings

23. *Id.* para. 98.

24. *Id.* para. 100. This judgment was recently the subject of some criticism in the literature: see Elkana Leist, *He’art Psika: Eenus BeMirma Legabei “Mihut HaOse”* [Case-Law Commentary: Rape by Deception Regarding “the “Perpetrator’s Identity”—In the Wake of Cr.A. 2411/06, *Ploni v. State of Israel*], 146 HA’SANEGOR [DEFENSE LAWYER] 4 (2009) (Isr.). For broader criticism arguing for the exclusion from the scope of the rape offense cases in which consent to sex was obtained by deception regarding the perpetrator’s identity, see Pundik, *supra* note 9. Pundik does not, however, rule out completely the possibility that other offenses, less serious than rape, could be applied in such circumstances. However, he argues that recognizing a crime of rape by deception understates the difference in wrongfulness between coercion and deception and risks dilution of the attached condemnation. Supreme Court Justice Rivlin also expressed criticism of this rule, in CrimA 5097/07, *Pahima v. State of Israel* [May 25, 2009], Nevo Legal Database, para. 13. Jonathan Herring, *Human Rights and Rape*, 2007 CRIM. L. REV. 228. For criticism of this position, see Hyman Gross, *Rape, Moralism, and Human Rights*, 2007 CRIM. L. REV. 220; Michael Bohlander, *Mistaken Consent to Sex, Political Correctness and Correct Policy*, 71 J. CRIM. L. 412 (2007); Advocating the stance that consent based on mistake can be considered a rape offense if a person has sexual intercourse with another knowing that the latter would not agree to the activity if s/he knew “the truth,” see Jonathan Herring, *Mistaken Sex*, 2005 CRIM. L. REV. 511. For broad criticism of the rape by deception offense, see Rubinfeld, *supra* note 8, who considers that the notion is almost universally rejected in American criminal law and claims that this points to a need to reject the notion of sexual autonomy. For a critique of Rubinfeld’s view, arguing for expansion of the notion of rape by deception, see Tom Dougherty, *No Way Around Consent: A Reply to Rubinfeld on “Rape-by-Deception,”* 123 YALE L.J. ONLINE 321 (Dec. 1, 2013), <http://www.yalelawjournal.org/forum/no-way-around-consent-a-reply-to-rubinfeld-on-rape-by-deception>. For a discussion of the case law on rape by deception, see Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998). For a discussion of its problematic application regarding transgender defendants, see generally Gross, *supra* note 6; Alex Sharpe, *Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent*, 2014 CRIM. L. REV. 207.

25. Indictment in the Kfar Saba Magistrate’s Court, CrimC (Kfar Saba) 2372/07 State of Israel v. Jane Doe (Nov. 25, 2007) (unpublished) (Isr.). In discussing this case, I will refer to the “female defendant” as the court referred to her, using feminine form. In contrast to the *Alkobi*

culminated already in 2009,²⁶ it was only in 2012 that the publication ban on the case was partially lifted. In this case, whose facts recall the *Alkobi* case, the person who was referred to in the bill of indictment as the “female defendant” was accused of the following factual occurrences: the defendant, who was about twenty years old at the time of the described events, met a fifteen-year-old girl, to whom she presented herself as a sixteen-and-a-half-year-old boy and spoke in the Hebrew masculine form. After a number of encounters, the “female defendant” kissed, as stated in the indictment, the female minor and on, later occasions, touched the latter’s breasts and engaged in additional physical contact with her, including touching her genitals. At some later point, the bill of indictment alleged, the “female defendant” left her Israeli ID card lying around, and it was found by the female minor, who saw the name and sex of the “female defendant” on the ID. Following this discovery, the female minor confronted the “female defendant,” declaring that she knows she is female; the “female defendant” denied this fact and that it was even her ID card that the female minor had found. Afterwards, the two continued to meet, and on one occasion, the “female defendant” penetrated the female minor’s vagina with her fingers. During one of their encounters, the female minor saw the “female defendant” send a text on her cellular phone using her real name. The indictment alleged that “at this stage, the female minor understood that there was basis to her suspicion and that the female defendant had deceived her and was not a male.” Following this, the indictment continued, the two met again, and the “female defendant” again penetrated the female minor’s vagina with her fingers. Based on these facts, the indictment charged the “female defendant” with indecently assaulting the female minor with the latter’s consent, when that consent had been obtained by deception regarding the perpetrator’s identity,²⁷ and with the offense of statutory rape of a minor with consent.²⁸ After

case, I found no indication that the “female defendant” had any preference in terms of her gender presentation.

26. Verdict, CrimC (Kfar Saba) 2372/07 State of Israel v. Jane Doe (2007) (unpublished) (Isr.); Sentencing Judgment, CrimC (Kfar Saba) 2372/07 State of Israel v. Jane Doe (Jan. 28, 2009) (unpublished) (Isr.).

27. This is in contrast to sections 345(a)(2) and 348(a) of the Israel Penal Law, 5737-1977, Special Volume LSI 4 (1977) (Isr.). Section 345(a)(2) provides, “If a person had intercourse with a woman . . . (2) with the woman’s consent, which was obtained by deceit in respect of the identity of the person or the nature of the act . . . [t]hen he committed rape and is liable to sixteen years imprisonment.” Section 348(a) provides, “If a person committed an indecent act on a person under one of the circumstances enumerated in section 345(a)(2) to (5), mutatis mutandis, then he is liable to seven years imprisonment.”

28. This is in contrast to section 346(a)(1) of the Israel Penal Law:

reaching a partial plea bargain, the “female defendant” admitted to the facts set forth in the indictment and was convicted for them.²⁹

In the framework of the presentencing arguments, the prosecution raised the *Alkobi* case and, stressing that “the circumstances were similar, even if the charges differ,” requested that a similar sentence be handed down.³⁰ The defense attorney, in turn, pointed out that, as noted in the indictment, the female minor had not discontinued the relationship “once she had understood that this was not a boy.” He described the events as an intersection “of the margins of society” and noted the problems that the “female defendant” suffers from, including a discrepancy between her biological age and “personal, mental, and intellectual capacities,” and that she was at a stage of “questioning her sexual identity.” Moreover, he added, the events had occurred “in the framework of her exploring her response to what boys do to girls,” and she was in a social and familial framework that did not enable the possibility of “not heeding the consensus and going with the flow.”³¹

In sentencing the defendant, the court reiterated the facts detailed in the indictment and described them as acts that, “even were they committed with alleged consent,” had been engaged in “through deceit regarding the female defendant’s sex.”³² Judge Feder further noted that a “suspicion of a gender disorder” had emerged from the presentencing reports and that the defendant “experiences unformed gender identity and gender identity confusion.”³³ After weighing the various considerations, the court sentenced the “female defendant” to six months in prison to be served as community service, followed by a twelve-month suspended sentence, along with a fine and payment of financial compensation to the female minor.³⁴

If a person had intercourse with a minor who has reached age 14, but has not yet reached age 16 and who is not married to him, or if a person has intercourse with a minor who has reached age 16, but has not yet reached age 18, by exploiting a relationship of dependence, authority, education or supervision, or by a false promise of marriage, then he is liable to five years imprisonment.

29. Verdict, CrimC (Kfar Saba) 2372/07 State of Israel v. Jane Doe (Nov. 25, 2007) (unpublished) (Isr.).

30. Presentencing Hearing Protocols at 7, CrimC (Kfar Saba) 2372/07 State of Israel v. Jane Doe (Dec. 3, 2008) (unpublished).

31. *Id.* at 7-8.

32. Sentencing Judgment at 3, CrimC (Kfar Saba) 2372/07 State of Israel v. Jane Doe (Jan. 28, 2009) (unpublished).

33. *Id.* at 5.

34. *Id.* at 8-10.

Despite the similarity in facts and charges to the *Alkobi* case, at no point did the *Jane Doe* court deliberate the gender issues that arose³⁵ beyond brief mention of a “suspicion of a gender disorder” and the defendant’s “unformed” and confused sexual identity. Thus, the court’s only allusion to the gender question pathologizes the gender identity of the person it referred to as “the female defendant.” It is interesting to note the tension between this pathologization, on the one hand, and the criminal charges, on the other, where the latter allege criminal intent on the part of the defendant. However, common to both these trajectories, despite this opposition, is the patent disregard for the chosen gender identity. The lack of additional details on the case makes it difficult to set hard-and-fast rules in this matter, but the description of a “gender disorder” and “gender identity confusion” is likely evidence that the defendant identified, at least some of the time, as a man (even though he was born with female reproductive organs). The absence of a detailed legal analysis, moreover, makes it difficult to reach meaningful conclusions about the legal logic on which the court based its decision. What is quite prominent in this case, however—and was emphasized in the defense’s presentencing arguments—is that the female minor continued her relations with the “female defendant” even *after* having discovered the latter’s “true” identity, not once, but on two further occasions.³⁶ In this respect, like the *Alkobi* case and U.K. and U.S. cases before it, this case raises questions about the law’s imposition of a heteronormative order on a more queer reality, with its fluid sexual and gender identities. Uniform and binary conceptions of identity and of clear and unambivalent knowledge about identity, which characterize the heteronormative order, apparently cannot encompass this queer reality, and the criminal law in effect functions to punish any deviation from this order.

The criticism I have expressed elsewhere of the *Alkobi* case and parallel U.K. and U.S. cases therefore holds—perhaps even more compellingly—with regard to the *Jane Doe* case as well. Judith Butler has explained how the sex categories do not exist in a natural and autonomous way but are in fact produced by the social institution of gender: the premise of a binary system of gender is constructed on a

35. For an analysis of the discussion of the gender issues in the *Alkobi* sentencing judgment, see Gross, *supra* note 6, at 187-90.

36. It should be stressed that the relations engaged in following the discovery were also described in the indictment as part of the set of facts that established the performance of indecent acts with consent obtained by deception.

conception of gender as a mirror-image of sex.³⁷ Under an understanding of gender as autonomous from sex, in contrast, “man” or “masculine” can designate a female body no less than a male body, and “woman” or “feminine” can designate a male body no less than a female body. Following Butler’s analysis, then, gender can be understood as “performative” and as an effect of corporeal designation, so that the gendered body “has no ontological status apart from the various acts which constitute its reality.”³⁸ The gender designators are not expressive but, rather, performative; they in effect constitute the identity that they purport to express, and there is no basis, therefore, to the claim that there is an identity that is different from the one being performed, nor one that is prior to or more real than that identity.³⁹ Gender, under this conception, is a type of imitation that has no origin.⁴⁰ When we play the gender role of a man, we are imitating “being a man” and not doing something that derives naturally from some biological fact. A man who plays the gender role of a man is always performing an “imitation” of masculinity, whether his genitalia are male or female. Thus, the performance of masculinity that a male performs and the performance of masculinity that a female performs have the same ontological status, because both are equally an imitation and neither is more authentic or real than the other.

Nonetheless, the gender performance is compelled performance, and thus, behavior that is not consistent with the gender norms—heterosexual norms—leads to ostracization, punishment, and violence, as the accusation of gender impersonation in these cases demonstrates.⁴¹ The acts and gestures that constitute the performance are subject to a severely rigid social regime, which restricts and organizes them around two polarized and stable gender identities—man and woman. The gender regime, which Butler calls “the regulatory fiction of heterosexual coherence,”⁴² is what generates the norm that imposes a correlation between biological sex, gender, and desire. This outcome is presented as a natural state. Consequently, the system that Butler describes—which is constructed on gender binarism and a conception of the gender role as

37. Gross, *supra* note 6, at 179.

38. BUTLER, *supra* note 15, at 135-40.

39. *Id.* at 141, 213.

40. *Id.* at 137-38; Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 21 (Diana Fuss ed., 1991).

41. Butler, *supra* note 40, at 339.

42. *Id.* at 338.

seemingly naturally deriving from also-binary biological sex—is part of the matrix of compulsory heterosexuality.⁴³

This conception of gender as an identity that is always performance, always imitative, exposes the flaws in court decisions on gender impersonation. In the *Alkobi* case, the court discussed the details of the case at great length and took a stance that was based on the premise that the feminine gender role must naturally derive from Alkobi's female genitalia.⁴⁴ Although the *Jane Doe* court did not delve deeply into these issues, it did, nonetheless, implicitly adopt the same position and even took it one step further: indeed, even under the case law (including the *Alkobi* decision) that would justify Jane Doe's conviction had the female minor not discovered Doe's "true" identity, the fact that she had remained in the relationship after "discovering" the facts (if not after the first time, from the ID card, then at least after the second time, when things became clear from the cell phone text) would seem to attest to a presumable desire to continue the relationship regardless of the sexual and gender identity of the "female defendant." The court refrained from any consideration whatsoever of these questions.

The circumstances of the *Alkobi* case invited exploration into the meaning of retroactively interpreting voluntary relations as an injury justifying criminal law intervention when a fact that was presumably unknown beforehand emerges in retrospect.⁴⁵ This is particularly compelling in the context of the *Jane Doe* case: What are the implications of retroactively conceptualizing consensual relations as an injury that warrants the intervention of the criminal law, when the complainant continued these relations even after the explicit revelation of a fact that was allegedly withheld from her at the outset? The *Alkobi* case and its U.S. and U.K. counterparts raise difficult questions about how the courts impose the heteronormative order and punish those who deviate from it by crossing out of the gender role assigned him or her by this order on the basis of his or her biological sex. Even though the *Jane Doe* court did not give as comprehensive a consideration of gender identity as the *Alkobi* court did, the issue presents no less forcefully, especially in light of the continuation of the relations after the "discovery" of the defendant's "true" identity.⁴⁶ And even absent any

43. For a more expansive discussion of Butler's stance and its relevance, see Gross, *supra* note 6, at 179-82.

44. *Id.* at 175.

45. *Id.* at 200.

46. In addition to these cases, there was an instance of gender impersonation on the Internet for the purpose of engaging in sexual relations. DH (Hi) 12-54901-03 State of Israel v. Danino (May 7, 2012), Nevo Legal Database. According to the bill of indictment in this case,

conclusive determinations regarding the self-identification of the defendants in these cases, it is clear that the court decisions in their matters had a particularly threatening impact on transgenders—people who live a gender identity that differs from the identity assigned to them according to the biological sex to which they were born.⁴⁷ Indeed, the *Alkobi* case has been singled out by both transgender activists and the court that rendered the decision itself as dealing, by and large, with transgenderism.⁴⁸

As mentioned above, in Britain, too, similar cases have been brought before the courts. In 2012, nineteen-year-old Gemma Barker, described as a young girl who presented herself as a young man in order to have relations with other girls, was convicted of sexual assault and fraud and sentenced to thirty months in prison.⁴⁹ Barker, according to the media, had taken on three different “fake” male identities in order to have sexual relations with other girls, aged fifteen and sixteen. In convicting Barker, the court noted that she had admitted to engaging in these relations. Addressing the defendant, the court described the damage she had inflicted on the complainants and described her as “deceptive and deceitful.”⁵⁰ In 2013, in Scotland, the trial of twenty-five-year-old

Danino, the defendant, had pretended to be a nineteen-year-old female soldier and made contact with young girls under the age of 14, conducting intimate conversations and asking them to touch themselves. Danino was charged with rape, amongst other things, under the deception provision.

47. On this dimension of the *Alkobi* case, see Gross, *supra* note 6, at 219-24. The effect of the similar judgments given in the United Kingdom and discussed below on transgender people is discussed also in Sharpe, *supra* note 24, and Alex Sharpe, *We Must Not Uphold Gender Norms at the Expense of Human Dignity*, NEW STATESMAN (May 1, 2013), <http://www.newstatesman.com/politics/2013/05/we-must-not-uphold-gender-norms-expense-human-dignity> [hereinafter Sharpe, *We Must Not Uphold Gender Norms*]. For criticism of the duty imposed on transgenders to disclose their gender history, see Alex Sharpe, *Transgender Marriage and the Legal Obligation to Disclose Gender History*, 75 MOD. L. REV. 33 (2012) [hereinafter Sharpe, *Transgender Marriage*]. On the transgender category as not only explaining nonnormative genders but also as itself having a formative quality, see DAVID VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* (2007). On the history of the transgender and the transsexuality categories, see JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* (2002).

48. Gross, *supra* note 6, at 188-89.

49. Since the protocols of proceedings in this type of criminal court of first instance are not made public in Britain, the information is drawn from media reports. Furthermore, in the absence of additional information, I have used feminine designations in referring to the defendants in the British cases, consistent with how they were referred to by the courts and media. According to the cited reports, the conviction for deception in this case was apparently not directly linked to the charge of gender impersonation but rather based on other facts.

50. “*Deceptive and Deceitful*”: *Girl, 19, Who Disguised Herself as a Boy To Trick Girls into Sex Warned She Faces Jail*, MIRROR ONLINE (Mar. 2, 2012), <http://www.mirror.co.uk/news/uk-news/girl-19-who-disguised-herself-750356>; Matt Blake, “*I Felt Repulsed and Dirty and Wanted To Kill Myself*”: *Schoolgirl Victims of Teenage Girl Who Dressed as Boy To Date Them Speak of their Anguish as She Is Jailed*, MAIL ONLINE (Mar. 6, 2012), <http://www.dailymail.co>

Christine (Chris) Wilson culminated in conviction for “obtaining sexual intimacy by fraud,”⁵¹ based on “her” confession, for relations “she” had engaged in with minor girls who did not know the “truth” about “her” sex. Wilson’s attorney stated that Wilson was hoping to undergo gender reassignment,⁵² but Wilson was sentenced to three years’ probation nonetheless.⁵³ In 2013, Justine McNally was convicted for sexual assault after having sexual relations with a sixteen-year-old girl while “posing” as a Goth boy named Scott and wearing a strap-on dildo that resembled a penis. This case reached the court of appeals, which held that the complainant “chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant’s deception”⁵⁴ and, furthermore, that “deception as to gender can vitiate consent.”⁵⁵ In the court’s analysis, the sexual nature of the act is different when the complainant is “deliberately deceived by a defendant into believing that the latter is male.”⁵⁶ McNally was sentenced to three years’ detention in a young offender institution, which, on appeal, was reduced to nine months’ detention suspended for two years.⁵⁷

As with the other instances, the events in the recent cases in Israel and Britain occurred far away from the large urban centers,⁵⁸ which

uk/news/article-2110430/Gemma-Barker-jailed-Vctims-girl-dressed-boy-date-speak-anguish.html. The film *The Girl Who Became Three Boys* documents the affair from the perspective of the complainants and not from that of Barker herself. *The Girl Who Became Three Boys* (Channel 4 broadcast Aug. 7, 2013). In 2011, in Scotland, another case with similar circumstances was on its way to trial, but the charges were eventually dropped. *Woman’s Sex Deceit Charges Dropped*, BBC NEWS (Mar. 8, 2011), <http://www.bbc.co.uk/news/uk-scotland-tayside-central-12680781>.

51. Sharpe, *supra* note 24, at 207-08.

52. *Woman Was Sexually Intimate with Girls While Pretending To Be a Man*, STV NEWS (Mar. 06, 2013), <http://news.stv.tv/north/216583-christine-wilson-pretended-to-be-a-man-to-have-sex-with-teenage-girls>; Alice Philipson, *Woman, 25, Posed as a Boy so She Could Seduce Teenage Girls into Sexual Relationships*, DAILY MAIL (Mar. 7, 2013, 10:00 PM), <http://www.dailymail.co.uk/news/article-2289437/Christine-Wilson-Woman-25-posed-boy-seduce-teenage-girls.html>.

53. Sharpe, *supra* note 24, at 207.

54. *McNally v. R.*, [2013] EWCA (Crim) 1051, [26] (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Crim/2013/1051.html>.

55. *Id.* para. 27.

56. *Id.* para. 26.

57. *Id.* paras. 1-2. McNally was convicted for assault by penetration. *Id.* at 15-17; Sharpe, *supra* note 24, at 207. McNally did serve three months of the custodial sentence before the Court of Appeals mitigated the sentence. *McNally*, [2013] EWCA (Crim.), [52]. For criticism of the decisions in the Wilson and McNally cases, see Sharpe, *We Must Not Uphold Gender Norms*, *supra* note 47; Sharpe, *supra* note 24.

58. In *McNally*, the defendant came to London to meet up with the complainant, but resided outside the city. *McNally*, [2013] EWCA (Crim), [6]-[10].

perhaps tolerate life in gender identities that deviate from the heteronormative regime. They also were similar in circumstance to earlier cases in terms of the ages of the defendants and complainants.

III. IMPERSONATING A JEW IN THE *KASHUR* CASE

In the past, I have speculated on whether a man “passing” as a member of an ethnic or racial group he does not belong to according to the social determination would be convicted of sexual offenses if he fails to reveal his race or ethnicity to a woman he has sexual relations with by his initiative.⁵⁹ Such a scenario in fact eventually played out in reality—or at least in the way reality was reframed in the courtroom: in 2010, an Arab man named Sabbar Kashur was convicted by the Jerusalem District Court (similarly to Alkobi and the “female defendant” in *Jane Doe*) of rape and indecent assault in the framework of a plea bargain, under the Israel Penal Law section on deception regarding the perpetrator’s identity.⁶⁰ The sentencing judgment was grounded on the facts in the amended indictment, according to which Kashur, who was married, falsely represented himself as Jewish and single and interested in pursuing a serious romantic relationship. Randomly encountering the complainant, who was a complete stranger, on a Jerusalem street, he suggested she accompany him to a nearby building, to which she consented due to his “false representation.” First in the elevator and then on the top floor of the building, Kashur sexually touched the complainant and then had sexual intercourse with her until he had reached gratification. Immediately following this, he “left the building, leaving her naked on the top floor.”⁶¹ The district court’s sentencing judgment stated that this was done “with the complainant’s consent, which was obtained by deception and based on false representation.”⁶² The court noted that this consent had been obtained by deception and had the complainant not thought Kashur to be a Jewish, unmarried man interested in a meaningful romantic relationship, “she would not have

59. Gross, *supra* note 6, at 197-98.

60. Sections 345(a)(2) and 348(a) in conjunction with section 345(a)(2) of the Penal Law, 5737-1977, Special Volume LSI 1, (1977) (Isr.). I discussed the *Kashur* case in my article, Aeyal Gross, *Hakol K(a)shur: Performativut VeHatziat Gvulot HaMigdar VeHaLeom BaPsika Al Ones BeMirma* [Performance and Crossing Gender and Nationality Borders in the Case-Law on Rape by Deception], 42 THEORY & CRITICISM 99 (2014) (Isr.).

61. Sentencing Judgment, CrimC (Jer) 561-08 State of Israel v. Kashur (July 19, 2010), Nevo Legal Database, paras. 2-4.

62. *Id.*

cooperated with him.”⁶³ Sentencing Kashur to eighteen months in prison and another thirty months’ suspended sentence,⁶⁴ the court concluded that it is “obliged to protect the public interest from sophisticated, smooth-tongued criminals who can deceive innocent victims at an unbearable price—the sanctity of their bodies and souls.”⁶⁵

While the district court did not base its decision on existing case law, in the appeal of the sentence, the Supreme Court’s decision relied on Justice Rubinstein’s *Saliman* opinion. The Court referred to the claim made by Kashur’s attorney in the appeal: the district court had not accorded sufficient weight to the fact that only a few minutes passed between when Kashur and the complainant first met and the occurrence of the sexual act; therefore, claimed the defense attorney, no real weight could be attributed to the false representation, especially given that this was a random encounter between the two. Justice Meltzer noted in his opinion that in the notice of appeal, the claim was made that Kashur’s actions had been solely immoral in nature and in no way criminal and that the criminal law is not supposed to intervene in such behavior.⁶⁶ The appeal notice did, in fact, assert that while the facts described in the indictment did not give rise to the offense of rape by deception but, at the very most, to the less severe offence of obtaining something by deception,⁶⁷ in light of the *Saliman* precedent, the law would likely allow for conviction of rape by deception regarding the perpetrator’s identity in these circumstances. The appeal focused, therefore, on the sentencing judgment, alleging that only a very low level of criminality arose from the appellant’s actions as described in the amended indictment and that a prison sentence was not justified.⁶⁸ However, in the “margins of the appeal” of the sentence, the defense requested that the Supreme Court scrutinize the *Saliman* rule in relation to the scope of the application of the offense of rape by deception regarding the perpetrator’s identity. It was noted that prior to the *Saliman* decision, the governing rule in Israel

63. *Id.* para. 13. It is interesting to note that neither the indictment nor the sentencing judgment made any mention of the fact that Kashur is Arab, noting only that his presentation of himself as an unmarried Jew had constituted false representation. Bill of Indictment, CrimC (Jer) 561-08 State of Israel v. Kashur (2010), Nevo Legal Database, para. 2. This is noteworthy given that in the *Alkobi* indictment, no claim was made that she is a woman or even that her biological sex is female. See Gross, *supra* note 6, at 182-83.

64. Sentencing Judgment, CrimC (Jer) 561-08, State of Israel v. Kashur (July 19, 2010), Nevo Legal Database, para. 18.

65. *Id.* para. 15.

66. CrimA 5734/10 Kashur v. State of Israel [2012], Nevo Legal Database, para. 11.

67. Notice of Appeal para. 8, Kashur v. State of Israel (Isr.) 561/08 (Jan. 15, 2012), Nevo Legal Database, para. 8; Penal Law, 5737-1977, Special Volume LSI 1, § 415 (1977) (Isr.).

68. *Id.* paras. 7-14.

had been similar to that of most common law systems, under which rape by deception regarding the perpetrator's identity has occurred only when the actor impersonated a specific person known to the complainant and with whom she would want to have sexual intercourse.⁶⁹ In this spirit, it was proposed in the appeal notice that in deliberating the appeal of the sentence, the Supreme Court should consider convicting Kashur of the lighter offense of obtaining something by deception.⁷⁰

This argument apparently stood at the foundation of Justice Meltzer's determination that the claims made in the appeal touched on the very issue of the conviction itself and not the matter of the appropriate punishment, and thus, this was essentially an attempt to withdraw from the plea bargain.⁷¹ Meltzer held that there is no place for the appellant to make such claims once a plea bargain has been struck and approved; however, he stated, in certain rare instances, when the admission of facts in the framework of a plea bargain does not give rise to any crime or does not correlate with the offense agreed to in the plea bargain, it may be warranted to reopen the trial or make the necessary adjustments to the conviction. But these circumstances, the Court held, were not present in this case: the appellant had confessed in the amended indictment, which included the statement that the "false representation" establishes the charges of rape by deception and indecent assault, the consent to which had been fraudulently obtained.⁷² Meltzer ruled that the question of what types of false representation can serve as the basis for conviction for rape by deception, the moral and philosophical-legal aspects of the use of this offense to protect the public in general and women in particular, and the appropriate scope of the *Saliman* rule are all issues best left to more applicable circumstances; they have no place, he stated, in the framework of an appeal of sentence when the verdict based on the appellant's confession is not under appeal.⁷³ However, the Supreme Court did accept the appellant's claims regarding the sentence imposed by the district court and reduced the prison term by half, to nine

69. *Id.* para. 42.

70. *Id.* para. 54.

71. CrimA 5734/10 Kashur v. State of Israel [2012], Nevo Legal Database, paras. 15-16. In this respect, what occurred in the *Kashur* case was similar to how things unfolded in *Alkobi's* case, even if the latter's attempt to withdraw from the plea bargain was made at the presentencing hearing in the district court and not during appeal. *Alkobi's* attorney argued that *Alkobi* could not in fact be convicted of the offense of impersonating another person because conviction for this offense is possible only if a specific person has been impersonated. The district court rejected this claim. *See Gross, supra* note 6, at 175-76.

72. CrimA 5734/10 Kashur v. State of Israel [Jan. 25, 2012], Nevo Legal Database, para. 17.

73. *Id.* para. 18.

months, based, amongst other things, on the fact that the offense for which Kashur had been convicted was not situated on the “highest rung of rape offenses.” Nonetheless, the Court stressed that it affirms the district court’s stance that conviction for such offenses warrants a prison sentence.⁷⁴

The Israel Supreme Court seems to have been justified in determining that the actual conviction was not the matter under appeal, especially given that it had been agreed to in the framework of a plea bargain. Yet, could the Court have nevertheless determined also that, in fact, no offense emerges from this conviction—even though the defendant had confessed to one in the district court? In other words, can a plea bargain create criminal liability for a set of facts that does not establish the elements of the offense? In other contexts, the Court has held the answer to this to be no.⁷⁵ Another question, then, is whether it is justified to convict for rape by deception regarding the perpetrator’s identity even under the *Saliman* tests (putting aside for the moment current criticism of this rule) when intercourse occurred between a man and woman shortly after a random meeting of the type described in the *Kashur* sentencing judgment?⁷⁶

Orit Kamir has claimed that the way in which events unfolded in the *Kashur* case, as described in the sentencing judgment, attests to the fact that the complainant had sought sexual intimacy with a stranger she had met on the street, and for the purposes of consent to such sexual intimacy, the stranger’s salient characteristics were that he was a man interested and able to engage in sexual contact with the woman, without injuring her or causing her damage.⁷⁷ Kashur did not deceive the complainant with regard to those characteristics.⁷⁸ In a newspaper interview, Kashur actually confirmed that he had introduced himself as “Dudu,” a typical Hebrew name and, he said, as he had been called since

74. *Id.* paras. 20-24.

75. *Id.* paras. 16-17.

76. For criticism of the Supreme Court’s decision, see Uriel Procaccia, *Inus HaDin [Raping the Law]*, HAARETZ (Feb. 5, 2010), <http://www.haaretz.co.il/opinions/1.1633739> (Isr.).

77. Orit Kamir, *Inus BeMirma—Parashat Sabbar Kashur: HaAravi SheHitkhaza LeGever, VeHityakhsut Le’Edut HaMitlonenet BeBeit Ha’Mishpat [Rape by Deception—The Sabbar Kashur Case: The Arab Who Impersonated a Man and the Treatment of the Complainant’s Testimony in Court]*, K’VOD ADAM VE’HAVA (July 23, 2010), <http://www.2nd-ops.com/orit/?p=65632> (Isr.).

78. Amit Pundik notes that the *Kashur* case raises a question, but he gives no definitive response to this question: if the nationality, family status, and/or romantic intentions of the defendant were so important to the complainant in forming her actual will, should she not have devoted more than one brief conversation with the defendant to clarify these details? Perhaps she should have been more explicit in asking these questions. Pundik, *supra* note 9.

childhood; he claimed that the complainant never once asked him if he is Jewish. However, Kashur also admitted in the interview that he had told the complainant that he was single, despite being married.⁷⁹

Strong criticism of the conviction appeared in Israel, including from feminist perspectives,⁸⁰ and it generated also significant international public censure,⁸¹ with an implicit presentation of the decision as racist emerging in some of this criticism. In the wake of this outcry, it was made public, even before the appeal had been heard, that the complaint originally filed by the woman and, thus, the original indictment, had in fact been for violent rape, to which the complainant had also testified at trial, and not for rape by deception. But giving testimony in court had proven traumatic for the complainant, and to spare her the prolongation of this harsh experience, the state prosecutor decided to offer the defendant a plea bargain for a lesser charge.⁸² The complainant had completed her testimony in court, but the defense planned to recall her for cross-examination on incidents she had filed complaints about in the past relating to sexual offenses and in which her statements had been found unreliable. The prosecution, which believed that giving testimony had traumatized the complainant, wanted to prevent the need for her to

79. Harriet Sherwood, *Saber Kushour: "My Conviction for 'Rape by Deception' Has Ruined My Life,"* OBSERVER (July 25, 2010), <http://www.guardian.co.uk/world/2010/jul/25/saber-kushour-rape-deception-charge>; Aviad Glickman, *Ha'Elion Tzarich Lehafkhit BaOnesh Al HaOnes BeMirma [The Supreme Court Needs to Reduce Punishment for Rape by Deception]*, YNET (July 22, 2010), <http://www.ynet.co.il/articles/0,7340,L-3923281,00.html> (Isr.).

80. See, e.g., Kamir, *supra* note 77; Zeev Segal, *Zilut Shel HaOnes [Contempt for Rape]*, HAARETZ (July 21, 2010), <http://www.haaretz.co.il/opinions/1.1213045> (Isr.); Tzefi Saar, *Geveret Mejunderet: Tishtush HaHevdel Bein Ones LeMeen [Blurring the Difference Between Rape and Sex]*, ACHBAR HA'IR (July 27, 2010), http://www.mouse.co.il/CM.articles_item,1048,209,52688,.aspx (Isr.).

81. See, e.g., Jo Adetunji & Harriet Sherwood, *Arab Guilty of Rape After Consensual Sex with Jew*, GUARDIAN (July 21, 2010), <http://www.guardian.co.uk/world/2010/jul/21/arab-guilty-rape-consensual-sex-jew>; Robert Mackey, *Israeli Court Calls Lying for Sex Rape*, LEDE, N.Y. TIMES (July 21, 2010), thelede.blogs.nytimes.com/2010/07/21/israeli-court-calls-lying-for-sex-rape; Yifat Susskind, *In Israel, Miscegenation Equals Rape*, COMMON DREAMS (July 22, 2010), <http://www.commondreams.org/view/2010/07/22-3>.

82. Lital Grossman, *Ha'aiti Blee Michnasaim, Nisharti Kakha Keilu, Ki Ha'aiti BeHelem. Haritzpa Ha'ita Melukhleket BeDam VeNora Pakhadeti Laga'at BeAtzmi Kedei Lirot Eem Ani Beseder [I Had No Pants on, I Stayed Like This, Like, Because I Was in Shock. The Floor Was Dirty with Blood and I Was Really Scared To Touch Myself To See If I Was Okay]*, HAARETZ (Sept. 3, 2010), <http://www.haaretz.co.il/misc/1.1219822> (Isr.); Rachel Shabi, *Arab Rape-by-Deception Charge Was Result of Plea Bargain*, GUARDIAN (Sept. 8, 2010), <http://www.guardian.co.uk/world/2010/sep/08/rape-by-deception-plea-israel?INTCMP=SRC>. In fact, this was expressed previously, when the prosecution lawyer informed the press that Kashur had been charged with forcible rape, but during the evidence stage of the trial, evidentiary difficulties arose, which led to the plea bargain. Glickman, *supra* note 79. On the meaning of the release of this information, see Merav Michaeli, *Leha'amin Ahat laShnia'a [Believing One Another]*, HAARETZ (Sept. 6, 2010), <http://www.haaretz.co.il/opinions/1.1220102> (Isr.).

testify again by offering a plea bargain. The entire affair exploded when Kashur was sentenced to actual prison time, which seemed a racist decision given the offense with which he was charged and the sentence he received. The media, it was claimed, behaved “as an elephant in a china shop” in its treatment of this case.⁸³

This belated information does shed light on how the case unfolded, even if we accept completely the reliability of the complainant’s complaint and despite the defense’s claim that it was filled with contradictions.⁸⁴ The new information, however, does not alter the fact that Kashur’s conviction, as it was articulated in the district court sentencing judgment, constituted a legal determination in which a person was convicted on facts that almost undoubtedly do not amount to criminal conduct.⁸⁵ On the one hand, assuming the complainant’s factual version to be true, the public release of the background information should have led us to cease to view Kashur as an innocent victim of racism and instead regard him as someone who got off relatively lightly for a severe and violent act of rape. On the other hand, the picture worsened in terms of legal procedure: it emerged that for the prosecution’s purposes, facts that had never occurred were fabricated and criminal offenses were rather dubiously superimposed on them in the framework of a plea bargain—in complete contradiction to the case law on plea bargains.⁸⁶ Without detracting from the importance of protecting

83. Grossman, *supra* note 82.

84. *Id.*

85. See Yossi Dar’s claim that “the fact that a person signs a plea bargain—this fact, in itself, is still not sufficient to convict him. There is a need also for the plea-bargain agreement to give rise to culpability.” Yossi Dar, *LeZakot Et Saber Kashur [Acquit Sabbar Kashur]*, MACHLAKA RISHONA [FIRST CLASS] (Aug. 5, 2010), <http://www.news1.co.il/Archive/003-D-50712-00.html> (Isr.).

86. In CrimA 1820/98 *Angel v. State of Israel* 52(5) PD 97 [1998], which was referred to by Justice Meltzer in paragraph 17 of his opinion in CrimA 5734/10 *Kashur v. State of Israel* [Jan. 25, 2012], Takdin (Isr.), it was determined (in paragraph 7 of *Angel*) that it is necessary to make sure that the facts establishing the charges, as they are set forth in the plea bargain agreement, reflect the actions attributed to the defendant without any substantive deviation from what happened in actuality. “It is only seemly,” ruled Justice Beinisch, “that the court convict the accused in line with his actions and not according to a fictitious and artificial set of facts.” The Israel Supreme Court recently referred to the importance of using judicial discretion even when a plea bargain has been made and spoke of a possible scenario in which the facts described in the indictment in no way give rise to the alleged offense. In such cases, it was held, it will be a miscarriage of justice if the court were obliged to affirm the charges in the indictment, even if they have been admitted to by the accused himself. If the facts in the indictment are not sufficient to give rise to an offense, this will lead to a miscarriage of justice. CrimA 7725/11 *John Doe v. State of Israel* [Jan. 24, 2013], Takdin Legal Database, paras. 21-23. In another case, the Supreme Court ruled that the court must examine whether the facts in the indictment to which the defendant admits in the framework of a plea deal give rise to the offense he is attributed with, or whether he should be acquitted, even if the parties made no claim of a correlation between the

the complainant from drawing out the trauma of testifying, it is clear that the prosecution, the district court, and even the defense attorney at the trial stage all collaborated in producing a verdict and sentencing judgment that were very problematic, both in terms of the factual story told in the court decision (which, according to all involved, never occurred even though the accused had confessed to it) and in the precedent that the court set, that conviction for rape by deception is justified on such a set of facts.⁸⁷

The *Kashur* case very compellingly raised the issues and concerns that emerged in *Alkobi* regarding the duty of disclosure when engaging in sexual intercourse, and the same questions that arose in *Alkobi* can be asked here, too, with the appropriate modifications.⁸⁸ Say Kashur were a *Mizrahi* (a Jew of Middle Eastern or North African descent or origin) who “passes” for an *Ashkenazi* (a Jew of European descent or origin) and had engaged in sexual relations with a woman in similar circumstances, and the woman later discovered that he is in fact *Mizrahi*. Would the court have determined this to be a criminal offense? Would the police have responded to the woman’s complaint in such an event?

It is from this perspective that the *Alkobi*, *Jane Doe*, and *Kashur* cases can be differentiated from the rest of the Israeli case law on rape by deception regarding the perpetrator’s identity: the case law on impersonation relating to identity components like gender or nationality deals with circumstances that differ from those dealt with in the rest of the case law on this offense. While, as Pundik notes, the crime of rape by deception was traditionally applied to specific types of deception, such as spousal impersonation or sexual intercourse under the guise of medical treatment,⁸⁹ many recent cases in Israel have involved the impersonation of a licensed professional. The circumstances of the latter cases tend to resemble those in *Saliman*, where a person impersonated someone from

facts and the offenses detailed in the indictment. CrimA 8122/12 Pachmawi v. State of Israel [Jan. 27, 2013], Takdin Legal Database.

87. Tami Katsabian has asserted that the decision not to continue with the complainant’s testimony, which was intended, supposedly, for her protection, alongside the reconstruction of the story by the prosecution as one of “rape by deception,” reduces the complainant to someone who behaved childishly and like a victim and reinforces the conception of women as in need of the law’s protection and rescuing even when they have consensual sexual intercourse following a chance meeting. Thus, she claims, what actually occurred was not that the complainant was protected but rather that she, and her complaint, were silenced. Tami Katsabian, *Gender Nationality Rape and the Legal Discourse* (2011) (unpublished seminar paper, Yale University) (on file with author).

88. See Gross, *supra* note 6, at 197-98 (hypothesizing the duty to disclose Jewish ethnicity under the courts’ rationales in *Kashur* and *Alkobi*).

89. Pundik, *supra* note 9.

a particular profession or someone holding a certain position and sought some benefit through this impersonation.⁹⁰ The question is whether there is any qualitative difference between the charge of impersonating a professional (sometimes while promising benefits that people working in that profession can provide) assuming that this gives the impersonator an advantage in pursuing sexual relations, and the charge of impersonation relating to identity elements such as nationality or gender. In the latter contexts, there are the issues of the division of people into arbitrary and binary categories of identity and the punishment of anyone who deviates from the category he or she has been assigned, which differs in nature from the question of impersonating a licensed professional. Not only does this have implications from the perspective of the person accused of impersonation, but it also has social bearing because such cases involve categories of identity that are usually based on binaries (man/woman, Jew/Arab) and a hierarchy. Society seeks to preserve these binaries and this hierarchy, and the law is one of its means for achieving this. On this background, I will argue in the next Part of the Article that the critical conception of gender is applicable also to the context of nationality: Kashur—in the legal framing of his story—was punished for, amongst other things, deviating from the nationality performance expected of him, when he “passed” for a Jew.

Yet does the distinction I propose between binary, hierarchical identity categories, and other types of categories, such as professional affiliation, hold in all circumstances? Is there validity to the claim that identity is always “subjective” whereas one’s profession is always “objective”? Can such a sharp distinction be made between the two? To what extent is one’s profession part of one’s identity so this distinction is blurred?

There is no unequivocal solution to these questions. In many respects, it is, indeed, possible to distinguish between arbitrary categories of identity, such as religion and race, and one’s profession. On the one hand, it could be claimed, the sexual and national identities imposed on

90. For an example of the case law on impersonation of a professional in Israel, see, e.g., CrimA 10222/06 John Doe v. State of Israel [Dec. 5, 2007], Nevo Legal Database. Another instance is the case of a man who engaged in intimate relations with a woman and even proposed marriage and set a wedding date, while falsely representing himself as the deputy head of the *Mossad* (Israeli intelligence) along with a number of other lies. He was convicted in the framework of a plea bargain of obtaining something by deception (although not of sexual offenses). CrimC 59629-01-13 State of Israel v. Raz (July 7, 2013), Takdin Legal Database. The magistrate’s court referred to the *Saliman* rule, under which, it noted, the offense of rape by deception applies in this case, where the complainant had consented to sexual intercourse due to the false representation, but the prosecution had been lenient with the defendant, charging him only with the offense of obtaining something by deception. *Id.* para. 9.

us in the population registry, which are part of the arbitrary classification of people and creation of borders between them, differ significantly from professional categories, which relate to the profession a person chose to engage in, has been trained in, and actually practices: the latter is not compelled, it is not arbitrary, and it is not part of the binary and hierarchical division of society. In addition, there is almost no mobility between categories of identity, in contrast to categories like occupation. Yet on the other hand, it can be argued, a person's choice of profession or occupation is constrained by social and economic conditions, which is compounded by the entry barrier created by the licensing requirement in certain professions. For example, can a person who practices alternative, nonconventional forms of therapy and regards himself to be a healer, despite not being recognized as a medical doctor, assert that his exclusion from the medical profession is based on exclusionary criteria that are no different substantively from exclusion from a gender or national identity? A possible response to this is that the criteria for belonging to the medical profession are not arbitrary. This belonging does not derive from simply "being born" as such⁹¹ but, rather, is based on reasoning that is constructed on verified suitability, knowledge, and training. Certainly, these criteria can be criticized for being a function of power when they are supposed to be objective.⁹² However, as this discussion demonstrates, although it is possible to distinguish between the rigid identity categories and categories like profession, this distinction can be challenged. I maintain that in the context of the issues raised in this Article, there is value to making a distinction between identity categories and other categories. For as the discussed cases illustrate, criminal law acts to preserve a person's belonging to the identity he was "assigned" and to punish him if he crosses its boundaries—particularly if into an identity that is more privileged—in a way that raises different issues from those that arise in cases of impersonating a particular professional for the purpose of securing sexual favors.

91. Although we know, as Simone de Beauvoir famously told us, "one is not born, but rather becomes, a woman," socially, one's gender identity is assigned from birth and, at times, even before. 2 SIMONE DE BEAUVOIR, *THE SECOND SEX: LIVED EXPERIENCE* 301 (H.M. Parshley trans., 1952).

92. Foucault's thinking is relevant particularly to the criticism of the "objectivity" of knowledge and the sciences. For a discussion of how knowledge is a function of power, see MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* (Colin Gordon ed., 1980).

IV. “CROSSING THE GENDER BOUNDARIES, BETRAYING THE NATION’S BOUNDARIES”:⁹³ GENDER PERFORMANCE AND NATIONALITY PERFORMANCE

Like the *Kashur* case, the *Alkobi* and *Jane Doe* cases in Israel and the so-called gender impersonation cases in the United Kingdom and United States raise questions about arbitrarily assigned identities.⁹⁴ In all of these cases, the sexual relations engaged in were, from the perspective of the courts, nonnormative: in *Alkobi* and *Jane Doe* and their American and British counterparts, relations viewed by the court as occurring between two women, and in *Kashur*, relations between a Jewish woman and Arab man.⁹⁵ As Elizabeth Emens has noted, the social norm relating

93. This title is taken from one of the slogans of the queer activist “Black Laundry” in the 2003 Tel Aviv Gay Pride Parade, which was held shortly after *Alkobi*’s conviction. See Gross, *supra* note 6, at 231. It gains new meaning in view of the link between the *Alkobi* and *Kashur* cases. See Amalia Ziv, *Performative Politics in Israeli Queer Anti-Occupation Activism*, 16 GLQ: J. LESBIAN & GAY STUD. 537 (2010).

94. Another Israeli case that dealt not with professional affiliation but with an identity feature is CrimC (Nz) 522/07 State of Israel v. Yosef (July 15, 2007), Nevo Legal Database. Here, the defendant was convicted of deception regarding the perpetrator’s identity in the context of age. In two earlier cases, the courts had deliberated impersonation regarding nationality in the framework of romantic relations, but in these cases, there was no charge of rape by deception. See CrimA 499/72 Al-Sha’abi v. State of Israel 27(1) PD 602 [1973], discussed in Gross, *supra* note 6, at 174-75, where the defendant was convicted for receiving a benefit by deception. Despite a certain resemblance between the two, there are many differences in the circumstances and contexts of the *Al-Sha’abi* and *Kashur* cases. For a discussion, see *infra* text accompanying note 107. Another relevant case was CrimC (Nz) 4054/05 State of Israel v. Said (Mar. 22, 2006), Nevo Legal Database, which dealt with a Palestinian defendant who had been living in Israel without a permit for thirteen years and had presented himself as a Jew by the name of Eyal Halabi. A romantic relationship developed between the defendant and female complainant, and she moved in with him. He was convicted of a number of offenses, including obtaining something by deception and solicitations of fraud, but not of any sexual offense. For a discussion, see *infra* text accompanying notes 105-106. An indictment is currently pending against a Bedouin who is an Israeli citizen who had sexual relations with women while misrepresenting himself as a Jew and pilot in the Israel Air Force. See *infra* text accompanying note 108. Amit Pundik points out that the paradigmatic instances of impersonating a husband or sexual intercourse under the pretext of medical treatment are far more recognized as offenses in common law systems; however, conviction for rape in situations of deception that do not fall under these two exceptions is not common in most common law legal systems, and only a few countries have a rape offense that is as general in formulation as the Israeli rape-by-deception offense. Even where there is a criminal prohibition on sexual intercourse through false representation, it is generally a less serious offense. See Pundik, *supra* note 9, at 247-48. Similarly, Stuart Green argues that *Kashur* marks a significant departure from the prevailing rule in Anglo-American jurisdictions, finding rape by deception in context well beyond cases of fraudulent medical procedures and spousal impersonation. See Stuart Green, *Lies, Rape, and Statutory Rape*, in *LAW AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM* (Austin Sarat ed., forthcoming Oct. 2015).

95. Amit Pundik asserts that despite the media attention given to the racist aspect of the case, the sentencing judgment mentioned only once the fact that *Kashur* is not Jewish and gave weight to the other elements about which he had been deceitful (according to the agreed facts in the amended indictment), namely his personal status and his desire for a serious relationship. In

to sex is heterogamy (pairing outside one's type), whereas the norm relating to race dictates homogamy pairing with one's type.⁹⁶

I submit that the gender “impersonation” in the Israeli, U.K., and U.S. cases and the ethnicity/nationality “impersonation” in *Kashur* concluded in conviction because this normative expectation was breached. This is regardless of the fact that the convictions came in the framework of plea bargains to which the defense attorneys agreed in order to spare their clients an even worse fate. Again, in both types of impersonation cases, the parties engaged in relations that are considered nonnormative. However, while deviating from sexual heterogamy was punished in all three countries, only in Israel has deviation from racial homogamy been criminalized. In Israel, the nonnormative nature of the relationship is reflected, for example, in the fact that these relations occurred between two people who cannot marry one another under the law governing marriage in Israel. Personal status law in Israel is governed by religious law, which does not allow marriage between people from different religions or same-sex marriage in Israel, although such marriages, when performed outside of Israel, are registered in the Israeli population registry.⁹⁷ Thus, if in the *Alkobi* case—and, apparently, also the *Jane Doe* case—the court protected the heteronormative order under the pretext of protecting women from deception, in *Kashur*, it protected the ethnic-national order. The *Kashur* context of protection relates specifically to the prevailing conception in Israeli society of the need to protect “our” Jewish women from the Arab threat to them, particularly in light of the alleged Arab demographic threat—a conception Zvi Triger shows to be supported, if only in practice, by the preclusion of marriage between people from different religions in Israel. Triger notes that despite the fact that this prohibition allegedly applies symmetrically to both sexes, in practice, the social attitude towards

light of this, Pundik questions the centrality of the racist aspect in this case. Pundik, *supra* note 9, at 217. In my estimation, however, it is difficult to detach the matter of Kashur's being an Arab from the story as it was framed in court. For a discussion of the *Kashur* case and the injurious nature of telling lies to women—specifically with regard to personal status—of the type told by Kashur according to the sentencing judgment, see Dana Spector, *By Lying, by Lying*, YEDIOT AHARONOT: SEVEN DAYS WEEKEND MAG., July 23, 2010.

96. Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009).

97. This is assuming also that even were Alkobi and the defendant in *Jane Doe* considered men from a gender perspective and registered as such in the population registry, Israeli law would preclude them from marrying a woman. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139, § 1 (1953) (Isr.); see also HCJ 143/62 Schlezinger v. Interior Minister 17(1) PD 225 [1963] (Isr.); HCJ 3045/05 Ben-Ari v. Director of Population Registry in Interior Ministry 61(3) PD 537 [2006] (Isr.).

Jewish women who marry Arab men is far harsher than the reverse circumstances.⁹⁸ This attitude manifests in the activities of a number of organizations that seek to “protect” Jewish women from Arab men who want to date them⁹⁹ and even in activities of the Tel Aviv municipality in this context.¹⁰⁰ In this respect, the national order has colonial-racialized dimensions. Moreover, as Tami Katsabian claims, the complainant in the *Kashur* case was, in effect, also punished for having sexual intercourse outside the nationality boundaries: her complaint of forcible rape was thrown out, and according to the legal conceptualization of the case, the alleged problem was that she had had sex with a Palestinian without knowing his nationality.¹⁰¹

It is important to stress that I cannot and do not seek to make any determinations with regard to the factual dispute over what occurred in the *Kashur* case. What is being discussed, rather, is its legal framing and social meaning. At this juncture, it should also be noted that when I raise questions about the justification of convicting in such cases, I am not arguing for a right to equality in sexual relations; I am not proposing a “law of equal opportunities in sex,” analogous to equal opportunities in employment law, or advocating civil or criminal sanctions against anyone who “discriminates” in sexual relations. My criticism is not meant as a call for punishing discriminators. The cases I am discussing in this Article are instances in which those who were *discriminated against* are punished. It is clear that there is a need to defend women’s (and men’s) choices regarding with whom they have intimate relations. The question is not whether such a right to choice exists, and again, I am not proposing penalizing anyone who refuses to engage in intimate relations with

98. Zvi Triger, *The Gendered Racial Formation: Foreign Men, “Our” Women and the Law*, 30 WOMEN’S RTS. L. REP. 479, 482 (2009).

99. For a critical discussion of an organization that seeks to “protect” Jewish women from the romantic advances of Arab men, see Lital Levine, *Sinat Aravim VeSinat Nashim: Irgun LEAVA Ose Sivuv BaReshet [Hatred for Arabs and Hatred for Women: The LEAVA Organization Is Making Its Way Around the Internet]*, HAARETZ (Aug. 23, 2012), <http://www.haaretz.co.il/news/education/1.1807354> (Isr.). On this organization and five others that operate in the same field, see RUTH CARMİ, MA IM ARAVİ HAYA MATKHİL IM AKHOTKHA? [WHAT IF AN ARAB WERE TO MAKE A MOVE ON YOUR SISTER?] (2014); Vered Lee, *Love in the Time of Racism: The New, Dangerous Low in the Campaign To Stop Interracial Relationships*, HAARETZ (Apr. 25, 2013), <http://www.haaretz.com/weekend/magazine/love-in-the-time-of-racism-the-new-dangerous-low-in-the-campaign-to-stop-interracial-relationships.premium-1.517545>; Ori Blau, & Shai Greenberg, *Kahana Khai BeRevakha [Kahana Lives in Comfort]*, HAARETZ (May 7, 2011), <http://www.haaretz.co.il/misc/1.1173276> (Isr.).

100. Morya Ben-Yosef, *Tel-Aviv: Halriya Meshika Tokhnit LeMeniyat Kishrei Yehudiout Im Bnei Miutim [Tel-Aviv: The Municipality Launches a Program for Prevention of Relationships Between Jewish Women and Men from Minority Groups]*, TEL AVIV TIME (Feb. 23, 2010), <http://www.nrg.co.il/online/54/ART2/066/580.html?hp=54&loc=4&tmp=7464> (Isr.).

101. Katsabian, *supra* note 87.

another for discriminatory reasons. The question, rather, is whether in the cases being discussed, there was any criminal conduct that justified convicting those who were discriminated against—that is, the defendants. In other words, does the right to choose in fact impose criminal liability, for deception and impersonation, on a defendant because he had sexual relations with a woman who is discriminatory, without her knowledge of the defendant’s supposed “true” identity?¹⁰² The lack of knowledge could stem from the fact that the defendants “passed” for the identities that they took on, from errors on the complainants’ part, or from direct lies told by the defendants. Of course, a distinction can be made between the cases, and different degrees of criminal liability—if any—can be argued for in accordance with the defendants’ conduct along this axis. The issue becomes even thornier when we consider the complexities of determining what “true” identity is—if such a thing exists—and whether and to what extent, especially given criminal law’s mental element requirement regarding the *accused*, preference can be given to the complainants’ stance in such circumstances over the evidence and defendants’ self-definition.

In the framework of the *Kashur* appeal, it was argued that the way in which the defendant had presented himself to the complainant should be examined from the perspective of the “passing” phenomenon: namely, how members of minority groups who regard themselves as deprived tend to present themselves, in certain social circumstances, as belonging to the majority so as to avoid racist or discriminatory treatment. It was also argued that this is, in fact, a strategy for coping with discrimination deriving from belonging to a minority and has been recognized as such across the world; moreover, reference was made to a study on the prevalence of the phenomenon amongst Arab students in Israel.¹⁰³ “Passing” does indeed have a history—researched particularly most prominently in the United States context—of the assumption of a new

102. Because the entire “impersonation” story in the *Kashur* matter was in fact constructed as a fictitious narrative for the purposes of the plea bargain, there are no “real” facts in this case on which to base an analysis and application of these aspects of the question. In any event, the amended indictment defined what was called “the false representation” as follows: “The defendant, who is married, falsely represented himself before the complainant as Jewish and unmarried, and also presented himself as someone interested in a serious romantic relationship.” The courts repeated this narrative, without adding any further detail. See Sentencing Judgment, CrimC (Jer) 561-08 State of Israel v. Kashur (July 19, 2010), Nevo Legal Database, para. 3; CrimA 5734/10 Kashur v. State of Israel [Jan. 25, 2012], Takdin (Isr.), Nevo Legal Database, para. 3. For a discussion of what she calls the “illusory nature” of the distinction between “non-disclosure” and “active deception” in the context of transgender defendants charged with criminal offences, see Sharpe, *supra* note 24, at 216-18.

103. Notice of Appeal, *supra* note 67, para. 41.

identity to escape the discrimination experienced in the current identity. But in addition to its racial-ethnic history, “passing” has a gender history as well. Under the conception that bases identity on biological facts, this phenomenon is seen as threatening especially when someone “passes” for a hegemonic, privileged identity, the access to which is intended to be restricted to those who belong to it in a “natural” and “true” way—that is, as an alleged matter of biology. The social and legal systems punish such prohibited boundary crossing, which undermines the social order that is based on rigid identity categories and assigns privileges in accordance with those categories.¹⁰⁴ The defendants in the cases I discuss in this Article did, indeed, cross boundaries in the framework of binary and hierarchical identities (man/woman and Jew/Arab), be it ethnic-nationality boundary or gender boundary, into privileged identities, and they were punished for this. Moreover, in the *Kashur* case, this punishment was doled out by the court without any consideration given to the meaning of “passing” for excluded and disadvantaged groups.

In addition to these cases, three other instances of “passing” for a privileged national identity have been deliberated in the Israeli courts in dealing with sexual relations between an Arab man and a Jewish woman. The first case was the matter of Walid Said, a Palestinian who had been residing in Israel without permit for thirteen years and had been presenting himself as a Jew named Eyal Halabi. The circumstances in this case differed from those in *Kashur*, and accordingly, the court’s approach diverged significantly from that in *Kashur*. Said was convicted of a number of offenses, including obtaining something by deception and solicitations of fraud (but not of any sexual offenses), for, amongst other things, engaging in a romantic relationship with the Jewish complainant, who had even moved in with him. The presentencing report determined that the defendant perceives himself as Israeli in every respect.¹⁰⁵ In this instance, the court in fact indicated sympathy for the defendant’s assumption of a new identity, which was manifested in the minimal sentence it handed down. The court stated that in adopting a Hebrew

104. On this meaning of “passing” in the racial and gender contexts, see Elaine K. Ginsberg, *Introduction: The Politics of Passing*, in *PASSING AND THE FICTIONS OF IDENTITY* 1, 1-18 (Elaine K. Ginsberg ed., 1996). Ginsberg speaks about the unique logic of racial and gender identities, in contrast to other identities such as status, sexual orientation, and ethnicity. But I submit that in the Israeli context, nationality-ethnicity plays a similar role to that of race in the American context on which Ginsberg focuses. On “passing” as blurring the well-delineated boundaries of race, gender, and status, see Linda Schlossberg, *Introduction: Rites of Passing*, in *PASSING: IDENTITY AND INTERPRETATION IN SEXUALITY, RACE AND RELIGION* 1, 1-12 (Maria C. Sanchez & Linda Schlossberg eds., 2011).

105. In this case, as described, the defendant was a Palestinian resident of the Occupied Territories, who not only was not Jewish, but was also not an Israeli citizen.

name, the defendant had acted to find an alternate or new homeland for himself; moreover, the court expressed doubt as to whether it had actually been necessary to charge the defendant for using a Hebrew name. Judge Carmela Rotfeld-Haft even recommended assisting the defendant in acquiring permanent residence status in Israel.¹⁰⁶

The second case, which resembled the *Kashur* case in certain respects, dealt with a married Druze man, Al-Sha'abi, who had presented himself to a Jewish girl as an unmarried Jewish man. As in the *Said* case, Al-Sha'abi was not convicted of a sexual offense but, rather, of obtaining something by deception, although in different and, allegedly, more serious circumstances than in the *Kashur* case: in *Al-Sha'abi*, the relations had been ongoing; there were declared intentions of getting married; and the complainant had gotten pregnant.¹⁰⁷ The *Kashur* case is the first instance known to me—at least in Israel—in which the far more serious offense of rape by deception was applied in such circumstances. The third case, which is still pending in court, is that of Tamir Mazarib, a married Bedouin and reserve-duty security officer in the Israeli Air Force. He was accused of presenting himself to women as an unmarried Jew and active-duty Air Force pilot, so that they would agree to have sex with him. He used the name Daniel or Dudu Tamir in presenting himself.¹⁰⁸

It is interesting to note that in the *Kashur* appeal, the defense attorney referred to the *Alkobi* case, claiming, in arguing for a reduced sentence, that the chain of events described in *Alkobi* had been far more severe than in *Kashur*. This was due, he argued, to the advanced planning of the “deception” in the *Alkobi* case, the long string of complainants over a period of time, and the fact that “deception” regarding gender is far worse than deception regarding ethnic identity in the context of sexual relations: Alkobi’s “deception,” claimed the defense attorney, related to information that is far more determinative in deciding whether to have sexual intercourse with someone. “It is debatable,” he asserted, “to what extent a person’s ethnic identity is a legitimate consideration in weighing sexual relations with him. It would seem that

106. CrimC (Nz) 4054/05 State of Israel v. Said (Mar. 22, 2006), Nevo Legal Database. For a discussion of this case, see Leora Bilsky, *Citizenship as Mask: Between the Imposter and the Refugee*, 15 CONSTELLATIONS 72, 86-88 (2008).

107. CrimA 499/72 Al-Sha'abi v. State of Israel 27(1) PD 602 [1973].

108. Gilad Grossman, *Bedoui Hitkhaza LeTayas Kedei Lekaim Yekhasei Min Im Nashim* [A Bedouin Pretended To Be a Pilot To Have Sex with Women], WALLA NEWS (July 29, 2013), <http://news.walla.co.il/?w=%2F10%2F2665046&m=1> (Isr.). In a decision from January 2011, the Supreme Court allowed the release of the defendant’s details, Misc.CrimM 321/11 Mazarib v. State of Israel (Jan. 13, 2011), Nevo Legal Database.

there can be no doubt that a partner's gender identity is a far more legitimate and relevant consideration."¹⁰⁹ Thus, claimed the defense attorney, "Hen Alkobi's deception was much graver. It was in respect to information that is far more determinative regarding whether or not to engage in sexual relations," and this was compounded by the other factual divergences that made the *Alkobi* case more serious, he added.¹¹⁰ The defense attorney's position, even though undoubtedly argued as part of his duty of loyalty to his client, adopted uncritically the district court's presentation of the *Alkobi* case and, in essence, reinforced the notion of a certain truth that one is obliged to disclose in the framework of sexual relations, while creating a "hierarchy" of disclosure.¹¹¹ His argument can be understood as alleging that it is worse to cross gender boundaries than nationality boundaries. This stance also incorporates the notion of conformity between biological sex and gender identity and the premise that belonging to a gender identity that differs from your "assigned" identity is "deception." In this sense, the defense attorney embraced unquestioningly the district court's problematic rulings in *Alkobi*.

This stance, I hold, should be rejected for its fundamental assumptions about sex and gender—premises that I criticized above in discussing the *Alkobi* and *Jane Doe* cases. Moreover, the defense attorney's position confused the issue of the legitimacy of a person's choice regarding with whom he or she has sexual relations and the issue of, as I called it above, the punishment of the person who is *discriminated against* (and not the discriminator, whom no one wants to punish) in both the *Alkobi* and *Kashur* cases. As opposed to the defense attorney's stance, which distinguishes between the cases and establishes a hierarchy between the gender context and ethnicity context, I maintain that it is necessary to stress the resemblance and connection between the regulation of these boundaries: not only because in both cases the law regulates our belonging to the arbitrary identities we have been assigned, but also due to the need to understand that the gender rigidity of the division into men and women is vital both for compulsory

109. Notice of Appeal, *supra* note 67, paras. 24-27.

110. *Id.*

111. For criticism of the singling-out of gender history as something that transgender people are expected to disclose, unlike other issues, such as religion or racial identity, where no such expectation exists, see Sharpe, *supra* note 24, at 220-22; Sharpe, *Transgender Marriage*, *supra* note 47, at 38-40, 43-47. However as the *Kashur* case illustrates, at least in the Israeli context, the law has been interpreted in a way that creates similar expectations regarding ethnic/national/religious identity.

heteronormativity and heterosexuality¹¹² and for the gender-national project, particularly the Zionist version. As a number of researchers have shown regarding the Zionist project, it seeks to “cure” the Jewish man from the flaws in his masculinity and to make “men out of men” and “women out of women.”¹¹³ This project entails a clear designation of who is a Jew and who is not, who is a man and who is not; and in its framework, any blurring, life in the borderlands, or boundary crossing is taken to be a dangerous act warranting punishment.¹¹⁴

It is important to realize that like Kashur, the defendants in *Alkobi*, *Jane Doe*, and their U.K. and U.S. counterparts all transgressed the social order and the regime of privileges, firstly, by crossing the boundaries of identity (into privileged identities) and exposing, through their conduct, the fact that identity is constructed and based on performance and is not “natural” and then, secondly, by engaging in relations that are conceived of as deviating from what this regime demands (i.e., relations between two people who are homogamous in terms of nationality but heterogamous in terms of gender). In this context, an analysis of the case law on rape by deception relating to “gender impersonation,” which rests on a performative conception of gender, can contribute to the analysis of the case law on nationality “impersonation,” in a way that invites a conceptualization of nationality as performance. Like the gendered body, the body that is associated with a particular national group has no autonomous ontological status from the acts that constitute its reality. Just as a particular name or behavior associated with gender is in fact performance of what it is to be a “man,” so a particular name or conduct is performance of what it is to be a “Jew.” The nationality designators, like the gender designators, are performative and, in effect, constitute the identity they purport to express; and like gender, nationality is also a type of imitation that has no origin. But nationality performance, like gender performance, is compelled performance, and thus, behavior that does not comply with its norms, leads to—as seen in cases of deviation from gender norms—ostracization, punishment, and violence.

Indeed, the social regulation of nationality is no less severe than the regulation of gender, and it is also—certainly in the Israeli context—based on two identities that are supposed to be perceived as polarized and

112. On compulsory heterosexuality, see ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence*, in *BLOOD, BREAD, AND POETRY* 130 (1986).

113. MICHAEL GLUZMAN, HAGUF HATZIONI: LEUMI'UT, MIGDAR VEMINIUT BASIFRUT HAIVRIT HAKHADASHA [THE ZIONIST BODY: NATIONALISM, GENDER AND SEXUALITY IN MODERN HEBREW LITERATURE] (2007); DANIEL BOYARIN, *UNHEROIC CONDUCT: THE RISE OF HETEROSEXUALITY AND THE INVENTION OF THE JEWISH MAN* (1997).

114. Gross, *supra* note 6, at 229-31.

stable, that is, Jew and Arab.¹¹⁵ In both contexts, there are social constructs that purport to be “natural.” Benedict Anderson has noted that “in the modern world everyone can, should, [and] will ‘have’ a nationality, as he or she ‘has’ a gender.”¹¹⁶ Deviation from the nationality—as from the gender—that we all “have” leads to punishment, especially when it occurs in the framework of an intimate relationship and in violation of the sexual-gender-national order in which, as Doris Sommer notes, nationality and sexuality (specifically heterosexuality) are mutually allegoric and each one anchors itself in the alleged stability of the other.¹¹⁷ Thus, in the legal framing of his story, Sabbar Kashur, who presents himself as “Dudu,” deviates from the nationality performance that is expected of him and is punished for this (in particular, for “passing” for a Jew) as well as for being an Arab man who had sexual relations with a Jewish woman. Particularly noteworthy, however, is that whereas the gender regulation that emerged in the Israeli cases was similarly manifested in the cases in the American and British courts, the type of nationality regulation that arose in *Kashur* is relatively unique, in both context and form, to Israel, reflecting its ethno-nationalistic character.¹¹⁸

The Israel Supreme Court, in fact, refused to attribute any weight to the comparison Kashur’s defense attorney suggested between his client’s case and the *Alkobi* case, referring to the latter as “an exceptional case in itself, whose facts are different in substance from the case before us [*Kashur*].”¹¹⁹ Yet in fact, it can be argued that Hen Alkobi, who presented himself using male names such as “Kobi Alkobi” and “Kobi Biton,”¹²⁰ and Sabbar Kashur, who presented himself as “Dudu,” suffered similar

115. The complex status of *Mizrahim* is related to this binarism, which is based on the denial of their Arab identity. See YEHOUDA SHENHAV, *THE ARAB-JEWS: A POSTCOLONIAL READING OF NATIONALISM, READING, AND ETHNICITY* (2006).

116. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 5 (1991).

117. On the connection between nationality and sexuality, see DORIS SOMMER, *FOUNDATIONAL FICTIONS* 30-41 (1991). For the Israeli context, see, for example, Michael Gluzman, *HaKmihaa LeHetrosexualiut: Tzhioniut VeMiniut BeAltneuland* [*The Yearning for Heterosexuality: Zionism and Sexuality in Altneuland*], 11 *THEORY & CRITICISM* 145 (1997). In the Israeli sexual-gender-national order, the “Zionist body,” as Gluzman calls it, is a standard masculine body, and heterosexuality is a component of this masculine standardness, as part of the nationalist project.

118. Aeyal Gross, *Democratia, Etniut VeKhukatiut BeIsrael: Bein “HaMedina HaYehudit” Ve’HaMedina HaDemocratit’* [*Democracy, Ethnicity and Constitutionalism in Israel: Between the “Jewish State” and the “Democratic State”*], 2 *ISRAELI SOC.* 647 (2000).

119. CrimA 5734/10 *Kashur v. State of Israel* [Jan. 25, 2012] (Isr.), Nevo Legal Database, para. 19.

120. Amended Bill of Indictment (3d Amendment) § 3, CrimC (Hi) 387/02 *State of Israel v. Alkobi* (Mar. 25, 2003) (unpublished) (Isr.).

fates, in their legal framing and the message this conveyed, because they had both committed a double “sin”: both did the unforgiveable act of crossing out of the roles—gender and nationality—that society had assigned them and moving into more privileged identities (with a certain amount of success from the perspective of “passing”), and both had engaged in sexual relations that are perceived to be a threat to the dominant national-gender order. The criminal law offense of rape by deception was enlisted, in the cases discussed in this Article, as a tool for restoring this order as well as to transmit a cautionary message to those seeking to cross the prohibited boundaries.

V. CONCLUSION

The rape-by-deception offense can be considered solely in terms of its function as a tool for protecting the requirement for women’s consent to sexual intercourse and as generating a debate about the importance of sexual autonomy.¹²¹ The stringent consent requirement necessarily arises from the need to protect women and their sexual freedom. But we must ask what happens when, in the name of this desire to protect women, we strengthen the state’s punitive power and how the state uses this power. The analysis in this Article of the resort to a rape-by-deception charge in cases relating to gender and national identity has shown that the state’s punitive power in such instances is implemented so as to preserve the sexual-gender-national order. From this perspective, the court decisions discussed in the Article can be understood as a sort of Pyrrhic victory for the important goal of protecting women’s sexual autonomy: an aspiration in whose name legal norms are produced that reinforce the social-national-gender order, which is an order in which women—and Arabs, in the Israeli context—have an inferior status.¹²² In this respect, the story of the offense of rape by deception in these contexts alludes to the bigger story of the paradox of appealing to the state and its legal system to further emancipatory projects:¹²³ while seemingly indispensable, we must acknowledge the costs of this tactic and its reflection of the broader paradox of pursuing justice in the modern state.

121. See Rubinfeld, *supra* note 8, at 1372.

122. On the problematic nature of the feminist appeal to the state for its disciplining power in the demand for justice, see BROWN, *supra* note 21, at 21-29, 43-47, 52-96.

123. WENDY BROWN & JANET HALLEY, *LEFT LEGALISM/LEFT CRITIQUE* (2002).