PALESTINIAN WOMEN AND HOUSING LAWS IN ISRAEL: A CASE STUDY OF LEGAL AND EPISTEMIC INJUSTICE

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ABSTRACT

This Article is built on a legal metaphor. In criminal law, we discuss whether an actor has the *mens rea* for a crime. I argue in this paper that judicial review of cases related to rights infringements involve a similar inquiry. In applying discrimination laws, courts actually, though sometimes not explicitly, search for anything between intent and awareness. In administrative law, courts search for indications of the negligence of the administrator. I use the test case of Palestinian women and Israeli housing aid rules to show where these legal practices fall short in treating the core problem. I analyze this situation and extrapolate from it to claim that in situations of the intersectionality of gender and socio-economic status within minority groups, epistemic injustice is unavoidable. I suggest in this paper that we borrow the strict or absolute liability framework from other areas of the law and apply it to situations in which individuals within minority groups are not given access to certain benefits or rights.

Keywords: Judicial Review, Poverty, Palestinian Women, Discrimination, Evidence-Based Legislation

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I. INTRODUCTION

This Article aims to look afresh at a deeply ingrained problem: how Welfare Law[1] is ill-suited to properly address the needs of excluded people within minority groups. Specifically, the Article is set against the backdrop of the discrepancy between the rules and regulations constructing Israel's Housing Aid regime and the lived reality of Palestinian women in housing-related matters in Israel.[2] As a legal practitioner, I have witnessed first-hand the devastating consequences for clients when they hit a dead-end in a judicial review, with the court repudiating requests for welfare aid or refusing to address claims regarding the illegality of a rule. Here, I set out what I believe to be a shortcoming of judicial review in addressing situations in which an individual's petition for welfare is denied. Simultaneously, I highlight how courts could make a stronger institutional contribution to the protection of marginalized groups. This Article is therefore an attempt to both critically analyze the judicial review of Welfare Law and suggest a way forward.[3]

The main claim put forward in this Article is that the different legal frameworks aimed at addressing this discrepancy—which I view as a wrong in itself, through the lens of *epistemic injustice*[4]—are focused on the mentality of the rule-makers, or, to borrow metaphorically from criminal language, their *mens rea*.[5] I use the terms taken from criminal law and tort law metaphorically here, since transposing criminal law terminology helps to better articulate the judicial actions

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1 For purposes of this Article, I will refer to laws aimed to provide social welfare as Welfare Laws. These include laws regulating and providing eligibility for housing aid in any form, food security or income supplement programs prescribed by law, and other rights for social benefits existing in the legal system.

2 This Article occasionally refers to the Israeli Palestinians (or "Israeli-Arabs") as "Palestinians" for purposes of flow and ease for the reader. For an in-depth description and discussion of the categories within the Palestinian population in Israel and the historic Palestine area, *see* Yousef T. Jabareen, *The Arab-Palestinian Community in Israel: A Test Case for Collective Rights under International Law*, 47 GEO. WASH. INT'L L. REV. 449 (2015).

3 For a general overview of Judicial Review, *see*, *e.g.*, Thomas Poole, *Judicial Review at the Margins: Law, Power, and Prerogative*, 60 U. TORONTO L.J. 81 (2010). For judicial review and its importance regarding human rights, *see*, *e.g.*, Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002). *See also* J.A. King, *Institutional Approaches to Judicial Restraint*, 28 OXFORD J. LEGAL STUD. 409 (2008).

4 MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (Oxford Univ. Press 2011); THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE (Ian James Kidd, José Medina & Gaile Pohlhaus eds., 2019).

5 Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1931).

regarding Welfare Law. Doctrines such as discrimination law, therefore, point to either "intent to discriminate" or some other "awareness" of the humiliating aspect of the discriminatory act as the fundamental wrong of discrimination.[6] The legal field of legislation law, and, specifically, the common demand for evidence-based legislation,[7] sets de-facto ground rules for the "reasonable legislator," which, if ignored or not fulfilled, results in what can be characterized as negligent legislation.[8] Those judicial actions are oftentimes referred to in other categorizations of constitutional law and administrative law, and they prescribe specific judicial treatment. Naming the judicial practices with terms taken from a different field illuminates the actual commonalities between seemingly different practices of the actors in the field (the judiciary, the plaintiffs, and the state).

Importantly, this Article does not seek to enter a discussion regarding rule-makers' intent to discriminate against minority groups or even their neglectfulness regarding minorities' special circumstances. Nor does it intend to address the highly differential domestic application of human rights law in the field of social and economic welfare. Instead, it offers an alternative approach that borrows from different legal fields to bypass the quest—and the need—to prove the *mens rea* of the rule-makers.

The basic premise of this argument: if legislating or rule-making for minorities within the bounds of Welfare Law were reframed as an activity justifying strict or even absolute liability, one could examine the activity's desired public goal, to reflect on who holds the power and who benefits from the activity, and question whether there is a reasonability threshold of conduct that can solve the problem of the injustice suffered by people in intersectionality situations faced with

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6 Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149 (1992); Elizabeth S. Anderson, *What Is the Point of Equality?*, 102 ETHICS 287 (1999); TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW (Oxford Univ. Press 2015); SHREYA ATREY, INTERSECTIONAL DISCRIMINATION (Oxford Univ. Press 2019); Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); IRIS MARION YOUNG & DANIELLE S ALLEN, JUSTICE AND THE POLITICS OF DIFFERENCE (2011); FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES (Harv. Univ. Press 2006); Meghan Campbell, *The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform*, 41 OXFORD J. LEGAL STUD. 1197 (2021).

7 Ittai Bar-Siman-Tov, *The Dual Meaning of Evidence-based Judicial Review of Legislation*, 4 THEORY & PRAC. LEGIS. 107 (2016); Ittai Bar-Siman-Tov, *Semiprocedural Judicial Review*, 6 LEGISPRUDENCE 271 (2012).

8 RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 218 (Timothy Endicott, John Gardner & Leslie Green eds., 2012).

ill-fitting welfare laws. This Article contends that there is an inherent and unavoidable risk in legislating welfare to minorities and that, therefore, the aforementioned discrepancy is predictable by the state and the courts. Simply put, the Article argues that no matter how hard legislators try—assuming they do try, which they *should*—welfare legislators will never fully understand the circumstances in which the intersectional minority lives (in this test case, Palestinian women). Thus, when evidence of such gaps in understanding is present, the Article holds that the case should automatically be ruled as the legislator's *responsibility*. The necessary in-depth debate regarding the outcomes of such a ruling, be it reparation or retraction of rules or other remedies, is left for another paper. The argument submitted here would have a simplifying and expediting effect on the court's review of Welfare rules and regulations while avoiding the need to address the ill-fitting rule's normative placement, scrutinize the legislative process, or attempt to demonstrate the intent of the legislators.

The approach set out in this Article advocates for putting marginalized women at the center—in this case, Palestinian women in poverty—as Crenshaw and others have called on us to do.[9] This proposal nonetheless recognizes that populations who are excluded three or four times over, by nationality, race, gender, and class, could never fully be catered to. The ultimate proposal here is to shift courts' attention toward what can be done to remedy the situation of these vulnerable populations when the unavoidable eventually happens and their specific needs and life experiences are misunderstood or overlooked by legislators. Welfare Law, as I have mentioned (See footnote 1), is a branch of law directed at individuals in need, and as such, it focuses on the state's pivotal position and responsibility toward, in our case, Palestinian women. The Article refrains from addressing the complex and critical "minority-within-the-minority" dimension, namely the discrimination and oppression women suffer at the hands of their own communities with their patriarchal norms and their gender

9 Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally about Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1428 (2012); Khiara M. Bridges, *Beyond Torts: Reproductive Wrongs and the State*, 121 COLUM. L. REV. 1017, 1047 (2021) (reviewing DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019)); Matthew Evans, *Structural Violence, Socioeconomic Rights, and Transformative Justice*, 15 J. HUM. RTS. 1, 14 (2016); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 342 (2013); Priscilla A. Ocen, *Unshackling Intersectionality*, 10 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 471, 471 (2013).

stratification.[10] While policymakers and scholars alike should work to pay attention to the relationship between state, communal, and private powers and strive to identify injustices within internal minority situations, effort must be made to ensure the law does not negate individual agency and choice by assuming the relevance of liberal values in non-liberal cultures.[11] This Article tackles a less ambitious goal here, claiming that Welfare Law should not be used to "correct" communal and social injustices by means of technicalities—denying individual aid, for example, by insisting on treating property as if it were equally shared when, in fact, it is not.

The body of the Article starts with an illustrative scenario and its domestic normative background will be presented: the granting or denial of Housing Aid in Israel in relation to Palestinian women's housing circumstances. Second, a theoretical argument is presented to categorize the different legal approaches that have been proposed by courts and other scholars to date, analyzing the case-study scenario presented earlier, and pointing to their common theme of seeking to determine the rule-maker's *mens rea*. Third, proposed alternative review options are presented. To reiterate, the aim here is to address the question and process of placing responsibility on legislators. As to the question of how it helps the plight of Palestinian women to position responsibility as belonging with the legislator, as a legal theorist, I believe that placing responsibility on the shoulders of rule-makers carries an important declarative weight, even if the specific legal actions

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10 For a thorough discussion of internal minorities in other contexts and legal fields, *see, e.g.*, Meital Pinto, *What Are Offences to Feelings Really About? A New Regulative Principle for the Multicultural Era*, 30 OXFORD J. LEGAL STUD. 695, 698 (2010); Meital Pinto, *The Right to Culture, the Right to Dispute and the Right to Exclude. A New Perspective on Minorities within Minorities*, 28 RATIO JURIS 521, 530 (2015); Nahshon Perez, *Why Tolerating Illiberal Groups is Often Incoherent: On Internal Minorities, Liberty, "Shared Understandings," and Skepticism*, 36 SOC. THEORY & PRAC. 291, 310 (2010); Rawia Abu Rabia, *Redefining Polygamy Among the Palestinian Bedouins in Israel: Colonialism, Patriarchy, and Resistance*, 19 J. GENDER SOC. POL'Y & L. 459, 462 (2011).

11 *See e.g.*, Martha C. Nussbaum, *On Hearing Women's Voices: A Reply to Susan Okin*, 32 PHIL. & PUB. AFF. 193 (2004) (criticizing Okin's claim regarding multiculturalism and women's rights). I also refrain from entering deeply into the feminists versus liberals debate regarding multiculturalism, colonialism, and the agency of individuals within minorities, though I touch on it further in the paper. I hold that, while the discussion around whether there are some values that the state should promote to protect women from oppression within their communities is important and highly sensitive (however and whoever decides what and if protection is needed), Welfare Law is not the place to conduct that discussion, since it deals with the most basic needs of the individual.

stemming from that attributed responsibility remain to be discussed.[12] The subsequent stage of development—to articulate the result of this shift of responsibility, whether by compensations or other sanctions, and the results of that move—are beyond the present scope and will be for a further paper to explore.

II. CASE STUDY: ISRAELI HOUSING AID RULES AND PALESTINIAN WOMEN

A. *Normative and Local Background*

The Israeli welfare state deals with the housing needs of low-income people via two main routes: public housing and rent subsidies.[13] Subsidized public housing is distributed only to those considered to be in deep poverty, with rent subsidies, therefore, taking the lion's share of Housing Aid ring-fenced for people on low incomes in Israel. This trend is emphasized further by the fact that public housing is only available in specific areas: the state refrains from attaining and providing public housing in smaller nuclei or in Israeli-Arab-populated towns and villages.[14]

This policy stance, which leans away from public housing and toward rent subsidies, was a product of both market changes and a general shift in Israel away from a social welfare state toward a privatized capitalist state in the 1970s.[15] Whereas previously, its Housing Aid policy had centered on a publicly-mandated and -funded drive to settle the Jewish newcomers in state-built new villages and neighborhoods, now the general ideological shift toward capitalism and

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12 Among other actions might be the need to create a participatory law-making process, establish a different moral foundation for the welfare state, or strike down rules based on existing human rights frameworks.

13 This Article does not address other forms of housing assistance such as help with mortgage payments, young couples' benefits aimed to facilitate early home ownership, etc. For a discussion of housing assistance in Israel, *see e.g.*, Elia Werczberger & Nina Reshef*, Privatisation of Public Housing in Israel: Inconsistency or Complementarity?*, 8 HOUS. STUD. 195 (1993); Press Release, Bank of Israel Office of the Spokesperson and Economic Information (Mar. 22, 2015).

14 Ravit Hananel, *Public Housing in Israel: From Welfare State to Neoliberalism*, 8 RENEWALS FOR ARCHITECTURE AND SOCIAL HOUSING? 68 (2020), https://journals.openedition.org/craup/4677 [https://perma.cc/666A-CQY3].

15 *Id.*; *see generally* Protocols of Financial Committee in the Knesset, 150 (18.6.1990) and 170 (2.8.1990) reviewing changes in housing assistance policy and tools.

privatization was translated in the housing area into a focus "on the population and not the houses."[16]

A testament to the rent-subsidy regime's reliance on free-market thinking and the development of an open rental market is the present-day prohibition on subsidies where the rental contract is between family members.[17] This regime seemingly reflects two underlying notions: (1) these contracts are somehow fraudulent; and (2) the existence of such a contract indicates there is familial "support," in which case one can survive without any support from the state. Looked at through the lens of a "short blanket" mentality,[18] it is clear why a person with ostensible familial support is regarded as less deserving of state assistance.

B. *Typical Palestinian Housing Scenario: Women Caught in the Middle*

Much like ethnic minorities elsewhere, Palestinians are grossly over-represented in the poverty statistics in Israel, with over half of the Palestinian population in Israel living under the poverty line, compared to around 20% of Israelis.[19] The Palestinian villages are also markedly over-represented in the lowest clusters on the socio-economic scale, which measures and compares local councils and municipalities; and the Bedouin villages in the Negev southern desert are ranked the poorest villages in the whole country.[20]

Given these stark statistics, it might be reasonable to assume that Israel's Welfare rules and regulations would be tailored to assist the Palestinian community in particular and address the poverty known to afflict it, or that special attention would be given to the effectiveness

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16 Protocols of Financial Committee in the Knesset, *supra* note 15.

17 Housing Department Rules of Housing Aid (2012), art. 3.14 (Isr.).

18 This is the notion that resources are finite and "pulling" on the one side will create shortage on the other. See for example Teresa Bertotti, *Resources reduction and welfare changes: Tensions between social workers and organisations. The Italian case in child protection services*, 19 EUROPEAN JOURNAL OF SOCIAL WORK 963 (2016).

19 *Palestinian Poverty Level Almost Double Israel Average*, MIDDLE E. MONITOR (Dec. 31, 2018), https://www.middleeastmonitor.com/20181231-palestinian-poverty-level-almost-double-israel-average [https://perma.cc/MA4U-PYK4].

20 Ronen Shamir, *Suspended in Space: Bedouins Under the Law of Israel*, 30 LAW & SOC'Y REV. 231 (1996); KATIE HESKETH, SUHAD BISHARA, RINA ROSENBERG & SAWSAN ZAHER, THE INEQUALITY REPORT: THE PALESTINIAN ARAB MINORITY IN ISRAEL 8, 20 (2011), https://www.adalah.org/uploads/oldfiles/upfiles/2011/Adalah_The_Inequality_Report_March_2011.pdf [https://perma.cc/E6ME-DAK5].

of state assistance and benefits in alleviating poverty in the Palestinian segment of society. In reality, the National Insurance Institute, the main welfare institution in Israel, reports poverty-alleviation rates of 35% in the Jewish population versus just 16% in the Palestinian segment.[21]

This Article suggests that at least one reason for that efficiency gap is the fact that the rules regarding housing are ill-suited to the genuine—in contrast to the perceived or assumed—needs of the Palestinian community. While state rules are focused on the free rental market, the familial connection is powerful and omnipresent, meaning that, in the absence of state support, the traditional family stratifications operate to ensure that women's only feasible option is to live with family members.[22] In this kind of traditional living situation, an added negative value—emotional and social, not merely financial—is assigned, for example, to women living alone or with strangers (people with no blood ties to the family). In these communities, the power of the social rule is such that women are under extreme pressure to rent exclusively from within the family.[23]

To illustrate, this Article presents an example of living arrangements *not* recognized or addressed in Israel's current Housing Aid regime. The example is an illustrative one, but it is based on my collected experience as a litigator in Israeli courts and intimate knowledge of the experiences of Palestinian women in different geographical and social parts of Palestinian society in Israel. Generally, the law envisions a modern, capitalist, secular, individualized housing environment, while the housing situation in the Palestinian

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21 NII ANN. REP. ch. 3 (2019), https://www.btl.gov.il/Publications/Skira_shnatit/2018/Documents/chap-3-01-havtachat-hachnasa.pdf [https://perma.cc/J34Z-ULUK] (Hebr.) (discussing "stipends: current status and trends").

22 Sarab Abu-Rabia Queder, *Permission to Rebel: Arab Bedouin Women's Changing Negotiation of Social Roles*, 33 FEMINIST STUD. 161 (2007).

23 All taking as starting point these social placing and patriarchal restrictions, *see* Tal Meler, *A Room of One's Own": Remote Learning among Palestinian-Arab Female Students in the Israeli Periphery Following the COVID-19 Crisis*, 34 GENDER & EDUC. 280 (2022); Hannah Rought-Brooks, Salwa Duaibis & Soraida Hussein, *Palestinian Women: Caught in the Cross Fire Between Occupation and Patriarchy*, 22 FEMINIST FORMATIONS 124 (2010); Sarab Abu-Rabia-Queder & Naomi Weiner-Levy, *Identity and Gender in Cultural Transitions: Returning Home from Higher Education as "Internal Immigration" among Bedouin and Druze Women in Israel*, 14 SOC. IDENTITIES 665 (2008).

community, and especially that of women in the community, is far removed from the "cookie-cutter" liberal image.[24]

C. *The Penalty for Renting from Family Members*

As mentioned, Housing Aid rules include the prohibition on receiving rent subsidies when the applicant is renting from a family member.[25] The following imagined example clarifies the problematic implications of this prohibition in the Palestinian context:

Batala is thirty-seven years old. She is a mother of three and the second wife of a Bedouin man, living in his extended family's compound in the unlisted hamlet of Hura. She is being abused by her husband, who provides no type of support to her or the children. She wants to physically distance herself from him,[26] but, according to the religious and cultural customs by which she is governed, he would be granted custody of their children, who would usually be taken care of by his mother or other women in his extended family.[27] If she wants to stay close to her children and be a part of their lives, she must stay close to him. But hamlets like Hura are composed of no more than two extended families.[28] If she stays there, she will end up renting from her own family members or her husband's family. Additionally, as a separated woman, she will be socially—and maybe physically—punished if she rents from total strangers, so she is effectively confined to the boundaries of the extended family.

Trapped by social and traditional bonds, and especially due to the strictly-enforced religious rules that state that children must remain with their father's family in cases of separation,[29] women like Batala

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24 Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 65 (1983).

25 NII ANN. REP., *supra* note 21.

26 Backed by NGOs and legal clinics, there is a slowly forming trend of Bedouin women trying to leave abusive familial situations. The prohibition on receiving rent subsidies when renting from family members is one of the obstacles in the way of such partial emancipation. *See, e.g.*, *Bedouin Women Stand Up in the Negev*, CORDAID (Apr. 7, 2015), https://www.cordaid.org/en/news/bedouin-women-stand-negev/ [https://perma.cc/5Z8K-S3PQ].

27 According to Sharia Law. *See* Iyabode Ogunniran, *The Child Rights Act versus Sharia Law in Nigeria: Issues, Challenges & a Way Forward*, 30 CHILDREN'S LEGAL RTS. J. 62 (2010); Mahdi Zahraa & Normi A. Malek, *The Concept of Custody in Islamic Law*, 13 ARAB L.Q. 155 (1998).

28 Abu-Rabia-Queder & Weiner-Levy, *supra* note 23.

29 Nabila Espanioly, *Violence against Women: A Palestinian Women's Perspective: Personal Is Political*, 20 WOMEN'S STUD. INT'L F. 587 (1997); ELIZABETH

wish to live close by, in the same village or city. But the state rules that deny applications for rent subsidies when the individual is renting from a family member, the fact that villages themselves often comprise only extended families, and the social restriction that is imposed on fraternizing with strangers, especially unknown men, lead to a dead end. Even those women who have somehow managed to find a way out—likely thanks to someone from the family who is prepared to rent them a place where they could live—are unable to leave if they cannot afford rent without state support.

Generally, laws that are not fit for their purpose or fail to meet their declared goals present a legal question as to their justification. In the situation addressed here, the problem is multiplied. First, intersectionalized people, among the excluded and marginalized, are not free to challenge the law, nor to affect its content.[30] Judicial tools are less accessible to them, and therefore, they are less likely to get their day in court, if at all.[31] Second, the essence of Welfare Law is the redistribution of social goods to segments of the population who are less fortunate. It is no coincidence that Welfare Law deals with minorities, people with disabilities, and other excluded groups: these are the people left outside the "distributive circle" of the market because the market operates on hegemonic perceptions.[32] As a legal category, it combines elements of citizenship, social perceptions, and moral judgment when it is called to justify redistribution and assert eligibility and deservingness to state assistance. Since the declared goal of Welfare Law is to benefit those in most dire need,[33] culturally ill-fitting rules within

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BROWNSON, PALESTINIAN WOMEN AND MUSLIM FAMILY LAW IN THE MANDATE PERIOD (2019).

30 This phenomenon is, of course, not unique to Israel but is rather one of the problems of intersectional discrimination. *See e.g.*, ATREY, *supra* note 6; Iyiola Solanke, *Putting Race and Gender Together: A New Approach to Intersectionality*, 72 MOD. L. REV. 723 (2009); Sandra Fredman, *Positive Rights and Positive Duties: Addressing Intersectionality*, *in* EUROPEAN UNION NON-DISCRIMINATION LAW (Dagmar Schiek & Victoria Chege eds., 1st ed. 2008).

31 *Id.*

32 Carlos Gradín, *Poverty among Minorities in the United States: Explaining the Racial Poverty Gap for Blacks and Latinos*, 44 APPLIED ECON. 3793 (2012); Emily Rosenbaum, *Racial/Ethnic Differences in Home Ownership and Housing Quality, 1991*, 43 SOC. PROBS. 403 (1996); Darryl Li, *On Law and Racial Capitalism in Palestine*, LPE (June 15, 2021), https://lpeproject.org/blog/on-law-and-racial-capitalism-in-palestine/ [https://perma.cc/CE4S-MM6S].

33 There is, of course, a relationship and tension between need and responsibility, and different welfare states establish their eligibility criteria differently based on their moral perception of choice, agency, responsibility, and community. *See* MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE (Univ. of Chi. Press 2013); Gøsta

Welfare Laws are doubly problematic. Third, ill-fitting rules carry a narrative message with exclusionary consequences. When constructed, Welfare Laws reflect the social perception of social situations.[34] By designing laws that do not take into account the reality of Palestinian women's lives, legislators demonstrate their lack of knowledge about, and interest in, the struggles and well-being of Palestinian women. Aside from the material aid being denied, the women are being symbolically excluded, again; this time because the law sends out a message to society that their social and familial situations do not "count." This is the injustice that is at the root of the two other wrongs—epistemic injustice.[35]

III. TRADITIONAL EXPLANATORY FRAMEWORKS AND LEGAL TREATMENT

In what follows, this Article maps the existing legal responses to the problem of ill-fitting rules, grouping them, non-traditionally, by their respective concepts of the legislator's or regulator's *mens rea*, rather than by legal branch (constitutional versus administrative). Subsequently, the Article claims that, while all the existing approaches to the problem aim to solve it, it is time to acknowledge that they sometimes fall short in this attempt. This Article claims that it is not always fruitful to only aim to prevent such discrepancies and the legal system should move to establish the proper response—that is, not insisting on proving intent or even negligence *a posteriori*. This responsibility without proving guilt is essentially what is called in criminal or tort law "absolute liability,"[36] and this Article will explain why it is

Esping-Andersen, *Welfare Regimes and Social Stratification* 25 J. EUR. SOC. POL'Y 124 (2015); Gøsta Esping-Andersen & John Myles, *The Welfare State and Redistribution*, *in* SOCIAL STRATIFICATION (David B. Grusky & Katherine R. Weisshaar, eds., 2014).

34 *See* Cover, *supra* note 24.

35 *See* Franziska Dübgen, *Scientific Ghettos and Beyond. Epistemic Injustice in Academia and Its Effects on Researching Poverty*, *in* DIMENSIONS OF POVERTY: MEASUREMENT, EPISTEMIC INJUSTICES, ACTIVISM 77, 78 (Valentin Beck, Henning Hahn & Robert Lepenies eds., 2020); Jonathan O. Chimakonam, *Is the Debate on Poverty Research a Global One? A Consideration of the Exclusion of Odera Oruka's 'Human Minimum' as a Case of Epistemic Injustice*, *in* DIMENSIONS OF POVERTY: MEASUREMENT, EPISTEMIC INJUSTICES, ACTIVISM 97 (Valentin Beck, Henning Hahn & Robert Lepenies eds., 2020); Xavier Godinot & Robert Walker, *Poverty in All Its Forms: Determining the Dimensions of Poverty Through Merging Knowledge*, *in* DIMENSIONS OF POVERTY: MEASUREMENT, EPISTEMIC INJUSTICES, ACTIVISM 263 (Valentin Beck, Henning Hahn & Robert Lepenies eds., 2020).

36 *Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

prudent here. But, before turning to mapping the legal avenues available to address the ill-suited nature of the current Welfare rules, a brief explanation is provided on what those discrepancies in the rules reflect.

Sociologically, there is no news here. Israel's liberal welfare state legislators and rule-makers work to weave a social net that is almost at odds with the life in which women in minority communities are embedded.[37] In principle, women have some options, but in reality, they are not truly free to choose. For example, technically, the women could turn to the state courts to oblige their Palestinian community to ease its norms so that they can rent from strangers without reprisal.[38] They are also free to appeal to constitutional courts if they feel the legal provisions restrict or infringe on their constitutional rights.[39] But, in the social context, the creation of this ostensible net of possibilities is not only a mirage—unattainable in the reality due to social, economic, and gender constraints—but is also a harmful act.[40] Following Gustafson, this is a ceremony (albeit not criminal in nature) that signals degradation by exposing the limitation of the boundaries of personal freedom while doing nothing to ease them.[41]

In the social context of the Palestinian woman, she is actively being excluded from the national social security net, left to the mercy of familial support—with all its potential restrictions, discriminations, and injustices. [42] If a woman does not want to lose her identity and her community, she must usually give up the independence that the state's financial support would give her. What is more, the choice has to be made in public: she either has to denounce her social bonds or contest

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37 Ben Weinberg, *Welfare State of Exclusion*, JEWISHCURRENTS (Jan. 20, 2020), https://jewishcurrents.org/welfare-state-of-exclusion [https://perma.cc/DW5M-5UVN].

38 ELISA SCALISE & AMANDA RICHARDSON, A GUIDE TO PROTECTION AND PROMOTION OF WOMEN'S HLP RIGHTS IN THE GAZA STRIP 7 (Wafa Kafarna & Jehad Arafat eds., 2016), https://www.nrc.no/globalassets/pdf/reports/a-guide-to-protection-and-promotion-of-womens-hlp-rights-in-the-gaza-strip/a-guide-to-protection-and-promotion-of-womens-hlp-rights-in-the-gaza-strip [https://perma.cc/HKL4-ZS92].

39 Abdullah Mahmmoud & Osama Daraj, *The Right of Women to Equality in the Palestinian Basic Law*, 10 OPEN J. SOC. SCIS. 1, 4-5 (2022).

40 Nadera Shalhoub-Kevorkian & Adrien K. Wing, *Violence Against Palestinian Women in the West Bank*, *in* COMPARATIVE PERSPECTIVES ON GENDER VIOLENCE: LESSONS FROM EFFORTS WORLDWIDE 59 (Rashmi Goel & Leigh Goodmark eds., 2015).

41 *See* Gustafson, *supra* note 9.

42 Abu-Rabia-Queder & Weiner-Levy, *supra* note 23; Espanioly, *supra* note 29; Rought-Brooks, Duaibis & Hussein, *supra* note 23.

Welfare rules in court. In the Palestinian context in Israel, this "publicity" entails a third layer of choice, whereby women are cornered into publicly adhering to the state's court system over their own community norms, thus potentially risking being portrayed as choosing the State of Israel over Palestinian national identity. This not only contradicts a woman's (private) sense of identity; such a move could also have devastating social consequences for her.

Fueling this academic view, which attributes "intent" to the ill-fitting nature of Welfare Law vis-à-vis the reality of Palestinian women, are myriad accounts of legal discriminatory outcomes suffered by minorities.[43] In-depth literature explores the racist and colonizing treatment the welfare state extends to minorities, in general, sometimes labeling it structural violence.[44] A rich body of scholarship discusses the control to which minority women living in poverty are especially subject.[45] Regarding Palestinians, and Palestinian women in particular, many scholars use the theoretical framework of colonialism and post-colonialism.[46] While the danger posed by the indigenous person is not security-related, it is the "impuissant" and "financially weak" aspect of the Palestinian community that is seemingly considered endangering to the state and other citizens by the legislators. Hence, according to the post-colonial view, the law seeks to "fix" the problem through the welfare system, in which women are encouraged to make better financial decisions, and seeks all manner of "solutions" that belong to a paradigm alien to these women's realities.[47]

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43 ATREY, *supra* note 6.

44 *See* Evans, *supra* note 9.

45 Gustafson, *supra* note 9; Mimi Abramovitz, *From the Welfare State to the Carceral State: Whither Social Reproduction?*, *in* DEMOCRACY AND THE WELFARE STATE: THE TWO WESTS IN THE AGE OF AUSTERITY 195, 205 (Alice Kessler-Harris & Maurizio Vaudagna ed., 2017); Ocen, *supra* note 9.

46 Gurminder K. Bhambra & John Holmwood, *Colonialism, Postcolonialism and the Liberal Welfare State*, 23 NEW POL. ECON. 574 (2018); Queder, *supra* note 22; Rassem Khamaisi, *Between Customs and Laws: Planning and Management of Land in Arab Localities in Israel*, JERUSALEM: FLOERSHEIMER STUD. (2007), https://en.fips.huji.ac.il/publications/between-customs-and-laws-planning-and-management-land-arab-localities [https://perma.cc/B77L-2LB6]; James Midgley & David Piachaud, *Conclusion: Interpreting the Imperial Legal for Social Welfare*, *in* COLONIALISM AND WELFARE: SOCIAL POLICY AND THE BRITISH IMPERIAL LEGACY (James Midgley & David Piachaud ed., 2011); Shamir, *supra* note 20; Nimer Sultany, *The Making of an Underclass: The Palestinian Citizens in Israel,* 27 ISRAEL STUD. REV. 190 (2012); Sally Engle Merry, *Law, Jurisprudence, and Social Thought: Colonialism, Post-Colonialism, and Legal Theory*, 17 POL. & LEGAL ANTHROPOLOGY REV. 95 (1994).

47 An alternative theory regarding the Palestinian minority in Israel is that of multicultural entrapment. *See generally* MICHAEL KARAYANNI, A MULTICULTURAL

Legal Solutions: The Focus on the Moral Responsibility of the Legislator

In legal terms, the housing rules described in this Article infringe upon women's human rights. But, what are the legal avenues open to anyone wishing to contest such infringements? The rest of this Article attempts to address this question and point to a much-needed shift of focus that may better address this troubling phenomenon.

As noted earlier, typically, these kinds of provisions are constructed in rules and regulations, and not within state laws.[48] Were this not the case, these provisions would have been open to constitutional attack, inviting constitutional review based on infringement of the right to equality—and also the right to dignity, which includes the right to housing.[49] All human rights are recognized in the Israeli system only by the courts and not through concrete recognition in the two "foundation laws" addressing human rights—the Israeli equivalent of the bill of rights.[50]

Among legal scholars and jurisprudence, there is an elaborate debate about the core value protected by the constitutional right to dignity, and thus also about the proper judicial review in cases claiming discrimination.[51] Unequal distribution of resources can be an indicator

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ENTRAPMENT: RELIGION AND STATE AMONG THE PALESTINIAN-ARABS IN ISRAEL (2020) (discussing how liberal accommodations for group rights, while seemingly tolerant, fosters "control by accommodation." By ceding complete control to religious forums and customs, disadvantaged sectors of the religious group like women and children face alarming damage. In this way, the process of multicultural entrapment maintains the subjugation of already-weakened parts of a minority population.). *See also* Abu Rabia, *supra* note 10 (analyzing the legal intersection of colonial power and patriarchal power).

48 *See* Jabareen, *supra* note 2.

49 Basic Law: Human Dignity & Liberty, 5754-1994, SH No. 1454 p. 90 (1958) 69 (Isr.).

50 David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR. L. REV. 238-46 (1992).

51 Since it goes beyond the scope of this Article, it suffices to state that, while the common rhetoric insists that constitutional equality in Israel is not linked to intent to discriminate. *Compare* Barak Medina, *Domestic Human Rights Adjudication in the Shadow of International Law: The Status of Human Rights Convention in Israel* 50 ISR. L. REV. 331, 346 (2017) (arguing that Israeli constitutional equality is not linked to intent to discriminate), *with* Moshe Cohen-Eliya, *On the Mental Element in the Base of Anti-Discrimination Jurisprudence of Israeli Supreme Court: Intent? Result? Indifference?*, 17 MISHPAT UMIMSHAL 147 (2016) (Heb.) (claiming that Israeli legal construction usually demands evidence of unequal treatment, linking discrimination to indignity and humiliation). *See also* BARAK MEDINA, HUMAN RIGHTS LAW IN ISRAEL (2017) (in Hebrew), it can be claimed that the Israeli legal

of discrimination and are used as a litmus test for the existence of intent to discriminate, or at least the indifference to the harm of discrimination accruing.[52] Even if a plaintiff convinces the constitutional courts that a recognized and protected human right was infringed, there is still a long way to go to secure a positive ruling. Constitutional review in Israel assumes that no human right is completely exempt from infringement, and therefore, courts examine the *proportionality* of the infringement.[53] Thus, courts are focused on both the intent of the legislator and the process of legislation, seeking to ensure that there was a justifying rationale behind the law and that the legislating process did not overlook other means, less infringing of rights, to achieve the same goal.[54]

In the administrative field, where most reviews of welfare regulations and rules occur, the focus is even more strictly on process.[55] Administrative law has long-established constraints and obligations governing the work of rule-makers and administrators. In tort law there is the concept of the "reasonable rulemaker," though administrative law lacks this concept, I argue it logically connects to the obligation in administrative law to base rules and regulations on sufficient and relevant information. Framed this way, administrative courts can be viewed as drawing the lines of reasonableness for future processes by regulators and rule-makers.

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construction usually demands evidence of intentional unequal treatment, linking discrimination to dignity and humiliation.

52 *See* Oran Doyle, *Direct Discrimination, Indirect Discrimination and Autonomy*, 27 OXFORD J. LEGAL STUD. 537 (2007); Andrew J. Morris, *On the Normative Foundations of Indirect Discrimination Law: Understanding the Competing Models of Discrimination Law as Aristotelian Forms of Justice*, 15 OXFORD J. LEGAL STUD. 199 (1995); John Gardner, *Discrimination as Injustice*, 16 OXFORD J. LEGAL STUD. 353 (1996).

53 Talya Steiner, *Proportionality Analysis by the Israeli Supreme Court*, *in* PROPORTIONALITY IN ACTION: COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE 285 (Mordechai Kremnitzer, Talya Steiner & Andrej Lang eds., 2020).

54 *See* EKINS, *supra* note 8; Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463 (2011); Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 L. & ETHICS HUM. RTS. 140 (2010); Steiner, *supra* note 53, at 285.

55 *See, e.g.*, Mary Renae Carter, *Standards of Judicial Review in the Virginia Administrative Process Act Note*, 30 U. RICH. L. REV. 905 (1996); Robert Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORDHAM L. REV. 1 (1959); Michael P. Waxman, *Administrative Law: Judicial Review - Preserver of the Process Seventh Circuit Review*, 59 CHICAGO-KENT L. REV. 331 (1982).

Framing this obligation in terms of negligence, rather than discrimination (especially if discrimination is thought of in terms of intentional behaviour), suggests a different approach to understanding what is wrong with the discrepancy between the law and the reality of minority communities, and to constructing the legal response to it. These kinds of jurisprudence do not attribute malice to the legislator but point to an oversight on their part, a failure to discern facts that they should not have missed. Two legal constructions worth mentioning in that regard are the evidence-based legislation discourse and the legal debate and jurisprudence regarding presumptions and overly broad rules.

Evidence-based legislation is a relatively new framework that encapsulates and echoes the well-established notion of basing regulations and rule-making on a proper foundation of data.[56] The demand that legislation be evidence-based is present in many legal regimes in different forms and on different normative levels.[57] Based on the notional ideal that legislators are generally well-meaning representatives of the people, the general discussion revolves around what kind of evidence the prudent legislator should consider before enacting a law.[58]

Similar to the general sentiment around evidence-based legislation, many legal constructions and discussions that have focused on scrutinizing the rule-making procedures are rooted in the idea that; if one could only make legislators think a little more carefully about the rules and laws they produce, these would be better suited to the legal problems they are intended to address.[59] This jurisprudence (and the literature supporting it) identifies problems within the democratic procedure and attempts to address them.[60] The *mens rea* attributed to the legislators, even when courts do opt to interfere, annul, or change administrative decisions or regulations, is one of negligence—seemingly implying that legislators are well-meaning actors engaging in an activity that society generally wants to enable, but who are going about

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56 Ittai Bar-Siman-Tov, *The Dual Meaning of Evidence-Based Judicial Review of Legislation*, 4 THEORY PRAC. LEGIS. 107 (2016).

57 Ittai Bar-Siman-Tov, *Semiprocedural Judicial Review*, 6 LEGISPRUDENCE 271, 274, 277 (2012).

58 *See id.*

59 *See* Richard Ekins & Chye-Ching Huang, *Reckless Lawmaking and Regulatory Responsibility*, 3 N.Z. L. REV. 407 (2011).

60 K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control,* 108 CAL. L. REV. 63 (2020); Wendy Bach, *Governance, Accountability, and the New Poverty Agenda*, 239 WIS. L. REV. 59 (2010).

it in a way that endangers others because of a failure to take appropriate precautions.

A different route, but one that relies on similar preliminary assumptions regarding the *mens rea* of the rule-makers, is covered by the jurisprudence dealing with presumptions in law. Generally regarded as a warranted, if undesirable, legal tool due to its efficiency, presumptions are legal "shortcuts" that legislators or courts take.[61] Theoretically, presumptions are based on common sense and life experience and can be viewed as reflecting power: inserting presumption into the law reflects the power of establishing a statement, thereby transferring the burden of refuting this statement to the other side.[62] It also echoes the presumed authority over (and understanding of) the field that the rule-maker believes themselves to hold—justifying the enactment of such a powerful claim in the form of a legal presumption.[63]

Usually, courts dealing with administrative authorities tend to give precedence to the administrative process.[64] Leaving a wide "reasonable range," courts search not for content but procedural safeguards, so as to not be seen as replacing administrative discretion.[65] When reviewing presumptions as well as other administrative rules, the main concern is whether they were based on sufficient research and truly reflect common sense and whether they are irrefutable.[66]

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61 Antonio E. Bernardo, Eric L. Talley & Ivo Welch, *A Theory of Legal Presumptions*, 16 J.L. ECON. & ORG. 1 (2000); Edna Ullman-Margalit, *On Presumption*, 80 J. PHIL. 143 (1983); Edmund M. Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937); Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994).

62 David M. Godden & Douglas N. Walton, *A Theory of Presumption for Everyday Argumentation*, 15 PRAGMATICS & COGNITION 313 (2007); Morgan, *supra* note 61.

63 Ullman-Margalit, *supra* note 61; Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. PA. L. REV. & AM. L. REG. 307 (1920); Fred J. Kauffeld & Richard Whately's, *Presumptions and the Distribution of Argumentative Burdens in Acts of Proposing and Accusing*, 12 ARGUMENTATION 245 (1998).

64 *See, e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

65 Michael B. Rappaport, *Replacing Agency Adjudication with Independent Administrative Courts*, 26 GEO. MASON L. REV. 811 (2018); Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319 (2011).

66 Shapiro & Murphy, *supra* note 65; Carter, *supra* note 55; William H. Chamblee, *Administrative Law: Journey through the Administrative Process and Judicial Review of Administrative Actions Comment*, 16 ST. MARY'S L.J. 155 (1984).

In sum, one can paint courts' review within administrative law as looking for ways to articulate a "reasonable regulator" threshold and search for indications of deviations from guidelines of reasonableness. The guidelines are drawn in various forms, including demands for proper administrative deliberation, weak-form review of the rule-making process, or sometimes demands for parliament to legislate—thus calling for attention from a higher normative branch.[67]

It is therefore helpful to think of existing jurisprudence and legal doctrines as being concerned with the *mens rea* of the rule-makers or legislators, as argued earlier. They presume that ill-fitting rules—or the epistemic wrong—are either: (a) the result of purposeful discrimination or calculated infringement on other human rights, such as the right to a dignified existence, or (b) the result of negligence—specifically, neglecting to take into account diverse views, needs, or circumstances.

IV. WHAT IS PROBLEMATIC ABOUT THE EXISTING LEGAL REVIEW AVENUES?

While, as noted earlier, it is theoretically accurate to describe the discrimination within a framework of intent, racism, colonialism, and other assumed expressions of malice (or at least ignorance), it is less than constructive to do so in terms of the legal results. To explain why, the discussion that follows is divided into the "intent-focused" and the "negligence-focused" solutions. First, two problems with the "intent" review avenue are presented. It is, of course, true that constitutional review can, and does, focus on the process at times, in what is termed "weak-form review."[68] As mentioned above, to refresh the traditional legal divisions, this categorization is used rather than a constitutional or administrative one.

A. *Identifying Discriminatory Intent*

While, theoretically and doctrinally, it is possible to address issues of systematic discrimination against minorities through the

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67 This does not happen in all legal systems, *but see e.g.*, Oren Tamir, *The Limits of Ely-Stretching*, NAT'L L. SCH. INDIA L. REV. (forthcoming).

68 Adam Shinar, *With a Little Help from the Courts: The Promises and Limits of Weak Form Judicial Review of Social and Economic Rights*, 5 INT'L J.L. CONTEXT 417 (2009); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO L.J. 251 (1992). For a different approach, *see* Adrienne Stone, *Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law*, 60 U. TORONTO L.J. 109 (2010).

constitutional framework of human rights, and especially the right to equality, it is a very difficult maneuver to perform.[69] This presents a problem with taking the avenue of constitutional review seeking to identify intentional discrimination. The problem is due to two primary reasons: (1) lack of access to justice among excluded minorities and especially excluded groups within those minorities, and (2) the high doctrinal threshold for litigating discrimination claims.[70]

In terms of access to justice, it is a well-recognized phenomenon that minorities, and especially marginalized populations within minority groups, are in no position to challenge human rights violations in court.[71] This is more so in the case of people in poverty, who lack not only the social and cultural equity needed to approach the courts but also the financial means required to take on such an expensive and resource-consuming task.[72]

Other than the practical, grounded accessibility problem, there are also doctrinal limitations to consider, which lower the chances of correcting structural discrimination through the constitutional courts. Doctrinally, legal scrutiny within constitutional analysis doctrine is limited to gross human-rights infringement,[73] where the violation is

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69 Shreya Atrey, *The Intersectional Case of Poverty in Discrimination Law*, 18 HUM. RTS. L. REV. 411 (2018) (discussing an additional problem with using discrimination law to address poverty-rooted discrimination, which is the existing jurisprudential tendency to ignore the multilevel intersectionality of poverty). *See also* Shreya Atrey, *Comparison in Intersectional Discrimination*, 38 LEGAL STUD. 379 (2018) (discussing the problem of using discrimination law to address poverty-rooted discrimination); ATREY, *supra* note 6 (discussing the same problem but leaving open the question of burden of proof and the debate of intent or direct discrimination for development in further discussion).

70 Since social and economic rights are essentially not constitutionally recognized in the United States legal system, as such, the avenue for constitutional torts and the different immunity regimes connected to it and discussed in section 1983 of the Civil Rights Act are not addressed in this Article.

71 William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631 (1980). There are also doctrinal limitations such as evidence rules. *See* Benjamin Oliphant & Lauren J. Wihak, *Dunsmuir and the Scope of Admissible Evidence on Judicial Review: Principled Limitations or Path Dependency?* 69 UNIV. OF TORONTO L.J. 31 (2019).

72 Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. POVERTY L. & POL'Y 473, 499-503 (2015).

73 Rosalind Dixon, Proportionality & Comparative Constitutional Law versus Studies, 12 THE L. & ETHICS HUM. RTS. 203 (2018); NICHOLAS BAMFORTH, MALEIHA MALIK & COLM O'CINNEIDE, DISCRIMINATION LAW: THEORY AND CONTEXT (Nicholas Bamforth, Maleiha Malik & Colm O'Cinneide eds., 2008); Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002).

constructed in law and cannot be redeemed by justifiable causes to enact the discriminatory law.[74] The constitutional review is focused, as mentioned above, on the process of legislation, making sure it does not hide wrongful causes and that it involved active efforts to avoid the harmful result. But when the legislators present "bleaching" justifications—such as a seemingly neutral security aim, concealing racist and intentionally discriminatory motives—the court will not be the place to find protection from human rights violations.[75] Moreover, when dealing with the right to housing, which is only weakly protected in the Israeli legal system (as in many other legal systems), the threshold for accessing constitutional protection is even higher.[76]

This problem is relevant, especially to Welfare Law, which is claimed to be neutral and general. When debating laws that actively differentiate between Palestinians and Jews, such as the religious laws in Israel that grant full autonomy to religious groups' courts over family law and related issues, the starting point of the discussion is of laws directly and candidly addressing the Palestinian collective.[77] Welfare Law, on the other hand, is purportedly individualistic, which makes the claim of intentional discrimination harder to prove and convey. This is despite the fact that, in Israel, 50% of Palestinians live in poverty, and thus the welfare regime and Welfare rules effectively wield much more power over that population than over the Jewish population (except for the ultra-orthodox Jewish sector, which also lives in harsher poverty than the rest of the general population).[78]

B. *Identifying Discriminatory Negligence*

Using administrative venues, or what is dubbed "weak-form" constitutional protection, focuses on the process of law-making.[79] Although not a claim of redundant legal review, when it comes to

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74 Steiner, *supra* note 53.

75 EKINS, *supra* note 8; Steiner, *supra* note 53.

76 *Israel: Discriminatory Land Policies Hem in Palestinians*, HUM. RTS. WATCH (May 12, 2020, 12:00 AM), https://www.hrw.org/news/2020/05/12/israel-discriminatory-land-policies-hem-palestinians [https://perma.cc/J3CW-5ECD].

77 *See e.g.*, KARAYANNI, supra note 47.

78 Gideon Alon, *Palestinian Poverty Nears 50% Across Territories*, HAARETZ (Mar. 17, 2005), https://www.haaretz.com/2005-03-17/ty-article/palestinian-poverty-nears-50-across-territories/0000017f-dc19-d3a5-af7f-febf025e0000 [https://perma.cc/X399-S2C5].

79 Mark V. Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1 (2006); *David Landau, Aggressive Weak-Form Remedies*, 5 CONST. CT. REV. S. AFR. 244 (2014).

intersectional populations, process limitations or scrutiny by the legal branch can also fall short of providing the protection such collectives need. The main claim here is that in the current institutional deliberation forums and the existing processes expected and justified by the courts, the problem of the absence of voice among marginalized populations within minorities will not be healed. While it is prudent to search for better-institutionalized solutions, it is critical to acknowledge the shortcomings of process review about intersectional people, especially when one of the reasons for exclusion is economic status. The process review and its search for the "reasonable rule-maker" are ill-conceived.

Essentially, process-review methods and theories focus on parliament and other state-level, ministerial, or municipal decision-making forums. In the case of Palestinian women living in poverty, there are three exclusions from the rule-making process that this type of review misses and, consequently, three places where it fails to protect the truly marginalized population:

1. *Exclusion Within the Traditional Community*

In a patriarchal system such as the Palestinian community in Israel, and, in particular, the Bedouin community in the Negev, women are under-represented in communal decision-making (and in private matters),[80] and women are excluded from benefiting from social goods such as housing and property ownership.[81]

This is not a phenomenon unique to Palestinian women. In many traditional societies, women are marginalized; and, in many marginalized social groups, women's status merits special attention due to their specific voice having been excluded from the conversation. The understanding of the essence of multiple marginalized identities is already three decades old, having first been conceptualized by Crenshaw in 1991, as *intersectionality*[82] (this term and its potential in this Article's scope will be addressed in the next section). Scholars have recognized the problems of protecting groups' rights for communal

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80 Bridges, *supra* note 9.

81 Karayanni offers a review of the different ways women and children are discriminated against and controlled in the Israeli-Palestinian social context and dubs this phenomenon "the Individual predicament." *See* KARAYANNI, *supra* note 47.

82 Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243-44 (1991); Crenshaw, *supra* note 9. *See also* Atrey, *The Intersectional Case of Poverty in Discrimination Law*, *supra* note 69.

customs, control, and decision-making, especially concerning women's rights being infringed by these customs and by the power the group exercises.[83]

2. *Exclusion Within Parliament: Representation Focused on Community Issues*

Even though Palestinians are recognized and represented in the Knesset (the Israeli Parliament), their representation does not heal the exclusion of Palestinian women or their individual predicaments. Due to questions of voting thresholds and voting patterns within the Palestinian community in Israel, the Palestinian representatives in the Knesset are grouped into two "Palestinian parties" (out of a dozen in total), with only two Palestinians elected when belonging to other parties.[84] Out of the 120 Knesset Members, just 11 are Palestinians; and, of these, only 2 are women.[85]

Moreover, the Palestinian representatives, for the most part, address national or communal issues.[86] Since they are being scrutinized from within and outside Israeli politics, they are dealing with multiple

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83 Susan Moller Okin, Azizah Y. Al-Hibri, Sander L. Gilman, Joseph Raz, Saskia Sassen, Cass R. Sunstein & Yael Tamis, Is Multiculturalism Bad for Women? 11 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999). *But see* Lila Abu-Lughod, Do Muslim Women Need Saving? 8 (2013) (noting more recent critical and more careful debate of women's situations in non-western society).

84 Mazal Mualem, *Arab Parties to Determine Israeli Government*, AL-MONITOR (Apr. 22, 2021), https://www.al-monitor.com/originals/2021/04/arab-parties-determine-israeli-government [https://perma.cc/KH4M-LTEU].

85 *Newly Strengthened in Knesset, Arab Women Seek to Expand Their Voice*, TIMES OF ISRAEL (Mar. 13, 2020), https://www.timesofisrael.com/newly-strengthened-in-knesset-arab-women-seek-to-expand-their-voice/ [https://perma.cc/M36Z-6RTH]. This is not an 'Israeli' problem but rather it is common in many situations of majority-ruled parliaments. Remedies have been suggested. *See* Yasmin Dawood, *Electoral Fairness and The Law Of Democracy: A Structural Rights Approach to Judicial Review*, 62 U. TORONTO L.J. 499, 500 (2012); Sarah Hannett, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, 23 OXFORD J. LEGAL STUD. 65, 67 (2003); Hugh Beale, *Inequality of Bargaining Power*, 6 OXFORD J. LEGAL STUD. 123, 124 (1986).

86 John Parkinson, *Legitimacy Problems in Deliberative Democracy*, 51 POL. STUD. 180 (2003); Jabareen, *supra* note 2; Victoria Plaut & Matt J. Goren, *Identity Form Matters: White Racial Identity and Intergroup Attitudes*, 11 SELF & IDENTITY 237 (2012); Victoria C. Plaut, *Diversity Science and Institutional Design*, 1 POL'Y INSIGHTS FROM THE BEHAV. & BRAIN SCIS. 72 (2014); Flannery G. Stevens, Victoria C. Plaut & Jeffrey Sanchez-Burks, *Unlocking the Benefits of Diversity: All-Inclusive Multiculturalism and Positive Organizational Change*, 44 J. APPLIED BEHAV. SCI. 116 (2008).

political identities and perceptions of their mission in the Israeli political arena.

3. *Exclusion Within Society at Large: Poverty as Exclusion*

The exclusion from society is manifested in two ways. First, it is expressed in the "problem of intersectionality," as Ocen[87] refers to it, which is where the public and activist discourse does not address all marginalizing identities but chooses to paint the problem solely as "Palestinian," "feminist," or "poverty-related." By ignoring intersectionality-specific implications and circumstances, this discourse fails to acknowledge the web of control and exclusion to which Palestinian women living in poverty are subjected.[88] This is evidenced, for example, by the difficulty of converging civic campaigns for justice that include both Palestinian women *and* Jewish women living in poverty.[89]

Second, Palestinian women living in poverty are, of course, subject to the same exclusionary forces that affect people in poverty in general—that is, the cycle in which social exclusion is both caused by and causes poverty. In the debate surrounding how to define poverty, sociologists and welfare scholars examine the poor's experiences of both physical hardship and struggle *and* marginalization and exclusion—the social, as well as the monetary aspect of living in poverty.[90] Townsend and followers of his school of thought focus on the place

87 Ocen, *supra* note 9.

88 *Id.*

89 One somber yet perhaps optimistic exemption is the current public demand for the issue of domestic violence to be addressed—an issue responsible for horrific statistics that have only worsened in the shadow of the COVID-19 pandemic. The public feministic debate in Israel has stressed the importance of an institutionalized response regardless of whether the victims are Palestinians or Jews. On a different attempt to bridge groups fighting for social change, *see* Yoav Dotan, *The Boundaries of Social Transformation through Litigation: Women's and LGBT Rights in Israel, 1970–2010*, 48 ISR. L. REV. 3 (2015). On past attempts to bridge groups' mobilization for social change, *see e.g.*, *Socioeconomic (Im) Mobility: Resisting Classifications within a "Post-Projects" Identity*, *in* CRITICAL AUTOETHNOGRAPHY: INTERSECTING CULTURAL IDENTITIES IN EVERYDAY LIFE 195 (Robin M. Boylorn & Mark P. Orbe eds., 2014); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak Colloquium: Social Welfare Policy and Law*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987).

90 Emanuele Ferragina, Mark Tomlinson & Robert Walker, *Poverty, Participation and Choice: The Legacy of Peter Townsend*, JOSEPH ROWNTREE FOUND. (2013), https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/society-poverty-participation-full.pdf [https://perma.cc/8DNK-TGAB].

of the person living in poverty relative to society.[91] These scholars note the exclusion that takes place and the impossibility of participation in the public debate among people in poverty, on account of their lack of resources as well as the daily fight for survival that this circumstance entails. [92]

But I wish to suggest that exclusion is not only the *result* of living in poverty; it is also the *reason for* it. Viewed from the understanding that decisions regarding resource distribution and public priorities are political, poverty becomes a vicious cycle almost impossible to escape. People who live in poverty experience inequality in access to public debate and impediments to their participation in it, leading to the absence of their point of view and their needs from that debate, which results in greater emphasis being placed on the needs and preferences of those who do *not* live in poverty and do have access to public discourse.[93] In turn, this leads to resource-allocation decisions that only perpetuate poverty. When solutions are sought, they are often inadequate or ineffective.[94] The absence of self-representation in public debate and the public sphere in general also leads to the infiltration of stigma and prejudice.[95]

Given the interplay of all three forms of exclusion, it is not enough to solely address process-related issues and aim to tailor better guidelines for the non-negligent legislator. As iterated in the next section, even with the most good-hearted legislator imaginable, and the best legislating practices, some intersectional people will still fall through the net due to the very specific risks to which they are exposed. Therefore, the focus should not only be on seeking to correct the process but also on ensuring the proper response to situations in which such risks are realized. The court should address questions of cure: does the court rule that compensations should be paid to those

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91 PETER TOWNSEND, POVERTY IN THE UNITED KINGDOM: A SURVEY OF HOUSEHOLD RESOURCES AND STANDARDS OF LIVING (1979); ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? (2015).

92 TOWNSEND, *supra* note 91; ATKINSON, *supra* note 91.

93 Nicholas Carnes, *Working-class People are Underrepresented in Politics. The Problem Isn't Voters*, VOX (Oct. 24, 2018, 8:00 AM), https://www.vox.com/policy-and-politics/2018/10/24/18009856/working-class-income-inequality-randy-bryce-alexandria-ocasio-cortez [https://perma.cc/GR3F-2SCX].

94 Ezra Rosser, *Getting to Know the Poor*, 14 YALE HUM. RTS & DEV. L.J. 32 (2011).

95 Dorothy Allison, *A Question of Class*, *in* THE INSTITUTION OF EDUCATION (Pearson Custom Publishing ed., 2003). Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 1, 1, 97 (2018); Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283 (2017).

adversely affected by ill-fitting rules? Can it grant automatic eligibility, overruling an administrative decision that was based on the ill-fitting rules? Can courts annul an ill-fitting rule upon demonstration of the discrepancy?

In the next and final parts of this Article, the focus is on how the review lens can be turned away from searching for guilt and moral wrongness that will justify legal remedy and toward the situation itself and how to remedy it there and then.

V. NEW LENSES FOR REVIEWING WELFARE LEGISLATION FOR INTERSECTIONED PEOPLE

As seen, ill-fitting Welfare Law that does not take into account how the realities and experiences of intersectional people raise a legal problem. Despite the different theoretical foundations for establishing guilt on the part of the rule-maker, the legal avenues for reviewing such rules rarely find them to be discriminatory or unreasonable.[96] Due to their broad neutral language, access-to-justice limitations, due to representation deficits, or as a result of a preference for public considerations over the rights and welfare of individual marginalized persons, the courts consistently prove not to be up to the task of achieving social and legal change.

This is all part of the search for the *mens rea* of the rule-maker. On that basis, this part proposes an alternative way to review situations in which ill-fitting Welfare rules are causing harm to the person in poverty. Just as the term *mens rea* is borrowed from the criminal realm, this proposal borrows from other legal fields to facilitate the shift it aims to encourage. Here, "shortcuts" are displayed to prove intent or negligence on the part of the rule-makers. This Article lays out a more radical approach in which, when legislating for "Intersectionality-situated-othered" individuals, such as the women profiled in this Article, courts should adopt a responsibility-without-guilt stance and place the onus and the obligation to correct the wrong on the state.

It is important to clarify that liability and *mens rea* are being used in a metaphorical sense, as it has been throughout the Article. The following suggestions for change in the judicial review are not intended to imply that legislators should incur actual liability in terms of tort or criminal law. Alternatively, there is a need for a unique judicial

96 For a rare different case, *see* HCJ 10662/04 Hassan v. Nat'l Ins. Inst., (2012), https://versa.cardozo.yu.edu/opinions/hassan-v-national-insurance-institute [https://perma.cc/9T3K-22X4].

approach toward Welfare Law when intersectional people are involved, in an attempt to even out the structural imbalance of power outside the courts.

A. *Proving Moral Responsibility: Legal Shortcuts to Liability*

Even if the perception is that courts can only demand a remedy from rule-makers if responsibility is proven and maintained, there are a few well-known legal mechanisms devised to address similar situations in which power and resources are distributed unequally between plaintiff and defendant.

1. *Various Doctrines Shift the Burden of Proof*[97]

Borrowing from the criminal field, using statistical evidence or "modus operandi" evidence can be used to "bypass" having to prove intentions to discriminate. Thus, when dealing with legislation in an area of law that exerts a disproportionate effect on a marginalized community, and in a social context in which a community is underrepresented and suffers persistent racism and de-legitimization, one could claim that this is the "modus operandi" of the Israeli legislator to discriminate against Palestinians. It is, of course, questionable how such a "shortcut" can be helpful when intent to subordinate Palestinian women, or even Palestinians in general, has rarely been proven to be at the root of other discriminatory legislation in the past. But the combination of the three aforementioned exclusions is enough to generate an accumulation of statistical evidence. Thus, it is maintained that whenever the legislator uses broad rules and presumptions in Welfare Law in the case of minorities, there is reason to accept the evidential presumption that they are *not* rising to the level of a "reasonable legislator"—i.e., that they are not basing their rules on *relevant* and *accurate* data.

The legislator then must prove that they are acting to bridge those representational gaps. Like the doctrine of statistical evidence, which transfers the burden of proof in trials, the idea is to address power imbalances and access-to-knowledge inequality: the legislator knows

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97 Here, I take a distinct route from the one portrayed in *Intersectional Discrimination* by Atrey. ATREY, *supra* note 6. While Atrey does recognize the problem with placing the burden of proof on intersectional people but paints solutions in broad strokes, I attempt to suggest some concrete solutions by infusions from other fields of law. *Id.* at 195-98.

who was part of the legislative process, but the public, let alone the minority harmed by the rule, does not.

Borrowing from tort law, fault or negligence occurs when the damager fails to act with due care—that is, with the prudence that a reasonable person in the same situation would have exercised. Borrowing from the public law realm, the administrative obligation to enact rules and legislate based on full relevant data (evidence-based legislation) and the constitutional demand to frame potential human-rights infringements only in law and not in administrative decisions can be viewed as the reasonable legislator's framework. When ignoring relevant information, it can be said that the legislator is neglecting their obligation to act with the required prudence.

The doctrine of *res ipsa loquitur* can be of use here. While still building on fault, this doctrine shifts the burden of proof in court and levels the field when dealing with strong damagers and particularly vulnerable damaged persons, such as the Palestinian women in this case. When talking about poverty law generally, it can be said that there is a need to hold a presumption of liability, such as *res ipsa loquitur*, to acknowledge the power imbalance between the legislator and the law's subjects. Using this doctrine, one would only need to demonstrate a situation in which Welfare rules are ill-suited to the reality of people living in poverty. That would be sufficient to conclude that the rule-maker neglected to consult with all relevant actors and to base their policy and rules on sufficient data.

2. *Strict Liability: Welfare Legislating for Minorities Demands Special Scrutiny*

It is first important to note that the use of strict liability (and later to the even harsher absolute liability) is referred to as a borrowed framework and *not* as a direct application of either the full criminal or tort doctrine. As such, the proposed approach circumnavigates questions of desert[98] and the problems of personal human dignity that criminal scholars are concerned with.[99]

Strict liability evolved with the Industrial Revolution, reflecting the view that some actions or products pose a potential danger regardless of any reasonable care taken by the people in charge of them.[100]

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98 GUYORA BINDER, FELONY MURDER 43 (Stanford Univ. Press 2012).

99 Anthony Nordman & Isaac Hall, *Up in Flames: Containing Wildfire Liability for Utilities in the West*, 33 TUL. ENV'T L.J. 55 (2020).

100 Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81

Certain activities are perceived as inherently carrying a high risk of causing injuries to others; and, when such a risk materializes, the conductor of the potentially harmful actions or the owner of the potentially harmful object is held liable, without having to engage in the discussion around placing fault or negligence.[101] While other forms of *mens rea* based analysis focus on the actor, strict liability focuses on protected value. Described simply, strict liability does not concern itself with the intentions or thoughts of the perpetrator but with protecting a highly regarded social interest from actions that can endanger it.

Some scholars view strict liability as essentially an act of insurance, reflecting the understanding that some harm is unavoidable when engaging in certain actions, while not wanting to prohibit those actions altogether.[102] Whoever is benefitting from the action (in this case, society as a whole, having a welfare system—society being represented by the legislator, who is also the one enacting the ill-fitting rules) is expected to take further precautions and strive to prevent harm by acting with more than due care; and, if they fail (that is, when ill-fitting rules are produced), they are therefore expected to "buy" the residual risk by taking responsibility if any such risk materializes. Others view strict liability as a guidance mechanism indicating how much effort is supposed to go into preventing the actualization of the risk (in this case, non-traditional procedural norms intended to bypass the threefold exclusion, for example).[103]

Unlike the next suggestion, but similar to the above-mentioned mechanisms, this doctrine opens the door for the rule-maker to prove that they did, indeed, take the extreme precautions needed to bridge the exclusion and misrepresentation of intersectional people vis-à-vis the Welfare Law system.

YALE L.J. 1055 (1972); Richard A. Epstein, *A Theory of Strict Liability*, 2 J.L. STUD. 151 (1973).

101 Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 AM. U. L. REV. 313 (2003).

102 Monika Simmler, *Strict Liability and the Purpose of Punishment*, 23 NEW CRIM. L. REV. 516 (2020); Franz Werro & Erdem Büyüksagis, *The Bounds between Negligence and Strict Liability*, *in* COMPARATIVE TORT LAW: GLOBAL PERSPECTIVES, ch. 10 (Mauro Bussani & Anthony J. Sebok eds., 2d ed. 2021); GUYORA BINDER, FELONY MURDER (Stanford Univ. Press 2012).

103 Mordechai Kremnizer, Justified Deviations from the Requirement of "Mens Rea", 13 BAR-ILAN L. STUD. 109 (1996); Adi Parush, Moral Responsibility, Criminal Liability and the Value of Human Dignity, 13 BAR-ILAN L. STUD. 87 (1996); Miriam Gur-Arye, Deviations from the Requirement of Culpability, 13 BAR-ILAN L. STUD. 129 (1996).

B. *Absolute Liability: Responsibility Without Guilt*

All the mechanisms touched on thus far enable courts to assign remedies without demanding the almost-impossible mission of proving guilt on the rule-maker's part in every case. But, regardless of the legal outcome, the more radical notion of absolute liability construction steers the discussion away from the results and toward correctly naming the problem. That is, the problem is rooted in the exercising of state authority over cultural minorities. In this last part, searching for guilt is found to be futile since these kinds of ill-fitting rules are unavoidable when legislating to minorities in the current rule-making process.

Here, there are two vectors unavoidably on a collision course. On the one hand, there is the Welfare Law itself. Unlike private or local initiatives to better the economic status or enable the economic development of communities, Welfare Law has all the qualities of state law—that is, a public, top-down, generalized law. By design, it reflects notions of citizenship and perceptions of belonging and recognition, and, as part of its redistribution essence, it creates and nurtures the supportive "us" versus the supported "them." As problematic and stratifying as this dichotomy is, it also reflects a social commitment to others and the recognition of an obligation to prevent members of the obligated community from experiencing sub-minimal life conditions.

Juxtaposed against the essence of the state's or country's Welfare regime, on the other hand, is the essence of intersectionality and the position of multiply-excluded persons or groups. By definition, the experience of poor, Palestinian women cannot be fully translated to render it understandable for middle-class Jewish men that make up the majority of the Israeli Knesset.[104] It is not only a matter of practical representation. The idea of intersectionality in itself incorporates a notion of otherness that no formal recognition can bridge. In a sense, being brought into the fold (by being elected to parliament, for example) undermines the ability to represent those excluded from it.

While it is essential to make every effort to recognize the other's experience and actively listen, there is no realistic possibility of putting oneself in another's shoes. This is not to exempt the legislator from the moral obligation to seek to understand (and, elsewhere, it was proposed that "othered" groups must be included in the law-making

104 Alex Lederman, *Knesset Elections 2021: A Guide To Israel's Political Parties*, ISR. POL'Y F. (Mar. 10, 2021), https://israelpolicyforum.org/2021/03/10/378nesset-elections-2021-a-guide-to-israels-political-parties/ [https://perma.cc/28TS-TG3B].

act itself).[105] By taking such an approach, the legislator can, at least theoretically, prevent ill-fitting rules from being applied. Notwithstanding, the participation of *all* in the welfare legislation process, to the extent that no experience or point of view is excluded, is not realistically achievable. In the current climate of hate and blame, stigma and prejudice, it is even less plausible to imagine a truly participatory legislation process that would measure up to the strict responsibility standards laid out here. Past attempts at participatory legislation indeed have not always been successful,[106] although some reasons are seen for optimism in this regard, with participatory legislation being promoted in England, Scotland, and elsewhere.[107]

It is beneficial to begin from the premise that ill-fitting Welfare rules are impossible to avoid. Sometimes, and despite even the most well-meaning legislator's personal efforts (and until such an institutionalized participatory process is implemented), the risk inherent in the situation of state law attempting to assist the "other," combined with the deep otherness of multiply-excluded groups, will occasionally materialize in Welfare rules that are at odds with lived reality. To reiterate, while every effort should be made to avoid such occurrences, much like efforts to best avoid traffic accidents when the risk does materialize—due to the extreme imbalance of power between the damager (the legislator) and the damaged (the Palestinian women living in poverty), and due to the acknowledged inevitability of the risk—that intent should not be necessitated, nor negligence be proven. The mere existence of such rules is proof that the risk materialized, and, as in other absolute-liability situations, it should be concluded that the

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105 Yael Cohen-Rimer, *Participation in Welfare Legislation—A Poverty-Aware Paradigm*, REGULATION & GOVERNANCE, https://onlinelibrary.wiley.com/doi/abs/10.1111/rego.12451 [https://perma.cc/8UG9-A3HS] (accessed Jan. 12, 2022).

106 Wendy A. Bach, *Mobilization and Poverty Law: Searching for Participatory Democracy amid the Ashes of the War on Poverty*, 20 VA. J. SOC. POL'Y & L. 96 (2012).

107 *See, e.g.*, Ruth Lister, *Inclusive Citizenship: Realizing the Potential*, 11 CITIZENSHIP STUD. 49 (2007); Ruth Patrick & Mark Simpson, *Conceptualising Dignity in the Context of Social Security: Bottom-up and Top-down Perspectives*, 54 SOC. POL'Y & ADMIN. 475 (2020); Mark Simpson, Grainne McKeever & Ann Gray, *From Principles to Practice: Social Security in the Scottish Laboratory of Democracy*, 26 J. SOC. SEC. L. 13 (2019). The current Chilean move to rewrite the constitution using participatory methods is also interesting. *See, e.g.*, Margarita R. Seminario, *The 2020 Chilean Plebiscite: Overview, Citizen Engagement, and Potential Impact*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 5, 2020), https://www.csis.org/analysis/2020-chilean-plebiscite-overview-citizen-engagement-and-potential-impact [https://perma.cc/A7CX-D2T9].

responsibility lies with the damager and demands punishment or reparations.

The idea here is not suggested as a means to justify ill-fitting rules, by way of "buying" the harmful outcomes or forgoing efforts to avoid them when possible. To disconnect guilt from responsibility is not to suggest there is no guilt. It merely suggests that guilt cannot, and should not, be proven in these situations, and should instead add to the efforts to outline preventive methods and schemes to address the damage after the fact. Therefore, judicial review of cases reflecting the discrepancy between the state's rules and the realities of intersectional individuals and communities should not search for traces of discriminatory intent or discuss the law's goals and aims. At the intersection of welfare, cultural minorities, and marginalized persons within the minority community, the dissonance between law and reality reflects the actualization of the risk, and placing responsibility cannot be argued with.

Unlike the rest of the mechanisms proposed in most scholarship, this type of "borrowed" liability does not concern itself with *mens rea* at all. Thus, even if the rule-makers *have* been proven to conduct a reasonable process or even shown to have actively attempted to address the minority's needs and reality, the onus will still be on them to remedy the situation.

VI. POSSIBLE ILLUSTRATIVE REMEDIES

This Article has focused on delineating the difficulties of judicial review of Welfare Law involving intersectional people and offering an alternative pathway: a shift in liability. Now, this Article turns to make broad suggestions for remedies stemming from such a proposed shift.

A. *Personal Litigation Remedies*

Within the litigation of a case regarding state-aid benefits, the result of a liability shift can mean essentially constructing a *presumption* of eligibility for intersectional people. Claimants with a "multiply-excluded" profile should only have to show that they have been denied aid in order to force the state authority to justify the denial in court and *prove* that the specific claimant does not meet the criteria for aid. For example, if the state claims that someone is not eligible for rent subsidies because the rent contract provided is fraudulent, it should be the

state's job to prove the contract is indeed fraudulent and not the (intersectional) individual's job to prove it is authentic.

A similar but less provocative construction can be the implementation of judicial guidelines to frame judges' discretion in Welfare cases regarding intersectional people. Such guidelines can point the judge to actively engage in questions regarding claimants' accessibility issues and their understanding of the proceedings and the administrative process that they are contesting, among other factors. This line of questioning can bring to the surface points in time where the administrator implementing the rules ignored intersectionality-related capabilities, social background, and so forth.

B. *Systematic Remedies*

The problem of access to justice—especially prevalent among intersectional people—potentially renders personal litigation remedies ineffective when trying to address systemic social problems. In contrast, the proposed liability shift, or the notion of absolute liability, has access to a broader range of judicial avenues to systematically change welfare legislation and adjudication.

Constitutional review is one such option. Through constitutional review implementing the understanding of intersectionality and liability, courts would find rules to be unconstitutional based on a legal construction similar to the discriminatory impact theory developed in labor law.[108] Forgoing the demand for intent in discriminatory analysis can result in a ruling that seemingly neutral ill-fitting rules are discriminatory, and consequently pronouncing them unconstitutional and revoked.

Alternatively, based on the absolute liability idea, judicial review focused on process (weak-form constitutional review or administrative law judicial review) can lead to the implementation of *participatory* mechanisms of legislation. Understanding the intersectionality risk as described above should lead to the understanding that no neutral legislator can produce, alone, rules that are nuanced enough to address the distinct realities of intersectional people who are the law's recipients. Adopting absolute liability will thus lead to a procedural obligation, which, when ignored, will lead to revoking the ill-fitting rule.

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108 Elizabeth Hirsch & Christopher J. Lyons, Perceiving Discrimination on the Job: Legal Consciousness, Workplace Context, and the Construction of Race Discrimination, 44 L. & SOC'Y REV. 269 (2010).

VII. CONCLUDING REFLECTIONS

This Article has focused on shifting the legal review of situations of ill-fitting Welfare rules away from the quest to demonstrate the intent of the rule-makers and toward placing responsibility on them and moving toward the proper remedy. This Article does not analyze what such a remedy might look like, except to say that the options are many. The constitutional tort route, recognizing damages of infringement of constitutional rights, and compensations based on such recognition,[109] might be one additional viable option, prescribing compensations for Palestinian women who have been denied Welfare Aid due to the existing rules.

It does not escape attention that these suggestions have peripheral results, mainly the instability of the law. As a rule, a law that is more nuanced and particular, and a judicial system that is more sensitive to the plight of unrecognized and marginalized populations, will inevitably lead to a more responsive law. This kind of law indeed has its negative consequences. This Article hopes to inspire the review and consideration of the extent of those consequences as an essential step.

It is also important to note, again, that the theoretical legal construction presented here is not meant to exempt legislators from laboring to achieve fair and well-suited laws (in Welfare Law and other fields) about minorities and intersectional people within those minorities. The notion that there is an inherent risk at play is not intended to discourage anyone from endeavors to prevent its actualization. Rather, this risk highlights that when it does actualize, and when other classical routes of venues avail no legal solution, the prospect of strict or even absolute liability can be of use in articulating what is nonetheless wrong with ill-fitting Welfare rules and furthering the discussion on how to fix the problem.

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109 John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013).