2008

How Law Thinks of Disobedience Perceiving and Addressing Desertion and Conscientious Objection in Israeli Military Courts

Hadar Aviram
UC Hastings College of the Law, aviramh@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship

Recommended Citation
Available at: http://repository.uchastings.edu/faculty_scholarship/992

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marusc@uchastings.edu.
How Law Thinks of Disobedience: Perceiving and Addressing Desertion and Conscientious Objection in Israeli Military Courts

HADAR AVIRAM

The study transcends the dichotomy "law in the books"/"law in action" by taking law's knowledge-production mechanisms seriously. It examines how the Israeli military justice system perceives and addresses disobedience toward the mandatory military service duty by deserters and conscientious objectors. Both groups resist the military service ethos but differ in the offenders' demographics and motivations. The findings show how law co-opts the socio-political problems, assimilates them, and transforms them to narrow its framework. The legal system can be cognitively open to external frameworks introduced by powerful and resourceful defendants; it remains, however, normatively closed to alternative rules and perspectives.

I. INTRODUCTION

One bright and unremarkable morning in 2000, the Israeli military court addressed the case of a soldier who committed an unauthorized absence from service to help his family through an economic crisis. He was one of more than a thousand people in similar situations tried that year for desertion and probably one of ten to twenty defendants for the same offense that very morning. The audience seats were almost empty and the case yielded practically no public interest. The "guilty" verdict led to a substantial prison sentence. As part of a short, formulaic verdict, the court wrote:

I am grateful to Malcolm Feeley, Kristin Luker, Neil Fligstein, Lauren Edelman, Robert A. Kagan, Jonathan Simon, Dorit Rubinstein, and Chrysanthi Leon for their excellent comments on this project, and to Victoria Slind-Flor, Anat Shelley, Yaron Gat, and Noam Finger for their valuable assistance. I would also like to thank the Israeli Military Advocate General Unit for its gracious and willing cooperation. This project could not have been realized without the generosity of the Fulbright Foundation Fellowship and the UC Berkeley Chancellor Dissertation Award.

Address correspondence to: Hadar Aviram, Associate Professor, University of California, Hastings College of the Law, 200 McAllister Street, San Francisco, CA 94102, USA. Telephone: (415) 581-8890; E-mail: aviramh@uchastings.edu.
The defendant's behavior is very severe and combines severe elements of taking the law into one's own hands and a severe violation of military discipline. The defendant's disciplinary past also cannot be ignored, nor our impression that he did not make the most of the array of legal paths available to him before he took the law into his own hands. (South 64/00: 1)

Cases like this were tried, on a regular basis, in the years that followed, including in the summer of 2003, when in the adjacent hall, a well-attended, sensational trial took place. Five conscientious objectors were tried for refusing to serve in the army due to the occupation of the territories. The room was packed with family members and political supporters, who were occasionally interviewed before the media cameras outside the court. The defendants were eventually convicted, and, like the typical deserter, were sentenced to a considerable prison sentence. In their lengthy verdict, the court wrote:

This is ideological or political crime, and it is more severe and dangerous than regular criminal activity stemming from a wish for personal benefit... not only do they disobey the law, they renounce its compulsory power. They might be imitated by others, enjoy the support of people and public institutions, which hinders an egalitarian enforcement of law, and might gather around them a large public, who might be prepared to exhibit violence behavior to the point of mutiny and rebellion against the authorized government, that is, democratic society. (Headquarters 151, 174, 205, 222, 243/03: 3)

What do we make of the similarities between the two types of cases? What do we make of the differences between them? Did the court simply apply an abstract principle—the duty to perform military service—to the soldiers' cases? Does the verdict, therefore, reflect its formal adherence to the principle of general deterrence and the rule of law? Or, was the verdict shaped by the court's knowledge about the political and socio-economic situation in Israel, or by its bureaucratic need to smoothly handle the morning's caseload without creating dangerous precedents? Does the fact that the process—the public attendance, the media, the procedural path of the trial—was so different matter, in light of the similar results?

What we see in the juxtaposition of these two examples cannot be fully captured and explained using any of the two traditional paradigms through which mainstream scholarship has viewed law: "law in the books" and "law in action" (Pound 1910). The two paradigms have been presented as diametrically opposed to each other, and their contrast has become the formative idea of law and society studies, the "great divide" (Sarat and Kearns 1993). "Law in the books," that is, the doctrinal, lawyerly view on law, would argue that in both cases the court has applied a general, universal principle—the rule of law—to the specifics of the case (convicting those who knowingly eschew their legal duty to perform military service). By doing so, the court weighs the different interests (upholding the law versus considering the defendants' personal circumstances) and makes a legal decision (Mensch 1998; Vandevelde 1996). This endogenous, doctrinal
analysis of what law, or the court, has done in these cases, provides a decent explanation for the similar outcomes in both cases, which support the rule of law; however, it entirely misses the differences in context, the way the trials progressed, and their meaning in the extra-legal world.

“Law in Action,” a social science paradigm aimed at contrasting the normative decrees of substantial and procedural law with the practices in the field (see Banakar 2003; Cotterell 1995; Dau-Schmidt 1999; Friedman 1986; Levine 1990; Sarat and Kearns 1993; Trubek 1990), would seek to provide an entirely different narrative to explain the two types of verdicts. The decision to severely punish a deserter—examined in light of empirical data pointing to a strong correlation between desertion and socio-economic deprivation—could be interpreted as the product of class and wealth differences in society, perpetuated and supported by the legal structure (see, e.g., Balbus 1973; Hay, Linebaugh, Rule, Thompson and Winslow 1975; Stone 1985). It could also be explained as a product of the court’s organizational structure, in which guilty pleas, established punishment levels, and easy solutions smooth the everyday interaction between the actors in the system (e.g., Blumberg 1967; Emmelman 1996; Feeley, 1973; Nardulli 1978; Sudnow 1965). On the other hand, the conviction and severe punishment of a conscientious objector could be interpreted as the outcome of a politically driven move to legitimize the military occupation of the territories through the mechanisms of due process. These explanations capture some of the realities behind the cases; however, they do not take law, and the rule of law, seriously. They see the similar legal reasoning in both cases as a ruse, a mechanism for legitimacy in the face of inequality and extralegal considerations rather than taking legal reasoning itself to task and examining its meaning.

By ignoring the way in which the law thinks, traditional “law in action” scholarship misses a rich dimension of what law, and the legal system, does.

This article is an empirical building block in a more recent tradition of scholarship, which offers a way in which the “law in action” path can be enriched to include a perspective that takes law, its products, and its operations, seriously. The analysis it suggests does not comment on law’s normative objectives, in the manner of “law in the books” scholarship. Rather, it reveals how law itself, through its ways of perceiving problems, constructing content, and crafting logic, accounts for practices in the legal arena. Using the examples of desertion and conscientious objection, I examine how the military justice system uses and produces knowledge about disobedience; how this knowledge helps it conceptualize disobedience as a criminal offense; how it structures images of the offenders; and how its adherence to doctrinal principles clashes with its sensitivity to extralegal factors like political conflict and social inequalities when it addresses disobedience through the mechanisms of the criminal justice process.

Several important works in the last few decades have made suggestions for bridging, or transcending, the law in the books/law in action dichotomy. Some scholars do so by examining the meaning of law on everyday lives...
Ewick and Silbey 2000; Sarat 1990; Sarat and Kearns 1993); others have examined its symbolic value for social movements (McCann 1986, 1998). In the context of this project, however, I use a different approach, which relies on the scholarship of Niklas Luhmann (Luhmann 2004; Luhmann and Baecker 1995) and Gunther Teubner (1983, 1989, 2001). Luhmann and Teubner see law as a social system, which operates on the basis of endemic dichotomies (mainly the dichotomy “legal/illegal”) and concepts (Clam 2001). To them, law is an autopoietic system; it does not engage in dialogue with other disciplines or forms of knowledge. When law is “irritated” by concepts from other disciplines, it co-opts and transforms them to become part of its own knowledge-production mechanisms (Luhmann 2004). These autopoietic characteristics make law “cognitively open” to external irritants, but “normatively closed,” in the sense that, eventually, these irritants are incorporated into the internal web of communications and dialogues (King and Piper 1990; Nobles and Schiff 2001).

The article does not aim to provide a detailed analysis of these theoretical frameworks, nor to synthesize them with the work of other theorists who have examined the legal field from epistemological, text-conscious perspectives, such as Bordieu’s notion of a legal “field” (1987), Fish’s analysis of the law’s “formal existence” (1991), or the work of some scholars in the Foucaultian tradition of governmentality, whose analysis of policymaking texts relies on an “empiricism of the surface” (Hunt and Wickham 1994; Rose 1999; Simon 1998, 2007). Rather, it utilizes Luhmann’s perception of law insight premise according to which law consists, at least in part, of a mechanism for adapting and producing knowledge. This notion does not require full acceptance of the Luhmannian premise according to which law is entirely disconnected from extralegal concepts; nor does systems theory, as presented by Luhmann and Teubner, account for such an alienated definition of law (King 1995, 2001). As Mariana Valverde points out,

[o]ne can reject the depiction of law as an autonomous epistemic subject generated in the texts of autopoiesis writers and nevertheless acknowledge Luhmann and Teubner’s insights into the ways that law creatively appropriates extralegal knowledges. Inquiring into law’s knowledges, law’s research methods, would not have been possible within the limits of the critique of ideology framework that has been so ubiquitous within progressive legal studies and sociology of law. That framework demonstrated its power in enabling a whole generation of critical legal studies, feminist legal analysis, queer legal scholarship, and critical race theory. But like all frameworks, it has its limits, and these have become more visible in recent years. The inability of this framework to see what Luhmann and Teubner see—law’s active role in constituting powers and knowledges—has already been mentioned. This blind spot can be regarded as the effect of a more general problem, namely, the myth of the socioeconomic “real.” (Valverde 2003: 5)

As Valverde suggests, the weakness of critical theories is in their adherence to the “real” as a critique of legal regimes. While the enterprise of uncovering power dynamics is worthy and important, it falls short of demonstrating
the legal system's power in creating realities and the machinations by which the system creates them. This project, therefore, is an addition to the works that draw attention to the patterns by which the "real" is constructed by legal knowledge (King and Piper 1990; Wandall 2007). By putting the Luhmannian understanding of law to an empirical test, I seek to show how legal knowledge about disobedience interacts with legal policymaking. The article uses data gathered from the legal system's communications and products—courtroom hearings and verdicts—to uncover the inner logic and thought patterns that lie at the base of the policies regarding deserters and conscientious objectors. As I show here, the legal classification logic dominates the perceptions and policies toward disobedient soldiers by reducing, simplifying, and classifying their personalities, demographics, and motivations. Admittedly, intellectual, middle-class defendants with a well-articulated political agenda, like the conscientious objectors, succeed more than weak and powerless defendants, like deserters, in presenting the extralegal context to their disobedience. However, the internal legal system uses similar thought patterns to make sense of both groups and eventually reduces their differences and circumstances using established, monolithic categories. Therefore, while the importance of power differences and professional conflicts to the shaping of legal policies cannot be discounted, this article argues that such external factors are eventually co-opted and modified in their discursive interaction with formal law. The findings suggest that the story of law's dialogue with power structures is much more complex than a mere claim that the more powerful are treated more advantageously. The legal response to different individuals is shaped, to a great extent, by the thought patterns and inner workings of legal discourse, at least as much as by the interests and maneuvers of personal and professional interests of groups and individuals.

II. THE CASE STUDY: HOW DOES THE ISRAELI MILITARY JUSTICE SYSTEM PERCEIVE, AND ADDRESS, DISOBEDIENCE TO SERVE IN THE ARMY?

The case study observes the construction of a legal concept—the criminalization of disobedience—through the eyes of the Israeli military justice system. While every case study has features that make it idiosyncratic and problematic to generalize from, the subject of this article is a system that closely resembles the Israeli civilian criminal justice system, in the tradition of Anglo-American law. The military justice system is a smaller, more specialized sibling of the civilian one. Its jurisdiction extends over all soldiers, who are subject to a dual system of laws: the civilian and the military criminal courts (Finkelstein and Tomer 2002; Mudrik 1991). Military courts have priority whenever a criminal incident has any military-related features. Soldiers can be tried in the military system for any civilian criminal offense—from petty offenses to murder—as well as for military offenses, which are defined in the Military Justice Act,
1955. Criminal procedure in the military system, also prescribed by the Military Justice Act, is almost identical to civilian criminal procedure. The act itself, like much of Israel’s civilian criminal law and procedure, is an imported version of the equivalent British legislation, albeit heavily amended and reformed. There are, however, some significant differences: prosecutorial discretion in the army includes the option to indict the soldier in a small-scale “disciplinary hearing” before a lay commander, a process that is not subjected to procedural or evidentiary rules, and that does not entail a criminal record. Also, if a soldier is discharged from service, he or she ceases to be subjected to military jurisdiction. These features make the system slightly less residual than the civilian system, though the latter also offers various extralegal mechanisms for diverting cases away from the courts. It should also be mentioned that the system is of relatively small size, comprised of eight jurisdictions across the country, and employing a total of no more than two hundred officers (judges, prosecutors, and defense attorneys). A typical career at the Military Justice system often involves changing roles and locations every few years. These size and organization features yield much familiarity between officers who are “repeat players” and create close-knit courtroom communities (Nardulli 1978). While classic courtroom ethnographies often had to be limited to one or two criminal courtroom settings (Feeley 1979; Maynard 1984), this legal system can be studied in its entirety, which makes it an ideal setting for a study focusing on a variety of knowledge-production sites.3

Acts of desertion and conscientious objection can be prosecuted as military offenses: Unauthorized Absence from Service (article 94 of the Military Justice Act, 1955) and Refusing to Obey an Order (article 102 of the Military Justice Act). Both offenses, imported from British military legislation, were designed for an imperial army fighting away from home. In the Israeli context, however, they receive an entirely different meaning, as legal mechanisms to conceptualize and repress acts of defiance that constitute a challenge to the formative Israeli ethos of compulsory military service. Ever since the inauguration of Israel as an independent state in 1948, military service has not only been a duty based on the Security Service Act ([combined version], 1986), but also an important aspect of Israeli identity. In its early years, military service was designed to be a “melting-pot” for the Israeli multicultural society (Kimmerling 1971; Levy 2003). It is also credited for supplying social legitimacy and material advantages (Barnett 1992); in public debates, it is common to invoke one’s military background as a justification to present a knowledgeable opinion (Vald 1992; also see Chacham 2004). However, the seemingly egalitarian model of military service has not remained unchallenged; members of certain social groups are exempted from service, a topic constantly under public debate (Margalit and Halbertal 1998). The army’s participation in ethically debated activities has produced waves of resistance, particularly in the Lebanon war (Linn 1996a; Sheleff 1987) and the 1988 Intifada (Kidron 2004; Linn 1996a). The inadequacies of the army
as a “melting pot” have received somewhat less critical attention, but some studies argue that the army does not ameliorate, but rather reproduces and aggravates, social inequalities, through gender- and ethnicity-based discrimination (Kimmerling 1971; Levy 2003; Smoocha 1984).

While the two study groups—deserters and conscientious objectors—challenge the military service ethos, they do so from very different places in the Israeli social order. Conscientious objectors, described by themselves and by others as members of the Israeli middle class, left-wing intelligentsia (Chacham 2004; Linn 1996a, 1996b), choose to exit the military service framework based on political dissent and opt to mobilize their political views through alternative mechanisms: academic and public debate as well as political activism. Deserters, on the other hand, represent the weakest social groups in Israeli society; the offenders, often new immigrants or working-class youngsters, often explain their absence from service as stemming from economic difficulties in their families. The few military studies on desertion confirm that the poor, the undereducated, and the ethnically marginalized are significantly and strongly overrepresented in the deserter population (Borkov 1992; Gahelet 2000; Rosenberg and Gorny 1965). Therefore, while the former group challenges national ethos based on an ideological divide, the latter group “opts out” due to a socio-cultural one.⁴

III. METHODOLOGY

The research was designed to identify the epistemological structure behind the military justice system’s perception and treatment of desertion and conscientious objection. Rather than explaining the difference in terms of legal doctrine, social differences, or organizational features (such as, for example, heavy caseloads), the goal was to examine how the legal system created truth and utilized it in its policy toward desertion and conscientious objection, and how much of this truth was the product of legal principles, extralegal ways to frame the problems, or an assimilation of the latter into the framework of the former. For this purpose, the study used a multimethod design (Creswell 1994; Jupp 1989), observing four “sites” in the legal system: the indictment stage, courtroom hearings, legal reasoning in verdicts, and—for deserters only—quantitative analysis of verdict outcomes. In each of these sites, the findings were analyzed to answer the following questions: How does the system perceive the problem? Which bodies of knowledge shape this perception? How does the policy reflect these perceptions and knowledge sources?

The indictment “site” focuses on prosecutorial decision making. It uses military archival material and in-depth interviews with prosecutors to explicate indictment policies through the ethos of compulsory and egalitarian military service and its two corollaries: the ethical, defensive nature of the
army ("it is ethical to serve") and its populist nature ("everyone can serve"). This section compares the case-by-case, inquisitive, philosophical care in which conscientious objectors’ cases are examined and eliminated from the system’s docket, to the bureaucratic, arithmetic method in which desertion cases are brought to court. This section also explains why the following sections, which address later stages in the legal process, involve so many desertion cases and so few conscientious objectors’ cases. I see the difference in numbers of cases in the postindictment stages not as a methodological hurdle, but as a finding in itself, which stems as much from the prosecutorial concern about the potential for political discourse in court as from its lack of concern about challenges to the socio-economic structure.

The courtroom hearing "site" is based on an analysis of extensive courtroom observations of deserter and conscientious objector trials, conducted almost daily in military courts between June and October of 2003. supplemented with in-depth interviews of prosecutors, defense attorneys, and judges. The observations cover procedural practices as well as substantive content and informal interactions within the courtroom, and seek to find a connection between the respective "voices" of the two groups of offenders and the amount of flexibility in form and content of the legal process.

The legal reasoning "site" examines the legal system’s most explicit discursive product: the verdict. In my content analysis of eighty-five randomly selected deserter verdicts and the two lengthy verdicts in the conscientious objectors’ cases, I identify the realms of knowledge used by the judges to construct a "truth" about the problems and offenders it addressed. The analysis relied on coded key phrases, narratives, redundancies, omissions, and value statements in order to produce a picture of legal thoughts on social problems (Bogoch and Don-Yichya 1999); but beyond these indicators, it sought to figure out to the extent which the social and political issues underlying the problems were allowed to enter the legal language and the ways in which they were assimilated, modified, and recreated within it.

The fourth and final "site" examines the infiltration of knowledge about desertion to the actual outcome of the case—the severity of the sentence—using a linear regression model. Unfortunately, due to the screening processes described in the first "site," this section only addresses desertion cases, whose numbers allowed for large-scale quantitative analysis. The regression model examined the correlations between the imprisonment sentence for deserters and a set of fifty-five variables, which were coded directly from 853 randomly sampled military verdicts of deserters tried in the years 2000–2002. The reason for this source was that the model was meant to reflect not the "reality" of sentencing, but the patterns as the judges saw them. For the project’s purposes, the independent variables were divided between three groups: doctrinal variables (length of absence, criminal record), system variables (the identity of the legal actors, plea bargains and defense tactics), and socio-economic aspects pertaining to the offenders’ particular problems. The model was coded and run using the SPSS software package version 12.0, particularly
the Stepwise regression option. Running recursive models has several methodological shortcomings; however, it proved a useful tool in this particular section of the study, which followed a "ground theory" approach, in the sense that no preliminary assumptions were made as to the prevalence of legal or extralegal factors in the decision-making process.

IV. FINDINGS

A. HOW DISOBEEDIENCE BECOMES A CRIMINAL CASE: A GENEALOGY OF CRIMINALIZATION

Policy decisions addressing disobedience, including the prosecutorial decision to indict, occur in an epistemological space. Any decision to prosecute a deserter or a conscientious objector builds on a body of preconceived knowledge: an understanding about the nature of the problem, the people involved in it, and the way it should be addressed (Frohmann 1997). As prosecutorial policies in desertion and conscientious objectors' cases show, in both cases the decision to indict has to synthesize two contradictory notions: the classicist, criminal law notion of individuals as autonomous moral agents whose choice contradicts the monolithic public good and the external narratives that suggest a more ambiguous picture. In both cases, the external narratives are transformed into legal considerations, and, as such, they influence the knowledge that surrounds the prosecutorial decision.

The classicist view of disobedient people as criminals is constructed through the formative ethos of compulsory and egalitarian military service. The army's popular image is that of an institution of the Israeli people in which everyone shares the duty and privilege to defend their nation against its surrounding enemies (Almog 1997; Levy 2003). This ethos constructs military service not only as a legal duty, but as one which embodies positive social values. It is the legitimate, socially approved choice; dissent and disobedience are criminalized. This duality rests on the premise that serving in the army is not only mandatory, but also viable and possible under all circumstances. According to the ethos, the army presents no ethical challenges due to its defensive character, according to which it only engages in ethical practices that are necessary for the country's survival (its very name—Israel Defense Force—supports this narrative). An ethical army, by definition, is never engaged in immoral missions, and therefore does not present any moral dilemmas to its soldiers (Levy 2003; Pappe 1993). Similarly, military service is never placed in conflict with familial obligations or socio-economic necessities; in an egalitarian "army of the people," the military welfare authorities make sure that every soldier in need receives support and financial aid, which assure that everyone not only has to serve, but is able to do so. The corollary of these formative ideas is that anyone
who opts out of military service, by suggesting that this legal duty conflicts with his or her conscience or necessities, is consciously making the wrong (albeit free) choice and is therefore fully accountable for his or her actions. The monolithic narrative leaves no room for questioning the moral rightness of military activities or the conflict between service and familial or financial necessities.

External considerations, however, do knock on the door. In the conscientious objectors’ cases, they are presented as alternative readings of the political situation: the offenders argue that participating in military activities means committing immoral acts. The law is not deaf to the problematic and challenging nature of this argument; however, due to the classicist premise of monolithic “good” and free choice, it cannot accept it as face value. Instead, it transforms the moral argument into a model of personal difficulty. Since the army’s activities in the territories are ethical, the objectors are, naturally, “wrong” in their refusal to serve. However, the army is prepared to make certain concessions to them, which do not stem from ethical uncertainty, but rather from a bona fide attempt to accommodate their (misguided) consciences. The official policy in conscientious objector cases has been based on a distinction between pacifists (“full objectors”), who are exempted from service on a case-by-case basis, and people whose objection stems from political dissent (“selective objectors”) who are criminalized. Personnel documents from the early 2000s include lists of hundreds of high school seniors (potential regular service soldiers) who signed petitions against the occupation. For each of these cases, the list specifies the potential fate of the case: whether the objector appeared to be a pacifist or a political dissenter; whether the objector’s parents could be used to convince them to serve; and whether they had a personal history of mental problems or narcotics that could lead to their quiet dismissal from service for other reasons. Objectors that insisted not to serve were awarded a lengthy hearing at the military “conscience committee,” formed in 1995. The committee was comprised of officers from the personnel units, a legal officer, and (since 2002) a volunteer professor of philosophy. This peculiar choice indicates the realm of knowledge that the committee relied on: it was not preoccupied with the objectors’ honesty, but rather with their philosophical viewpoints. Co-opting and modifying the Rawlsian concepts of conscientious objection and civil disobedience, the committee interrogated objectors, their lawyers, and witnesses about the grounds for their refusal to serve, attempting to convince them of their mistake. In the early 2000s, the escalation of the Israeli-Palestinian conflict led to the emergence of a new “objection frontier” (Leibovitz-Dar 2000), comprised of reservists and high school students. This eruption of dissent yielded a military policy according to which objectors were not indicted, but rather tried in disciplinary hearings and sentenced to short prison terms. During their incarceration, the objectors received various offers to serve under special terms (such as service at a hospital with no uniform, no weapons, and no basic training). Only if they declined these
offers to "end the matter quietly," and continued refusing to serve, they would be prosecuted. These diversionary techniques led to the fact that only two cases, featuring six regular service soldiers, eventually reached the military courts. These two cases, the Yoni Ben Artzi case (Headquarters 129/03) and the five political objectors' case (Headquarters 151, 174, 205, 222, 243/03), are analyzed at length in this project.

In desertion cases, external considerations knock on the door in the form of the deserter population's problematic demographics. The prosecutors I interviewed, who indicted deserters, encountered dozens of cases every day, in which, invariably, the defendants explained their absence in terms of socio-economic hardships and family emergencies. Moreover, the prosecutors were aware that desertion had "a lot to do" with socio-economic hardships and were familiar with some of the military studies that suggested this link. Nevertheless, in the interviews, the prosecutors maintained that financial and familial misfortunes did not eliminate the choice to serve despite one's problems ("All in all it's a question of values. I can tell you that, no matter what my circumstances were, I would never desert" (Interview #1)). Most of them expressed faith in the army's welfare mechanisms as a means to financially provide for soldiers, even though none of them knew the particular amounts and conditions ("I'm assuming the army gives people everything they need" (Interview #38)). However, the classicistic image of deserters as autonomous agents clashed with the large, and growing, numbers of cases in which defendants framed their actions in the context of external difficulties. Like in the conscientious objectors' cases, here, too, legal policy found a way to incorporate and encapsulate these contradictory notions in a way that did not challenge the monolithic ethos of military service.

The threat of deserters was constructed by prosecutors and policymakers as lying not in the individual case, but in the bulk of cases as a whole. Prosecutors were quick to note that desertion accounted for more than 50 percent of the military courts' workload (a fact confirmed by the unit's yearly activity reports (Military Advocate General Corps Activity Reports 2001, 2002)), which, to them, indicated the difficulties faced by military unit commanders who contacted them and voiced their concerns about the growth of the phenomenon ("They keep telling us to increase punishment, because they don't understand" (Interview #35)). They also mentioned their frustration with allocating a large percentage of their workday for handling these cases, which offered them no professional challenge or interest and diverted their energy away from more complex legal cases ("When I have a sexual abuse case I want to put in days and nights, whereas with these cases... there's no comparison at all" (Interview #4)).

The prosecutorial understanding of desertion as a "bulk threat" yielded a highly formalized, bureaucratized prosecutorial response mechanism. A specialized unit, the Desertion and Unauthorized Absence Prosecution, manufactured identical indictments by the dozen on an average day, basing their decision almost exclusively on one parameter: the length of absence
from service. This easy-to-apply standard, incorporated into Military Prosecution Instruction 2.04, was perceived to provide a measurable indicator for the severity of the offense. According to prosecutorial guidelines, deserters whose absences exceeded forty-five days were to be tried in court; shorter absences (about 70 percent of the cases) were handled through disciplinary procedures in the unit or in military prisons. With the escalation of the Israeli-Palestinian conflict in 2000, desertion rates rose, a phenomenon linked by the media with the economic crisis prompted by the escalation (Glickman 2003; Harel 2002; Rabin 2002). This led to more lax policies, which informally raised the minimum absence period for indictment to sixty days. Desertion prosecutors repeatedly referred to their job as a "technical" one, and to desertion files as "repetitive" and "boring":

Sometimes I get here and feel like I'm a machine, like when there's a [military police arrest] operation... I take a pile of cases and just process humongous amounts, like sixty cases a day. I can do a case in a minute, half a minute, and then you can't really go into their personal circumstances... after three years here my brain has gone into entropy and I can read the cases upside down. (Interview #29)

Several things should be noted. First, at the base of each prosecutorial decision are classicistic constructions of disobedience as a matter of personal and misguided choice, setting aside pluralistic considerations of alternative moralities or social inequalities. Second, in both cases, the pluralistic considerations are reinterpreted and included in the indictment policy. However, while both problems represent threats to different aspects of the same ethos, the nature of this threat is different. The potential threat of conscientious objectors is rooted in their individual moral and intellectual resources. The army's unwillingness to engage in philosophical debate within the legal arena propels it to make substantial efforts to resolve conflicts in an informal, individualized, quiet manner. The potential threat of deserters—seen as a disempowered, silent minority with socio-economic difficulties—lies not in their individual arguments, but in the argument emerging from their large and increasing numbers, which problematizes the ethos of a "people's army." The army's unwillingness to ask questions about the nature of compulsory service leads it to a bureaucratized policy of prosecuting by numbers (Sudnow 1965), while preserving the rhetoric of personal choice for cases which reach the court.

B HOW DISOBEDIENCE IS DISCUSSED IN COURT: FLEXIBILITY, CONTENT, AND VOICE OF THE OFFENDERS IN HEARINGS

Observing the legal proceedings in deserters' and conscientious objectors' cases revealed an adherence to the classicist narrative of choice in both cases, while introducing the extralegal issues (political dissent for objectors, social inequalities for deserters) in predefined, limited places within the
process. There was, however, a difference in the extent to which the legal arena was willing to accommodate these external considerations. Conscientious objectors’ trials were much more flexible in form, and allowed for the inclusion of more diverse content into the legal framework; this was, to a great extent, owed to the salience and voice of the offenders within the process. Deserter trials, on the other hand, were characterized by strict adherence to a routine format, constrained content defined almost exclusively by formal legal requirements, and a weak, mediated voice of the offenders.

Deserter trials were often tried in court in batches of ten to twenty cases per morning, before a single judge. The trial style was defined by the actors as an “assembly line.” Trials with plea bargains were remarkably similar to trials with open sentencing (the latter were slightly slower: see Nardulli 1978); negotiation between the parties, though informal (Maynard 1984), did not change the nature of courtroom dynamics. The prosecution presented documentation relating to the absence; the defense presented welfare, medical and/or mental health documentation, and occasionally produced testimonies from the defendants or their family members telling of the situation at home, who were cross-examined by the prosecution in a more-or-less uniform fashion. One of my interviewees, a young prosecutor, handed me a ready-made printed form with cross-examination questions for defendants, which she had created and distributed among all deserter prosecutors in the district (Interview #19).

The judge remained relatively passive, stopping the stream of cases only when something hindered the smooth progress of the day, such as a Russian-speaking defendant who required a translator. A middle-class witness, such as an employer or a former commander taking interest in the defendant and coming to testify, was considered a rare event, and in the one instance it occurred, the witness was treated with great respect and interest. One of the prosecutors commented: “It’s real rare that commanders show up...I mean, they don’t have time, but also, you know, it’s not very likely that deserters will ever go back to the unit, right?” (Interview #18). Order and quiet in the courtroom were strictly maintained, and verdicts were read to the defendants in formal language, sometimes followed by a quasi-parental “word of advice” from the judge warning them not to commit future absences (“Next time I won’t be so lenient with you. I hope we won’t see you here again.” Field notes from courtroom observations, 22 September).

By contrast, the court was extremely flexible in procedural requirements in conscientious objectors’ trials. In one of its decisions about allowing certain testimony, it even stated explicitly that it intended to provide the objectors with every possible means to present their perspectives. Thus, the trials included lengthy testimonies; in one of them, the five defendants were allowed to present their world views one after the other before any of them was cross-examined. In the other trial, high-ranked military officials were summoned as defense hostile witnesses and cross-examined for hours. The court exhibited remarkable tolerance to the appearance and behavior of the
defendants and their supporters: the defendants were allowed to appear in
civilian clothes, political side remarks from the audience were ignored or
addressed forgivingly, and the court even agreed to negotiate its recess
policy with a defendant’s mother who rose from the audience (“I’m the
mother of one of the defendants, and we have many supporters outside
who want to come in, and it’s really crowded here. If we had a break, we
could have a ‘changing of the guard’” “Okay, ma’am, we’ll keep going
for about fifteen minutes and then we’ll take a break.” Field notes from
courtroom observations, 18 September).

The difference between the trial styles was even more evident in the
content of the hearings. Deserter cases, always following a guilty plea, seldom
strayed from the routine narrative based on the “ends of punishment”—
deterrence, retribution, and a narrow interpretation of rehabilitation as the
likelihood that the offender would return to normative service. The default
assumption was that the offender was an autonomous, free-willed being
(Hudson 1987, 1993) who chose his or her personal welfare above the service
duty. While prosecutorial cross-examination questions repetitively prodded
in this direction by suggesting the legitimate paths available to the defendant
(“Why didn’t you talk to your commander? Why didn’t you wait to hear
from welfare? Why don’t your brothers help at home?”), the defense line
did not question the prevalence of military over personal obligations but
made use of a discourse of mercy and quasi-therapeutic language to diminish
the range of choice available to the defendant. As one of the interviewees, a
veteran defense attorney, explained. “The defense attorney’s work basically
consists of painting a picture of great misery” (Interview #36). The defendant’s
socio-economic background was never discussed as a general feature of
desertion cases, but only as the specific offender’s personal mitigating
circumstances.

The content of conscientious objector trials was much more colorful and
diverse. The court, partly in response to issues brought up by the prosecution
and the defense, allowed extensive discussion of issues that, from a narrow
perspective, would be deemed irrelevant: the defendants’ personal histories
and world views—an “etiology of ideology” of sorts. The court and the parties
encouraged the defendants and witnesses to elaborate not only on their
childhood formative experiences (Ben Artzi’s sister was asked to relay
stories from her brother’s antics and protests in junior high school), but
on their perspectives about the general questions brought up: what counted
as a pacifist world view (in the Ben Artzi case) and what constituted, or
should have constituted, an issue of conscience (in the five objectors’ case).
These were not external questions garnishing the legal discussion: the
court’s substantive agenda was organized around them. The court also
enabled the defense to criticize military authorities, such as drafting officers
and the conscience committee.

The difference in procedure and content was largely due to the different
roles played by the defendants in the two types of cases. While deserters
were brought to trial from detention cells, wearing prison uniforms, cuffed in their hands and feet, and under heavy military police escort, objectors appeared in civilian clothes, entering the courtroom to an applause from the large audience, comprised of their unmistakably middle-class families and political supporters. Deserters were hardly heard in court; their voices were heavily mediated by their defense attorneys, who feared they would damage themselves in self-testimony. One of the interviewees, in a self-reflective moment, commented: "The problem is we're making the judge's job easier. It's much more convenient for the judge to hear the reality in dolled-up legalese from the defense attorney who says 'difficult economic situation.' Who knows what would happen if we had them tell the story in their own words?" (Interview #12). When the defendants did speak, it was mostly to ask for mercy before the verdict, and they were often shy and hindered by language and articulation barriers.

Conscientious objectors, on the other hand, testified at length, clearly and articulately, did not hesitate to rephrase questions posed to them in cross-examination, and often glanced at the court typist's official monitor, to see whether they were quoted correctly.

What led to the creation of such polar models, resembling a bureaucratic assembly line in one type of cases and an epistemological discussion in the other? Beyond the difference in numbers of cases, which probably led to a trivialization and routinization of the deserters' cases (Eisenstein and Jacob 1977; Sudnow 1965), the two genres seem to follow two very different agendas, which dictate the system's cognitive openness to encompass philosophical issues and personal "etiology of ideology" as essential information to shape its knowledge in one case and its closure to any issue beyond the formalities of caseload management in the other.

In the deserter cases, the institutional agenda is oriented inward, into the military courtroom workgroup itself. Through its procedural rules, choices of content, allocation of voices, and power in the process, the system strives to perpetuate itself and its policy respecting desertion. The focus seems to be, in the short run, to facilitate the smooth flow of the workday, to deal with exceptions in a way that reinforces the rules, and to minimize conflict; in the long run, the system wishes to maintain precedents as simple guidelines, to allow for equally smooth workdays in the future. The autopoietic nature of deserter case management is, therefore, technical and endogenous, and does not require any openness to alternative realms of knowledge.

By contrast, the agenda in conscientious objector cases is externally oriented and includes a more complex twofold message: On the epistemological level, the content and form produced in the courtroom are designed to reinforce the consensual idea according to which the objectors are morally, legally, and politically wrong or misguided. On the procedural level, the court projects the idea of extreme judicial fairness. In order to avoid potential undermining of its legitimate foundation, the court wishes to present itself as providing the objectors with every possible opportunity of proving themselves.
right and allows itself to compromise form and content for this purpose. These two seemingly contradictory messages are, in fact, two sides of the same coin: the military position on the conscientious objection question can be shown to be legitimate only through extremely fair processes, thus making the discussion apolitical and fair. The outward-bound nature of this agenda requires the court to expand its cognitive openness and to allow at least for external terminology to inform it about the problem, while maintaining ultimate control (and normative closure) about the manner in which this terminology is assimilated into the legal process and applied to the case.

C. HOW DISOBEDIENCE IS CONSTRUCTED IN LEGAL REASONING: PROBLEM PERCEPTIONS AND REALMS OF KNOWLEDGE IN COURT VERDICTS

The dialogue between legal reasoning and extralegal perceptions of the problems is showcased in the court's most basic legal communication: its final product, the verdict. In verdicts of both deserters and conscientious objectors, not only did the court present its perspectives on the problem, the subjects, and the suitable strategies and technologies for its solution, but in addition it disclosed important underlying information: the disciplines and realms of knowledge it utilized to shape its perspective on the problem.

Desertion was seen, first and foremost, as a criminal offense. The verdict's narrative invariably began by stating the length of absence and other information pertinent to the offense, and supplied the offender's motive for the offense (often economic or medical hardships in the family, which preceded the offense) later, in a fragmented, nonchronological manner. The style of these descriptions often foreshadowed the severity of the verdict. The court constructed the defendants into two categories: "the rule"—free-willed individuals who had made a selfish choice to absent themselves from the army—and "the exception"—people who encountered hardships or suffered from serious personal adjustment problems that make them somewhat less blameworthy. The first group was characterized by expressions such as "chose," "took the law into his own hands," and "forced his will on the army," conveying a message of manipulation and selfishness:

I have weighed the matter of the defendant. My impression is that his main difficulties are not in the economic level, but in his will to exit the unit in which he serves. The defendant actually did not take any legal measures to try and solve his problems and chose a path of absence from service. (North 316/00:1)

The second group's circumstances were described more sympathetically, using words such as "distress," "harsh circumstances," "disability," "unfitness," and "had to desert." These soldiers were not exempted from responsibility, but the individualization of their circumstances as exceptional allowed the court to use a less harsh tone:
The only question I am facing is whether to impose an imprisonment sentence on the defendant. My answer to this question is that since the defendant has been dismissed from service based on a mental health profile there is no room to impose an imprisonment sentence on him... it would be better if the military authorities would identify the disabilities of soldiers of his kind even before the draft so that the soldier would not have been drafted to service at all, because he is not fit for service in his condition. (North 457/00: 1)

Through these two categories, the court made a narrow “window” for introducing extralegal considerations. The categories allowed the court to make sense of the deserters: they were either “manipulators,” autonomous agents in defiance of the rule of law, or “victims” of particularly difficult circumstances. By reducing the issue of social inequality to individualized mitigating circumstances, the court allowed some discussion of the underlying issues, while limiting the potential for generalization and problematization.

The two conscientious objector verdicts were far more lengthy and detailed. In them, conscientious objection was portrayed as dangerous behavior, whose harm stemmed from the individualism, candidness, and self-conviction of the intelligent, articulate defendants. Any tolerance for objection was perceived as a risk of politicizing the army, dividing the population within the army, persuading others with subversive rhetoric, and snubbing common sense by assuming that everyone else is mistaken. The questions that interested the court were a compromise between the pertinent legal question of guilt and the epistemological issues brought up by the defendants and their attorneys (Khanin, Sfard and Rotbard 2004). In the Ben Artzi trial, the court was interested in the power and authority of an external body (the conscience committee) to define pacifist beliefs, and in “the five” trial, the court was interested in the conceptual meaning of conscience and whether it could be broadened to include political considerations.

These expanded interests led the court to an interesting, and uneasy, dialogue between law and political philosophy. While the court borrowed philosophical terms from the Rawlsian theoretical realm, it merely used them as labels for its own classifications. In the Ben Artzi case, the traditional legal distinction between “absolute” pacifism and “selective” refusal on political grounds was reinforced partly because of its supposedly easy application. In the five objectors’ case, the court made a distinction between “conscientious objection,” which it defined as refusal based on the need to personally dissociate oneself from actions perceived as immoral, and “civil disobedience,” defined as a refusal aimed at convincing others in the wrongness of the disputed law. Other realms of knowledge received even lesser respect; when the defense in the five objectors’ trial wished to dispute the (empirical) claim that acknowledging conscientious objection might be extensively misused, the court replied, in a classical autopoietic argument, that it had all the knowledge it needed to evaluate risk—in Supreme Court precedents:

We are speaking of matters that are known to everyone, things that were claimed again and again in front of the different courts, and adopted by them.
Indeed, the Supreme Court, sitting as High Court of Justice, stated the main part of these doubts and dangers, and adopted them as a cause and a reason to avoid assisting the petitioners, who had addressed it asking to legally recognize their refusal to perform military service. (Headquarters 151, 174, 205, 222. 243/03: 7)

As with deserters, the court was obsessed with classifying, simplifying, and understanding the objectors: it ventured to the defendants' personal histories in order to extract the "dominant" motive for their actions:

We found that we are close to the opinion . . . according to which, although the possibility of duality in motives is possible, it is, in general, a theoretical and distant possibility. We thought that the main motive hiding behind the actions of the defendants before us, considering the totality of circumstances surrounding their actions, is the will to cause a political change, that is, to bring about a change in public opinion and the governmental policy. We doubt whether the conscientious motive, in itself, is enough to be a basis to the defendants' refusal, based on the totality of the things they said. Yet, we are ready to avoid stating unambiguously, that the civil disobedience motive is the only one moving the defendants, and to assume, that it is also a motive of conscientious objection which moves them, perhaps even as a sufficient motive, to commit the act of refusal. (Headquarters 151, 174, 205, 222, 243/03: 75; emphasis in original)

In the Ben Artzi case, while the court was unable to comfortably pigeonhole the defendant's beliefs as either pacifistic or political/subversive, it sought to unify and harmonize them:

Is the inability to adjust to the military framework a consequence of the pacifist belief, or perhaps the pacifist belief is the cause [sic—probably meant "result"] of the inability to adjust to, or to accept, the existence of a military framework, whose goals are defined the way they are defined, and whose means are the way they are?! (Headquarters 129/03: 23)

The defendant distinguished . . . between the pacifist belief and the political view (though it is clear that a pacifistic view will be difficult to reconcile with a different political view). (ibid.: 32, 33)

The tendency to reduce and simplify human complexities for the sake of legal decision was evident in deserters' and in conscientious objectors' cases. In both cases, when seeking an "understanding" of the defendants, the court opted for individualization rather than for an open discussion of the general extralegal arguments underlying the issues. However, there were differences in the content of the classifications. With deserters, the court looked more favorably upon helpless, weak defendants, who were more victims of their circumstances than selfish manipulators. With conscientious objectors, the court sought articulate individuals, whose well-defined ideology was isolated and manageable. Though the objectors were given much more respect and voice than the deserters, and though conscientious objectors' verdicts were more cognitively open to assimilate "external" content, pertaining to the extralegal, political framing of the problem, in both cases legal
reasoning remained, eventually, normatively closed to different perspectives on the issues themselves.

D. HOW DISOBEDIENCE IS MEASURED: A QUANTITATIVE EXAMINATION OF SENTENCES FOR DESERTION

Finally, the study examined the interplay of legal and extralegal factors in a nontextual "site"—the sentence. As explained above, due to the small number of conscientious objectors who reached the trial stage, this section of the study refers to deserters alone.

The main finding from the model was that, contrary to several assumptions highlighted in realist socio-legal research, and consistent with other large-scale sentencing quantitative studies (Flemming, Nardulli and Eisenstein 1992), the criminal sentence was, first and foremost, a function of traditional, doctrinally defined factors. The strongest and most significant explanatory variable was, by far, the length of absence from service, which, as mentioned above, was regarded by all actors in the system as the most accurate indicator of the severity of the offense. The strong correlation between length of absence and length of prison sentence was evident in linear, logarithmic, and cluster bivariate regressions, and particularly salient for absences not exceeding one year (see Figure 1).10

Subsequently, a multivariate regression was run,11 resulting in an explanatory model that predicted punishment for deserters as a function of the twelve significant variables. Bivariate analysis for each variable was also conducted. Table 1 showcases the significant variables,12 classifying them according to their nature: variables corresponding to a doctrinal "law in the books" approach (severity of the offense, criminal record); trial-related variables

![Figure 1. Imprisonment as a Function of Length of Absence, for Absences Not Exceeding One Year: Linear and Logarithmic Regressions.](image-url)
Table 1. A Classification of Significant Variables, According to the Theoretical Framework They Support and Their Bivariate Regression R-Square Values

<table>
<thead>
<tr>
<th>Strong Explanatory Power (R Square ≥0.2)</th>
<th>Medium Explanatory Power (1 ≤ R square &lt; 0.2)</th>
<th>Weak Explanatory Power (R Square &lt; 0.1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doctrinal Variables</td>
<td>Trial-Related Variables</td>
<td>Defendant-Related Variables</td>
</tr>
<tr>
<td>Length of Absence</td>
<td>Previous Absences</td>
<td>Number of Judges</td>
</tr>
<tr>
<td>Previous Suspended Sentence</td>
<td>Number of Absences</td>
<td>Current Service Status</td>
</tr>
<tr>
<td>Doctrinal Variables</td>
<td>Reserve Defense Attorney</td>
<td>Health Problems</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Alcohol/Drug issues</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Service Conditions</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Jewish/Non-Jewish</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Assistance from Unit</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Parental Marital Status</td>
</tr>
</tbody>
</table>

As the table shows, the court’s sentencing policy corresponded most strongly with the doctrinal variables—length of absence, used as an index of severity, and criminal record—and was considerably less influenced by extralegal factors, system- or offender-related. The third and fourth strongest variables in the regression—service status at the time of trial and involvement in alcohol/narcotics—suggest that the court treated more leniently soldiers who, due to their circumstances, were either out of the system, or on their way out of it. According to the Personnel Unit’s Standing Instruction k-30-01-07, drug and/or alcohol abuse are almost automatic grounds for discharge; therefore, soldiers with such problems would naturally leave the army and consequently not repeat the offenses, thus rendering a deterrent sentence unnecessary. The remaining significant variables had a very small effect on the model. Socio-economic economic factors, which were often mentioned by the judges as mitigating circumstances, were almost completely absent from the model, except for three variables, and even those reflected hidden social prejudices more than they reflected genuine consideration of the circumstances. As to trial-related variables, the model revealed that defense strategies, such as plea bargaining, did not make much difference. The two other variables concerning trial circumstances—number of judges and representation by reserve service attorneys—have rather mundane, bureaucratic explanations.

V. DISCUSSION: HOW DISOBEDIENCE IS JURIDIFIED

The main common finding from the four “sites” is a reinforced acknowledgment of the power of law to dominate and produce knowledge, including
the "translation" and adaptation of extralegal knowledge into its own logic and vocabulary. In its process of understanding and addressing disobedience, law came in direct conflict with alternative narratives. In the conscientious objectors' cases, the legal monolithic definition of ethical behavior—compliance and military service—is directly challenged by individuals who argue for a different perspective on the morality of the situation, in which their conscience requires them not to serve. In desertion cases, the resistance to the monolithic definition of legal behavior is much less vocal; by preferring to work or help their families, deserters challenge the notion that military service is a viable option for them and challenge the assumption of equality underlying the duty to serve. In both cases, the challenges say something not only about the rule of law, but also about legal knowledge: they introduce alternative frameworks that illuminate the problems from a different perspective. Law does not operate in ignorance of these challenges; nor does it engage in direct dialogue with the competing discourses. What it does is introduce concepts and fragments from the challenging realms into the legal decision-making process, in a way that enhances, but does not hinder or modify, the main premises of the criminal justice process. In both cases, the external narratives are reduced into Weberian "ideal types"—mutually exclusive categories that, in their turn, help the legal system classify the cases at hand and make sense of them. While this modern, rational method is not endemic to law, it is certainly used by law to a great extent (law is, in this respect, an important defining phenomenon of modernity (Trubek 1986; Weber and Eisenstadt 1968)). In the cases of both deserters and conscientious objectors, the process and its content, though cognitively open to influences of external disciplines, was eventually dominated by legal rationality, which was the definitive factor in reaching the outcomes. This prevalence of law illustrates and verifies the autopoietic concept of law as a self-referential system, which is normatively closed despite being cognitively open (Teubner 1989).

Legal vocabulary had an interesting interaction with the external realms of knowledge that it encountered when addressing the two problems, particularly conscientious objection. Concepts from political philosophy enriched and informed the legal discussion of the problem, but its actual usage during trial and in the verdict did not resemble its original form. The law recreated and constructed philosophical categories to the advantage of its classification system, by using concepts assimilated from philosophy as headlines for the rational-legal categories into which it classified the defendants. This enabled the court to maintain the dual character of its function: making decisions based on its own doctrinal premises, while simultaneously obtaining external validation and legitimacy to a controversial decision through the disciplinary framework advocated by the defendants and their supporters, who would potentially undermine the court's legitimacy to try and convict them for their moral and political beliefs (Fish 1991).

It is equally evident, though, that law's dialogue with the external knowledge frameworks was different in the two problems studied. For conscientious
objectors, the law’s prevalence was manifested in the bottom-line outcome of the trials (a conviction and a prison sentence), but the legal discussion provided the defendants with some important advantages. Introducing language from political philosophy into the legal arena and delving into epistemological examinations of ideology entitled the defendants to an extensive voice throughout the process, which legitimized framing the issue of objection as a matter for political and public debate. For this reason, it is difficult to say whether the conscientious objectors’ brush with the law resulted in victory or failure; the full implications of the trials may include their spillover into public debate, which have benefited the movement in the arenas more important to them and to their struggle.16

The picture was significantly different for deserters. In the absence of resources for presenting an articulate voice framing their problem in generic terms (such as economic inequalities or cultural insensitivities), and facilitated by the large numbers of cases, the problem of desertion was addressed through a default model creating a highly formalized, bureaucratic strategy for trying and sentencing them. The power of precedents and existing practices enabled the court to create a simplified technical “how-to” method, which not only facilitated the smooth flow of routine cases during the workday, but also created a self-perpetuating momentum, which led all actors—even defense attorneys—to conform to its rigid guidelines. This effect of legal formality goes beyond the mere premise of “underclass oppression” suggested by socio-legal realism. Such a notion would explain why the defense fails to protect the interests of deserters, but not why it fails to try and do so. Acknowledging the power of legal indoctrination as a self-perpetuating mechanism provides a fuller account of how the policy regarding deserters came to be.

How, then, do power and resources, extralegal variables, affect the legal process? These social factors lead an interesting dialogue with the legal discourse. While formality prevails for both groups of offenders, vocal and voiceless alike, the conscientious objectors at least enjoy the possibility to introduce their outlook on the problem as a source of knowledge into the legal realm. They have the advantage of the system’s cognitive openness to their own perspective. Even if this advantage does not directly translate into acquittals and lenient sentences (normatively favorable outcomes), at least it makes the problem salient and interesting enough for the law to give it extensive attention and to talk about it partly on the offenders’ terms. This attention in itself is a resource unavailable to the masses of forgotten, routine, deserter cases who fail to present alternative frameworks to the prevalent formality.

VI. CONCLUSIONS

How much can we generalize from the case study? It is possible that other groups of offenders, more and less powerful, engage in different types of
dialogue with the law and with different degrees of success. The case study is problematic in that it does not allow isolating the factor that most facilitated the difference between the problems, which could be the difference in numbers, in resources, in ideology, or in the Israeli tendency to prioritize political issues over socio-economic ones. It may be that law becomes more autopoietic when it has more previous sources to rely on and refer to, as in the case of deserters. It is not even clear whether isolating these factors from each other is possible, since these factors are closely related to each other. Be this as it may, the outcome is that the law, which still dominates the discussion, is prepared to make more extensive cognitive allowances for one group than for the other. Future research on different case studies might be helpful in further examining this correlation.

Finally, the case study shows how approaches based on a critical observation of law itself can bridge and inform formalist and realist perspectives on law. The case study shows that both aspects are significant in determining legal thought and policy. While not discounting the importance of power and social structure, careful attention to legal formality allows for understanding the thought process through which power is "converted" into legal currency by the inner workings of the legal system, a mechanism that merits further academic attention.

HADR AVIRAM is Associate Professor at UC Hastings College of the Law. Her research interests include sociology of law, criminology and criminal justice, and social movements.

NOTES

1. Several authors have offered ways to synthesize the various discursive analytical frameworks without oversimplification: such an important task merits its own discussion and exceeds the limits of this article (for insightful theoretical analysis of these perspectives, see Andersen 2003; Banakar 2003; Cotterell 1995).

2. It should be mentioned that the military justice system described in this article is an entirely different system from the military courts in the occupied territories, which were the subject of Lisa Hajjar's recent book (Hajjar 2005). Whether one agrees with Hajjar's analysis or not, and despite the significant legal and political changes that took place since her data collection (Benisho 2005), the legal system in the occupied territories is a forum where military members of one political entity try, convict and punish people of a different ethnicity, fighting for independence. This can hardly be compared to an internal military system which deals with Israeli soldiers.

3. My access to the field was facilitated by the fact that my own military service, between 1996 and 2000, was performed in the military justice system; I was thus familiar with the different units, processes, and vernacular, and even maintained a few personal connections, though most of the junior personnel had changed.

4. It is probably due to these differences between the two groups that they have not been previously discussed together in academia. Naturally, conscientious objection tends to draw much more scholarly attention, particularly in the fields
of legal doctrine and political philosophy. Notwithstanding the interesting features of the political and philosophical discussion of this problem, its intricate details and insights are largely irrelevant for the purpose of this study, though the fact that conscientious objection managed to raise considerable interest, while desertion failed to do so, is a finding in itself.

5. The choice to select eighty-five cases of deserters stems from the fact that these verdicts tend to be very short and formatted (averaging two to three pages of text), as opposed to the conscientious objectors' verdicts, which were extremely lengthy and elaborate (seventy to one hundred pages). As I discuss above, the different prosecutorial decision-making processes, and the ideas that shape them, make for many desertion indictments and very few conscientious objection indictments: this, as explained above, is a finding rather than a methodological problem. However, I felt that a textual comparison would be more complete if similar amounts of text were analyzed for both problems, and therefore chose a number of deserter cases that was methodologically manageable and yielded about the same amount of text. Since patterns tended to repeat themselves, and emerged from careful reading, I did not engage in rigorous counting of textual expressions.

6. In at least 50% of the cases, indictment followed an arrest by the military police; naturally, in these cases, the "length of absence" was defined by the arbitrary date of apprehension and therefore could not really indicate much about the severity of the deserter's act.

7. The models can be easily mapped onto Packer's models of crime control and due process oriented systems (Packer 1968). However, rather than reflecting two different systems, they appear side by side in the same system, for handling offenses which violate the same values.

8. This would not necessarily entail vocal support of the occupation in the territories: the message is subtler and has more to do with presenting the army as an apolitical body who follows legal, and ethically sound, governmental orders.

9. The original meaning of the categories in Rawlsian theory is substantially modified in their translation to "legalspeak": not only are the categories redefined, but they are made to be mutually exclusive, to allow for classification, a feature their original meanings did not possess (Rawls 1999).

10. Absences ranged between 1 and 2,690 days, with a mean of 131 and a median of 71. Standard deviation was 227.9. The pattern indicates a large number of relatively short offenses, and a small percentage of long offenses, sometimes two years or more. For all observations, linear regression yielded an R square of 0.18, compared to 0.28 in logarithmic regression; for absences of a year or less, R square was 0.28 for linear regression and 0.23 for logarithmic regression.

11. Since missing observations appeared in different categories for each case, I opted to fill the blanks with the variable mean rather than excluding all cases with a missing value from the model, which would lead to a very small number of observations. This was a possible course of action because there was no reason to assume that the observations with missing values differed from others (Pindyck & Rubinfeld 1991).

12. Two variables that appeared as significant in the original stepwise model were removed from this model: economic difficulties (R square = 0.137, b = 6.4) and escaping confinement (R square = -12.4, b = -8.3). The coefficient sign suggested that defendants whose economic difficulties were mentioned in the verdict got harsher punishment. This seemed to be rather illogical (even through a radical perspective!), and this result is therefore attributed to possible multicolinearity between this variable and the plea-bargain variable; naturally, for people who bargained for a set punishment, less data were included in the verdict, including data about economic situation.
In addition, the model suggested that defendants who escaped confinement got harsher punishments than those who did not; this also could not be explained, except perhaps by referring to the small number of cases in which this was the case, and was therefore also excluded from the model.

13. One interesting ramification of this phenomenon is the creation of seemingly wrong incentives for offenders. Repeated desertions, as well as drug convictions and other types of troublemaking, are grounds for discharge. It follows, therefore, that a recidivist deserter is twice rewarded for repeated offending: firstly, by managing to exit the army and secondly, by receiving a lenient imprisonment sentence. This inverted economic rationale suggests, again, that the court’s commitment to values of deterrence and retribution is mostly rhetorical.

14. The defendant’s Jewishness was a mitigating factor, which was a discouraging finding; the bivariate table, however, reveals that it had a very small, albeit statistically significant, impact on the model as a whole.

15. Cases tried before three judges yield harsher punishments than cases tried before a single judge, because military law limits the single judge’s sentencing authority to one year. When the prosecution wishes to ask for a longer sentence, it asks for the case to be tried before three judges. The fact that these cases eventually do yield harsher punishments means that either the prosecution predicts well which cases are more severe, or the judges act by a self-fulfilled prophecy and treat the cases assigned to three judges as more severe. The latter assumption is attractive if one considers the fact that sometimes ten or fifteen cases will be heard on the same day, only one or two of them deemed “severe” by the prosecution, and still, the increased punishment for all cases was found to be significant. As to the finding that deserters represented by reserve service attorneys fare significantly worse than those represented by regular service attorneys or private attorneys, this can be attributed to the division of labor within the military defense, by which regular service attorneys prefer to take the more appealing cases and assign the less promising ones to reserve attorneys.

16. This assumption is very difficult to test, as different objectors may view their objectives differently. The media coverage of the objection movement was certainly more favorable, and less criminalizing, than that of desertion, but it is impossible to establish whether this influenced the court’s image of objectors or resulted from it (Aviram 2004).

REFERENCES


**CASES CITED**

North 316/00 The Military Prosecutor v Corporal Ovadia Israeli (unpublished; on file in court registry and with author).
North 457/00 The Military Prosecutor v Private Uzi Nisimi (unpublished; on file in court registry and with author).
South 64/00 The Military Prosecutor v Private Izhak Harush (unpublished; on file in court registry and with author).

STATUTES AND MILITARY COMMANDS CITED

Security Service Act [combined version], 1986.
Military Prosecution Instruction 2.04: Unauthorized Absence, Desertion and Loss of Contact with Unit.
Standing Instruction—Personnel Unit—k-30-01-07.

MILITARY DOCUMENTS AND REPORTS CITED

Military Advocate General Corps Activity Reports for 2001 and 2002 (Tel Aviv: Ministry of Security).