WHEN, AND WHERE, DOES HISTORY BEGIN? COLLECTIVE MEMORY, SELECTIVE AMNESIA, AND THE TREATMENT OF ASYLUM SEEKERS IN ISRAEL

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In this Article, I consider the strategic use of constitutional history, as reflected in national collective memories, and analyze, as a case study, the State of Israel's treatment of the recent surge of illegal entrants into Israel. The rise of entry of asylum seekers/infiltrators (the ambiguity is central to Israel's policies on the matter) from Africa into Israel via Egypt, which began around 2006, led the government to design stricter rules for treatment of entrants. The treatment of tens of thousands of entrants from Sudan and Eritrea, who could not be returned to their country under international law, remains the most pressing aspect. To tighten the policy, the government transformed a 1954 statute that was originally enacted to answer the challenges of Arab infiltrators (Fedayeen) into Israel in the mid-1950s. I discuss a series of four legislative amendments, enacted between 2012 and 2016, as a response to three Supreme Court decisions that found the first three amendments unconstitutional and place this recent history in the context of law-makers' reliance on the State's collective memory of the Holocaust and other mnemonic narratives of oppression. Collective memory, a central socio-cultural aspect of the ways histories are rendered and used to shape national identity, is addressed in this Article as a construct that can be implemented strategically to promote policy-and law-making. A quantitative analysis of oral presentations by members of Israel's parliament in the process of the legislation of

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those four amendments, compared with some presentations in the context of the removal of international sanctions against Iran, offers proof of the claim that collective memories are used strategically by policy-makers and law-makers, and, more generally, history, as translated by state officials, is highly malleable.

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I. INTRODUCTION

How, and how much, is the design and implementation of legislation impacted by past events, especially those that have been canonized as part of a nation's collective memory? Do rule-makers selectively and strategically marginalize remembrance in favor of forgetting and, if so, when? The question of the strategic use of constitutional history, addressed in this Article, considers, as a case study, the legal treatment of the recent surge of illegal entrants into Israel. As such, it addresses an underdeveloped research direction. The study of collective memory, well-developed by sociologists and other social scientists, has yet to be linked with the legal scholarship concerned with policy-making and legislation. Further, this Article joins those who consider the strategic use of

collective memory and refocuses the debate on strategic processes of *forgetting*, rather than remembering. This Article thus weaves several strands of current research: strategic and selective reliance on collective memory, collective amnesia, the politics of rule-making, and the difficult field of the treatment of asylum-seekers by host states.

The starting point of this Article is the long-accepted claim that the design of rules is not simply the outcome of actual needs and factual situations, but is also influenced by various legal, social, and cultural elements. This truism is important to law and history scholarship: the research of the history of law is an end to itself, but it can also contribute to the understanding of contemporary rules, structures, and practices.[1] Constitutional-law scholarship can be especially enriched by this body of research: constitutions are affected by the past as much as they are the result of the needs of the present. Some constitutions contain explicit references to the nation's past, but even when they do not, new constitutions respond to past structures and are impacted by them.[2]

In its analysis of the role of history in the making and evolution of constitutional law, this Article focuses on collective memory, described in Yadin Dudai's usefully simple definition as "a set of historical narratives, beliefs, and customs shared by a social group over generations."[3] The study of shared, constructed pasts offers an important viewpoint for the consideration of the impact of the past on constitutional structures and reasoning.

Tracing this concept's historical roots often begins with the sociologist Émile Durkheim's discussion of "collective representations" or meanings and symbols that are part of a group's identity; rather than conceived individually, they are created by, and belong to, the whole group.[4] Maurice Halbwachs, Durkheim's disciple, credited by many as the founding father of modern collective-memory study, developed this sociological insight by focusing on the past and considering its uses at

1. *See, e.g.*, David Ibbetson, *Historical Research in Law*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 863 (Peter Cane & Mark Tushnet eds., 2003); Michael Lobban, *The Varieties of Legal History*, CLIO@THÉMIS (2012), http://www.cliothemis.com/IMG/pdf/TP_Lobban.pdf.

2. *Compare, e.g.*, 1946 CONST. pmbl. (Fr.) ("In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity . . . ."), *with* 1958 CONST. pmbl. (Fr.) heading a constitution designed to answer the French crisis of 1958 ("The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004."). The preamble to the Constitution of the United States similarly lacks direct references to its prehistory. U.S. CONST. pmbl. ("We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.").

3. YADIN DUDAI, MEMORY FROM A TO Z: KEYWORDS, CONCEPTS, AND BEYOND 51 (2002).

4. ÉMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE 420–28 (Joseph Ward Swain trans., Free Press) (1969).

subsequent points in time.[5] The surge of memory studies since the mid-twentieth century is well-documented.[6] No fewer than 131 books currently in print and more than a thousand articles, book chapters, and reviews are concerned with this concept.[7]

Although much of this rich body of research is embedded in sociology, the surge of collective memory research is evident in other academic fields, including legal scholarship in general and constitutional history in particular. The impact of specific collective memories on the design and implementations of rules is studied by scholars of international and domestic law alike. Yet, the study of the uses of collective memory in the context of rule-making is yet to be developed.

In this Article, I draw on Maurice Halbwachs' vision of "presentism." Arguably the founding father of modern collective-memory research, Halbwachs developed the assumption, crucial to this Article, that national narratives that serve as both elements for the creation of national identities and as symbols for such identities are often shaped and reshaped, if not manipulated, to promote and establish discourses that serve the needs and interests of current authors of these identity narratives.[8]

This Article addresses the idea of manipulative collective memories, strategically formed and reformed, in the context of the legal treatment of illegal entrants into Israel during this and the past decade. Between 2012 and 2016, tens of thousands of asylum seekers/infiltrators (the ambiguity is central to Israel's policies on the matter) entered Israel illegally, which led to the introduction of stricter legal arrangements, designed, if undisclosed, not only to consider the future of the entrants, but also to curb future entry and to encourage the entrants' exit. This Article traces the introduction of four legislative amendments, enacted between 2012 and 2016, that established detention facilities to which those who remained in the country could be sent. Three judicial decisions invalidated parts of the first three amendments as unconstitutional. The latest statutory amendment, which followed the recommendations made in the most recent decision, now regulates the field. Entrants who choose to remain in the country may be held in a semi-open detention facility for a maxi-

5. *See* MAURICE HALBWACHS, THE COLLECTIVE MEMORY ch. 4 (1950), http://web.mit.edu/allanmc/www/hawlbachsspace.pdf.

6. *See infra* Part II.A.

7. Search, http://www.booksinprint.com/ (search: "collective memory" as keyword in title, 679 results found) (last visited Jan. 4, 2017); Search, http://www.jstor.org/ (search: "collective memory" in title or text, 12,895 publications found) (last visited Jan 4, 2017).

8. *See* HALBWACHS, *supra* note 5 ("[N]ot merely those resulting from the physical distribution of members within the boundaries of a city, house, or apartment, but many other types also—engrave their form in some way upon the soil and retrieve their collective remembrances within the spatial framework thus defined.").

mum period of twelve months, in addition to incarceration in a prison facility for a shorter period.[9]

This affair could have been steeped in history: the past persecution of the Jewish people could potentially be linked with the plight of at least some of the entrants. Whether this history has directed government policy, legislation, and its implementation has not yet been researched; this Article is a contribution to this less-studied question. The focus of this Article on the memory of the Holocaust also enables a limited-scope study, suitable for the context of an article.

Part II offers an overview of the interdisciplinary body of research of collective memory in general and of the expression of the collective memory of the Holocaust in Israeli society. Part III is dedicated to short analyses of three background issues: the political regime and the legislative process in Israel, the State's form of judicial review, and the pre-2012 history and law of asylum-seeking in Israel. These are necessary for an understanding of the series of statutes and judicial decisions examined in the following Part. Building on the previous section, Part IV traces the introduction of four legislative amendments, enacted between 2012 and 2016, which established detention facilities to which those who remained in the country could be sent.[10]

In Part V, I link the two research foci—collective memory and immigration/asylum-seeking—with the politics of law-making. All countries that are potential hosts of immigration, legal or illegal, need to optimally balance the rights or interests of entrants with those of their citizens and the arising social tensions. Policy solutions to the tension between clemency and harshness may include: the swift grant of refugee status to those who meet the requirements and denial of protection to those who don't; the establishment of detention centers, designed to enable authorities to check the entrants' claims, or to curb entry, or both; the creation of transnational arrangements aimed, *inter alia*, at removing entrants to third countries; and others. All of these typically require legislation, beyond mere executive policy-making. Yet, the design of legal arrangements and their implementation are not necessarily shared.

Since the design of rules is not simply the outcome of factual situation, I analyze the role and impact of collective memory on the design of policy and legislation. In the context of this case study, Part V traces the impact of one pivotal element of Israel's collective memory, the persecution and mass murders of Jews in the Holocaust, on the post-2012 legislative treatment of the growing number of asylum-seekers. This Article ex-

9. Prevention of Infiltration (Offences and Jurisdiction) (Temporary Measure) Law, 5776-2016, Section 2 (replacing Section 32U of the 1954 Prevention of Infiltration Law). For a general overview of the current situation, see *Refugee Law and Policy: Israel*, LIBRARY OF CONG., https://www.loc.gov/law/help/refugee-law/israel.php (last visited Jan. 4, 2017).

10. *See infra* Part II.

amines the declarations of rule-makers, namely members of the Knesset, the Israeli parliament ("MKs"), during the legislative process and the extent of their reliance on this element of collective memory to support their positions. Both qualitative and quantitative methodologies are used. To measure the extent of reliance, this Article offers a textual analysis of all direct and indirect references to the Holocaust and other events of mass prosecution, found in the explanatory notes to the bills, and in two groups of Knesset meetings' records (minutes): those of plenary debates over the enactment of the post-2012 legislation and of the debates of the standing committee that prepared the bills for their second and third readings.[11] The emerging pattern is clear: the explanatory notes contain no historical references; as for plenum and committee debates, MKs belonging to coalition parties largely refrained from relying on the Holocaust or on other collective memories of oppression; they only did so to deny the comparison, in response to criticism by opposition MKs, who couched their dissent with such references. The only exception to this regularity is found in the case of members of two centrist parties, who tended to adopt a range of individual stances. The results are then compared to several oral presentations regarding the removal of anti-Iran sanctions, in which the emphasis on the State's collective memory is striking.

These findings offer insights not only to the understanding of the form and content of Israel's treatment of a sensitive issue, but they also contribute to the study of constitutional history through one of its social and legal components. The question of strategic use of collective memory has usually been discussed in the context of the *creation* of collective memory—a process that involves remembering (in various degrees of fidelity to facts, as far as this is possible). Some scholars, whom I join, are equally interested in the *erasing* of memory or of processes of forgetting. Thus, drawing on the vision of the strategic creation of collective memory, I join those who study collective amnesia and enrich the discussion by emphasizing that amnesia can also be selective. In the case of Israel, I tentatively argue that governments and other political decision-makers, as well as, possibly, a nation's society and culture, draw on the history of persecution when the issue discussed is perceived as one linked with a threat to the state; when no such direct threat is imminent, and the measures involved are those of the exertion of state power, if not coercion, links with such history are weakened, if not removed.

11. For the methodological decisions regarding the nature of "reference," "direct," and "indirect," see *infra* text accompanying notes 182–85.

II. COLLECTIVE MEMORY AND AMNESIA AS STRATEGIC TOOLS: VALUES FOR HISTORICAL CONSTITUTIONAL STUDY

A. Collective Memory Studies—An Overview

The concept of collective memory is a useful tool for the study of constitutional history. The creation of a constitution, its nature, and its evolving meanings beyond mere text require socio-historical analysis. For example, the accepted tale of the creation of the U.S. Constitution is cushioned by several layers that have become nodes of meaning: the legacy of colonialism, the role of the Philadelphia Convention as the drafter of the Constitution, and the role of the *Federalist Papers* in its ratification process.[12] Several elements of this socially established account do not fully reflect historical facts. For example, only those who study history, or are critically interested in late eighteenth-century constitutionalism, remind themselves that the convention mandate was limited to the amendment of the Articles of the Confederation or that many of the final elements of the text where decided by the Committee of Detail.[13] *Brown v. Board of Education*, clearly more than a mere Supreme Court decision, is often employed as a symbol that enables society to minimize the force of racial discrimination, despite the fact that *Brown* did not transform society in one fell swoop nor can it signify the disappearance of racism today.[14] Similar discussions could be dedicated to the Civil War, the Cuban missile crisis, communism, and 9/11, to name but a few historical events that have become part of the collective memory of the United States.

It is impossible to do justice in this Article to all aspects of the growing, rich body of research on collective memory;[15] this Part identifies some of its main themes and emphasizes those central to the case study and its analysis.

The initial step in the development of collective-memory research was the distinction between individual memory and social/cultural memory. I begin with the twentieth century, although earlier roots have

12. *See* UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL 12–13 (2008).

13. For a short, popular account, see MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913).

14. *See* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955); *see also* David S. Meyer & Steven A. Boutcher, *Signals and Spillover:* Brown v. Board of Education *and Other Social Movements*, 5 PERSP. ON POL. 81, 82 (2007).

15. *See, e.g.*, Jeffrey K. Olick et al., *Introduction*, *in* THE COLLECTIVE MEMORY READER 3–39 (Jeffrey K. Olick et al., eds., 2011) [hereinafter Olick et al., *Introduction*]; YAEL ZERUBAVEL, RECOVERED ROOTS 3–12 (1995); Jeffrey K. Olick & Joyce Robbins, *Social Memory Studies: From "Collective Memory" to the Historical Sociology of Mnemonic Practices*, 24 ANNU. REV. SOCIOL. 105 (1998); James V. Wertsch & Henry L. Roediger III, *Collective Memory: Conceptual Foundations and Theoretical Approaches*, 16 MEMORY 318 (2008).

been unearthed.[16] In his *Elementary Forms of the Religious Life* (1912), Émile Durkheim, the influential French sociologist and philosopher, identified that societies adopt vague but prevailing "collective representations," or meanings and symbols that are part of a group's identity; rather than conceived individually, they are created by and belong to the whole group.[17] The link with the past was emphasized in Maurice Halbwachs' work. As Durkheim's student, Halbwachs developed this sociological insight by focusing on the past and considering its uses in subsequent points in time.[18] His claim that "most groups . . . engrave their form in some way upon the soil and retrieve their collective remembrances within the spatial framework thus defined,"[19] was later termed "presentist," an assumption that is crucial to this Article. For Halbwachs, national histories, that is, national narratives that serve both as elements for the creation of national identities and as symbols for such identities, are often shaped and reshaped, if not manipulated, to promote and establish discourses that serve the needs and interests of current authors of these identity narratives.

Indeed, one of the central contributions of the study of collective memory has been the introduction of the distinction between "pure" history and the uses of history as a tool for engineering post-memory national culture, thereby emphasizing the flexibility and malleability of social memory.[20] Yet, not all scholars adopt the "distortion of the past" angle; some wish to deflect attention from the strategic template and the pathologies of workings of collective memory. For Barry Schwartz and others, the evolution of collective memory is a social and cultural endeavour that potentially involves all members of society.[21] They argue that assessments of the process as one directed top-down, motivated from above by sometimes undisclosed, possibly malevolent motives, cannot capture the spirit of the building of national identities, which is essentially a positive social process.[22] This important aspect of collective-

16. For an overview of the historical roots of the concept, see Olick et al., *Introduction*, *supra* note 15, at 8–12.

17. DURKHEIM, *supra* note 4, at 432–39.

18. *See generally* HALBWACHS, *supra* note 5.

19. *Id.*; *see also* MAURICE HALBWACHS, ON COLLECTIVE MEMORY (Lewis A. Coser ed. & trans., 1992).

20. *See* HALBWACHS, *supra* note 5; Pierre Nora, *General Introduction: Between Memory and History*, *in* REALMS OF MEMORY: THE CONSTRUCTION OF THE FRENCH PAST 1 (Lawrence D. Kritzman ed., Arthur Goldhammer trans., 1996–1998).

21. *See* Barry Schwartz, *Memory as a Cultural System: Abraham Lincoln in World War II*, 61 AM. SOC. REV. 908 (1996); Barry Schwartz, *Social Change and Collective Memory: The Democratization of George Washington*, 56 AM. SOC. REV. 221 (1991); Barry Schwartz, *The Social Context of Commemoration: A Study in Collective Memory*, 61 SOC. F. 374 (1983).

22. *See* Barry Schwartz, *Rethinking the Concept of Collective Memory*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF MEMORY STUDIES 9 (Anna Lisa Tota & Trever Hagen, 2016); *see also* PAUL RICOEUR, MEMORY, HISTORY, FORGETTING (2004); Jan Assmann, *Collective Memory and Cultural Identity*, 65 NEW GER. CRITIQUE 125 (John Czaplicka trans., 1995).

memory study, which draws on complex understandings of the evolution of multi-player societies and cultures, should not be marginalized. Despite this, the "presentist" focus, emphasizing private interests, remains central to the scholarship and is important for the analysis in this Article.

To encapsulate these and other strands of collective-memory research, the sociologist and historian, Jeffrey Olick, summarizes his review of the directions taken in the field under an intentionally simplistic distinction between three research questions: what do we do *with* the past; what does the past do *for* us; and what does the past do *to* us?[23] Under this taxonomy, the first question, which can be rephrased as "how is the past used," has inspired studies of carriers of collective memory, that is, the agents and vehicles that contribute to its evolution. These are concerned with social and cultural constructs that are either culturally or socially emergent (or both), such as commemoration practices, cultural artifacts, museums, and, in Pierre Nora's words, "realms of memory."[24] Presentists and those concerned with strategic uses of past memories, offer distinct responses to the second question. The third question, in Olick's view, is central to those who focus on trauma and its impact on collective identity.[25]

This Article joins those concerned with the second question: the discussion of the traumas of the Holocaust and other histories of persecution is not led by a wish to assess their impact on Israeli law, but rather to consider how much the collective memory of these traumas has been used to shape law and to grant it social and political legitimacy.

The second prism used in this Article is the concept of amnesia. While much of the research is linked with remembering, the study of forgetting has not been neglected. Obviously, the concept of memory implies forgetting: the idea of piecemeal construction of remembered identities essentially means that choices are continuously made between alternative narratives, and those that are not chosen fade into oblivion. This truism was central to Halbwachs' work and continues to feature in current work: a dedicated focus on social forgetting and amnesia has developed alongside the study of memory.[26] My direction here is not on

23. Jeffrey K. Olick, *From Usable Pasts to the Return of the Repressed*, 9 HEDGEHOG REV. 19, 20–21 (2007).

24. *See generally* Nora, *supra* note 20; Pierre Nora, *Between Memory and History: Les Lieux de Mémoire*, 26 REPRESENTATIONS 7 (1989). For further studies, see, e.g., VERED VINITZKY-SEROUSSI, YITZHAK RABIN'S ASSASSINATION AND THE DILEMMAS OF COMMEMORATION (2010); Barry Schwartz, *The Social Context of Commemoration: A Study in Collective Memory*, 61 SOC. FORCES 374 (1982).

25. *See, e.g.*, JEFFREY C. ALEXANDER ET AL., CULTURAL TRAUMA AND COLLECTIVE IDENTITY (2004).

26. For the grant of weight to both memory and forgetting, see, e.g., RICOEUR, *supra* note 22, at 412–57; EVIATAR ZERUBAVEL, TIME MAPS: COLLECTIVE MEMORY AND THE SOCIAL SHAPE OF THE PAST (2003). For studies of forgetting and of the marginalization of collective memory, see, e.g., Lupicinio Îñiguez et al., *The Construction of Remembering and Forgetfulness: Memories and Histories of*

forgetting as such. The aspect of "selective amnesia" is key here and has received less attention. In this context, the strategic use of rule-makers of a well-embedded collective memory, and its absence in some fields, is noted and assessed.

Finally, the interdisciplinary nature of memory studies is more marked as this field grows. Although much of the academic work in this field is classified as sociological, other participating disciplines include history, psychology, international relations, culture studies, and law.[27]

Indeed, reliance on collective memory in legal scholarship is on the rise.[28] The impact of the past on domestic and transnational law is now addressed in several contexts. One of the main strands of this research focuses on the role of courts, and other *quasi*-judicial fora, as carriers of collective memory in post-trauma and post-crisis times, as in the case of the Nuremberg post-WWII trials.[29] In this vein, some scholars link issues of memory with concerns about conciliation and repair, promoted mainly through courts, truth commissions, and a variety of social forces.[30] Others analyze the impact of collective memory on the shaping of law and policy in a variety of case-studies and areas of law.[31] I join this latter body of research and address one of its least-studied contexts: the strategic use of memory by national legislators.

B. Collective Memories in Israel

The State of Israel was built on two past-facing pillars, constructed around two memory narratives: that of glory and independence and that of ruination and persecution. The glory harks back to biblical times: the epic story of the nation's creation, its exodus from Egypt and the return

the Spanish Civil War, *in* COLLECTIVE MEMORY OF POLITICAL EVENTS: SOCIAL PSYCHOLOGICAL PERSPECTIVES 237 (James W. Pennebaker et al. eds., 1997); Vered Vinitzky-Seroussi & Chana Teeger, *Unpacking the Unspoken: Silence in Collective Memory and Forgetting*, 88 SOC. FORCES 1103 (2010).

27. My home library of the social sciences and humanities follows the Library of Congress classification system and has dispersed its dozens of books on the topic on the shelves of these subject codes and others (including archeology, emigration and colonialism studies, philosophy, communications, and literature).

28. *See* Joachim J. Savelsberg & Ryan D. King, *Law and Collective Memory*, 3 ANN. REV. LAW SOC. SCI. 189 (2007).

29. *See, e.g.*, DONALD BLOXHAM, GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 2 (2001); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 1 (1997).

30. *See, e.g.*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 1 (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE 8–9 (2000).

31. *See, e.g.*, MOSHE HIRSCH, *Collective Memory and International Law*, *in* INVITATION TO THE SOCIOLOGY OF INTERNATIONAL LAW 46, 58–88 (2015) (focusing on international economic law); Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1751 (2000) (pertaining to racial discrimination and international humanitarian law); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 1998 (2003) (concerning American constitutional law).

to the land of Canaan, then the building of the Temple.[32] The name of the new state, Israel, resonates even earlier times: this was the name given by God to Jacob, the third Father.[33] Around the other pillar are the memories of the destruction of two Temples, the exile by the Romans in 70 CE, centuries of foreign rule of the land, diasporic living, and persecution events, culminating in the horrors of the Holocaust.[34] The distinction between glory and persecution is not, however, sharp. Memories of "bravery to death" include the Roman siege of Masada,[35] the last stronghold of Jewish opposition in 73/74 CE;[36] the Bar Kokhba revolt against the Romans in 132 CE,[37] which led to a short interval of independence; and, moving to modern times, the ghetto revolts during the Second World War, the most famous of them being the Warsaw Ghetto uprising.[38] All of these, and other similar events, ended in death and failure, but all were taken on by the new state as symbols of the bravery of the Jewish people and their constant faith in remaining a distinct nation.[39]

This mixed glory/persecution collective memory found its place in the collective memories of the new history of the State. Pre-independence historic memory in Palestine (or *Eretz Israel*) includes the series of "events" (*Me'ora'ot*) (mainly in 1929 and 1936–1939)—organized Arab Palestinian revolts against the British Mandate rule—which involved a series of attacks on Jewish settlements.[40] These were distilled in the national memory into memories of the Battle of Tel Hai (1920), a powerful example of bravery to death against Arab attack, the Hebron Massacre (1929), and others.[41] The War of Independence (1948, up to the Armistice Agreements in 1949) was interpreted by the new state as a memory of bravery. It was encapsulated in the slogan "few against many," a phrase linked with the Bar Kochba rebellion, but this

32. For a brief, popular historical account that embodies many of these collective memories, see Israel Hanukoglu, *Brief History of Israel and the Jewish People*, ISR. SCI. AND TECH., http://www.science.co.il/Israel-history.php (last visited Jan. 5, 2017). For one of the most salient works, see ZERUBAVEL, *supra* note 15, chs. 2–5.

33. Hanukoglu, *supra* note 32.

34. *Id.*; Yael Zerubavel, *The Death of Memory and the Memory of Death: Masada and the Holocaust as Historical Metaphors*, 45 REPRESENTATIONS 72–100 (1994).

35. NACHMAN BEN-YEHUDA, THE MASADA MYTH: COLLECTIVE MEMORY AND MYTHMAKING IN ISRAEL (1995); Yigael Yadin, MASADA : HEROD'S FORTRESS AND THE ZEALOTS' LAST STAND (Moshe Pearlman trans., 1966); ZERUBAVEL, *supra* note 15, at 60–70.

36. *Id.*

37. *Id.* at 48–56.

38. For a central chronicle, see YITZHAK ZUCKERMAN ("Antek"), A SURPLUS OF MEMORY: CHRONICLE OF THE WARSAW GHETTO UPRISING (Barbara Harshav trans. & ed., 1993).

39. *See supra* notes 32, 35, 38. For further focus on the Holocaust, see Olick et al., *Introduction*, *supra* note 15.

40. YUVAL ARNON-OHANA, ARAB REVOLT IN ERETZ ISRAEL 1936–1939 (2013) (in Hebrew); HILLEL COHEN, YEAR ZERO OF THE ARAB-ISRAELI CONFLICT: 1929 (2015); ANITA SHAPIRA, ISRAEL: A HISTORY 72, 75-83 (Anthony Berris, trans., 2012).

41. Yael Zerubavel, *The Politics of Interpretation: Tel-Hai in Israel's Collective Memory*, 16 AJS REV. 133 (1991).

time ending in a vision of victory, which was sealed by the UN recognition of the State in 1949.[42]

The idea of bravery in the face of an eternal existential threat remains central to Israel's post-independence history. The above-mentioned pre-independence collective memories became part of the State's cultural pantheon; indeed, very much following Maurice Halbwachs' "presentist" view of the design of collective memory, they were relied upon and shaped to enhance the State's national identity.[43] These have been augmented by memories of wars, victories and losses, using different commemorative measures—days of remembrance, memorial day sirens, memorial sites, and artifacts.[44] Law had a role in this project: several statutes ordain memorial days, and others establish, or authorize the establishment, of memorial sites.[45] A statute that established a dedicated agency for the management of national parks and nature reserves was amended in 2005 and 2010 to expand the agency's role as the regulator of national and memorial sites, and it now authorizes the agency to establish these sites of commemoration.[46] The intermixed nature of memorial and heroism is symbolically marked in the calendar: the Day of Remembrance for the Fallen Soldiers of Israel and Victims of Terrorism is held the day before Independence Day, and the Holocaust and Heroism Remembrance Day is commemorated eight days earlier; this commemoration period is well-marked in public life.[47] Further, the

42. On this theme, *see, e.g.*, Yigal Eilam, *The Myth of the "Few Against the Many" in 1948*, 9 PALESTINE-ISRAEL J. POL., ECON. CULTURE. no. 4 (2002), http://www.pij.org/details.php?id=107#.

43. HALBWACHS, *supra* note 19.

44. Memorial days include the Day of Remembrance for the Fallen Soldiers of Israel and Victims of Terrorism (4 Iyyar of the Jewish calendar) and the Holocaust and Heroism Remembrance Day (27 Nisan)—both established during the first two decades of the State. Others include the Yitschak Rabin Memorial Day (11 Cheshvan), the Ben Gurion Memorial Day (6 Kislev), the Rechavam Ze'evi Memorial Day (Tishrei 30), and the Departure and Expulsion of Jews from the Arab countries and Iran Memorial Day (November 30).

45. For studies of these and other mnemonic sites, both physical and cultural, see, e.g., Maoz Azaryahu, *War Memorials and the Commemoration of the Israeli War of Independence, 1948–1956*, 13 STUD. ZIONISM, 57, 57 (1992); Vered Vinitzky-Seroussi *Commemorating a Difficult Past: Yitzhak Rabin's Memorials*, 67 AM. SOC. REV. 30, 30 (2002).

46. National Parks, Nature Reserves, National Sites and Memorial Sites Law, 5758–1998 (Isr.) (English translation), http://www.sviva.gov.il/English/Legislation/Pages/NatureBiodiversityOpenSpaces.aspx (scroll down to "National Parks, Nature Reserves, National Sites and Memorial Sites Law;" then click on "[l]ink to unofficial translation"). The law defines "a national site" as "a structure or group of structures or part of them including their immediate vicinity which are of historic national importance in the development of settlement in the country and which the Minister of the Interior, pursuant to the provisions of Section 38, has declared to be a national site." *Id.* at 1. "A national memorial site" is defined as "a memorial site for commemorating Israel's military campaigns having special significance in the history of the nation or the State which has been so declared pursuant to the provisions of section 45." *Id.* The statute contains procedures for the declaration of such sites. *Id.* at 21. A full list of the sites is currently unavailable.

47. For statutes that ordain remembrance days, see, e.g., Martyrs' and Heroes' Remembrance Day Law, 5719–1959, § 1–2, (Isr.); Heroes' Remembrance Day (War of Independence and Israel Defence Army) Law, 5723–1963, § 1(a), (Isr.). For statutes creating commemoration centers, see, e.g.,

choice of names for some of these remembrance days reflects the mixed nature of the collective memory they commemorate. Saliently, the wedding of "Holocaust" with "heroism" (the latter referring to ghetto uprisings) is far from accidental.

My focus on the memory of the Holocaust not only befits the context of state treatment of illegal entrants claiming to be refugees of oppression; its centrality to Israeli society justifies its nature as one of the most influential collective memories of the State, if not its defining feature. This choice also enables a limited-scope study, suitable for the context of an article.

Unsurprisingly, the memory of the Holocaust is central to any debate on collective memory, well beyond Israel.[48] In the context of Israel, the following analysis draws on Tom Segev's account of the memory of the Holocaust, in which both centrality and strategic use are evident:

> The most fateful decisions in Israeli history, other than the founding of the state itself—the mass immigration in the 1950s, the Six-Day War, and Israel's nuclear project—were all conceived in the shadow of the Holocaust. Over the years, there were those who distorted the heritage of the Holocaust, making it a bizarre cult of memory, death, and kitsch. Others too have used it, toyed with it, traded on it, popularized it, and politicized it. As the holocaust recedes in time—and into the realm of history—its lessons have moved to the center of a fierce struggle over the politics, ideology, and morals of the present.[49]

This and other constructed memories have been challenged by counter-narratives. For example, the established story of "the few against the many," depicting the miraculous victory of a small army against hosts of enemy armies that led to the independence of the State, has been challenged by the "new historians," whose arguments also question the earlier-depicted voluntary fleeing of Palestinians with accounts of forced expulsion.[50] Likewise, the place of "heroism" in the construction of the memory of the Holocaust has been criticized as overly emphasizing the element of bravery; although tempered in recent decades, this original construction has not been removed from the canon.[51] Analyses of the temporal transformation of government reliance on the Holocaust, from

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Martyrs' and Heroes' Remembrance (Yad Vashem) Law, 5713–1953, § 2(1)–(2) (Isr.); Law Yitschak Rabin Memorial Day, 5747–1997 (Isr.).

48. Olick et al., *Introduction*, *supra* note 15, at 29–36 (titling one part of the introduction as "Did the Holocaust Cause Memory Studies?").

49. TOM SEGEV, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST 11 (Haim Watzman trans., 1993).

50. For "new historical" research on the refugee problem, see, e.g., BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947–1949 11 (1987); ILAN PAPPE, THE ETHNIC CLEANSING OF PALESTINE xviii (2006). Addressing the debates over these collective memories is beyond the scope of this Article.

51. *See, e.g.*, ZERUBAVEL, *supra* note 15, at 193, 195; *see generally* SEGEV, *supra* note 49.

earlier repression of the memory to full incorporation in culture, education, and politics has likewise been challenged.[52] Further, the distinction between particularism and universalism, discussed and analyzed in a variety of historical and cultural contexts, including in collective-memory literature, is not absent in analyses of Israeli society.[53] Uri Ram's distinction between three narratives: national-Zionist, postnational (post-Zionist), and neonational (neo-Zionist), the latter owned by right-wing nationalist groups that rely on either religious or nationalist tradition, or both.[54] For Ram, post-Zionists adopt a universalistic ethos, while neo-nationalists assume a particularist stance.[55] While Ram does not directly address the ethos of the still-leading, central national Zionist ethos,[56] it may be fair to tentatively assume that those belonging to the left side of the political map (so-called post-Zionists, but also others) are prone to adopt a universalist approach, while participants on the right, who adopt a nationalist-centrist stance, are more particularist in their world-view.[57] In the context of the memory of the Holocaust, these different attitudes not only impact the nature of the collective memory, but may also influence the use of that version of collective memory in the political sphere, an aspect I touch upon towards the end of this Article.

III. ISRAEL: BACKGROUND ISSUES

In order to understand the governmental use, or nonuse, of the collective memory of the Holocaust, several preliminary issues require discussion. This Part is dedicated to three short overviews of background issues. A short analysis of the nature of the political regime and the legislative process in the State of Israel is required for the subsequent assessment of the references to collective memory in the Knesset records. The following overview of the judicial review process offers a background for understanding the climate under which the Supreme Court of Israel, sit-

52. *See, e.g.*, Anita Shapira, *The Holocaust: Private Memories, Public Memory*, 4 JEWISH SOC. STUD. HIST. CULTURE SOC'Y 40, 40 (1998) (presenting and arguing against the repression thesis).

53. *See, e.g.*, Galia Glasner Heled, *Responsive Holocaust Memory—Integrating the Particular and the Universal*, 8 LOOKSTEIN CTR. JEWISH EDUC. (2009), http://www.lookstein.org/online_journal.php?id=279; *see generally* Ernesto Laclau, *Universalism, Particularism, and the Question of Identity*, 61 OCT. 83, 84 (1992).

54. Uri Ram, *The Future of the Past in Israel: A Sociology of Knowledge Approach*, *in* MAKING ISRAEL 202, 208 (Benny Morris ed., 2007).

55. *Id.* at 207.

56. Ram does refer to the dispute between these camps over the reasons for the very limited efforts of Jewish leaders in pre-independence Israel to rescue Jews from Nazism, *id.* at 210–11, but it is not entirely clear whether the mainstream had internalized a pure particularist view or whether this view was only held by some groups.

57. Post-Zionism is emphatically defined as belonging to the extreme left; critics link this ideology with anti-Zionism. *See, e.g.*, ELHANAN YAKIRA, POST–ZIONISM, POST–HOLOCAUST: THREE ESSAYS ON DENIAL, FORGETTING, AND THE DELEGITIMATION OF ISRAEL 308 (Michael Swirsky trans., 2010).

ting as the High Court of Justice ("HCJ"), delivered the three decisions that led to the enactment of four consecutive amendments to a single statute. And finally, a short overview of the factual and legal background before the enactment of the first amendment in January 2012 provides the setting for the initiation of the policy, and it offers a possible explanation for government insistence on the maintenance of an exclusion policy.

A. Political Regime and Legislative Process

The State of Israel, which received its independence in 1948, is a parliamentary democracy.[58] Elections to its single house of representatives, the Knesset, are usually held every four years.[59] Following a nationwide, single-constituency proportional vote, the president, who is the ceremonial head of state, grants a Knesset member (usually the head of the largest party) the responsibility of forming a government and presenting a list of ministers for Knesset approval.[60] The nature of the electoral system and the heterogeneity of its the population have ensured a high number of elected parties—the current, twentieth Knesset consists of ten parties, only two less than the earlier Knessets that were elected before the rise of the election threshold from 2% to 3.25% in 2014.[61] In this climate, no single party has ever received over half of the 120 Knesset seats, and all governments since 1948 have been based on multi-party coalitions.[62] The three recent Knessets that enacted the four amendments analyzed in this Article, during the period between March 30, 2011 (first reading of the 2011 bill) and February 8, 2016 (second and third reading of the 2016 bill), maintained five- or six-party coalitions.[63] All of these governments were led by the Likud right-wing party.[64]

The State's legislative process, set out in the Knesset rules of procedure, consists of the following stages. When a proposed bill is tabled by the government, a first reading (vote) in the plenum is followed by a re-

58. For a survey, see, e.g., SUZIE NAVOT, THE CONSTITUTION OF ISRAEL: A CONTEXTUAL ANALYSIS 5 (2014).

59. *Id.* at 95.

60. *Id.* at 134–35.

61. *See All Parliamentary Groups—By Knesset*, THE KNESSET, https://www.knesset.gov.il/faction/eng/FactionListAll_eng.asp?view=1 (last visited Jan. 5, 2017) (reporting current and past Knesset parliamentary parties).

62. *See Parliamentary Groups in Governments*, THE KNESSET, https://www.knesset.gov.il/faction/eng/FactionGovernment_eng.asp (last visited Jan. 5, 2017) (listing coalition members according to their party).

63. *See All Governments of Israel*, THE KNESSET, https://www.knesset.gov.il/govt/eng/GovtByNumber_eng.asp (last visited Nov. 29, 2016) (listing government members according to their party membership).

64. *Id.*

ferral to one of the Knesset committees.[65] The committee holds an often meticulous debate over the bill, usually involving the participation of invitees (in addition to government representatives, these can be citizens, NGOs, and other interested parties).[66] A majority of the vote of the committee members is required to move the bill to the plenum second and third readings, held consecutively.[67] The second reading in the plenum is dedicated to debates over reservations tabled by (opposition) Knesset members.[68] Each is voted upon, and the process culminates during the same meeting with the third reading or the final vote on the bill as a whole.[69] Bills that pass the first reading are published, under custom, in one collection of the formal series of government publications and include explanatory notes.[70] Once legislated, laws are published in another collection no later than ten days after their passing.[71]

B. Judicial Review of the Constitutionality of Statutes in Israel

As discussed in the next section, the HCJ has been repeatedly asked to decide issues concerned with the treatment of illegal entrants: decisions delivered before 2012 led to the adoption of a formal policy based on the international law principle of *nonrefoulement* and to the introduction of administrative-hearing processes. Before we turn to an analysis of the series of decisions concerned with the amendment of the Prevention of Infiltration Law, a brief overview of Israel's constitutional law is required.

The treatment of illegal entrants, especially those granted refugee status by international law, involves, by nature, issues of human rights. Incarceration and detention curtail the liberty of detainees, in most cases also affecting their dignity. These issues arose in Israel and were decided under its constitutional law.

Israel does not have a single document identified as its formal written constitution.[72] Two years after its independence, Israel postponed the plan of enacting a full, formal written constitution.[73] Instead, the Knesset decided to enact, piecemeal, Basic Laws that would eventually become

65. KNESSET RULES OF PROCEDURE § 79(a) (Susan Hattis Rolef trans. 2012), https://www.knesset.gov.il/rules/eng/contents.htm.

66. *Id.* § 123(a).

67. *Id.* § 92(a).

68. *Id.* § 90(a)–(b)(1).

69. *Id.* § 92(a). Private members' bills must also pass a preliminary reading, see *id.* at §75.

70. *Id.* § 84(a), (d).

71. *Hatza'ot Hok* (HH) and *Sefer HaHukim* (SH), respectively. *See* § 2(d), Transition Law, 5709-1949, SH No. 1 p.3 (Isr.).

72. *Basic Laws*, THE KNESSET, https://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm (last visited Jan. 5, 2017).

73. *The Constitution*, THE KNESSET, https://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm (last visited Jan. 5, 2017).

chapters of the Constitution.[74] The first Basic Law, enacted in 1958, related to the Knesset (the Israeli Parliament).[75] To date, Israel has twelve Basic Laws.[76] Our focus is on the two 1992 Basic Laws that incorporate some human rights and liberties.[77]

In a nutshell, these Basic Laws define and protect several human rights, including freedom of occupation, dignity, liberty, property, and freedom of movement out of the State. The Basic Laws do not explicitly recognize equality, freedom of speech, and freedom of religion, intentional omissions that were part of the political deal that enabled their enactment, but the HCJ has been ready to recognize the protection of these, and other central nonenumerated rights, through the right to human dignity.[78] Both Basic Laws contain a limitation clause that allows a breach of a protected right, largely on the basis of proportionality and accordance with the State's main values.[79] The Basic Law: Freedom of Occupation also contains an override clause.[80]

Until 1995, all Basic Laws were considered akin to regular statutes, and their normative status rose only by later constitutionalization. Thus, Basic Laws could not limit the Knesset in its later legislation.[81] In its 1995 *Mizrachi Bank* decision, the Supreme Court recognized the *supra*-statutory status of the two 1992 Basic Laws (later recognized with regard to the other basic laws), and it further asserted the power of the judiciary to invalidate legislation that contradicted a Basic Law.[82] The power of constitutional review has been exercised several times since, three of which are discussed in this paper.

The process of examining constitutionality under the Basic Laws was subsequently formalized by the Supreme Court, relying on the text and comparable judicial reasoning elsewhere. Canada took a central place as a comparator, an understandable stance due to the similarity of some of its components. A court examining constitutionality for breach of protected human rights must first identify whether a right had indeed

74. *Id.*

75. *The Existing Basic Laws: Summary*, THE KNESSET, https://www.knesset.gov.il/description/eng/eng_mimshal_yesod2.htm#9 (last visited Jan. 5, 2017).

76. *See Basic Laws*, *supra* note 72.

77. Basic Law: Freedom of Occupation, Basic Law: Human Dignity and Liberty.

78. *See, e.g.*, NAVOT, *supra* note 58, at 25–46, 227–48; Michael Mandel, *A Brief History of the New Constitutionalism, or "How We Changed Everything So That Everything Would Remain the Same,"* 32 ISR. L. REV. 250, 257–58 (1998).

79. Basic Law: Freedom of Occupation, § 4; Basic Law: Human Dignity and Liberty, § 8. For the text of both, see *infra* text accompanying note 83.

80. Basic Law: Freedom of Occupation, § 8.

81. For judicial confirmation of this principle, see HCJ 3511/02 Negev v. Ministry of Infrastructure 57(2) PD 102, 103 (2003) (Isr.).

82. CA 6821/93 United Mizrachi Bank v. Migdal Cooperative Village, 49(5) P.D. 221, 303 (1995) (Isr.). For a summary and excerpts in English, see Omi, *Leading Decisions of the Supreme Court of Israel and Extracts of the Judgment,* 31 ISR. L. REV. 754, 764 (1997); *see also* NAVOT, *supra* note 58, at 31–32; Mandel, *supra* note 78, at 257–58.

been interfered with. In the context of the Freedom of Occupation, consideration of the existence of an override provision was the next step, but this step was irrelevant when the rights interfered with were protected under the Basic Law: human dignity and liberty. The focus, then, is on the limitations clause, that, similar to Section 1 of the Canadian Charter, applies to all the rights the Basic Law protects, explicitly or impliedly, against serious breaches to human dignity: "[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law."[83]

Examination of the propriety of the purpose precedes proportionality. Then, the term "to an extent no greater than is required," recognized as a proportionality test, is applied in a form that is almost identical to the Canadian and German tests.[84] Three sub-tests are applied. First, the court has to determine whether a rational connection between the means and the objective existed.[85] Then, it considers whether the means adopted are the least restrictive in achieving the objective.[86] Finally, under the *stricto sensu* proportionality test, the public benefits of achieving the goal are to be weighed against the harm caused to the citizen by the means' application.[87]

The judiciary's position as to its role as protector of rights and invalidator of statutory provisions found unconstitutional drew on a longstanding tradition of judicial intervention, or participation (as per different observers), in the public decision-making sphere. Recognition of human rights and the duty of the state to protect them long preceded the 1992 Basic Laws; the HCJ developed its jurisprudence under an ideology of high-level constitutionalism.[88] It has also been ready to rule against government action that endangered the integrity of the public service, as in the case of continuing service of ministers indicted for crimes such as bribery and breach of trust.[89] For some, this reflects a high-level, unprecedented form of judicial activism that extends beyond the limits proscribed in a viable democracy. The ongoing debate over the

83. Basic Law: Human Dignity and Liberty, § 8; Basic Law, Freedom of Occupation, § 4.

84. *See* NAVOT, *supra* note 58, at 228–30 (summarizing the limitation clause and proportionality tests).

85. *Id.* at 228–29.

86. *Id.* at 230.

87. *Id.* For translated decisions applying these tests, see, e.g., CA 6821/93 United Mizrachi Bank, v. Migdal Cooperative Vill., 49(5) P.D. 221 (1995); HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 153, 213 (1997) (Isr.); HCJ 2054/04 Beit Sourik Vill. Council v. The Gov't of Israel 44 PD 1, 21 (2004) (Isr.). These, and other translations, are available at www.court.gov.il.

88. NAVOT, *supra* note 58, at 222.

89. *Id.* at 197.

role of the court cannot be addressed here;[90] in any case, once government policies and legislation concerning the detention of illegal entrants were decided upon, it was clear that they could, and would, be challenged in court.

C. Immigration/Infiltration in Israel: Pre-2012 History and Law

Global migration, a principal feature of the history of the human race, has attracted much attention in modern times. A focus on humanitarian aspects of human movement during, and after, wars and crises emerged in the wake of the Second World War.[91] The establishment of the UN Refugee Agency ("UNHCR") in 1950, and the adoption, a year later, of the Convention relating to the Status of Refugees were important elements of the growing attention to the problem of asylum seekers. Tensions between the interests of protection/accommodation of migrants' rights and imagined or actual threats to national unity and stability of host states have shaped policies and laws around the globe.[92] The recent upsurge of refugees leaving Africa and the Middle East towards Europe has led the debate to newer heights, including references to "migration crises," "problems," and "issues" abound.[93] The crisis/problem/issue is global: migrants originate from all continents and enter, or attempt to enter, the United States, Australia, and all other developed countries.[94] According to a recent UNHCR report, "[b]y the end of 2014, nearly 60 million individuals worldwide were in situations of forced displacement as a result of persecution, conflict, generalized violence or human rights violations," stating that this phenomenon "outpace[s] anything seen since World War II."[95] The phenomenon is global, but in 2014, more than half of displaced persons came from Afghanistan, Somalia,

90. For an exposition of this debate see, e.g., RUTH GAVISON ET AL., JUDICIAL ACTIVISM: FOR AND AGAINST—THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY (2000).

91. Mandel, *supra* note 78, at 257–58.

92. *See* Myron Weiner, *Security, Stability and International Migration*, 17(3) INT'L SEC. 91 (1992).

93. *See, e.g.*, Melanie Amman et al., *Merkel's Last Stand?: Chancellor Running Out of Time on Refugee Issue*, SPIEGEL ONLINE (Jan. 19, 2016, 6:20 PM), http://www.spiegel.de/international/germany/critique-of-merkel-on-refugee-issue-deepens-a-1072549.html; Richard Orange, *Suddenly, the Swedes Are Talking About Their Refugee Problem*, TELEGRAPH (Jan. 16, 2016), http://www.telegraph.co.uk/news/worldnews/europe/sweden/12103667/Suddenly-the-Swedes-are-talking-about-their-refugee-problem.html; *Europe's Migration Crisis*, FIN. TIMES, http://www.ft.com/migration?ft_site=falcon&desktop=true (last visited Jan. 16, 2017).

94. *See, e.g.*, Julia Preston, *A Rush of Central Americans Complicates Obama's Immigration Task*, N.Y. TIMES (Jan. 8, 2016), http://www.nytimes.com/2016/01/09/us/a-rush-of-central-americans-compounds-obamas-immigration-task.html; *#LetThemStay: Thousands Gather in Australia-Wide Protests against Return of Asylum Seekers to Nauru*, ABC AUSTRALIA (Feb. 8, 2016, 4:05 AM), http://www.abc.net.au/news/2016-02-08/let-them-stay-protests-against-return-of-asylum-seekers-to-nauru/7150462.

95. U.N. High Commissioner for Refugees, *Report of the United Nations High Commissioner for Refugees: Covering the Period 1 July 2014-30 June 2015*, 4/23, U.N. Doc. A/70/12 (2015).

and Syria.[96] Just a few days into February 2016, the number of migrants estimated to have crossed the Mediterranean towards Europe was more than six times larger than during the equivalent period in 2015.[97] Migration for economic and other reasons is not necessarily included in all such reports, but, as shown below, the distinction itself is in crisis and requires further attention.

The state of Israel is strategically located as a land link between Africa and Europe. Its nature as a modern, democratic, and industrialized society has made it an option for migrant workers and refugees alike. On its independence, Israel is self-defined as the Jewish homeland.[98] From inception, its history has revolved around several tensions. Constantly in a state of conflict with Arabs and Palestinians and dotted by several agreements that have yet to ripen to full resolution, its internal social rifts have added to the general sense of instability. The tension between the secular and religious nature of the state is politically enhanced by the power of ultra-orthodox parties in the state's brittle coalition politics. Almost 21% of Israel's citizens are Arab/Palestinian[99] (the question of self-identity is another difficult issue); despite Israel's commitment to equal treatment of all citizens, which is only partially achieved, for some this is a threat to the Jewishness of the state.[100] And, linked with the latter tension, Jewish society is divided in its position towards the continued occupation of, and dominance over, the West Bank (or, under the competing account, the freeing of the area).

Against this background, the question of the treatment of refugees raises competing and difficult concerns. On the one hand, the history of Jewish persecution over generations, and particularly the legacy of the Holocaust, as well as the founding of the State as a liberal democratic Jewish State, hold potential for a heightened sensitivity of Israeli citizens to the plight of others; indeed, Israel participated in the drafting of the

96. *Id.*

97. Niraj Chokshi, *The Stunning Acceleration of Europe's Migration Crisis, in One Chart*, WASH. POST (Feb. 10, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/02/10/the-stunning-acceleration-of-europes-migration-crisis-in-one-chart/.

98. Under the November 1947 Partition decision, the UN voted to create two states, one Arab and one Jewish, designating the city of Jerusalem as a territory directly administered by the United Nations. The unilateral departure of the British and Arab rejection of the decision were followed by the 1948–1949 war, which ended with the declaration of independence of the State of Israel, recognized by the UN in May 1949. This chapter draws on MARGIT COHN, ENERGY LAW IN ISRAEL 19 (2010); NAVOT, *supra* note 58 at 4–6; ISRAEL MINISTRY OF FOREIGN AFFAIRS, www.mfa.gov.il (last visited Jan. 7, 2017).

99. Central Bureau of Statistics, *68th Independence Day—8.5 Million Residents in the State of Israel* , Media Release, May 9, 2016, http://www.cbs.gov.il/www/hodaot2016n/11_16_134e.pdf.

100. *See* BARUCH KIMMERLING, CLASH OF IDENTITIES: EXPLORATION IN ISRAELI AND PALESTINIAN SOCIETIES (2008). For an example from those who feel threatened, see Ariella Mendlowitz, *Israel at Risk of Losing Jewish Majority "Within Decades,"* BREAKING ISR. NEWS (May 1, 2016, 2:30 PM), http://www.breakingisraelnews.com/66802/israel-risk-losing-jewish-majority-within-decades/#VUKMTypqlEy1whcQ.97.

Convention Relating to the Status of Refugees of 1951, and it was one of the first to ratify it.[101] On the other hand, illegal entry into Israel was originally linked with national security concerns, a link that has never been severed. For example, Sudanese asylum seekers are considered national security risks by definition, since Sudan (now distinguished from the Republic of South Sudan) is defined as an enemy country.[102] Further, the growing number of foreign entrants is perceived by some as a direct threat to the (Jewish) unity of the State, especially since they supplement the existing large number of foreigners and non-Jews; inhabitants of weaker socio-economic areas, densely populated by foreign workers and illegal entrants, feel especially threatened; and, finally, xenophobia is not absent in Israeli society.[103]

Until 2006, the issue of illegal entrants was not one of the most pressing problems the state had to deal with; in a few cases, refugees were accepted for humanitarian reasons.[104] Two statutes, designed in much earlier times and for completely different purposes, were relevant. The Entry into Israel Law (1952) was enacted just a few years after independence.[105] This statute accompanies the Law of Return (1950), which regulates the grant of citizenship to Jews entering Israel.[106] The Entry Law regulates entry and authorizes the award of various types of visas and permits, from tourist visas to permanent residence.[107] The minister of the Interior is authorized to set conditions for the grants of visas and permits, cancel visas and residency permits, and remove on entry those

101. *But see* Rotem Giladi, *A 'Historical Commitment'? Identity and Ideology in Israel's Attitude to the Refugee Convention 1951–4*, 37 INT'L HISTORY REV. 747 (2015) (challenging the myth that the State of Israel was determined to ratify the convention and crediting a single person at the Ministry of Foreign Affairs as responsible for the State's move).

102. Procedure for Handling Political Asylum Seekers in Israel, STATE OF ISR. MINISTRY OF INTERIOR POPULATION IMMIGR. & BORDER AUTHORITY 12 (2011), http://ardc-israel.org/sites/default/files/procedure_for_handling_political_asylum_seekers_in_israel-en.pdf (last visited Jan. 7, 2017) (mentioning "enemy or hostile states—as determined from time to time by the authorized authorities"). Sudan is long recognized as an enemy state, as stated, e.g., in a State Comptroller report (The State Comptroller and Ombudsman of Israel, ANNUAL AUDIT REPORT 58B FOR 2007 AND FOR THE ACCOUNTS OF FINANCIAL YEAR 2006 97, 102, 109 (2008)). Yet, a list of all "enemy states" is unavailable. In the original version of the Prevention of Infiltration Law, the term "infiltrator" included "a citizen or subject of Lebanon, Egypt, Syria, Saudi Arabia, Transjordan, Iraq or Yemen." The list was deleted in the 2012 amendment of the Law. An identical list still exists in § 2A of the current law, which criminalizes, since 2007, illegal exit to these countries. Prevention of Infiltration (Offences and Jurisdiction)(Amendment No. 2) Law, 5767-2007, SH No. 2109, p. 463 (2007)(Isr.)

103. For a strong anti-refugee position, see *supra* note 100.

104. Israel granted asylum to several hundred Vietnamese refugees between 1977–1979; about 100 Bosnian refugees were admitted in 1993; and, after withdrawing from South Lebanon, several thousands of members of the South Lebanese Army, a militia that collaborated with Israel during its occupation of South Lebanon, were received with their families. *See, e.g.*, YONATAN PAZ, ORDERED DISORDER: AFRICAN ASYLUM SEEKERS IN ISRAEL AND DISCURSIVE CHALLENGES TO AN EMERGING REFUGEE REGIME 4 (2011).

105. Entry into Israel Law, 5712–1952 (1952) (Isr.).

106. Law of Return, 5710–1950(1950) (Isr.).

107. Entry into Israel Law, 5712-1952 (1952) (Isr.).

who are not permitted to enter. Further, any entry or stay in Israel without the proper documentation is an offense, punishable by a one-year imprisonment; such persons can be deported under the statute.[108]

The 1952 statute served as the basis for later treatment of the growing numbers of foreign workers, who have become an important element of the economy; despite the recent propensity of some politicians to treat "infiltrants" as labor migrants, discussed below, they are formally reported as a distinct group.[109]

Up to 2006, about 1,000 entrants entered Israel illegally and were treated under the Entry to Israel Law and held in custody in prison-like conditions while an order of departure or deportation was made against them.[110] In *Al Tai* (decided 1995), the HCJ ruled that refugees from Iraq, who could not be deported, could not be held in custody, as the purpose of custody under the law was only to execute deportation proceedings.[111] In 1999 (in response to an application to the HCJ), the Ministry of Interior ("MoI") authorized several of its lawyers to hear detainees, an administrative function that evolved into "custody review courts."[112] Operating in the three prisons holding these entrants, each tribunal consisted of a single lawyer employed by the MoI.[113] With some rise in the number of Sudanese held in those prisons, the Ministry justified the continued incarceration on the basis of the need to maintain "internal security and wellbeing," and declared that deportations were imminent under an ar-

108. *Id.*

109. Demand for foreign workers rose dramatically in the 1990s. Replacing the mass Palestinian workforce, limited due to the escalation of Israeli-Palestinian tension, tens of thousands of foreign workers were legally employed in traditional fields, including agriculture and construction, and in fields that answer new social demands, such as healthcare for the elderly and handicapped. The statistics are often contested, but according to a recent government report, at the end of March 2015 more than 95,000 of workers, with and without permits, resided in Israel—in addition to about 91,000 entrants under a tourist visa who remained in Israel after its expiration. Their origins vary: the largest number of workers with permits currently originate from Thailand, the Philippines, and Moldova; about 60% of visa-less tourists originate from ex-USSR countries, and illegal workers' origin follows a similar pattern. *See* POPULATION, IMMIGRATION AND BORDER AUTHORITY (PIBA), FOREIGNERS STATISTICS, Edition 1/16, 4, 6-7, 22–23 (April 2016) (in Hebrew). For relatively recent and earlier overviews, see ISRAEL DRORI, FOREIGN WORKERS IN ISRAEL: GLOBAL PERSPECTIVES (2009); David Bartram, *Foreign Workers in Israel: History and Theory*, 32(2) INT'L MIGRATION REV. 303 (1998). For reference to government policy, see *infra* note 135.

110. The factual analysis is based on several policy and research reports, including PAZ, *supra* note 104, at 6; GILAD NATHAN, KNESSET RES. AND INFORMATION CTR., ISRAEL SOPEMI REP.: IMMIGRATION IN ISRAEL 2010–2011, at 20, 23 (2011); *see also*, chronologically, cases concerned with entrants' incarceration: HCJ 7146/12 Adam v. Knesset, (2013) (Isr.); HCJ 7385/13 Eitan v. Government of Israel (2014) (Isr.); HCJ 8665/14 Desta v. Knesset (2015) (Isr.).

111. HCJ 4702/94 Al-Tai v. Minister of Interior, 49(3) PD 843. *See* HCJ 7146/12 Adam v. Knesset, at para. 8 (Arbel, J.), http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5277555e4.

112. *See* HCJ 7146/12 Adam v. Knesset, at paras. 22–24 (Arbel, J.) (2013) (Isr.), http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5277555e4.

113. *See id.*

rangement with the Egyptian government.[114] In the absence of any developments over time, some of the custody courts began to issue orders of release. In 2001, an amendment to the Entry to Israel Law authorized custody of entrants, listing causes for release; under the central cause, detainees were to be generally released after sixty days in custody.[115]

Subsequent events led the government to push for a tighter policy. Political crises in Africa—*inter alia*, civil wars, persecution for religious, political or tribal reasons, and forced extended conscription, mainly in Eritrea and Sudan, led to a rise of illegal entry through Egypt and the Sinai Peninsula.[116] The preference of Israel by the tens of thousands fleeing conscription (in Eritrea) and other political hardships was influenced not only by geographical reasons, but also due to the fact that the state was not known to return entrants to their country of origin if international law prohibited it and, more generally, due to the economic situation and the democratic nature of the state. In 2007 and 2008, the number of entrants rose to about 5,000 and 8,700, respectively; cumulatively, more than 64,000 entrants had entered Israel by the end of 2011.[117]

In 2006, concerned about the events in some African states and the rise of entrants, the MoI rejected its former reliance on the Entry into Israel Law and turned to the Prevention of Infiltration (Offences and Jurisdiction) Law, which at the time guaranteed no review or hearing processes.[118] Several applications to the HCJ against this practice led to government introduction of a review body in 2007, originally exercised by an appointed "special advisor to the defence minister."[119] The arrangement was introduced without the Court's issuance of a final order or decision.[120]

By this time, the issue had become socially contentious. Residents of towns in which illegal entrants tended to reside held vocal, sometimes violent, protests and used political leverage in their calls for solutions that would remove the growing African communities from their midst.[121] Much of this activity was self-organized by local associations and interest

114. *Id.* at para. 48 (Arbel, J.).
115. *Id.* at para. 22 (Arbel, J.).
116. *Id.* at paras. 4–6 (Arbel, J.).
117. *See* NATHAN, *supra* note 110, at 20.
118. Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, SH No. 161, p. 160. For an English translation of the Law in 1960, see http://www.israellawresourcecenter.org/emergencyregs/fulltext/preventioninfiltrationlaw.htm. *See also* HCJ 7146/12 Adam v. Knesset, at paras. 4–8 (2013) (Isr.), http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5277555e4.
119. *See id.* at para. 24 (Arbel, J.).
120. HCJ 3208, 3270, 3271, 3272/06, Anonymous v Head of IDF Operations Division. *See also* HCJ 7146/12 Adam v. Knesset, *id.*, at para. 24 (Arbel, J.).
121. *See, e.g.*, David Sheen, *The Ethnic Cleansing of Africans in Israel*, ELECTRONIC INTIFADA (Dec. 28, 2015), https://electronicintifada.net/content/ethnic-cleansing-africans-israel/15099.

groups.[122] Reports on the growth of criminal activity in areas populated by Africans, focusing on rape and drug abuse, further kindled the fires. "South Tel Aviv," relatively densely populated by foreign workers and illegal entrants, has become a catchphrase employed by those who view the state of affairs as dangerous to the fabric of Israeli society.[123] On the other side, a number of NGOs, both general human-rights groups and associations dedicated to refugee/immigration issues, operate to assist members of these communities in a variety of ways, from the provision of legal representation to food. These NGOs are dubbed by opposing groups as "extreme leftists," as are members of academia, the press, and the judiciary.[124]

An attempt to introduce a new immigration act in 2010, originated as a private bill but was endorsed by the government, did not pass the first reading.[125] The act was to deal with all aspects of immigration and entry, including the treatment of asylum-seekers.[126] Strong opposition, including opposition from within Prime Minister Olmert's coalition, led to the abandonment of the bill and to the redrafting of the arrangement in Amendment No. 3 to the Prevention of Infiltration Law.[127] The decision to amend the statute was part of a government decision, delivered in December 2011, to adopt three policies designed to prevent infiltration: the state would build a physical barrier, or wall, between Israel and Egypt; it would enhance its activity regarding the safe return of infiltrators to their country of origin; and, as part of the amendment of the law, it would establish a dedicated custody facility in the Negev, *Saharonim*, part of the prison of that name.[128]

The wall was completed by December 2013, but 94% of the barrier was functioning by the end of 2012.[129] At this time, the number of new entrants fell dramatically. In 2012, about 10,000 infiltrators were docu-

122. *See id.*

123. *Id.*

124. For a recent discussion of this, and other elements of the protest, see Shefi Paz, *An Answer to Any Question*, S. TEL AVIV CMTY. (Sept. 8, 2015), http://www.south-tlv.co.il/article15827 (in Hebrew).

125. Immigration to Israel Bill, 5771-2010 (Private Member Bill), http://www.knesset.gov.il/privatelaw/Plaw_display.asp?lawtp=1 (scroll down to relevant text) (in Hebrew).

126. *Id.* Under the bill, entrants from "dangerous states of areas," defined by the government when it found that entry from such areas was likely to endanger national or security interests of the state, were not to be granted initial permission; grant of status was conditional, *inter alia*, on ten years of legal residence and on absence of reliance on welfare services; further, the government was to set quotas for grants of refugee status.

127. For one critique of the bill, see generally Reuven (Ruvi) Ziegler, *The Immigration into Israel Law: A Review of the Arrangements Concerning Asylum Seekers and Refugees*, ISR. DEMOCRACY INST. (Jan. 18, 2011) (in Hebrew).

128. *Government Decision No. 3936: The Establishment of a Custody Facility for Infiltrators and the Curbing of Illegal Infiltration into Israel*, PRIME MINISTER'S OFF. (Dec. 11, 2011), http://www.pmo.gov.il/Secretary/GovDecisions/2011/Pages/des3936.aspx (in Hebrew) (reiterating several earlier decisions).

129. HCJ 7146/12 Adam v. Knesset, at para. 99 (2013) (Isr.), http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5277555e4.

mented; only 118 entrants were intercepted in 2013, 43 of them at the border.[130] Whether this was the result of the operation of the barrier wall or due to the introduction of the new legislative processes was a contested question.[131] Still, a relatively high number of legal and illegal infiltrators remained in the country. In 2011, more than 35,000 were documented as having remained in the country; the number rose to almost 53,000 at the end of 2013 and current reports set the number at 42,147.[132]

Throughout this period, and beyond, government policy on the matter drew on three main points. First, the wave of infiltration—the choice of this term is telling—had to be stopped. Hence the building of the barrier wall and the introduction of the detention measures discussed in Part IV.

Second, figures show that very few applications for refugee status have been accepted by the government. Global statistics of recognition of refugee status for Eritrean and Sudanese asylum seekers—in March 2014, 81.9% and 68.2%, respectively, as reported by the UNHCR—stand in stark contrast to less than 1% of Eritreans and none of the Sudanese applicants, a fact noted in Justice Vogelman's opinion in *Eitan*, the second of the three decisions analysed in this Article.[133] Many of the Eritreans who had fled from their country did so to escape permanent forced military service that amounted in some cases to twenty years. Those who had escaped for this reason and others, whose crime against the state consisted of their opposition to the state, were all to be subject to harsh measures if they returned. Their claims for asylum worldwide are based on this argument. For some government speakers, all deserters from military service were to be rightfully punished, as desertion is treated as a crime; therefore, they would not qualify for refugee status.[134] Third, the default position of at least some politicians seems to have been that all,

130. The number of entrants has vacillated since, but has never reached former rates. Intercepted entrants in 2015 and in the first three months of 2016 amounted to 229 and seventeen, respectively. *See* POPULATION, IMMIGRATION AND BORDER AUTHORITY (PIBA), FOREIGNERS STATISTICS, Edition 1/16, 4 (2016), https://www.gov.il/he/departments/general/foreign_workers_stats (in Hebrew).

131. For example, later on in the plenary debate during the first reading of the 2014 Bill, Eli Ishai, the former minister of Interior, claimed that "[p]rofessionals in the Ministry of the Interior today says: 80% due to the [law], 20% due to the fence." *Divrey HaKnesset*, Meeting 184 (Dec. 1, 2014) (statement of Eli Ishai, former Ministry of Interior).

132. *See Summary Data on Foreigners in Israel—Summary of 2013*, POPULATION AND IMMIGRATION AUTHORITY (2014), https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/%D7%A1%D7%99%D7%9B%D7%95%D7%9D%202013.pdf (in Hebrew); *Summary Data on Foreigners in Israel—Second Quarter—2016*, POPULATION AND IMMIGRATION AUTH. (2016), https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/q2_2016_0.pdf (in Hebrew).

133. HCJ 7385/13 Eitan v. Government of Israel at paras. 1, 26 (2014) (Isr.) (Vogelman, J.).

134. *See, e.g.*, Avi Himi, Chair of the Advisory Committee to the Ministry of Interior for Refugee Affairs, Ministry of Interior, at the Internal Affairs Committee Meeting (Oct. 14, 2013).

or at least most, entrants were in fact labor migrants rather than asylum seekers.[135]

IV. THE LEGAL TREATMENT OF ASYLUM SEEKERS/INFILTRANTS, 2012–2016: FOUR STATUTORY AMENDEMENTS AND THREE JUDICIAL DECISIONS

Since 2012, four statutory amendments to the Prevention of Infiltration Law were introduced, the latter three in response to three HCJ decisions that found parts of the first three amendments unconstitutional. A full overview of this saga extends beyond the scope of this Article, since the main focus here is on legislators' use of collective memory as express motivations during the legislative process. For our needs, only a brief description of the statutes and the Court's contribution is necessary. This case study spans several legislative processes, all concerned with the same issue; rather than focus either on one legislative process or on several that address different issues, this case study is thus especially useful methodologically.

The four statutory amendments concerned with the treatment of entrants contained two main aspects. First, was the authorization for the preliminary detention of entrants in a prison facility, *Saharonim*.[136] This detention period was officially required to discern the origin and personal status of the entrants.[137] The second feature was first introduced in the second statutory amendment (2013); as a response to the HCJ's invalidation of the 2012 amendment, discussed below, the legislature introduced a new, additional holding facility (*Holot*, "Sands").[138] Both *Saharonim* and *Holot* are located in the south of Israel, close to the Egyptian border, in a remote desert area that has no easy links with urban areas. *Holot* was to be an "open" facility, managed by the Prisons Authority; the rules concerning residence in this facility were serially changed following the

135. The following positions cited in the press by MK Miri Regev (Likud), MK Eli Ishai (Shas, coalition party), and Ron Huldai, Mayor of Tel Aviv, consistently used the term "labor migrants" rather than "asylum seekers" when discussing African entrants. *See, e.g.*, Ron Huldai, *The Infiltrators Are Labor Migrants and Are Not Under Danger in Their Country*, HAARETZ (Dec. 4, 2011) (in Hebrew); Eli Ishai, *We Are Not Deporting but Returning the Immigrants to Their Country*, GLOBES (June 17, 2012) (in Hebrew); Miri Regev, *Disperse the Infiltators in the Strongholds of the Extreme Left—Kefar Shmaryahu, Ramat Aviv and the Kibbutzim*, GLOBES (June 18, 2012), http://www.globes.co.il/news/article.aspx?did=1000757744 (in Hebrew).

136. *Government Decision No. 3936, supra* note 128.

137. *See* explanatory notes to § 4, Prevention of Infiltration (Offences and Jurisdiction) (Amendment No. 3 and Temporary Measure) Bill, § 4, 5771-2011 (2011) (Isr.). On the Saharonim facility see http://ips.gov.il/Web/En/Prisons/DetentionFacilities/South/Saharonim/Default.aspx (last visited Jan. 7, 2017).

138. Elizabeth Tsurkov, *Knesset Passes Revised Law for Detention of African Asylum Seekers*, 972 BLOG (Dec. 10, 2013), http://972mag.com/knesset-passes-revised-law-for-detention-of-african-asylum-seekers/83395/. On the *Holot* Facility, see http://ips.gov.il/Web/En/Prisons/DetentionFacilities/South/Holot/Default.aspx (last visited Jan. 4, 2017).

three decisions that found previous legislative arrangements unconstitutional.

The first in this series of amendments, Amendment No. 3 to the Prevention of Infiltration Law, was passed in January 2012, fully transforming the law from an emergency law designed to tackle the entrance of terrorists into Israel during the early 1950s, valid as long as an emergency declaration was in force, to a three-year interim arrangement.[139] The original provision that linked the statute with the existence of a declaration of emergency was thus removed.[140] According to the explanatory notes attached to the bill, it was introduced to provide the required administrative tools to manage the rising number of infiltrators.[141] Admittedly introducing a harsher regime to illegal entrants, or infiltrators, the statute was designed to enable the long-term incarceration that the Entry into Israel Law did not enable.[142]

"Infiltrators," defined in the amended law as persons whose entry into Israel was not through recognized entry stations, were to be held in custody (*mishmoret*) without trial in specified facilities, *Saharonim* being the central one.[143] Most incarcerated infiltrators could be released on bail after three years, although other causes for release were included.[144] Further provisions concerned the authorization of one or more of the tribunals operating under the Entry into Israel Law to act as tribunals for custody review, with right to administrative appeal to a district court.[145] The amendment created a three-year maximum period of custody without trial, subject to review that could only shorten the period under the limited causes set by the statute.[146]

The applications challenging the constitutionality of the amendment were successful. In *Adam*, all nine HCJ Justices ruled that this arrangement was unconstitutional. Incarceration without proper trial for such a

139. Prevention of Infiltration (Offences and Jurisdiction) (Amendment No. 3 and Temporary Measure) Law, 5772–2012, (2012) (Isr.).

140. Section 34 of the original law was removed. *Compare* Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 § 34 (1954) (Isr.), *with* Prevention of Infiltration (Offences and Jurisdiction) (Amendment No. 3 and Temporary Measure) Law, 5772–2012 (2012) (Isr.).

141. *See* explanatory notes to § 4, in Prevention of Infiltration (Offences and Jurisdiction) (Amendment No. 3 and Temporary Measure) Bill, § 4, 5771-2011, HH No. 577, (2011) (Isr.).

142. For the explanatory notes in the bill, see *id.*

143. For recent information on the Saharonim prison, see http://ips.gov.il/Web/En/Prisons/DetentionFacilities/South/Saharonim/Default.aspx (last visited Jan. 4, 2017).

144. Prevention of Infiltration (Offences and Jurisdiction) Law (Amendment No. 3 and Temporary Measure), 5772–2012, § 5 (2012) (Isr.).

145. *Id.* § 30F.

146. *See* Prevention of Infiltration (Offences and Jurisdiction) (Amendment No. 3 and Temporary Measure), 5772-2012 (2012) (Isr.).

long period could not be upheld, as it disproportionately breached the detainees' liberty and dignity.[147]

Three months later, the new amendment to the statute instated two main changes. First, the maximum period of incarceration without trial was reduced to three months.[148] Second, was the establishment of *Holot*.[149] Under this amendment, *Holot* residents could exit the facility, but were required to register their attendance three times a day, and the facility would be closed overnight.[150] Residents were not allowed to work in Israel, but some limited employment would be offered on site.[151]

The challenge to this second amendment was decided by the same nine HCJ Justices in *Eitan*.[152] Six of the Justices found the new arrangement regarding preliminary incarceration of entrants a disproportionate breach of entrants' liberty and dignity; custody had indeed been reduced to one year, but remained the default option, while most countries provided for a shorter custody period, and there was no justifiable reason for holding a person who was not likely to be removed in the foreseeable future.[153]

As for *Holot*, two preliminary points preceded the proportionality analysis: first, the capacity of *Holot* was limited to a few thousand people—at the time of the decision, about 2000 people were held there—far from the number of entrants remaining in Israel; second, the criteria for calling entrants to enter *Holot* had not been explicated by the authorities, a fact that raised the risk of selective enforcement.[154] Justice Vogelman then addressed four elements of the arrangement: the "openness" of a facility that required its residents to register three times a day, and its closure overnight; the operation of this "civilian" facility by the Prisons Authority; the absence of a maximum-stay period; and the provision authorizing the removal of held persons to prison custody.[155] Except for the second element, all others interfered with liberty, dignity, and due process, due to the virtual nonexistence of an appeal process.[156] The ensuing

147. HCJ 7146/12 Adam v. Knesset, at paras. 1, 16–21, 87–88 (2013) (Isr.). One of the nine justices would have invalidated only the provision concerning the period. The court granted the State a three month stay to enable continued detention. *See, e.g.*, *id.* at para. 8 (Hendel, J.).

148. Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, § 30A(a)(iii), added by Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Measure), 5774-2013, (2013) (Isr.).

149. *See id.* ch. D.

150. *See id.* § 32H.

151. *Id.* §§ 32F, 32G.

152. HCJ 7385/13 Eitan v. Government of Israel, at para. 1 (2014) (Isr.). For an unofficial English translation, see http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54e607184.

153. *Id.* at paras. 65–77 (Vogelman, J.). Justice Vogelman was the author of the central, most detailed opinion.

154. *See id.* at para. 90.

155. *See id.* at paras. 114–16, 141–42.

156. *See id.* at paras. 117, 120–29, 148–57, 168–79.

invalidation of the entire chapter by seven of the nine justices was stayed for ninety days, except for two elements that were rewritten for that period.[157] Yet, another defeat to the government, the decision led once again to a government-led bill that retained the element of detention subject to the government's interpretation of the decision.

In the absence of government reaction, *Holot* would have been closed at the end of the stay, December 22, 2014. To prevent this, the Ministry of Justice uploaded a draft bill on its website in late November 2014, granting only one week for comments rather than the customary three-week period.[158] The draft bill was approved by the minister's Committee on Legislation on Sunday, November 30.[159] The next day, the Knesset Committee approved a shortened legislative process by exempting the bill from being tabled prior to first reading; the first reading was held on the same day.[160] The bill was duly moved to the Internal Affairs Committee and debated from Monday to Wednesday of the first week of December.[161] During the debate on December 2, the committee members were notified that due to a coalition crisis, the Knesset was to dissolve.[162] The second and third readings of the bill, and of a few other bills, were conducted on December 8, 2014, just before the Knesset voted for its dissolution.[163]

Enter, then, the third amendment, in which the maximum period of incarceration without trial was further reduced, this time to three months.[164] Release was linked with a deportation order; under the ar-

157. *Id.* at paras. 189–91. Detainees were to register twice a day only and removal to custody was limited to ninety days. *Id.*

158. *See* Boaz Rakuch, *What Doesn't Work by Force*, HA-MAKOM (Nov. 18, 2014), http://www.hamakom.co.il/timeline-holot (in Hebrew).

159. Attila Somfalvi & Omri Efraim, *Gov't Unanimously Approves New 'Infiltrators Law*,' YNETNEWS.COM (Nov. 30, 2014), http://www.ynetnews.com/articles/0,7340,L-4597798,00.html.

160. Ben Hartman, *New 'Anti-Infiltration' Bill Passes Vote in Knesset*, JERUSALEM POST (Dec. 8, 2014), http://www.jpost.com/Israel-News/New-anti-infiltration-bill-passes-vote-in-Knesset-384046.

161. *Knesset Passes New "Anti-Infiltration" Law*, THE KNESSET (Dec. 8, 2014), https://www.knesset.gov.il/spokesman/eng/PR_eng.asp?PRID=11497.

162. *Knesset Votes to Dissolve; New Elections Called for March 17*, TIMES OF ISRAEL (Dec. 3, 2014), http://www.timesofisrael.com/new-elections-called-for-march-17-2015/.

163. *See, e.g.*, Moran Azoulay, *Officially Disbanded Knesset Election on March 17*, YNET (Dec. 9, 2014), http://www.ynet.co.il/articles/0,7340,L-4601174,00.html (in Hebrew); *Knesset Passes New "Anti-Infiltration" Law*, *supra* note 161.

164. The Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Laborers from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014, (2014) (Isr.). "The amendment, which came into effect on 18 December 2014, shortened the term for new 'infiltrators' from one year to three months, and limited the term of imprisonment at the Holot facility to 20 months. According to the current amendment, 'infiltrators' employed in Israel are required to deposit 20 per cent of their salary, and their employer a further 16 per cent, in a deposit to be given to the employees only upon their departure from Israel. In addition, a planned section of the Economic Arrangements Law would subject 'infiltrators' to a head tax of an additional 30 per cent of their wage." *Where There is No Free Will: Israel's "Voluntary Return" Procedure for Asylum-Seekers*, HOTLINE FOR REFUGEES AND MIGRANTS (April 2015), http://hotline.org.il/wp-content/uploads/2015/04/free-will-web-.pdf.

rangement, entrants who met the conditions for holding at the open center, as discussed below, were to be transferred to that center—a novel arrangement under which all new entrants who could not be deported were liable to be moved to *Holot*.[165]

Secondly, the chapter concerned with *Holot* was re-enacted, once again as a provisional measure for three years. In this version of the law, minors, women, and those over sixty were exempt from holding, as were, at the discretion of the MoI, those whose health would be impaired and purported victims of crime.[166] Candidates had a right to be heard before the operation of a residence order.[167] As before, residents were not allowed to work, except in the facility itself.[168] Registration was to be held only once a day, in the evening, and the facility would still be closed at night.[169] Residents were to receive appropriate living conditions and "pocket money."[170] The maximum holding period was set to twenty months.[171] No special provisions regarding early release were added.

The third measure originally targeted all persons staying illegally in the country, including those who held an expired visa, that is, the large group of persons considered work migrants. Under the Foreign Workers Law, 5751-1991, employers of foreign workers were required to deduct sums and to deposit them in a special bank account or fund; the monies were to be released to the worker on his departure from Israel.[172] Under the amendment, the sums to be deducted by the employer and the employee were raised and, on the entrant's departure, a further deduction of up to 80% of the funds was dependent on the period of postponement of departure.[173] This amendment was to apply six months after the crea-

165. *See* Elizabeth Tsurkov, *Israel's Deportation Policy Forced Asylum Seekers to Choose Between Prison and Persecution*, NEWSWEEK (Nov. 18, 2015, 12:10 PM), http://www.newsweek.com/israels-deportation-policy-forces-asylum-seekers-choose-between-prison-and-395921.

166. Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, § 32D(b), added by Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Laborers from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014, § 1(3) (2014) (Isr.).

167. *Id.* at § 32D(d), added by Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Laborers from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014, § 1(3) (2014) (Isr.).

168. *Id.* at § 32F, 32G, added by Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Laborers from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014, § 1(3) (2014) (Isr.).

169. *Id.* at § 32H, added by Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Laborers from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014, § 1(3) (2014) (Isr.).

170. *Id.* at § 32K, added by Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Laborers from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014, § 1(3) (2014) (Isr.).

171. *Id.* at § 32U, added by Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Laborers from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014, § 1(3) (2014) (Isr.).

172. Foreign Workers Law, 5751-1991, SH 5771 p. 112 (Isr.).

173. Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Laborers from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014, § 4 (2014) (Isr.).

tion of a special fund managed by the government; the arrangement has yet to enter into force.[174]

The challenge (the third) to the constitutionality of the arrangements was filed at the Supreme Court eight days after the enactment. The same justices deciding the previous case sat on the bench, minus the two who had retired and were replaced by new justices (in Israel, the number of Justices on the bench is usually three, sometimes more, but hardly ever full).[175] *Desta*, decided in August 2015, was more limited in its declaration of unconstitutionality.[176] The three-month maximum incarceration period was upheld, but the majority ruled that the maximum period of holding in *Holot*, set to twenty months, was disproportionately onerous and therefore unconstitutional.[177] The ruling of unconstitutionality was stayed by six months, once again to enable the Knesset to consider its next steps. The court, however, ordered that all those held for a period exceeding twelve months would be discharged as of the date of the decision.[178]

Once again, the Knesset responded swiftly: just days before the end of the stay period, a new amendment followed the strong suggestion of the HCJ and set the maximum period of *Holot* holding at twelve months.[179] To date, no challenge to the constitutionality of this last amendment has been filed, perhaps understandably, but applications concerning aspects of the arrangement, for example, against the propriety of specific orders, continue to be filed and decided.[180]

V. COLLECTIVE MEMORY AND SELECTIVE AMNESIA: A STUDY OF LEGISLATORS' REFERENCES TO THE HOLOCAUST AND JEWISH PERSECUTION

A. Memory and Amnesia in the Legislative Process of the Prevention of Infiltration Law

What was the effect, if any, of collective memories of Jewish persecution on the design of the legal measures treating the influx of asylum-seekers and other entrants into Israel? The title of the statute chosen to

174. *See id.*

175. For a general overview of Israel's judiciary, see *The Judiciary: The Court System*, ISR. MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx (last visited Jan. 9, 2017).

176. HCJ 8665/14 *Desta v. Knesset* (2015) (Isr.). For an unofficial English translation, see http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=56af90344.

177. *Id.*

178. *Id.*

179. Prevention of Infiltration (Offences and Jurisdiction) (Temporary Measure) Law, 5776-2016, SH No. 2530, p. 544 (Isr.).

180. *See, e.g.*, *Refugee Law and Policy: Israel*, *supra* note 9.

be transformed into the main legal measure does not hint at any link with this collective memory. "Prevention of infiltration" connotes a policy of denial of entry, and the recognition of entrants as infiltrators marginalizes, if not obliterates, any reference to persecution and refugeedom. But beyond this title, do the debates over the legislation resonate in any way with the nation's memory of the past?

The quantitative analysis of governmental and parliamentary oral references to this collective memory, offered in this Part, focuses on three sources: the explanatory notes attached to the published bills; the records of plenary sessions dedicated to the legislation of the four legislative amendments (first to third readings); and records of meetings of the Knesset Internal Affairs and Environment Committee (preparation for second and third readings).

This methodological choice offers three snapshots of expressions, one formal, two semi-formal. Explanatory notes to published bills are carefully penned by government lawyers, usually those within the proposing government department in conjunction with the Justice Ministry. Thus they are the best reflections of formal presentations of original understandings. Conversely, Knesset records, both of the plenum and the committees, tend to accurately reflect the heated debates of Knesset members of all parties; in sensitive areas such as the one discussed in the studied debates, little decorum and self-restraint is evident. Sometimes, the knowledge that these debates are open (and occasionally filmed) encourages members to be more vocal and less restrained, possibly theatrically so.[181]

In this study, a "reference" to collective memory was defined as any oral mention of the Holocaust, in a broad sense. "Direct references" are explicit references to the Holocaust, the Second World War, the Nazis, the persecution of grandparents, or to other iconic symbols such as "concentration camps." "Indirect references" are not explicit, but generate the memory of the Holocaust by triggering this collective memory. For example, MK Dov Khenin's mention of "Jews escaping Germany," MK Zehava Galon's argument that "we, the State of Israel, who knocked on the world's doors . . ." are both indirect references to the Holocaust, as is the mention of twentieth-century persecution.[182] Other references to the general history of the Jews as refugees, such as "we are a nation that has known refugeedom,"[183] were counted separately; although they do not

181. Other methodological choices are of course possible. A study of politicians' declarations in the media could provide further data, but they would reflect not only the politicians' motives, but also the selective process of media coverage (Facebook and other such media excluded). The three formal and semi-formal sources seem to suffice in the context of this Article.

182. For these reference, see, respectively, MK Dov Khenin, Committee meeting, Dec. 19, 2011, p. 41; MK Zehava Galon, Plenum meeting, January 9 2012, at 228; MK Dov Khenin, Plenum meeting, Mar. 30, 2011, at 38 (in Hebrew).

183. MK Zehava Galon, Plenum meeting, Mar. 30, 2011, at 38 (in Hebrew).

focus on twentieth-century history, they are still relevant, as they cannot be read out of the general context of the debate, which links them with other references to the Holocaust. They are thus considered "general indirect" references.

We rely on the records of all plenum and committees' debates that comprise legislative processes of all four amendments. The records are all available online on the Knesset website.[184] In all, the Knesset held eight plenary debates and fifteen committee debates, dedicated in whole or in part to the legislation of the amendments. Only the parts concerned with the amendments were analyzed (for the dates in the context of the full timeline of events see Table 1).

184. KNESSET R.P. 38–40, 118–120. Under the Rules, exceptions of accessibility apply to meetings of the Foreign Affairs and Defense Committee and to other cases, as laid down in the rules of procedure, but none of the debates on the four amendments were excepted. Access and search of records available at https://www.knesset.gov.il/plenum/heb/plenum_queue.aspx (plenary sessions) (in Hebrew); https://www.knesset.gov.il/protocols/heb/protocol_search.aspx (committees) (in Hebrew).

TABLE 1 – TIMELINE
AMENDMENTS TO THE PREVENTION OF INFILTRATION LAW
KNESSET DEBATES AND JUDICIAL DECISIONS

Legislation and Event	**Date(s)**
2012 Amendment	
First reading	3/30/2011
Committee debates	2/3/2011,[a] 7/25/2011, 11/14/2011, 12/13/2011, 12/19/2011
Second and third readings	1/9/2012
Amendment entry into force	1/18/2012
HCJ *Adam* decision date	9/16/2013
HCJ *Adam* entry into force	9/16/2013
2013 Amendment	
First reading	11/25/2013
Committee debates	11/26/2013, 11/27/2013, 12/2/2013, 12/4/2013
Second and third readings	12/9/2013
Amendment entry into force	12/11/2013
HCJ *Eitan* decision date	9/22/2014
HCJ *Eitan* entry into force	12/21/2014
2014 Amendment	
First reading	12/1/2014
Committee debates	12/2/2014 (three meetings), 12/3/2014, 12/8/2014
Second and third readings	12/8/2014
Amendment entry into force	12/17/2014
HCJ *Desta* decision date	8/11/2015
HCJ *Desta* entry into force	2/10/2016

2016 Amendment

First reading	2/1/2016
Committee debates	2/2//2016, 3/2/2016
Second and third readings	2/8/2016
Amendment entry into force	2/11/2016

a Special preliminary debate.

To identify all references to the collective memory of the Holocaust in the Committee records, we used a large set of keywords (in Hebrew) that ensured that all direct, indirect, and general references to the Holocaust were located.[185] All eight plenum debates and six of the fifteen committee meetings, as recorded, contain such references. The references were then classified by name of the MK, his or her party, including the party's coalition/opposition membership, and the speaker's position, either in support or in opposition of the bill.[186]

The content analysis of the explanatory notes to the four bills reveal no information: all contain factual descriptions of the background that justified the enactment—the rising number of illegal entrants, the insufficient existing law in the case of the first bill, or, in the case of the other three bills, a short reference to the ensuing HCJ decisions that required the legislation. The explanatory notes to the 2011, 2013, 2014, and 2016 bills also contain a short legal analysis of the compatibility of the bill to respective preceding judicial decisions.[187]

185. History, Jewish, World War, Germany, Europe, persecution, pogroms/riots (*pra'ot*), morality, draconian, dark, grandfather, grandfathers, grandmother, grandmothers, concentration, ghetto, and ghettos.

186. The three government coalitions that operated under the eighteenth, nineteenth, and the current twentieth Knesset were all led by the Likud right-wing party. The Labor left-center party was part of the first coalition during the first twenty-two months of the Knesset the party split into two factions about two months before the first reading of the 2012 amendment. One faction, the *Atzma'ut* ("independence") faction, remained a member of the coalition. The members of the two subsequent coalitions were all right-wing, center-wing and religious parties. The right-wing party *Ikhud Leumi* (The National Unity) served in the opposition in the nineteenth Knesset and disappeared in subsequent Knessets. Some of its MKs merged into *Israel Beitenu*, another extreme right-wing party, which was part of the coalition in the first two relevant Knessets and is currently serving in the opposition. Information on party membership in these coalitions is available at the Knesset website, at http://knesset.gov.il/main/eng/home.asp.

187. *See*, chronologically, Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Order), 5774-2013, § 30A(c) (2013) (Isr.); Prevention of Infiltration (Offences and Jurisdiction) (Amendment No. 3 and Temporary Measure) Bill, 5771-2011, HH No. 577, p. 594 (2011) (Isr.); Draft Bill for Prevention of Infiltration (Offences and Jurisdiction), 5776-2016, HH No. 1006, p. 430 (Isr.); Draft Bill for Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Laborers from Israel, 5775-2014, HH No. 904, p. 422 (Isr.).

The plenum and committee debates yield more interesting results. First, government-initiated references to collective memory of oppression—the Holocaust and others nodes of memory—are virtually absent. This silence can be initially explained by the nature of the policy: reminders of past horrors based on national identity involving the denial of entry of Jews escaping the Holocaust, and references to the ensuing atrocities, had no political utility for the adoption of a policy aimed to exclude the entry of others. Indeed, references to the Holocaust were limited, in general, to opposition MKs; coalition MKs mentioned these memories mainly to reject comparison, made by members of the opposition parties.

Consider, as an example, the dialogue between MK Zehava Galon, of the left-wing *Meretz* opposition party, and the Likud member MK Ofir Akunis, during the first reading of the 2012 Bill:

> GALON: We, who should have been the first to remember the lessons of the Second World War, how we requested status and refuge, and became a State —
>
> AKUNIS: You're not ashamed to compare —
>
> GALON: No, no, no, this is not Jewish, MK Akunis —
>
> AKUNIS: To compare this, to compare to the Second World War—
>
> GALON: This is not Jewish.[188]

Coalition members who presented a bill in the plenum or the Committee sometimes included a general reference to the past, as in the case of the Chair of the Committee for Internal Affairs, MK Amnon Cohen, opening the first meeting of the committee's preparation of the 2012 Bill for its second and third readings:

> COHEN: I wish we didn't need to legislate this law, but on the other hand we need to deal with those problems . . . we, as a people, suffered from expulsions in our history, we too underwent more difficult times. We are highly sensitive to these issues, but, however, we need to find the proper checks and balances to do things and not hurt a person as such . . . [o]n the other hand, we need to protect our state, our own poor people . . . we are a people that underwent a difficult period, and we need to do this too.[189]

188. Plenum meeting record, Mar, 30, 2011, at 46–47. All translations of the records by the author. A possible exception to this pattern can be found in the case of two members of *Hatnu'a*, a centrist party member of the coalition at the time. MK David Tsur's call to refrain from comparison to the Holocaust, in response to MK Rosin (the *Meretz* leftist party), who relied on this comparison, was substantiated by MK Elazar Stern, whose words are more tempered and could be read as a rejection of Tsur's position ("I, too, think that the legacy of the Holocaust is the attitude towards the weak. . . I agree with you [Rosin], I just say that what I can we do."). Plenum meeting record, Dec. 9, 2013, at 215–16.

189. Committee meeting record, July 25 2011, at 3. The term "man as such" (*Adam ba'asher hu adam*) carries a heavy history, used, *inter alia*, in Biblical literature (*e.g.*, NACHMAN RAPP, MEN IN HIS WAYS: BIBICAL STORIES, (1973)) and ethics literature (THOMAS J. HIGGINS, MAN AS MAN: THE SCIENCE AND ART OF ETHICS (1992)) and is part of the right to dignity protected under Israel's Basic

Such references were rare. In all, we found twenty references of coalition members, all supporting the bills, and forty-five references of opposition members, who largely opposed the legislation.[190] Opponents of the law tended to make more direct references (seventeen, as opposed to twelve direct references made by supporters, seven of which were direct responses to an opposition member's reference). The number and volume of references decreased over time, from a total of sixteen for the 2012 bill to six for the 2016 bill (See Tables 2a, 2b).

Law: Human Dignity and Liberty. *See also*, in the same vein, from Minister of Interior Gilad Erdan's speech, opening the first reading of the 2014 bill: "I am well aware that our duty, as the State of the Jewish people, is also to serve as an example and model in the ways we treat the immigrant—any immigrant, by the way, whether he is legal or illegal, whether he escapes from genocide or is an infiltrator arriving here to improve his quality of life. And still, we have a first and foremost duty towards the citizens of Israel . . . I understand the conditioning." Plenum meeting record, Dec. 1, 2014, at 71.

190. Two members of an extreme right party, in the opposition, contributed five references, supporting the first, 2012 amendment. See Table 2a.

TABLE 2A – DIRECT AND INDIRECT REFERENCES TO THE HOLOCAUST, PLENUM RECORDS[191]

Debate Date	Direct References				Indirect References				General Indirect References				Total Pro/Con	
	Pro Law		Con Law		Pro Law		Con Law		Pro Law		Con Law			
	C	O	C	O	C	O	C	O	C	O	C	O		
2012 Amendment														
1st reading	2	1[a,b]		1		1[a]						1	4	2
2nd and 3rd readings	2	3[a, c]		3				1	1				6	4
2013 Amendment														
1st reading				3	1			4	1[b]			1	2	8
2nd and 3rd readings	2[b]			4				2				2	2	8
2014 Amendment														
1st reading				1				1	1			1	1	3
2nd and 3rd readings								2						2
2016 Amendment														
1st reading								1				1		2
2nd and 3rd												2		2

191. For the distinction between "direct," "indirect" and "general" references, see *supra* text accompanying note 182. "Pro" and "Con Law" indicate the support, or opposition, of the speaker to the bill. "C" and "O" indicate the membership of the speaker in the government coalition or opposition.

readings														
Total	6	4		12	1	1		11	3			8	15	31
References of coalition members													15	
References of opposition members													5	31

a References by members of right-wing party, in the opposition, supporting the bill.

b Immediate response(s) to opposers' references.

c One immediate response to oppose reference, two moderate references by Knesset speaker.

TABLE 2B – DIRECT AND INDIRECT REFERENCES TO THE HOLOCAUST, COMMITTEE RECORDS

Debate Date	Direct References				Indirect References				General Indirect References				Total Pro/Con	
	Pro Law		Con Law		Pro Law		Con Law		Pro Law		Con Law			
	C	O	C	O	C	O	C	O	C	O	C	O		
2012 Amendment														
Meetings 1–5	1		2						2[a]		3		3	5
2013 Amendment														
Meetings 1–4	1		2[b]										1	2
2014 Amendment														
Meetings 1–5									1[a]				1	
2016 Amendment														
Meetings 1–2			1								1			2
Total	2		5						3		4		5	9
References of coalition members													5	
References of opposition members														9

a General references in opening remarks to the bill by Committee Chair MK Amnon Cohen (Shas, coalition, 2012) and Minister of the Interior Gilad Erdan (Likud, Coalition, 2014).

b Immediate responses to opposers' references.

The results of this textual study offer clear evidence of the use of collective memory as a political tool. Indeed, those citing the Holocaust could have been ideologically motivated, feeling that denial of rights of entrants was inhumane and contrary to international law; however, reliance on the Holocaust, possibly the most traumatic collective memory of Israeli society, was not used arbitrarily. On the other side of the political arena, the relative amnesia of proponents of the policy is doubly telling, considering that in other areas, in which Israel's sovereignty is considered to be directly under attack, references are numerous (see next section). Finally, the decrease of reliance on historical trauma may indicate the relative failure of gaining political power in this way. Whether this five-year history indicates that strategic reliance on collective memory is not bound to succeed is a matter for speculation. One must, however, emphasize that such contributions to debates are directed more to external audiences than to the other presiding MKs.

B. Government Memory and Amnesia: Comparison with Israel-Iran Issues

The absence of government-initiated references to the Holocaust and other historical memories has been clearly traced in the previous section. To merit this practice as "selective amnesia," I now move to an analysis of formal presentations on one topic—the nuclear threat of Iran over Israel.

At the beginning of the period analyzed in the previous section, the Knesset enacted two statutes dedicated to this issue: The Prohibition of Investment in Corporations that Trade with Iran Law, 5768-2008, which was replaced by the broader-scoped arrangement set in The Struggle Against Iran's Nuclear Program Law, 5772-2012.[192] Both were designed to follow the Western sanctions on Iran, mainly those laid by the United States.[193]

Plenum debates over the two statutes were much shorter than those held over the prevention of infiltration laws: the record of the first reading of the 2012 prevention of infiltration act, for example, is 9,270 words long, while 3,112 words sufficed for the first reading of the 2012 anti-Iran act, generally less contentious and protected by its national security na-

192. The Prohibition of Investment in Corporations that Trade with Iran Law, 5768-2008, SH No. 2147, p. 444; The Struggle Against Iran's Nuclear Program Law, 5772-2012, SH No. 2377, p. 634.

193. For an overview of the sanctions, see Doron Hindin, *Israeli Sanctions–Difficult–But Not Impossible to Navigate,* 39 WORLD ECR (2015), http://www.hfn.co.il/files/33644eb87c7b31fec816c438bc737c55/pdfFiles/WorldECR%20Issue%20-%20Israeli%20Sanctions.pdf.

ture. Committee debates over these bills are unavailable; held in the Foreign Affairs and Defense Committee, the records are confidential.

A textual review of all available records reveals a single reference to the Holocaust, made by Benyamin Netanyahu, who served as an MK in 2008 and was the initiator of the first amending statute. In a speech made after the law passed its third reading (itself an exceptional contribution), Netanyahu informed his audience that the bill emerged after his discussions with legislators in Florida, who asked him how, as a proponent of free markets, he could support economic sanctions. His response, as cited in the record, was:

> NETANYAHU: Look, if the year is, as I said in another opportunity, 1938, and Germany is Iran, Iran is Germany, and it runs to arm itself with nuclear weapon, what do you think I'd have said in 1938? Should one have had to set sanctions on that regime? The answer is that the then followers of free markets in Britain and the United States did impose sanctions, and how, and rightfully so. This is parallel to today.[194]

The parallel discussion over Iran and Israel's collective memories is marked in many other speeches. Suffice to cite parts of Prime Minister Netanyahu's speech at the US Congress in March 2015:

> NETANYAHU: We're an ancient people. In our nearly 4,000 years of history, many have tried repeatedly to destroy the Jewish people. Tomorrow night, on the Jewish holiday of Purim, we'll read the Book of Esther. We'll read of a powerful Persian viceroy named Haman, who plotted to destroy the Jewish people some 2,500 years ago. But a courageous Jewish woman, Queen Esther, exposed the plot and gave for the Jewish people the right to defend themselves against their enemies . . . Iran's regime is not merely a Jewish problem, any more than the Nazi regime was merely a Jewish problem. The 6 million Jews murdered by the Nazis were but a fraction of the 60 million people killed in World War II . . . My friends, standing up to Iran is not easy. Standing up to dark and murderous regimes never is. With us today is Holocaust survivor and Nobel Prize winner Elie Wiesel . . . I can guarantee you this, the days when the Jewish people remained passive in the face of genocidal enemies, those days are over. We are no longer scattered among the nations, powerless to defend ourselves . . . Facing me right up there in the gallery, overlooking all of us in this chamber is the image of Moses. Moses led our people from slavery to the gates of the Promised Land. And before the people of Israel entered the Land of Israel, Moses gave us a message that has steeled our resolve for thousands

194. Plenum meeting record, Apr. 2, 2008, at 143.

> of years. I leave you with his message today, 'Be strong and resolute, neither fear nor dread them.'[195]

The comparison between Iran and the Nazi regime is not limited to foreign audiences. A study of the speeches delivered in 2014 and 2015 by the prime minister on the Holocaust and Heroism Remembrance Day in *Yad Va-Shem*, the institute and museum of Holocaust commemoration, shows that the extent of discussion of Iran has markedly risen.[196]

C. Analysis

How can this selective reliance on the collective memory be explained? I tentatively suggest two possible explanations.

The first links directly with the concept of selective amnesia. In 1999, Peyi Soyinka-Aierwele, currently a Professor at Ithaca College, New York, published an article on her native country, Nigeria, entitled "Collective Memory and Selective Amnesia in a Transmutational Paradox."[197] The author was concerned by the return to power of General Obasanjo, former head of the 1970s military dictatorship, installed as president by the military in a semi-democratic election despite the atrocities of his reign. For Soyinka-Aierwele, this was a case of "selective amnesia,"—"an episodic, often pragmatic, and elective decision of pseudo-forgetting."[198] The concept of "selective memory" advanced here goes further: it is concerned with the *simultaneous* remembering and forgetting of a collective memory *by a single person, group, or society*, based on the context at hand. Such has been the case of the remembrance of the Holocaust and other histories of persecution of the Jewish people. In the context of entrance of foreigners into the State, policy- and rule- makers would have preferred to forget these histories, had opposing groups not have insisting on raising them in the public sphere. In other contexts, such as the threat of Iran's nuclear power, the reverse has happened. Most prominent are the current prime minister's references to these memories in his campaign against lifting some of the international sanctions against Iran.

Under this reading, the findings in this study show that collective memories are often strategically used in the political sphere. This strate-

195. Prime Minister Netanyahu, Speech in Congress (Mar. 3 2015), *in PM Netanyahu's Speech in Congress*, PRIME MINISTER'S OFF. (MAR. 3, 2015), http://www.pmo.gov.il/English/MediaCenter/Speeches/Pages/speechCongress030315.aspx.

196. Nir Hasson, *What Did Netanyahu Talk about in the Official Ceremony Marking the Holocaust Remembrance Day*, HAARETZ (Apr. 15 2015), http://www.haaretz.co.il/news/untouched/1.2615121 (in Hebrew); *see also Netanyahu on Holocaust Memorial Day: Bad Iran Deal Proves Lessons of History Have Not Been Internalized*, HAARETZ (Apr. 15, 2015, 9:36 PM), http://www.haaretz.com/jewish/holocaust-remembrance-day/1.651980.

197. Peyi Soyinka-Aierwele, *Collective Memory and Selective Amnesia in a Transmutational Paradox*, 27(1) ISSUE: J. OF OPINION 44 (1999).

198. *Id.* at 44.

gic use is not necessarily linked with different understandings of a specific memory: the prevention of infiltrators case was not one in which the views over the nature or importance of the specific collective memory of supporters of the arrangements were directly opposite to those who objected to the amendments. What differed was, on the surface, an insistence on incomparability (in the case of the supporters) and on sufficient similarity (for objectors). Deeper down were political strategic considerations that shape the extent, if any, of reliance on the collective memory. Raising the collective memory of the Holocaust in the case of the threat of Iran was deemed useful, while mention of it in the context of asylum-seekers was not.

This case study raises the question whether, at least in Israel, traumatic collective memories are used in cases of threat to the nation but are disregarded when the state exercises its powers, as in the case of the treatment of asylum seekers/infiltrators.[199] Whether this point is valid in other contexts and in other societies is a matter for further study.

A second possible explanation ties in with the particularist/universalist world-views of political actors, briefly discussed above. I mentioned above that, on a rough scale, Israeli nationalist political actors (on the right) tend to adopt a particularist Holocaust narrative, while actors on the left side of the political divide are prone to follow a universalist view. Under this assumption, one could claim that for the government and its coalitions, which were dominantly right-wing throughout the period analyzed here, the Holocaust was not viewed as (directly) relevant in the case of foreign infiltrators. Hence, under this view, no strategic-led selective amnesia was in play.

Still, once the Holocaust was brought into the political debate, be it by the opposition—or in the eyes of some critics, since its memory is never fully absent from political consciousness—it is pertinent to question its marginalization in this affair.

VI. CONCLUSION

The concept of collective memory has served well in developing nuanced accounts of national histories, their shaping, and evolution. It is now well-established that all memories and histories are manipulable just as much as they represent past facts. Legal-history scholars now consider collective memory as an important element of the ways societies and legal systems wrap around mnemonic constructs. Yet, little attention has been granted to the reliance on collective memory by legislators. This Article seeks to fill this research void by exploring legislators' reliance on the memory of the Holocaust in one context—the legislation of a series

199. Thanks to my student, Tiran Sasson, for first raising this insight.

of statutory amendments designed to address the influx of illegal entrants from Africa into Israel between 2012 and 2016. Following the argument that collective memory can be strategically employed to forward political interests, I show that there is a sharp left-right divide in parliamentary debates over these statutes. Members of left-wing parties were more prone to raise the memory of the Holocaust, with its implications regarding the plight of Jewish refugees, while right-wing representatives, most of them members of coalition parties, rejected all such references, essentially mentioning this collective memory only to refute opponents' arguments.

The strategic use of the memory of the Holocaust in politics is evident also in another context, concerning global policy against Iran, in which government references to this memory are rife. While further textual analysis is in place—for example, a similar textual study of parliament debates over domestic legislation concerning sanctions against Iran could further enrich the analysis—the current findings offer a clear snapshot of strategic remembering and amnesia.