

Judging Evil in the Trial of Kastner

LEORA BILSKY

When I speak of the banality of evil, I do so only on the strictly factual level, pointing to a phenomenon which stared one in the face at the trial. Eichmann was not Iago and not Macbeth, and nothing would have been farther from his mind than to determine with Richard III “to prove a villain.”

—Hannah Arendt

How strong evil is, thought Hendrik with an awestruck shudder. How it seizes on everything it wants and escapes unscathed! Things really happen in the world as they do in the films and plays of which I have so often been a hero.

—Klaus Mann

When Hannah Arendt came to Jerusalem in 1961 to attend the Eichmann trial she expected to find Evil incarnated in the person of Eichmann. How surprised she was to see the man in the glass booth. The word she used repeatedly to describe him was “mediocre,” referring to the very average qualities of his person.¹ To Arendt the dissonance between Eichmann’s

1. The two epigraphs at the beginning of this article are from Hannah Arendt, *Eichmann in Jerusalem* (New York: Penguin Books, 1994), 287, and Klaus Mann, *Mephisto*, trans.

Leora Bilsky is a lecturer in Tel Aviv University Law Faculty. She thanks Richard Bernstein, Eyal Chowers, Pnina Lahav, Annabelle Lever, Vered Lev-Kanaan, Martha Minow, Carol Rose, Philipa Shomrat, Alexandra Vacroux, Analu Verbin, and the participants in the workshop in Ethics and the Professions, Harvard University. She is especially grateful to the anonymous readers for *Law and History Review* and to Christopher Tomlins for their thoughtful comments. <bilsky@post.tau.ac.il>

horrifying actions and the bureaucratic character of the man demanded an explanation. Like so many of us, Arendt's conception of evil had been informed by great works of art, but the reality of this villain did not fit her expectations.

Arendt realized that in this context traditional images of evildoing (for example Macbeth or Iago) can prove to be serious obstacles to our ability to understand the nature of Nazi atrocities and to judge them. Hence, her use of the provocative term the "banality of evil" should be taken as a warning against literary allusions. Arendt, however, did not pursue this admonition against "literary" direction in her book *Eichmann in Jerusalem*. Instead, she focused on the parallel dangers produced by the legalistic tendency to apply legal precedents to new crimes in a way that obscures their novelty. In this essay, however, I would like to explore the use of literary images of evildoing in Holocaust trials. For this purpose I turn to the almost forgotten trial that took place in Jerusalem several years before the Eichmann trial—the case that came to be known as the Kastner affair.

It was in this trial, which took place in 1954–1955, that an Israeli judge first had to address the evils of the Nazi era in his court of law. The defendant was an old Hungarian Jew, Malkhiel Gruenvald, who was accused of defaming the Zionist leader of Hungarian Jewry, Rudolph (Israel) Kastner, by alleging that he had collaborated with the Nazis.² Kastner had lived in Budapest during World War II and organized, together with other Zionist activists (among them Yoel and Hanzl Brandt), a committee for the rescue of Jewish refugees trying to escape the Nazi terror in neighboring countries by entering Hungary. After the 1944 German takeover of Hungary,

Robin Smyth (New York: Random House, 1977). For Arendt's physical description of Eichmann, see *Eichmann in Jerusalem*, 5. "Adolf Eichmann . . . medium-sized, slender, middle-aged, with receding hair, ill-fitting teeth, and nearsighted eyes, who throughout the trial keeps craning his scraggy neck toward the bench . . . and who desperately and for the most part successfully maintains his self-control despite the nervous tic to which his mouth has become subject long before this trial started." See also letter from Arendt on April 13, 1961, in *Hannah Arendt/Karl Jaspers Correspondence, 1926–1969*, ed. Lotte Kohler and Hans Saner (New York: Harcourt Brace Jovanovich, 1992), 434. ("Eichmann is no eagle; rather, a ghost who has a cold on top of that and minute by minute fades in substance, as it were, in his glass box.")

2. For detailed descriptions of the Kastner affair, see Tom Segev, *The Seventh Million: The Israelis and the Holocaust*, trans. Haim Watzman (New York: Hill and Wang, 1993), 255–320; Yehiam Weitz, *Ha-Ish she-Nirtsah Paamayim* [The Man Who Was Murdered Twice] (Jerusalem: Keter, 1995); Yehuda Bauer, *Jews for Sale? Jewish Negotiations, 1933–1945* (New Haven: Yale University Press, 1994), 145–71. For a discussion of the decisions in the trial and appellate courts, see Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley: University of California Press, 1997), 123–25, 132–33, 142–44.

Kastner had served as chief negotiator with Adolf Eichmann, the top Nazi official responsible for the deportation of Jews to German concentration camps, and with other Nazi officials on behalf of Hungary's Jewish community. The deal sought by Kastner and seriously considered by the Nazis was a "blood for goods" pact, intended to save the life of nearly one million Jews in exchange for ten thousand trucks to be delivered to the German Army. This ambitious goal was not achieved and approximately 400,000 Hungarian Jews were eventually sent to their deaths in Auschwitz. However, Kastner did succeed in saving a group of 1,685 Jews who were shuttled to safety in Switzerland. This transport (known as the "Bergen Belsen transport") included a disproportionate number of Kastner's friends and relatives.

After the war, Kastner's involvement in this exchange was questioned; at the 1946 Zionist Congress he was accused by a Hungarian activist of being a cynical opportunist who had selfishly sacrificed Hungarian Jewry for his personal safety. Kastner responded with a libel suit against the accuser, submitted to the Congress's Honor Court. He also wrote a long report accounting for all his wartime activities in Hungary. However, the panel decided that it did not have enough evidence to reach a conclusive decision and recommended that the matter be investigated in depth in the future.³ Thereafter, Kastner moved to Israel and became active in Mapai (the labor party); by 1952 he served as spokesman for the ministry of trade and industry. Kastner was also on the Mapai candidate list for the first and second Knessets (Israeli parliament). Though he did not get elected, there was a good chance he would be successful in the third elections, to be held in 1955.

It was at this time that Malkhiel Gruenvald embarked on a campaign against Kastner. A devoted member of Ha-Mizrahi (the religious wing of the Zionist movement) and a refugee who had lost most of his family in Hungary, Gruenvald had a political as well as a personal agenda. In addition to seeking to expose Kastner's crimes, Gruenvald hoped to denounce Mapai, demand Kastner's removal, and facilitate the appointment of a commission of inquiry to investigate the events that had led to the decimation of Hungary's Jews. The target of his criticism was the negotiations that Kastner had conducted with Adolf Eichmann and the Nazi officer Kurt Becher (responsible for the economic exploitation of the Jews).⁴ Gruenvald asserted that these negotiations had facilitated the destruction of Hungarian Jewry while benefiting Kastner personally. In a pamphlet he sent to Ha-Mizrahi members in the summer of 1952 Gruenvald phrased his charge that Kastner had collaborated with the Nazis in vivid and offensive terms:

3. Weitz, *Ha-Ish she-Nirtsah Paamayim*, 60–61.

4. For a detailed examination of the negotiations, see Bauer, *Jews for Sale?* 145–71.

The smell of a corpse scratches my nostrils! This will be a most excellent funeral! Dr. Rudolf Kastner should be eliminated! For three years I have been awaiting this moment to bring to trial and pour the contempt of the law upon this careerist, who enjoys Hitler's acts of robbery and murder. On the basis of his criminal tricks and because of his collaboration with the Nazis . . . I see him as a vicarious murderer of my dear brothers. . . .⁵

According to Gruenvald's allegations, Kastner had become friendly with the Nazis through their negotiations and as a result had been allowed to save his relatives and a small number of Jewish dignitaries. In return, Kastner had let the Nazis use him by not informing Hungarian Jews of the real destination of the trains. Gruenvald also alleged that Kastner, in collusion with some Nazis, had stolen Jewish money and then helped save the life of Becher with favorable testimony at the Nuremberg war crimes trials. Warned by the attorney general that he must either sue Gruenvald for libel or resign from his government post, Kastner sued. Since he was a senior government official, he was represented at the trial by the attorney general, Haim Cohen, himself. In the course of the trial, however, it was Kastner, not Gruenvald, who found himself on the defensive.

Shmuel Tamir, the brilliant right-wing defense attorney who represented Gruenvald, answered the accusation against his client with the response: "He spoke the truth." Tamir did not deny that Gruenvald had written the offending pamphlet. Quite the contrary—he set out to prove that everything in it was true. Tamir claimed that had the Jews been informed of the Nazi extermination plan, many of them could perhaps have escaped to Romania, revolted against the Germans, or sent calls for help to the outside world, all of which could have significantly slowed down the Nazi killing process.

Tamir, who was affiliated with the right-wing Revisionist party, a political adversary to the ruling Mapai party, succeeded in twisting the criminal libel trial against the unknown Malkhiel Gruenvald into the trial of Rudolph Kastner and subsequently into the trial of the Mapai party to which Kastner belonged. During the years of the Holocaust, one of the central divisions in the *Yishuv* (the Jewish community in Palestine) had involved the relationship with the British authorities. Mapai had chosen cooperation with the British in their war efforts against the Nazis, while the Revisionists had believed that the military struggle for liberation from the British in Palestine should continue. At first glance, the Kastner trial would seem irrelevant to this controversy since it dealt with the actions of Jewish lead-

5. Translated by Lahav, *Judgment in Jerusalem*, 123. The Hebrew quotation is in Shalom Rosenfeld, *Tik Pili 124: Mishpat Gruenvald-Kastner* [Criminal Case 124: The Gruenvald-Kastner Trial] (Tel Aviv: Karni, 1955), 16–17. The full version is quoted and translated into English by Segev, *The Seventh Million*, 257–58.

ers vis-à-vis the Nazi occupiers. However, in his effort to discredit the Mapai party, Tamir used Kastner's political affiliation with Mapai leaders in order to imply an underlying resemblance in their political approaches. Both, he argued, had preferred negotiations and cooperation to military resistance. In Europe this choice had proved to be catastrophic since it had facilitated the Nazi annihilation of European Jewry. The trial, in Tamir's vision, should serve to demonstrate this "lesson" to the Israeli public, a warning against the pragmatic path of negotiations that he thought characteristic of Jewish behavior in the Diaspora throughout the ages. The Israelis, as the New Jews, should abandon this path and criticize the Mapai leadership for demonstrating a "Diaspora mentality." In short, the trial should serve to legitimate the Revisionist approach as the only "authentic" Zionism and as the only one capable of guarding against the future recurrence of similar catastrophes to the Jewish people.

The case was brought to the district court in Jerusalem and assigned to Judge Benjamin Halevi as a sole judge.⁶ Halevi, a German Jew who had left Germany before the rise of Nazism, had to confront the horrors produced by his country of birth and to give them a legal name and meaning. The Kastner trial was the first in which the actions of a Jewish leader under Nazi rule (as opposed to those of low-level functionaries and policemen) were subjected to legal investigation. The issue was a most painful one for a Jewish court since it focused not on the Nazis and their criminal acts, or the world and its betrayal of the Jews, but rather on the questionable behavior of certain Jewish leaders. In other words, the case forced the judge, and the Israeli public at large, to face the "evil inside." It demanded a legal judgment on the phenomenon of collaboration that had emerged under the Nazi regime.

6. In Israel there is no jury system. Judges of a trial court sit either as sole judges in minor cases or in groups of three judges in the more important or complicated cases. (Article 37 of the Courts Law [consolidated version], 5744–1984.) Since Kastner's libel trial fell under the category of minor criminal offenses and did not seem to involve complicated issues of law in the outset, a sole judge was assigned to it. This initial perception of the case is confirmed by the fact that the state prosecution appointed the inexperienced attorney, Amnon Tel, to the case. See Weitz, *Ha-Ish she-Nirtsah Paamayim*, 107, 115, 122–23. Later on, after Tamir had managed to transform the trial proceedings into a most complicated case, addressing the whole issue of the behavior of Jewish leaders during the Holocaust, Judge Halevi did not ask for a panel of three judges to be appointed. (This was in contrast to the state prosecution that replaced Tel, an inexperienced criminal prosecutor, with the attorney general, Haim Cohen.) With the benefit of historical hindsight we see that a panel of the judge's peers could have supplied a deliberative framework for judging the Holocaust by allowing the judges to consult each other. Indeed, on Kastner's appeal five judges were appointed to sit on the case, instead of the three who normally preside at the appellate court. (Article 26[1] of the Courts Law specifies that the Supreme Court will sit in panels of three justices and authorizes the president of the court to extend the panel.)

The challenge for the court was how to apply legal tools to the daunting task of making sense of the failure (and possibly the betrayal) of Jewish leaders. At the end of a heated and controversial trial Judge Halevi acquitted Gruenvald in a judgment that, at the same time, strongly condemned the behavior of Kastner. A few months later, while awaiting his appeal to the Supreme Court, Kastner was assassinated by people associated with radical right-wing circles.⁷ The appeal was successful—but too late for Kastner.

Among the many fascinating issues raised by the Kastner trial, I have chosen here to focus on the ways in which it was transformed into a political trial through the use of language and literary metaphors. I explore how Judge Halevi invoked the literary images of Faust and the Trojan Horse to provide coherence to his legal interpretation; how legal terminology and frameworks were used to enhance the power and relevance of these literary myths; and finally, how the manipulation of literary myth and legal language combined to produce a judgment that suited political forces dependent on the modern Zionist myth of heroic Jewish resistance to the Holocaust. I hope to demonstrate that although law, language, and literature are inseparable, their different combinations can produce different versions of history and morality.

Law and Literature: Halevi's Judgment

The study of the Kastner trial goes to the heart of the debate about the representation of the Holocaust in law and in literature. The debate is commonly understood in terms of a comparison between the relative strengths and weaknesses of each field in providing a responsible memory of the past. The two fields are viewed as providing independent representations based on different rules for reordering reality into a coherent structure.⁸ But this neat “discrete” view is called into question when we examine the first public confrontations with the Holocaust that occurred during the Kastner trial. In the court's judgment we encounter a complex interaction between the fields of law and literature. Literature provided stock stories that helped in attributing responsibility to recognizable individuals, while Law provided

7. Kastner was shot near his home in Tel Aviv on the night between March 3 and 4, 1957. The assassin belonged to an underground right-wing organization that was involved in the planning of terrorist attacks. The assassin (Zeev Ackshtein), the driver (Dan Shemer), and the head of the organization (Yosef Menks) were tried and convicted of murder. Weitz, *Ha-Ish she-Nirtsah Paamayim*, 332–36.

8. Lawrence Douglas, “Wartime Lies: Securing the Holocaust in Law and Literature,” *Yale Journal of Law and the Humanities* 7 (Summer 1995): 367–96.

a set of assumptions about human relations that made the messy reality fit the literary expectations.

It is common to divide legal judgments into two independent parts: facts and law. Most legal scholarship focuses on the latter component in which questions about the interpretations of statutes and legal precedents are at issue. The determination of the facts has traditionally been perceived as unproblematic, the result of applying rules of evidence and proof to testimonies and documents. But recently this relative lack of interest in the narration of “facts” has changed as legal scholars have discovered the relevance of narrative theory and studies of rhetoric. The nature of the defense used by Kastner’s lawyer offers a unique opportunity to scrutinize the process of narrating the facts in a trial. By invoking “truth” on behalf of his client, Tamir, the defense lawyer, impelled the judge to determine the historical “truth” about the Holocaust of Hungarian Jews using legal rules of proof and evidence. The Kastner judgment, therefore, was an attempt to reorder the historical facts according to legal doctrines. The result of this effort is a coherent narrative, two hundred and thirty-nine pages long, written according to the conventions of a psychological detective story and a morality play.

In his judgment Judge Halevi reorganized Gruenvald’s confused pamphlet into a four-point indictment against Kastner.⁹

1. Collaboration with the Nazis.
2. “Vicarious murder,” or “paving the way for the murder” of Hungarian Jewry.
3. Partnership with a Nazi war criminal [Kurt Becher] in acts of thievery.
4. Saving a war criminal from punishment after the war.

The transformation of the pamphlet into a list of four allegations symbolizes the inversion that had occurred during the trial. There the defendant (Gruenvald) had become the de facto accuser and the court had had to decide whether any of his claims against Kastner had any merit. Indeed, this was how the trial against Gruenvald acquired its popular name—the “Kastner trial.”

I focus on the two first accusations, which constitute the heart of the court’s judgment.¹⁰ These allegations supplied a simple response to the question that haunted the Israeli public at the time: what could account for

9. Cr.C. (Jm.) 124/53 *Attorney General v. Gruenvald*, 44 P.M. (1965) 3–241, 8. Unless otherwise noted, all translations from this source are mine.

10. The defense attorney proved allegation four by providing the affidavit Kastner had written in support of Kurt Becher. The court decided that allegation three had not been proved in the trial.

the “unheroic” deaths of millions of Jews during the Holocaust. Gruenvald’s accusations against Kastner had the potential of rehabilitating the masses of Jewish victims by attributing their deaths to deception and betrayal by their leaders. Indeed, Judge Halevi studied the “bargain” between Kastner and Eichmann in the light of the implicit question—did they go like lambs to the slaughter?

To address this tragic question required a story that would establish a causal link between the diverse facts that were presented in the trial: on the one hand, the lack of resistance on the part of the Jews of Kluj (Kastner’s home town) to boarding the trains, their misinformation about the destination of the trains and the fate awaiting them, and the absence of any efforts to sabotage the trains or to escape from the ghetto to the Romanian border; and, on the other hand, the inclusion (and thereby salvation) of the Jewish leaders of Kluj and Kastner’s relatives and friends in the “Bergen Belsen transport.” The judge found such a link by weaving a story that began with the temptation of Kastner by the Nazis, continued with his subsequent betrayal of his Jewish community, and culminated in his full collaboration with the Nazis. The essence of this judgment, which is related over many pages, is expressed in a sentence that appears at midpoint when Judge Halevi breaks the flow of his account with a seemingly disconnected observation: “But—*‘timeo Danaos et dona ferentis’* [beware of Greeks bearing gifts]. In accepting this gift K. sold his soul to the Devil.”¹¹

This sentence combines two archetypal stories: the Greeks’ victory over Troy and Satan’s victory over Faust. Years later, reflecting on the political turmoil surrounding the trial that had eventually led to Kastner’s assassination, Judge Halevi said that his words had been taken out of context and that he regretted having added this unfortunate paragraph to the judgment.¹² A close reading of the judgment reveals, however, that this literary allusion could not be so easily erased and that it, in fact, served as the glue that held Halevi’s judgment together. Indeed, the judgment sought to establish Kastner’s collaboration with the Nazis through an actual contract that had been signed between Kastner and Eichmann.

11. *Attorney General v. Gruenvald*, 51.

12. In an interview to the newspaper *Ma’ariv* on 3 October 1969 Judge Halevi stated: “This sentence was misinterpreted. In the judgment’s context where it appears it refers to the 600 emigration permits that Kromey gave Kastner in order to bind him to him, to make him dependent on Eichmann and the Gestapo. I explain there the extent of the temptation that was involved in Eichmann’s ‘gift’ . . . This literary allusion was not understood correctly, and if I had known in advance that it would be understood in this way I would have given up the literary term. It was not necessary.” Cited in Weitz, *Ha-Ish she-Nirtsah Paamayim*, 245.

The Contract with Satan

The very notion of selling one's soul to the Devil presupposes the existence of a contract. In this metaphor the judge emphasized what he took to be the main legal problematic of the Kastner affair—the contractual nature of Kastner's relationship with the Nazis.¹³ Moreover, the allusion to Kastner as one who had sold his soul to the Devil underlined his involvement as an act of rational and calculated choice, making it easier to attribute to him sole responsibility for assisting in the mass murder of Hungarian Jews. Contract doctrine supplied a language, constituted the legal subjects, and reorganized the temporal flow of the events, molding them into a familiar and comprehensible narrative.

The Kastner trial, however, was not an ordinary contract law litigation. After all, the case had come before the judge as a criminal libel trial against Gruenvald. Nevertheless, establishing the existence of a contract between Kastner and the SS was crucial to proving that Kastner had collaborated with the Nazis as Gruenvald argued. Judge Halevi had to decide when the contract had been signed, what its content had been, and whether it had been valid.

In relating the historical facts Halevi adapted the 1944 reality of Hungarian Jewry to the Zionist ideology that was prevalent at the time of the trial. The judge postulated that two mutually exclusive options had been open to Kastner and his partners in the Aid and Rescue Committee (*Va'adat Ezrah Vehatzalah*): the path of resistance, rebellion, and attempts at mass escape to neighboring countries or the path of negotiating an agreement with the Nazis that might save the Jews of Hungary.¹⁴ Kastner had chosen negotiations and thus, according to Halevi, had embarked upon a path that had inevitably led to full collaboration with the Nazis and to the betrayal of his people. The judgment describes this path from initial contacts, through a series of contractual offers and counteroffers, to an actual contract that was signed on May 2, 1944.

The first "offer" was made by a Nazi officer, Dieter Wisliceny, on the basis of a letter from Rabbi Weissmandel of Bratislava. This was addressed

13. The very structure of the judgment is such that after the "introductory" chapter (pp. 7–26) in which the judge presents the unsolved question (How is it that common people were led to Auschwitz without knowledge of their destination, while the leaders who encouraged them to board the trains found a safe haven in Switzerland?), he begins the judicial answer (the legal narrative) with the chapter entitled: "The Contract between Kastner and the S.S." See *Attorney General v. Gruenvald*, 26.

14. Contrast Halevi's binary approach to that of the historian Yehuda Bauer who surveys the spectrum of options that were open to the *Va'a'dat* and discusses them within the historical context of the time, Bauer, *Jews for Sale?* 145–71.

to three individuals in Budapest, urging them to continue the negotiations that he had begun with the SS about the "Europa Plan," a plan to save the remaining Jews of Europe in exchange for large sums of money.¹⁵ Wisliceny approached Fulop von Freudiger, leader of the Orthodox community in Budapest, Baroness Edith Weiss, an influential member of the richest and economically most important family in Hungary, and Rudolf Kastner, representing the Zionist group. Thereafter, Kastner and his colleague Yoel Brand seized the initiative and contacted Wisliceny with a counteroffer consisting of four obligations to be fulfilled by the Nazis in exchange for the money, including a promise to abstain from ghettoizing and expelling the Jews, to allow their emigration and spare their lives.¹⁶ The second "deal" that the judgment describes is that of Eichmann, who approached Yoel Brand with a proposal to exchange a million Jews for 10,000 trucks (also known as the "trucks for blood" proposal). Brand was asked to go to Istanbul and convey the proposal to representatives of the Jewish Agency and the Allies.¹⁷ Since this was the first time that the Nazis had agreed to the rescue of so many Jews in return for money and merchandise, Kastner and his committee were anxious to test whether their intentions were serious. Thus Kastner approached the Nazi officer Kromej with a proposal to allow the emigration of six hundred Jews (a number that later grew to 1685 people through negotiations with Eichmann) as an indication of the seriousness of the Nazis' intentions.¹⁸ It was this contract, allegedly signed on May 2 1944, that became the focus of Halevi's decision.

In the trial the two parties disagreed on the interpretation of this affair. Kastner claimed that he had not intended his initiative to replace the main contract to rescue the whole of Hungarian Jewry but to test the Nazis' intentions. From his point of view, this had remained such until the end. Tamir, on the other hand, argued that the whole negotiations boiled down to this contract, replacing all other initiatives. The judge preferred Tamir's interpretation and derived from this contract the main explanation for Kastner's subsequent betrayal of his people:

The benefit that K. gained from the contract with the Nazis was the rescue of the "camp of prominent Jews" and the price that he had to pay for this was a complete surrender of any attempts at real rescue steps benefiting the "camp of the people." The price the Nazis paid for this was to waive the extermination of the "camp of prominents." With this contract to save the prominent Jews, the head of the Aid and Rescue Committee made a "concession" with

15. *Ibid.*, 154.

16. *Attorney General v. Gruenvald*, 29–30.

17. *Ibid.*, 65. Bauer, *Jews for Sale?* 163–71.

18. *Attorney General v. Gruenvald*, 34.

the exterminator: in return for the rescue of the prominent Jews K. agreed to the extermination of the people and abandoned them to their fate.¹⁹

Judge Halevi stressed that the Nazis had used this contract to “tempt” Kastner and to bind him to them, thus drawing him into full collaboration.²⁰ “In accepting this gift,” namely, the contract of May 2, 1944, “Kastner had sold his soul to the Devil”—meaning that as the one responsible for his six hundred candidates for rescue, as long as his list of candidates was extended, his interest in maintaining the good relations with the Nazis increased accordingly. The rescue transport had depended until the very last moment on the good will of the Nazis, and that moment had come long after the destruction of all the Jews in the peripheries. In other words, according to Halevi, the promise of the transport to Switzerland (which occurred only in December 1944) had bound Kastner to the Nazis, and this accounted for the absence of any serious effort to rescue the Jews of Hungary as a whole.

The application of contract law to Kastner’s actions was needed in order to overcome the legal problem of how to attribute a criminal intention to a Jewish leader who had undertaken to rescue Jews. The accusation of “assisting the Nazis in the mass murder of Hungarian Jews” required proof that Kastner had known and intended the results of his actions. By finding a valid contract between Kastner and Nazi officials the judge could derive from it the needed “criminal intent” since every contract presupposes choice (free will) and is based upon appropriate knowledge of the outcomes. Establishing the existence of a contract could also transform Kastner’s failure to inform the Jews of the destination of the trains into an act of collaboration because his inaction could now be viewed as the result of a prior agreement between the parties. Halevi deduced Kastner’s intentions from the finding of a contract. The judge relied on the teaching of legal formalism, an approach that isolates the legal inquiry from the socio-historical context in which the transaction takes place. Halevi’s legal formalism supported the employment of a series of legal fictions as explained by the legal historian Pnina Lahav:

19. *Ibid.*, 111.

20. The judge divides his story into three subchapters: “Preparation to the Temptation,” “The Temptation,” and “The Dependence of K. on Eichmann.” *Ibid.*, 49–51. The description of the temptation is a dramatic moment in the judgment: “The temptation was great. K. was offered the opportunity to save six hundred souls from the impending Holocaust and a chance to somewhat increase their numbers through payment or further negotiations. And not just any six hundred souls, but those very people who were most important and deserving of rescue in his eyes, for whatever reason—if he wished, his relatives; if he wished, members of his movement; and if he wished, the important Jews of Hungary.” *Ibid.*, 51.

From a strictly legal point of view, the theory that Kastner entered into a pact with Satan rested on a series of fictions. The major premise was that Eichmann the Nazi commander and Kastner the chairman of the Jewish rescue committee were equal partners in a freely conducted negotiation. Two minor fictions proceeded from that major premise. The first was that Kastner's knowledge of the impending catastrophe was tantamount to criminal intent to assist the Nazis in murdering the Jews. The second was that Kastner's failure to share his knowledge with his fellow Jews made him a collaborator because "a person is presumed to will the consequences of his actions" and because the consequences of withholding information meant death to the majority of Jews.²¹

Contract law doctrine addresses the issue of when we are allowed to conclude from specific actions and words of the parties that they are bound by a contract. The appellate court took its investigation down this path when it reversed Halevi's judgment, focusing on the following questions: Can the parties to this contract be considered "equal" in any meaningful way? Can we infer the existence of free choice under extreme circumstances of inequality? Did Kastner's knowledge about Auschwitz amount to "full and certain knowledge" so that it can be considered as the intent to assist?²² For the purposes of our study of the legal representation of the Holocaust, I propose to take the opposite direction. I want to ask in what ways the finding of a contract by Judge Halevi shaped his conception of the protagonists' actions and of the historical narrative. My claim is that the lens of contract law allows us to see only a very restricted portion of the lives of the people who were involved in the negotiations. It was precisely this limitation that generated the image of Kastner as omnipotent and blameworthy in the image of his literary predecessor, Faust.

The Language of Contracts

As we have seen, the judge did not remain in the realm of literary myth but discussed a real contract that, in his view, had been signed between Kastner and Eichmann on May 2, 1944. On that day the Nazis had offered a concession—six hundred Jews would be allowed to leave Hungary for a safe haven—and in return, the judge concluded, Kastner had agreed to conceal information about the destination of the trains (Auschwitz) from the Jewish population. The judge described the affair in strictly contractual terms:

21. Lahav, *Judgment in Jerusalem*, 134.

22. *Ibid.*, 135–41.

Like every mutual agreement, the contract between K. and the leaders of the S.S. was made to the mutual benefit of both parties: each party got from the contract an agreed upon benefit and paid in return a carefully predefined price: the sum of benefits and the price for it were set in advance, all this according to the relative bargaining power of the two parties.²³

The language of contracts that dominates this paragraph, as well as the judgment as a whole, is used not only to attribute legal responsibility but also to allow Halevi to express his moral condemnation of Kastner's choice. This language, ordinarily employed for commercial transactions, here frames the barter arrangement about the lives of Hungarian Jewry, and this dissonance between subject matter and language was repeatedly emphasized by the judge. The judge ignored the fact that, although Kastner had employed this language in his correspondence, for Kastner himself the grotesque disparity between the language he used and its subject matter conveyed the tragic conditions of the Jews. Thus, Kastner wrote in one of his letters, "[i]n the last several days new people were brought into the negotiations whose appearance can be viewed as *deus ex machina*. The new *masters* are probably responsible for the comprehensive solution of the Jewish question. They have no friendly intentions towards us, but it seems that they do appreciate *fair partners* to the negotiations."²⁴ The tragic irony in Kastner's letter was that of a slave forced to play a game of free choice; this nuance disappeared from Halevi's reformulation. The judge selectively quoted from Kastner's letter to deliver his moral condemnation in a sarcastic tone: "[Kastner's] behavior proves his level of loyalty as a 'fair partner' to the negotiations with the 'new masters' who comprehensively 'solved' the Jewish problem of Hungary by way of a 'final solution.'"²⁵

The judge's moral condemnation consists, in part, of exposing the inadequacy of Kastner's language, a language that protects the speaker from acknowledging the full meaning of his actions. Halevi's reproach is augmented when we remember that this was a common technique among the Nazis themselves who employed it for the sake of secrecy and also to distance themselves from the harsh reality of their victims.²⁶ By drawing at-

23. *Attorney General v. Gruenvald*, 111.

24. My emphasis. A letter dated 14 May 1944 written by Kastner and Brandt to Sali Meir conveying a report on the development of the matter since their last letter of 25 April 1944. Quoted in *Attorney General v. Gruenvald*, 68.

25. *Ibid.*, 93.

26. In her testimony at Eichmann's trial, Hanzl Brandt, Kastner's partner, testified to Eichmann's moral deficiency, describing the "clean" commercial language that he used to block himself from the reality of his crimes. See *The Eichmann Trial: Testimonies* (Jerusalem, 1974) part B [Hebrew], p. 914: "My impression was that he was asking for a pure commercial environment, a simple transaction, we are two parties to this transaction."

attention to Kastner's language the judge shows how this attitude also infected the victims, or rather, the collaborators among them. The judge seems to imply that a purity of heart can be detected from one's choice of language.

The historian Saul Friedlander calls this phenomenon "affect neutralization." It consists not only of the use of "clean language," as demonstrated in Kastner's letter, but also of describing atrocities in a day-to-day language without acknowledging the incongruity.²⁷ Friedlander illustrates this latter point with sentences that consist of two essentially incompatible phrases such as "[A] at about the same time, the 'Lange Special Commando' arrived in Chelmno and [B] proceeded to construct temporary extermination facilities." He explains:

The first half implies an ordinary administrative measure, and it is put in totally normal speech; the second half accounts for the natural consequence, except that here, suddenly, the second half describes murder . . . Behind each sentence, the habitual structures of imagination impose themselves to hide the bare significance of the words.²⁸

Friedlander argues that the use of neutralizing language was pervasive among Nazis, and, ironically, he detects it also among prominent historians of Nazism.²⁹ In his view, "affect neutralization" is not restricted to sentences that use "clean language" to conceal the meaning of extraordinary crimes but can also occur in cases when the speaker uses explicit language about the crimes committed. Here, neutralization is achieved not by circumlocution of the criminal acts but by inserting them in the midst of familiar social conventions and moral norms. Friedlander demonstrates this technique with Heinrich Himmler's address of October 4, 1943 to the SS generals gathered in Posen:

The wealth they [the Jews] had, we have taken. I gave strict orders—which SS Gruppenfuhrer Pohl has carried out—that this wealth be promptly transferred to the Reich. We have taken nothing. The few who have committed a crime will be punished according to the order I gave at the beginning . . . We had the moral right, we had the duty to our people to annihilate the people who wanted to annihilate us. But we do not have the right to enrich ourselves, no matter if it were only a fur, a watch, a mark, a cigarette, no matter what it might be.³⁰

Friedlander explains: "Quite openly, Himmler talks to his audience about

27. Saul Friedlander, *Reflections of Nazism: An Essay on Kitsch and Death* (Bloomington: Indiana University Press, 1993), 95.

28. *Ibid.*, 91.

29. *Ibid.*, 92, 102.

30. Cited in *ibid.*, 102–3.

the annihilation of a people . . . But at the same time he undertakes the neutralization of what he is going to say by linking the action he describes—the extermination of the Jewish people—to stable values, to rules everyone acknowledges, to the laws of everyday life.”³¹

Friedlander’s analysis illuminates Halevi’s pervasive reliance on contract law doctrine throughout his judgment. Here, we can begin to see how Halevi’s opinion is itself implicated in the same errors for which he condemns Kastner. Even though Halevi rejects the “clean language” of Kastner, he chooses to discuss the whole affair within the framework of contract law. By adapting the events to contract doctrine, the judgment appeases the readers by showing them that the chaos and horror are, after all, coherent and explainable, that the familiar norms of contractual relations can be applied to the extraordinary circumstances of radical disparity of power, deceptions, threats, and uncertainty in which the negotiations were conducted.³² In short, by adapting the events of the period to the familiar order of contract law, the judge assures his readers that no rupture has occurred. It was only in the appeal that Justice Agranat undertook to expose the inadequacy of contract law to deal with these negotiations. He cited the words of Eichmann to Kastner during one of their meetings: “You seem extremely tense, Kastner. I am sending you to Teresienstadt for recovery; or would you prefer Auschwitz?”³³ Since contract law was so central in facilitating Halevi’s moral condemnation of Kastner, we should take a closer look at the central premises of contract law—free-willed agents, self-interestedness, meetings of wills, formal equality of the parties to the contract, full disclosure, strict responsibility for the outcomes—and how they were used by Halevi to adapt the actions of the “parties” to the normative world of business transactions.

The Protagonists (or Parties)

As in every contract, Kastner’s contract with Eichmann constituted its legal subjects. The language of contracts presented Kastner as a *self-inter-*

31. *Ibid.*, 103–4.

32. The straightforward application of contract law to the negotiations between Kastner and the Nazis also overlooks the fact that Kastner’s contract was with the “law” itself. For this reason Kastner could not rely on the “law” to enforce his “contract.” Kastner was in the position of an illegal gambler (for whom the law does not offer enforcement). As we shall see below, Kastner preferred the metaphor of a “game of roulette” as describing the nature of the relationship with Eichmann much more accurately. See below, note 56.

33. Cr.A. (Jm.) 232/55. *Attorney General v. Gruenvald*, 1958 (12) P.D. 2017, at 2043, 2076, cited by Lahav, *Judgment in Jerusalem*, 135.

ested, rational individual, always scheming how to exploit the reality of occupation in Hungary to further his own interests. Contract doctrine colored the negotiations in an individualistic light, obscuring the way in which a sense of responsibility toward his Jewish community shaped Kastner's decisions.

A contract is based on the legal presumption of a *meeting of wills* between the parties. By finding that a contract had been signed between Kastner and Eichmann the judge created the impression that there was no abyss separating their worlds, although he granted that the motives of the "parties" for entering into the contract must have been very different. However, for Halevi the distance between a mutuality of interests, the driving force of every contract, and full collaboration was not very great.³⁴ In this way, the existence of a contract enabled the judge to bind Kastner and Eichmann together and, at the same time, to isolate Kastner from his Jewish community (since the interests of Eichmann and the Jewish community were deemed opposed). Throughout his judgment Halevi failed to distinguish between the parties to the supposed contract and was thus willing to infer Kastner's knowledge from Eichmann's. And since the judge saw the events through the lens of contract law, he felt free to constantly shift between the points of view of Eichmann and Kastner to fill in the gaps in his historical narrative.

Another central assumption of the law of contracts is the *formal equality* between the parties. The judge's willingness to find a valid contract at the root of the Kastner-Eichmann relationship lent a sense of formal equality to the two parties. It obscured the radical inequality between the two men created by the conditions of terror, deceit, and uncertainty in which Kastner and his Aid and Rescue Committee operated. Moreover, by concentrating his investigation on one point in time, the signing of the contract, which occurred relatively early in the relationship, Halevi augmented the impression of equality. This impression was reinforced by the judge's use, throughout his opinion, of the initials K. and S.S. to refer to the parties to the contract. This use of initials, a common practice in legal documents, also served to erase the human faces of the parties and to depict them as symbols of their time, as archetypes: The Nazi and the Judenrat leader.

The protagonists in Halevi's narrative were depicted as fully informed agents; repeated reference was made to Kastner's boast that he was the best-informed person in all of Hungary.³⁵ This is important because unlike torts law or criminal law, both of which attribute individual responsibility according to the subjective intentions of the parties involved, contract law

34. *Attorney General v. Gruenvald*, 95.

35. See, for example, *ibid.*, 92.

demands full disclosure at the outset and, in turn, assigns strict responsibility to the parties according to the objective consequences of the contract, even if these were not planned or intended. Halevi relied on this legal presumption to conclude that Kastner had had all the information he had needed to come to a rational decision: “K. knew well the price from the very beginning of their contacts.”³⁶ Contract law allowed Halevi to ignore the subjective intentions of Kastner in entering the negotiations and to overlook the radical transformation in his original plan along the way. This approach facilitated the attribution of absolute responsibility to Kastner for the consequences of his actions—the death of approximately 400,000 Hungarian Jews.

Contract Time

The traditional formality of contract law also helped Halevi to represent the period of the Holocaust—a time of radical arbitrariness, uncertainty, and helplessness for the victims—as one that was nonetheless logical, rational, and most important, controllable. The political philosopher Hannah Arendt studied this need of human beings to control time with legal mechanisms. In *The Human Condition* she described the difficulties that the passage of time presents to human beings: their past cannot be erased, their future cannot be controlled. They struggle against this predicament with human artifacts, and central in this battle is the law. The possibility of forgiveness has the effect of retroactively changing the past. For example, the legal institution of official pardon (amnesty), exercised by the king or the president of a state, as well as the laws of limitation, make the desire to “change the past” feasible.³⁷ Similarly, our ability to promise and to bind ourselves to a certain course of action gives us a measure of control over the future. This practice is the basis of contract law. Of course, these are not perfect substitutes to having real control over time because what has been legally forgiven is still there, and contracts cannot predict and control all possible outcomes.

Halevi’s effort to impose a sense of order on the chaotic period he had to judge involved a temporal reorganization of the events, conveyed by the subtitles that he gave to the chapters of his story. He begins by presenting the consequences of the contract (“The Holocaust of the Periphery Towns”),

36. *Ibid.*, 105.

37. Hannah Arendt, *The Human Condition* (New York: Anchor Books, 1959), 212–19. See also Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 25–51.

then moves back to the starting point (“The Contract between Kastner and the S.S.”), and considers the interpretation of the contract (“The Meaning of the Contract with the S.S.”), and its main characteristics (“The Secrecy of the Contract with the S.S.”). The judgment then focuses on Kastner’s knowledge at the time of signing (“What Kastner Knew”) and concludes with the attribution of strict responsibility to Kastner. This construction of the facts is typical of a formalist approach to contract cases, but, when it is applied to historical events, it leads to anachronisms that obscure instead of clarifying the historical circumstances of the time.

The contract construction, with its focus on the moment of signing helped the judge to assume the existence of a crossroad at which a clear choice between the path of “treason” and the path of “heroism” was laid out. Kastner’s decision to cooperate with the Nazis was presented as the easier choice of certainty that had “foreseen consequences of saving only a well defined and limited number of Jews” with a very high “price” of abandoning hundreds of thousands of Jews to their fate, as opposed to the more heroic (and riskier) path of resistance (exemplified in the behavior of the Warsaw ghetto rebels). But in order to present such a clear-cut choice between two opposing paths, the messiness of historical circumstances had to be expelled from the legal narrative. This was achieved through the application of contract doctrine that focuses on one privileged point in time (the moment of signing). Chronological storytelling that gives equal attention to different points in time is not compatible with the logic of a contract.³⁸ A chronological tale, such as the one later offered by the appellate court, could limit Kastner’s responsibility by highlighting not only the moment at which the contract was concluded, but also the constant changes in the original plan, the conditions of terror, and the Jewish leaders’ growing despair.

Contract law also gave Halevi the freedom to move back and forth in time and to judge the events with *hindsight*. As I noted above, it allowed him to attribute later consequences to a prior plan and to hold Kastner responsible for these consequences. Indeed, Halevi even suggested that Kastner himself had assumed responsibility for what would follow, quoting Kastner’s own words at the time: “it is clear to me what lies in the bal-

38. We can perceive here a connection between time and narrative. Contract law expels time and encourages us to view Kastner as an archetype. When we are introduced to the archetypal story of how he “sold his soul to the Devil,” we grasp at once the beginning and end of Kastner’s story—there is no need for us to listen to the details as they unfold over time, and there is thus no need to listen to Kastner’s narrative. For an elaboration of the connection between time and narrative, see David Carr, *Time, Narrative, and History* (Bloomington: Indiana University Press, 1986).

ance . . . the loser in such (a roulette) game will also be called a traitor.”³⁹ Halevi missed completely the tragic implications of Kastner’s words that evoke an arbitrary game of chance. The retelling of facts in a way that obviates the role of chance is also illustrated in Halevi’s rejection of Kastner’s description of the rescue of his friends and relatives from a certain death at the hands of the Nazis as an “accidental success.”⁴⁰ The judge wrote that Kastner’s description was accurate “apart from the word ‘accidental’ . . . for this success was never ‘accidental’ but promised.”⁴¹ The fact that Kastner had had no certain knowledge about the destination of the “Bergen Belsen transport” was thus erased from the judgment, and the judge relied on subsequent knowledge that the occupants of this transport had been saved. Likewise, the hope that the negotiations would gain the Jews some precious time, and that the war would end before the plan to send the Jews to their deaths was implemented—sentiments that were repeatedly expressed in Kastner’s reports—was not given due weight by the judge when he balanced it against the knowledge that more than 400,000 Hungarian Jews had eventually been killed. Thus, the use of contract law allowed the judge to ignore the historical time in which Kastner’s actions had taken place, to reorder them according to a “legal time” of contract law, and to establish his guilt through hindsight.

The Literary Allusion to the Faustian Bargain

The temporal reorganization of the facts and the use of contract doctrine to depict the protagonist as educated, rational, and self-interested support the allusion to the popular story of Faust. The first reference to Faust in the trial was indirect. It appeared in a cited report by Pinchas Freudiger, a member of the Budapest Judenrat, describing the (non-Jewish) Hungarian leaders who rose to power under Nazi rule. Freudiger characterized them as “adventurers . . . whose sole purpose was to achieve power and who would *sell their soul to the devil* in order to get this power.”⁴² Judge Halevi reapplied this description to the Jewish leader, Rudolph Kastner, without pausing to distinguish the circumstances under which Kastner had acted from those of the Hungarian leaders. Ironically, Judge Halevi’s image of a

39. *Attorney General v. Gruenvald*, 56 (citing from Kastner’s report).

40. For a discussion of the elimination of the category of “chance” from the historical scholarship during the nineteenth century, see Reinhart Koselleck, “Chance as Motivational Trace in Historical Writing,” in *Futures Past: On the Semantics of Historical Time*, trans. Keith Tribe (Cambridge: MIT Press, 1985), 116–29.

41. *Attorney General v. Gruenvald*, 90.

42. *Ibid.*, 43.

Jewish Faust is reminiscent of the anti-Semitic origins of the legend in which Faust is depicted as a Jew, or, in other versions, moral blame is attributed to the Jew as the one who introduces a Christian man to the Devil.⁴³ The pact between Kastner and the Nazi devil demonizes Kastner and provides a psychological motive for his actions. Kastner is presented in the judgment as an opportunist who would have done anything to promote himself, even at the cost of half a million fellow Jews.⁴⁴

As mentioned above, Judge Halevi came to regret his statement about Kastner's selling his soul to the Devil. Now that the underlying structure of the decision has been reviewed, we are in a better position to decide whether the sentence could so simply be dropped from Halevi's opinion. I have thus far argued that the application of contract doctrines to the affair (above and beyond the single explicit reference) helped the judge to stress the similarity between Kastner and the literary figure of Faust. But the Faustian tradition consists of many layers and offers a variety of images—which of these “Fausts” does Halevi's Kastner resemble?⁴⁵

The traditional story that evolved during the Middle Ages depicted a brilliant scholar and sorcerer conjuring the Devil, making a pact with him, and after a contractually prescribed period of magical activity, perishing violently, his soul plunging down to the depths of Hell.⁴⁶ At the center of every Faust story is a contract. A contract also lies at the heart of Halevi's opinion. But the meaning of the Faustian contract and its implications vary from author to author and from period to period—and Halevi is no exception. Mann's *Faust* (1947) differed from Goethe's (1808), which had already proved different from the Faust of Marlowe (1592).

The historical Faust, Johann Faustus (born in Knittlingen and died in

43. Joshua Trachtenberg, *The Devil and the Jews: The Medieval Conception of the Jew and Its Relation to Modern Antisemitism* (Philadelphia: Jewish Publication Society of America, 1943), 23–26: “The earliest German version of the Faust legend pits a Jew against the devil, to whose wiles, of course, the Jew succumbs . . . Here it is the Jew's refusal to accept the true doctrine that renders him defenseless against Satan” (23). Trachtenberg traces the source of the Faust legend to another well-known legend about Theophilus where the Jew is depicted as a magician operating through the agency of Satan and introduces Theophilus the Christian to the Devil. These legends spring from the medieval fascination with the Devil and his association with the Jews.

44. The judge affirmatively quoted Moshe Kraus, the head of the “Israeli office” in Budapest, who described Kastner's immoral character to explain why he did not warn the people about the impending catastrophe: “When it concerns his own interests . . . he also lacks conscience. He has no conscience and no regard for others.” *Attorney General v. Gruenvald*, 93.

45. See E. M. Butler, *The Fortunes of Faust* (Cambridge: Cambridge University Press, 1952).

46. The first literary version known is found in the *Faust Chapbook* published by Spiess in Frankfurt am Maine in 1587. Butler, *The Fortunes of Faust*, 3–13.

1542), was a German astrologer and necromancer who probably studied at Heidelberg University. He was referred to as a doctor in the broad sense of the term, simply meaning that he was an educated man. Many of the later literary works retained this fact about Faust. Marlowe and Mann even titled their works *Doctor Faustus*.⁴⁷ Judge Halevi stressed Kastner's formal title of doctor (he received his degree in law) throughout his judgment. In the literary tradition, Faust's superior knowledge is either scholarly, artistic, or about the natural world. Kastner's superior knowledge, in contrast, was political: he knew of the pending destruction of European Jewry and, more specifically, according to Halevi, he knew about the destination of the Hungarian trains to the gas chambers in Auschwitz. The real Faust was a magician and an alchemist. Kastner himself was a journalist and a political activist, but when he negotiated with Eichmann over the plan to exchange 10,000 trucks for the lives of a million Jews, which Eichmann presented as a way to transform "worthless Jews" into a source of wealth for the Nazis, the deal entered the realm of alchemy.⁴⁸

In the Faustian tradition, the degree of Faust's moral fault is determined by whether he initiated the deal. Thus, in Marlowe's story, Faust conjures up Satan and is consequently condemned to Hell; in Goethe's story, the Devil initiates the transaction and Faust's soul is saved. In Halevi's story the issue of who initiated the deal is ambiguous because, as we have seen, there were several versions of the contract: the "Europe Plan" to exchange the Jews of Europe for two million dollars, initiated by Wisliceny; Kastner's and Brand's counteroffer consisting of four obligations to be fulfilled by the Nazis; the contract about the train of six hundred dignitaries designed by Kastner to test the seriousness of the Nazis' intentions about the "Europe Plan"; and Eichmann's offer to Brand to exchange a million Jews for 10,000 trucks, which was the basis of Brand's mission to Istanbul. We see then that by concentrating on the "Kastner train" the judge chose to focus on the one contract that was initiated and designed by Kastner, rendering him even more culpable according to the Faustian tradition.

Since determining the moral fault of Faust depends on his motivation, we must ask what motivated Kastner. The literature offers different answers to the motive underlying Faust's quest, such as knowledge, power, fame,

47. Christopher Marlowe, *Doctor Faustus*, with an introduction by Sylvan Barnet (New York: New American Library, 1969); Thomas Mann, *Doctor Faustus*, trans. John E. Woods (New York: A. A. Knopf, 1997).

48. The exact phrase used by Eichmann, "[t]o extract necessary labor from Hungarian Jewry and sell the balance of valueless human material against valuable goods," appears in War Refugee Board [United States], McClelland's report to Washington 8/11/44, cited in Bauer, *Jews for Sale?* 196.

wealth, and the pleasures of this world.⁴⁹ Even though Halevi acknowledged that Kastner's original aim was noble—saving Hungarian Jews from death—he stressed other elements that were more questionable. Kastner is depicted as a man from the provincial town of Kluj who sought to acquire power and influence in the Zionist circles of Budapest.⁵⁰ He acted in an opportunistic way, gradually gaining influence in the Aid and Rescue Committee and, thereafter, taking over the negotiations with the Nazis from the official Judenrat.⁵¹ Halevi suggested that Kastner's fascination with power also explained his desire to help the important Jews in the community (the "prominents"), since he viewed their rescue as his "Zionist and personal" success.⁵² Halevi also stressed Kastner's self-interest in the rescue plan—out of the 1685 passengers on Kastner's list, there were a few hundred from his own hometown of Kluj and a few dozen of his relatives, including his mother, wife, and brother.⁵³ As argued above, Kastner's character flaw was further emphasized by the choice of the language of contract, which has a strong individualist tone. In sum, Halevi's opinion stressed Kastner's ambition, his hasty decisions, and his failure to heed the good advice of other leaders as an explanation for his fall into temptation.

Although the original aim of the negotiations could still place Kastner in a noble light, the progression of the events as described by the judge revealed Kastner's moral degeneration, as though he were subject to a kind of "infection" that overtook those who dared interact with the Nazi devil.⁵⁴ Kastner associated more and more with the Nazis, learned their ways (drinking and gambling), and gradually separated himself from his Jewish community (for example, he chose to reside in Nazi hotels rather than Jewish houses).⁵⁵ The language used by Kastner, from which the judge often

49. See Butler, *The Fortunes of Faust*; see also J. W. Smeed, *Faust in Literature* (Westport: Greenwood Press, 1987).

50. *Attorney General v. Gruenvald*, 27.

51. *Ibid.*, 28–30. According to Freudiger's report (cited in agreement by the judge), Kastner deliberately provided incomplete reports so that no one could have a general perspective like his and compete with him for the leadership role. *Ibid.*, 46.

52. *Ibid.*, 51.

53. Segev, *The Seventh Million*, 265.

54. This is again reminiscent of the Faustian tradition that depicts the contract with the Devil as a kind of "infection." See J. P. Stern, *History and Allegory in Thomas Mann's Doktor Faustus* (London: H. K. Lewis, 1975), 11.

55. *Attorney General v. Gruenvald*, 223: "From January till April 1945 K. resided in Vienna without a Jewish backing. He did not act any longer as the head of the Rescue Committee of the Jews of Hungary and was dissociated from any Jewish public. In Vienna K. did not stay in the house of the Jewish community or in the Jewish hospital where a few hundred Jews still remained. Instead he lived in a hotel where S.S. officers stayed, and in which a room was ordered for him by the de-facto head of the Gestapo."

quoted, also consisted of “incriminating” metaphors from the world of card games and gambling.⁵⁶

For Halevi, the quest for power was not the only cause of Kastner’s moral corruption. The judge’s story hinted at another possible explanation by relating the rumor about the money and jewelry taken from the Jews as ransom by the Nazis. The Nazi officer Kurt Becher had allegedly returned this “treasure” to Kastner and they had divided it between themselves. The judge concluded that this accusation against Kastner was not proved, but its elaborate discussion in the judgment portrayed Kastner as a greedy person.⁵⁷

Kastner’s character was also cast in a poor light by his refusal to meet with the mother of Hannah Senesh to help release the heroine from her Hungarian prison. This was not part of Gruenvald’s accusations, and was irrelevant to the libel trial, but the judge nevertheless allowed testimonies and questioning on this issue and incorporated it into his judgment.⁵⁸ Hannah Senesh was an Israeli immigrant from Hungary who was sent by the British to Hungary as a paratrooper on an espionage mission and also to help organize the resistance and rescue of Hungarian Jews. She was caught by the Hungarian authorities, sentenced to death, and executed. The judgment created a strong contrast between the “heartless” Kastner busy with his quest for power, the “heartful” mother of Hannah Senesh begging him for help, and the “pure and heroic” Hannah, incorruptible even under torture.⁵⁹ This tale is reminiscent of the sins of the literary Faust who refused Gretchen’s pure love and subsequently caused her death.

Kastner’s travels in his attempts to save the lives of Jewish inmates in concentration camps (especially toward the end of the war) and his moving from one hotel to the next resembles the life of Faust, who did not have a permanent home and stayed in successive inns. Faust is depicted in the different versions of the story as a loner. He is not married, and his dealings with Satan to further his ambition and interests gradually drive him away from the company of ordinary people. Kastner, according to Halevi, similarly separated himself from the Jewish community by choosing to reside in hotels where Nazi officials stayed.

56. “We could not look behind Eichmann’s cards”; We chose “the German card”; “The loser in this game [of roulette] will also be called a traitor.” *Attorney General v. Gruenvald*, 49, 56.

57. *Ibid.*, 228–40. The association of Kastner, the Jewish leader, with greed also has an anti-Semitic tinge.

58. The judge relied on an analogy to the *Nazi and Nazi Collaborators (punishment) Law*, 5710–1950, article 15 that permits diversions from ordinary rules of evidence in order to get at the historical truth of the period.

59. *Attorney General v. Gruenvald*, 195–206. “The release [from prison] of this courageous, strong-willed, and rebellious young woman . . . would have been harmful to Kastner’s interests and contradict his collaboration with the Nazis. Hannah Senesh never surrendered to pressures of others and did not give up her mission” (205). Note that the contrast between heroism (Senesh) and betrayal (Kastner) acquires here a gendered structure, implying that an Israeli Woman is morally superior to a Diaspora Man.

Many of the Faust stories focus on his hubris—that of a man who purports to play God, transgressing the limits of human beings in scientific knowledge or creative powers. Indeed, Kastner aspired to go beyond the limits of human possibilities (trying to save a million Jews where everybody else had failed). In Halevi's story, however, the element of "playing God" acquired a very literal meaning because it involved deciding who would live and who would die (Kastner's list), the very embodiment of God's powers. Halevi argued that such a decision should never be made by a human being and saw in this the heart of Kastner's moral failure.⁶⁰ Moreover, in the literary tradition, Faust's visit to Hell, accompanied by Mephistopheles, is part of his "playing God." In Kastner's case this metaphor acquired a literal meaning when Kastner traveled to the man-made hell (Nazi concentration camps), together with the latter-day Mephistopheles (Kurt Becher), in order to prevent the murder of the remaining Jewish inmates. Ironically, instead of Faust's soul being saved at the last moment, in Halevi's version it is Kastner who saved the "soul" of his Mephistopheles from punishment by giving an affidavit on his behalf to the Nuremberg tribunal.⁶¹

Finally, there is the element of time. The price that Faust has to pay for transcending the human condition and tasting the knowledge, power, and creativity of God is to agree on a time limit to his own life on earth (twenty-four years). In religious versions of the story Faust also forgoes the possibility of eternal bliss in Heaven. This time limit resounds throughout the story like a ticking bomb, which Faust tries to stop in vain. For Kastner and his friends on the Aid and Rescue Committee, the race against time also played a crucial role. As the war approached its end, they tried to use the bargaining process with the Nazis in order to "buy some time" and delay the murder of the rest of the Jewish community.⁶² The time factor acquired

60. Compare this to Kastner's description of himself as Eichmann's puppet: "We knew that in front of us stands the general editor of the destruction of the Jews. But also the possibilities of rescue were in his hands. He—and he alone—decided on life and death." Here it is Eichmann who plays God (Kastner's report, p. 38, cited in *Attorney General v. Gruenvald*, 52).

61. *Attorney General v. Gruenvald*, 206–38. The transformation of literary fantasy into harsh reality under Nazi totalitarianism is discussed by Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1973). A recent movie by Roberto Benigni, *Life Is Beautiful*, attempts the opposite by trying to counter the harsh reality in the Nazi camps with an imaginative fantasy shared by a father and his child. The film tells the story of an Italian Jew who keeps alive his little boy's innocence in a Nazi concentration camp by pretending that the routines of the camp are no more than an intricate game staged for his son's benefit. In my opinion, this attempt fails, but while failing it nevertheless exposes the fantastical element in Nazi imagination.

62. "We did not have any illusions about the Nazi proposals, but we did not sit as judges,

a horrific urgency after Eichmann sent Brand to Istanbul with the condition that every day of delay in his return meant that 12,000 more Jews would be sent to Auschwitz.⁶³ All of Kastner's affairs were dominated by the knowledge that there was not enough time to save the Jews, and the haunting question was who would win in this game of time—Kastner (when the war ended) or Eichmann (when there were no more Jews left to kill).

A Moralistic Faust (or Kitsch and Death in the Courtroom)

Judge Halevi invoked the Faust story in his quest for answers about the meaning of good and evil under Nazi rule. In order to contain the chaotic historical reality, the judge relied on a literary tradition to help him identify evil and name it. The Faust story as used by Halevi seems to supply simple answers and to restore us to a world of order and meaning. The judge produced a moralistic narrative, which divided the world into clear and distinct categories of satanic evil and saintly goodness. Kastner was presented as the personification of evil, a selfish opportunist who sold out his community to the Nazis. The analogy between Kastner and Faust suggested that the nature of evil under the Nazi regime was no different from the evil familiar to us from great works of literature. This sense of familiarity discourages inquiry into the uniqueness of the events and into the true nature of cooperation with a totalitarian regime. Literature may have the power to protect us from the collapse of our moral order, but it can also prevent us from recognizing a new kind of evil. Is this a necessary consequence of trying to adapt reality to literary paradigms? And is it a reason to avoid literary devices or analogies in law?

My short answer to these questions is no. It is not literature as such, but rather Halevi's kitsch version of Faust that is responsible for flattening out the existential dilemmas that are so salient in the literary tradition. The judge confronted the Holocaust by creating an omnipotent and demonic Other on to which he projected the evil. The gradual demonization of Kastner had a double effect—it portrayed Kastner as a modern Faust, making it easier to blame him. But it also removed the story from the domain of human action, thus allowing the Israeli audience to avoid confron-

our role was to save the lives of Jews, and we had a duty to pass the proposal to the Jewish highest authorities for them to decide. We evaluated the chances as balanced, but not impossible. But we hoped that the Jewish agencies together with the Allies would find a way to continue the negotiation that we began, and to buy a lot of time by doing so." Kastner's testimony, pp. 42, 44, quoted in *Attorney General v. Gruenvald*, 66.

63. *Ibid.*, 68–69.

tation with the evil within. Literature, however, has more to offer than straightforward condemnation and closure. The judge ignored the rich literary tradition of Faust that could have supplied clues to understanding the psychological origins of the phenomenon of collaboration as well as the cultural sources of Nazism in Germany. Indeed, the literary critic Alfred Hoelzel argues that the four major reformulations of the Faust story (Chapbook, Marlowe, Goethe, Mann) should be read as attempts to understand the enigma of the relationship between good and evil:

[E]ach story purports to demonstrate human tragedy arising out of arrogance, disobedience, and a conspiracy with evil. Yet . . . the impetus for the rebellious behavior issues out of a wholly laudable instinct: the innate and insatiable human need to know, to discover, to understand . . . [here] essentially noble human ambitions, the quest for increased awareness of self, and environment, results in catastrophe.⁶⁴

Goethe was the first to break with the tradition of condemning Faust to Hell, providing instead a Faust whose aims are noble and admirable. As a man of the Enlightenment, Goethe could not bring himself to condemn Faust's pact with Mephistopheles. In an era when intellectual and political freedoms were ascendant, Faust's ambitions seemed more noble than transgressive. The good doctor's pact with the Devil is not concluded for instant gratification or the accumulation of wealth, but rather out of the desire to open up new vistas of inquiry and experience. Goethe even ends his poem with the words "He who exerts himself in constant striving, Him we can save." However, Goethe is not content with the simple Enlightenment message of the progress of good and an unambivalent upholding of the virtue of self-knowledge and self-assertion.⁶⁵ His fascination with the story lies precisely in the innate contradictions and ambivalence of Faust's actions. The author struggles with the realization that "[u]nalloyed good does not exist; good links inseparably with evil. To strive for a particular good or virtue, then, means to strive inevitably for its obverse evil side . . . Every exercise of good and noble may actually produce, paradoxically, evil results."⁶⁶ This realization leads him to criticize Kant's notion of "radical evil" in a letter to the Herders dated June 7, 1793: "However Kant, too, sinfully soiled his philosophical coat with the *shameful stain of radical evil*, after having spent a lifetime cleansing it of all sorts of filthy prejudices."⁶⁷

64. Alfred Hoelzel, *The Paradoxical Quest: A Study of Faustian Vicissitudes* (New York: Peter Lang, 1988), 160.

65. This message, however, is delivered in an outline of Lessing's version of Faust that was not developed any further. See Butler, *The Fortunes of Faust*, 113–25.

66. Hoelzel, *The Paradoxical Quest*, 81.

67. *Ibid.*, 86 (my emphasis). An interesting comparison can be made to Arendt's rejection

Goethe offers his Faust poem as a counterview of Good and Evil, in which the one cannot exist independently of the other. The actions of Faust demonstrate the interconnections between the realms in such a way as to blur their traditional distinctions. Accordingly, Goethe resists a simple resolution to his Faust and hopes that it will become “an unresolved problem that constantly entices people to think about it.”⁶⁸

Hence it was not literature as such that obscured Judge Halevi’s view of evil and its multiple facets, paradoxes, and ambiguities, but a certain version of it. What can explain, then, the judge’s choice of a moralistic-religious version of Faust as a literary vehicle for understanding Jewish cooperation with the Nazis? Perhaps part of the answer lies in the fact that Halevi was a German Jew and thus had to confront a double betrayal—that of the Jewish leaders, including religious leaders, who chose to cooperate with the Nazis and to save their own families, and that of his homeland (Germany), the country of Goethe and Mozart, embodiment of the ideals of humanity. Both betrayals demanded explanations and the judge found them in the popular version of the Faust legend, which is closer to the older Chapbook version where Faust’s sin condemns him to Hell, and which he turned into a story about the Nazi devil and the morally corrupt Kastner.

Halevi has not been the only one to invoke the more traditional image of Faust in order to answer the painful issues raised by National Socialism. The German writer Thomas Mann, seeking a literary vehicle that would allow him to come to terms with the history and culture that had produced the evil of Hitler, also found his cue in the Faustian tradition. Mann, who regarded National Socialism as a concrete historical instance of the Faust story, aimed to repudiate and rescind the Goethean affirmation of Faust’s career in his novel *Doctor Faustus*. Mann felt compelled to expose with unmitigated candor the evil side of the Faustian mission. His *Doctor Faustus* leaves little doubt about the mission of his protagonist (the composer Leverkuhn) and its implications. Leverkuhn’s career ends ignominiously in pain, suffering, insanity, and humiliation. However, unlike Judge Halevi (or for that matter, Thomas Mann’s son Klaus Mann, the author of *Mephisto*), Thomas Mann does not present us with a one-dimen-

of Kant’s notion of “radical evil” as inadequate to describe Eichmann’s moral fault and its replacement with the notion of “the banality of evil.” See letter from Hannah Arendt to Karl Jaspers, New York, December 2, 1960, in *Correspondence*, 409–10. For further discussion of this issue, see Richard J. Bernstein, *Hannah Arendt and the Jewish Question* (Cambridge: MIT Press, 1996); Leora Bilsky, “When Actor and Spectator Meet in the Courtroom: Reflections on Hannah Arendt’s Concept of Judgment,” *History and Memory* 8.2 (Fall/Winter 1996): 137–73 at 150.

68. A letter dated February 13, 1831, quoted by Hoelzel, *The Paradoxical Quest*, 106.

sional protagonist or disregard the ambiguities in his protagonist's quest for a creative "breakthrough." On the contrary, Mann finds in the Faust figure and his Janus face the key to understanding the duality in the German people—a deep-seated need for order and strict obedience combined with an equally strong proclivity for fantastic flights of the imagination.⁶⁹ The fascination of Germans with the Faust legend turns out to be more than mere literary taste; it offers a mirror to the nation's soul, especially to its attraction to fascism and its complacency towards the deeds of that regime.

Transferring these insights from literature to the law is, of course, problematic because of the inherent differences between the two fields. Literature as a medium is able to explore the ambiguities and the gray areas of human actions, while law demands resolution and is consequently limited in this respect. I would suggest, however, that there might be another factor at work here. We should remember that although the seeds of ambiguity were already present in Marlowe's version of Faust, it took several centuries until these ambiguities came to the fore and gave shape to the whole story. In the process the story underwent substantial transformations (religious propaganda, morality play, tragedy, and so forth). Halevi's judgment, in contrast, was the first encounter of an Israeli court with the Kastner affair, and it turned out to be only the first step in the reception of the Kastner story, which sparked a long process of coming to terms with Jewish responsibility. Thus, a few years later (and after the political assassination of Kastner) the story acquired a new formulation and meaning in the appellate judgment of the Israeli Supreme Court (discussed below). A much more subtle and complex version of the events was presented in the opinion of Justice Simon Agranat, who transformed the image of Kastner from villain to tragic figure. This suggests that it is not the legal discourse as such that is responsible for simplifying the moral dilemma, but rather the combination of a certain legal doctrine (contract law) with a specific jurisprudential approach (legal formalism) embedded in literary allusions. Before turning to the appellate court, however, I will complete my discussion of Halevi's opinion and see how the "pact with the Devil" was combined with another literary allusion, "the Trojan Horse," to shape the legal narrative into a conspiracy story.

From Contract to Gift: The Trojan Horse

As already noted, Halevi's observation "But—*'timeo Danaos et dona ferentis.'* In accepting this gift K. sold his soul to the Devil" linked the story

69. Hoelzel, *The Paradoxical Quest*, 168–69.

of Kastner to two cornerstones of the Western literary tradition. If the literary allusion to Faust was mainly sustained through the language of contracts, the allusion to Homer's story of the Trojan horse introduced a very different logic to the judgment—the logic of gifts. More precisely, this is a story about a deceitful gift that was meant to assure victory over the enemy at minimum cost.⁷⁰ Contract and gift would seem to be opposites, but Halevi's words make them complementary: “[i]n accepting this gift K. sold his soul to the Devil.” How could Kastner have been both the well-informed agent of a contract and the victim of a deceitful gift? Judge Halevi's account had to solve this seeming contradiction in order to offer a coherent explanation.

The opinion gradually uncovers different layers of the contract and brings the reader to a surprising discovery. At the immediate level Halevi examined the visible contract between Kastner and Eichmann to exchange Jewish lives for two million dollars. This contract might be condemned for the very willingness to negotiate with the Nazis, but it still fell within the reasonable (though not heroic) realm of legitimate attempts to save Jews. The suspicion that there was something immoral in the contract arose when the initial contract intended to save the lives of all the Jews of Hungary shrank to one aimed at saving a small group of six hundred “privileged Jews.” (As we recall, the judge rejected Kastner's contentions that this contract was merely meant to test the Nazis' real intentions.) The judge found the most sinister aspect of the deal with the Nazis in the “low price” that Kastner paid for adding another six hundred people to the original list: “The permission to emigrate was given to an additional six hundred people without real payment, it was an extraordinary ‘gift’ in Nazi terms.”⁷¹ Questioning the authenticity of such a generous “gift” from the Nazis, the judge sought its real meaning in the ancient story about the Trojan horse.

Law treats the categories of gifts and contracts as distinct and even opposed to each other. A contract entails a reciprocal transfer (*quid pro quo*)—something passed from one party to another. A gift, by contrast, is understood as a unilateral transfer—I give you something for nothing. However, as legal scholar Carol Rose demonstrates, the law is suspicious about the existence of “pure gifts.” Different legal doctrines aim to expose what at

70. “Timeo Danaos et dona ferentis,” meaning “do not trust all acts of apparent kindness,” comes from Virgil's *Aeneid* 2.49. Having besieged Troy for more than nine years because their admired Helen was a captive there, the Greeks pretended to abandon their quest and left the Trojans a “gift” of a wooden horse; once the horse was taken within the walls of Troy, Greek soldiers poured out of its hollow interior and destroyed the city. See Virgil, *The Aeneid*, trans. Rolfe Humphries (New York: Macmillan, 1987). For a retelling of the story, see Rex Warner, *Greeks and Trojans* (London: Macgibbon and Kee, 1951), 177–84.

71. *Attorney General v. Gruenwald*, 36.

first glance may appear to be a gift, but in fact turns out to be a contract in disguise, or (more sinisterly) larceny based on fraud and deception.⁷² This suspicion has to do with the understanding that only reciprocity indicates voluntarism, which is missing in a gift. And so, the gift transfer becomes something of an anomaly: “it is a leftover category with no easy scenario, because it seems to be voluntary without being reciprocal.” Legal doctrines for scrutinizing gifts have the effect of emptying the category, turning it into “contract” or “larceny.”⁷³

Judge Halevi shared the skepticism of the law toward the “gift.” Since there is no such thing as a “free lunch,” he looked for the Nazis’ real motivation for their sudden generosity. The judge explained that since the Nazis realized it would be extremely difficult to organize the destruction of the 800,000 Jews of Hungary with their diminishing resources, with the war approaching its end, and with the threat of another “Warsaw Ghetto Uprising,” the “Kastner list” was constructed by Eichmann as a modern-day “Trojan horse” in order to make their task easier. By allowing a limited number of “privileged Jews” to be saved, Eichmann obtained the cooperation of the Jewish leaders and diverted their attention from their duty to warn their communities about the upcoming transfer to Auschwitz, channeling their energy into composing the “lists” instead of organizing escape and resistance plans. Indeed, the judge concluded that the so-called “gift” had been very effective in paralyzing the Jewish leaders and in separating them from their communities. The “extraordinary gift” turned out to be fraudulent and dangerous.⁷⁴ This would seem to exculpate the Jewish leaders from responsibility for accepting the gift (apart from their failure to see through the deception) unless we return to an older understanding of gifts. In the ancient world, a gift was understood to create an implicit obligation

72. Carol M. Rose, “Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa,” *Florida Law Review* 44 (1992): 295–326. This mistrust of gifts is also apparent in the anthropological literature that demonstrates how what appears to be a gift can be explained as a contractual exchange (obligatory and self-interested). See for example Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies*, trans. W. D. Halls (New York: W. W. Norton, 1990).

73. Rose, “Giving, Trading, Thieving, and Trusting,” 298, 300. (Rose suggests taking the opposite direction and discovering the “gift” element in ordinary contractual transactions.) For a reflective essay about the need to retain the singularity of “gift” as a distinct category from “contracts,” see Jacques Derrida, *Given Time: I. Counterfeit Money*, trans. Peggy Kamuf (Chicago: The University of Chicago Press, 1992).

74. This “dark side” of gifts can be traced back to the etymology of the word *dosis* in Latin and Greek, which means both “gift” and “poison.” “The Latin and especially Greek use of *dosis* to mean poison shows that with the ancients as well there was an association of ideas and moral rules of the kind we are describing.” Derrida, *Given Time*, 36, referring back to his note to “Plato’s Pharmacy” in *Dissemination*, trans. Barbara Johnson (Chicago: University of Chicago Press, 1981), 131–32, 150–51.

towards the bestower of the gift. The very willingness to accept the gift from Eichmann placed moral blame on the recipients, just as the Trojans assumed partial responsibility by accepting the Greeks' gift.⁷⁵ The judge wrote, "the organizers of the destruction . . . allowed K. and the Judenrat in Budapest to save their kin and friends in the peripheral cities 'for free' in order to *commit* them to the Nazis."⁷⁶ But this could not be the whole story, because the judge also wanted to distinguish between the Judenrat members and Kastner and to attribute sole responsibility to the latter.

The allusion to the story of the Trojan horse is problematic in legal terms because it seems to undermine Kastner's legal responsibility for being deceived by the enemy's gift. In order to attribute such responsibility to Kastner, the judge had to show that, in his case, the "gift" was not a fraud but rather a "contract in disguise."⁷⁷ Since the implicit contractual element of gifts is not obvious, the judge juxtaposed the two narratives about Faust and the Trojan Horse in one sentence, thus indicating that for Kastner the gift was actually a contract. In return for the "gift" (the rescue of the 1685 Jews on Kastner's list) Kastner would have to pay the agreed upon "price" of collaboration with the Nazis (concealing the information about the impending destruction of the Jews in the ghettos).⁷⁸ At the same time, the sentence about Faust and the Trojan horse allowed the judge to distinguish

75. The moral blame of the Trojans is traced back to the warning given to them by the prophet Laocoön ("Are you crazy, wretched people? Do you think they have gone, the foe? Do you think that any gifts of the Greeks lack treachery? . . . Do not trust it, Trojans, do not believe this horse. Whatever it may be, I fear the Greeks, even when bringing presents" [lines 50–60]), a warning that they ignored. Likewise, Judge Halevi blamed Kastner for ignoring a warning given by Moshe Kraus, the head of the "Israeli office" in Budapest, that the negotiations were a "dangerous Nazi plot." *Attorney General v. Gruenvald*, 32.

76. *Ibid.*, 39.

77. The judge overlooked an important distinction between "gift" and "contract" that lies in their relation to time. Mauss (as interpreted by Derrida) reminds us that in a barter society, the idea of gifts introduces into the relations of people the interval of time. In other words, the difference between a barter-contract and a gift is that while the former demands immediate reciprocity, the latter "gives time" to the recipient before returning the (value of) the gift. The real element of gift in a gift turns out to be time. Derrida, *Given Time*, 41: "The gift is not a gift, the gift only gives to the extent it *gives time*."

Eichmann's proposal to Brand and Kastner that they exchange "trucks for blood" returned them to a barter society (the subject of Mauss's study). Kastner and Brandt, who did not have the trucks at their disposal, could only hope from this bargain for the "gift of time" as a way of saving the Jews. Their whole bargaining was aimed at gaining time. Judge Halevi missed the point of the bargaining by reducing it into a quid-pro-quo transaction devoid of any "deferral" in time.

78. The judge writes: "All the above circumstances come to show that it was very clear to K. from the beginning of his negotiation with the Nazis until the destruction of the ghetto of Kluj, what was the *price* that was expected and taken by the S.S. for saving his relatives and friends in Kluj; this price included, with the full knowledge of Kastner, the cooperation of the leaders in Kluj." *Attorney General v. Gruenvald*, 105.

between Kastner and the other Jewish leaders. While the Judenrat members in the provincial towns were in fact misled by the gift (Trojan Horse), Kastner knew all along its real meaning and assumed responsibility for its consequences (Faust).⁷⁹

The connection between the two stories becomes clearer from the way in which the judge presented his conclusions regarding Kastner's culpability:

I asked myself and K. how was it possible that at the same time that [his partner] Brand was trying to shock all the leaders of the free world and urge them to action, K. made ten phone calls to one of the leaders in [his hometown] Kluj and did not warn him about the destination of the trains? . . . The interest of K. in keeping the secret was not an accident . . . The behavior of K. was systematic and logical indeed: to guarantee the rescue of the prominent people, including his relatives and friends, he was *bound* to keep silent.⁸⁰

In other words, Kastner was working on behalf of the enemy and deliberately concealed from the Jewish leaders his knowledge that the "list" was a veritable Trojan horse. It was for this so-called "gift" that Kastner was willing to sell his soul to the Devil. Moreover, since Kastner was selling much more than his soul, that is, the lives of the Jews of Hungary, the contract was finally exposed to be a *conspiracy* between Kastner and the Nazis. This conspiracy, the judge suggested, was the key to understanding the difference between Kastner and other Jewish leaders.

Conspiracy Theory

The portrayal of Kastner as the archetypal conspirator evokes the common anti-Semitic stereotype of Jews as world conspirators.⁸¹ From the story of Jesus of Nazareth to the story of the elders of Zion, Jews have been feared and despised because of their alleged tendency to betray their friends and conspire against them. In Halevi's judgment, the conspiracy theory first

79. *Ibid.*, 96: "The leaders of Kluj were not heroes, they did not withstand the strong temptation created by the rescue plan designed by K. and the Nazis. This plan acted on the camp of the privileged Jews like a collective bribe, that brought them, whether they noticed it or not, to collaboration with the Nazis." In pages 101–15 of the judgment, the judge explains Kastner's full responsibility for securing the collaboration of the Jewish leaders.

80. *Ibid.*, 91–92.

81. Arendt, *The Origins of Totalitarianism*, 76: "It is well known that the belief in a Jewish conspiracy that was kept together by a secret society had the greatest propaganda value for anti-Semitic publicity, and by far outran all traditional European superstitions about virtual murder and well poisoning."

appears in a quotation from a conversation between Kastner and Eichmann. In reply to Kastner's asking how he could explain to the Hungarian authorities that a group of "prominent Jews" would be moved from the town of Kluj to Budapest, Eichmann answered: "We won't have difficulties with the Hungarians. I told the Hungarian officer that we uncovered a dangerous *Zionist conspiracy*. . . . I told him that we cannot put the conspirators together with the rest of the group, otherwise they will create disquiet and interfere with their labor."⁸² In fact, the stereotype of Jews ruling the world through a conspiracy can partly explain the initial decision by Himmler to offer the exchange of "Jews for trucks" via Eichmann to Kastner. Himmler may have been influenced by Nazi propaganda about Jewish control of Western leaders, and he may have hoped to create a bridge to the West via the negotiations with Kastner.⁸³

Conspiracy theory appeared in an altered form when it was reintroduced in the earlier Nuremberg Trials. In order to link the atrocities committed by the low-ranking Nazi functionaries to the Nazi leaders, and to attribute to the latter full legal responsibility, the prosecution in Nuremberg resorted to the criminal law of conspiracy. This law holds every conspirator responsible for all the acts committed by others in connection with the conspiracy.⁸⁴ The legal doctrine of conspiracy helped the tribunal to adapt "war" to the judgment of a court by viewing it as "a conspiracy organized by a few evil men, and as such quite analogous to domestic crimes of violence."⁸⁵ This legal conception of a Nazi conspiracy to wage an aggressive war influenced the intentionalist school of Holocaust historiography.

When we move from Nuremberg to Jerusalem there occurs a second inversion of conspiracy theory (bringing us back full circle). In the Kastner trial, the underlying narrative advanced by the judgment was that of the old Jewish conspiracy, which shifted the blame back to the victims by condemning Kastner for conspiring with the Nazi leaders.⁸⁶ Halevi's judg-

82. *Attorney General v. Gruenvald*, 57.

83. Bauer, *Jews for Sale?* 168: "The Jews, in Himmler's ideology, were the real enemies of Nazism. They ruled the Western Allies and they controlled Bolshevik Russia . . . A basic desire to murder all the Jews does not contravene a readiness to use them, or some of them, as hostages to be exchanged for things that Germany needed in its crisis; the negotiations could be held with either the foreign Jews themselves or with their non-Jewish puppets."

84. For a critical discussion of the use of criminal conspiracy in Nuremberg, see Judith Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964), 171–77.

85. *Ibid.*, 177–78.

86. Since the trial was not a criminal trial against Kastner, but a libel trial against Gruenvald, criminal conspiracy was not a legal charge brought against Kastner. The legal discussion concentrated on the question of whether Kastner "assisted" the Nazis in bringing about the mass murder of the Jews of Hungary. Only in the narration of the facts, and in order to find a causal link between the actions of Kastner and the destruction of Hungarian Jewry,

ment reads like a story within a story, uncovering a conspiracy between a Nazi and a Jewish leader eager to save his relatives and friends and willing to deliver the members of his community to the Nazis in exchange.

The Appeal—The Judgment of Justice Agranat

Justice Agranat's opinion, long and methodical, reversed almost all of Halevi's legal findings. It revealed that the law as such does not necessitate a black-and-white understanding of Evil and that it offers subtler tools than the ones used by Halevi to understand Kastner's decision to cooperate with the Nazis. A central change in the legal narrative occurred as a result of Agranat's firm rejection of contract law as irrelevant to deciding the case. In Agranat's opinion the so-called "contract" was illusory, because contract law requires some measure of equality between the parties and the exercise of free will, both of which were missing in the conditions of terror and deceit created in Hungary under Nazi rule.⁸⁷ This "factual" disagreement with the trial court discloses a more fundamental disagreement about legal jurisprudence: Judge Halevi employed the teaching of legal formalism to support his finding of a valid contract, while Justice Agranat relied on a more contextual approach to conclude that there was not enough evidence to support such a finding.⁸⁸ Thus, Agranat stressed that the psychological devices used by the Nazis, central among them their willingness to help family members of the people with whom they negotiated, undermined Kastner's contractual obligations.⁸⁹

Justice Agranat replaced the framework of contract law with that of administrative law, moving from the language of contractual obligations

do we encounter conspiracy as an organizing theme of the judge's historical narrative. For the need to distinguish between the meaning of causality in law and in history (and a warning about the conflation of the two through conspiracy law), see Shklar, *Legalism*, 194–99. Like any good conspiracy story, the language of secrecy is dominant in Halevi's narrative. He refers to the "Reich's secret" and says that "the secret of the rescue was transformed into a secret about the extermination." *Attorney General v. Gruenvald*, 57, 62–63.

87. Appeal, *Attorney General v. Gruenvald*, 2017, 2076.

88. Lahav, *Judgment in Jerusalem*, 135.

89. Appeal, *Attorney General v. Gruenvald*, 2099. Interestingly, similar questions about the possibility of equality and free will arise in the literary controversy about Faust's moral blame, given the trickery and lies of Mephistopheles and the enormous inequality between the parties. There are scholars who argue that Faust was simply blind to the invalidity of the contract. Halevi's blindness is similar in this respect to Faust's. (I thank Carol Rose for suggesting this analogy.) Indeed, Goethe, who was aware of this problem, tried to equalize the position of the parties by transforming the "contract" into a "wager."

to the language of *reasonable* actions and *balancing of interests*.⁹⁰ This decision calls for a close study of the different ways in which a change in legal discourse can shape the narration of the facts. However, in the space of this essay I can only offer an outline of how the introduction of administrative law doctrine (and sociological jurisprudence) influences our conception of the *protagonists* and the *historical time* of their actions. We saw how contract law painted Kastner in individualist and egoist colors. This was no longer the case in Agranat's opinion. Agranat argued that Kastner understood himself as a leader whose responsibility was to the community as a whole, and not to each individual separately. Administrative law, not contract law, better captures this aspect of Kastner's actions because it deals with the questions of how to balance the different interests of individual members of the community and how to reach a reasonable decision under conditions of uncertainty. Contract law, by contrast, perceives responsibility in terms of a personal obligation toward each member of the community individually on the basis of full disclosure and knowledge.

Contract law comes under the "private" side of the classical divide between private and public law, while administrative law comes under the "public" side.⁹¹ This fact partly accounts for the transformation in how Kastner's actions were perceived. Administrative law is collectively oriented since its emphasis is not on the private interests of the actor but on the leader's public duties towards his or her constituency. Moreover, instead of the absolutism of contract law (when interpreted according to a formalist approach) administrative law can allow gradations and uncertainties to enter into the actor's calculations. In accordance with this change Agranat quoted a legal authority saying that "certainty" itself is only high proba-

90. Appeal, *Attorney General v. Gruenvald*, 2080–82. Judge Halevi acknowledged at one point in the judgment that the relevant legal question was about a breach of trust by a public official (moving him in the direction of public law). However, he did not elaborate on this point because the signing of the "contract" constituted, in his eyes, a breach of this trust. See *Attorney General v. Gruenvald*, 110, 111. The difference between Halevi and Agranat can be attributed to their understanding of Jewish life in Europe. While Agranat was willing to see it in terms of self-governance (hence public law), Halevi remained within the framework of private law. (I thank Pnina Lahav for suggesting this point.)

91. It should be noted, however, that Justice Agranat himself was critical of the formalistic division into private and public categories. He exposed the blurring of the categories in the case of a libel trial where criminal law and civil law come together. The relevant question according to Agranat was about what standard of proof (civil or criminal) to apply to a libel trial defense that claims "I told the truth." Agranat believed that this decision required *balancing conflicting interests* (free speech and protection of the good name of individuals) and could not be decided by simply choosing the standard of proof according to the legal classification of public and private law. For elaboration, see Lahav, *Judgment in Jerusalem*, 129–30.

bility.⁹² Interestingly, this also allowed Agranat to undermine the moralistic tone of Halevi's decision by questioning the relations between law and morality. The discourse of probabilities common in administrative law translated Kastner's language of "gambling" into acceptable legal terms of "reasonable chances," thereby weakening Halevi's morally charged quotations from Kastner's words. This change was important because Halevi's judgment seemed to imply a seamless transition between the world of Kastner in occupied Budapest and that in Israel of the 1950s. It overlooked the fact that what would be considered virtuous under the radical conditions in which Kastner had worked (illegal forgery of documents, bribing government officials, lying in negotiations, and so forth) is very different from what we value in a leader in ordinary times. Agranat sought to correct this error by introducing a legal doctrine that could be adjusted to these different conditions, one that would be able to consider the need to "gamble" in human lives, to take risks and to use trickery.⁹³ Administrative law, with its language of balancing of interests (Agranat actually used the verb reconciling), allowed him to break away both from the moral absolutism of Halevi's judgment and from its binary world view.⁹⁴ In sum, administrative law doctrine allowed the judge to depict Kastner as a responsible leader (instead of an omnipotent one), responsive to the needs of his community at large (rather than acting out of selfish considerations). He described Kastner as a leader forced to make difficult decisions under impos-

92. Appeal, *Attorney General v. Gruenveld*, 2063; citing from Glanville Williams, *Criminal Law—the General Part* (London: Stevens and Sons, 1953): 36.

93. There is, however, an ambiguity in Agranat's approach of how much legal positivism (i.e., separating law from morality) is required in a judgment that raises such complicated moral dilemmas. On the one hand he insists on their separation (reasonable for the law is not necessarily morally approvable). Appeal, *Attorney General v. Gruenveld*, 2120: "There will be those who will argue that from a strictly *moral* point of view, and no matter what the practical considerations are, it was the duty of the head of the Committee to allow the leaders of Kluj to decide for themselves about the significance of the information about Auschwitz and to determine alone the fate of their community members. My answer to this will be that this matter belongs to the question of the *reasonableness* of the means that were chosen by Kastner to save the Jews of Hungary from destruction. It is a question of whether the line of financial negotiations with the Nazis raised the chance of achieving this mission." But at other times Agranat seems to argue that also from a strictly moral perspective Kastner should not be condemned. See, for example, *ibid.*, 2082: "My opinion is that even if Kastner did not achieve his aim, one cannot condemn him morally, under one condition—that he was allowed to think, given the circumstances at the time, that the way of commercial negotiations with the Germans offered the best chance—even the only chance—of saving the majority of the Ghetto Jews.

94. Appeal, *Attorney General v. Gruenveld*, 2064–65 (the choice of the word "reconciling" is even more striking given the fact that Agranat is quoting from an English source that uses the more neutral term "balance").

sible conditions of uncertainty, deceit, and time pressure. In this way, Agranat's Kastner came to resemble Goethe's tragic hero whose motivations were noble but whose acts often resulted in catastrophe.

Administrative law doctrine also helped Agranat to reorder the *time frame of the narrative*. We have seen how contract law erases historical time by focusing on two points in time—the signing of the contract and its ultimate outcome—while ignoring the fluctuations in the circumstances, knowledge, and intentions of the parties between these moments. The contractual time frame allowed Halevi to judge with hindsight by attributing later (objective) results to earlier (subjective) intentions of the parties. The reintroduction of time into the judgment forces us to listen to Kastner's own words at different points in time and to notice differences. Agranat argued that the main danger in Halevi's approach came from the failure of the judge to put himself in the shoes of the "protagonists." As a corrective, he recommended that the judge should attempt to "put himself in the shoes of the participants themselves; evaluate the problems they faced as they might have done; take into consideration sufficiently the needs of time and place, where they lived in their lives; understand life as they understood it."⁹⁵ In *Foregone Conclusions* Michael Bernstein connects the dangers of retrospective judgment (which he calls backshadowing), prevalent in literary and historical accounts of the Holocaust, to the temporal framework that these writers impose on the events. Bernstein urges that "backshadowing" be replaced with "sideshadowing," an approach that allows the reader to remember the alternatives and possibilities that were present at the time when the actors made their decisions: "The Shoah as a whole . . . can never be represented plausibly as a tragedy because the killing happened as part of an ongoing political and bureaucratic process. In the domain of history . . . there are always multiple paths and sideshadows, always moment-by-moment events, each of which is potentially significant in determining an individual's life, and each of which is a conjunction, unplotable and unpredictable in advance of its occurrence, of specific choices and accidents."⁹⁶ I believe that Agranat sought to achieve such "sideshadowing" by turning to administrative law doctrine, which does not fix our attention on one or two points in time. Rather, it allows the judge to put himself in the shoes of the actor, describing the process of calculating probabilities on the basis of uncertain and partial knowledge as an ongoing one, in which at each point in time the actor is expected to balance the risks and opportunities and to act accordingly.

95. Ibid., 2058. Translated by Lahav, *Judgment in Jerusalem*, 132.

96. Michael A. Bernstein, *Foregone Conclusions: Against Apocalyptic History* (Berkeley: University of California Press, 1994), 12.

Justice Agranat went even further by the reintroduction of historical time into the judgment. Instead of framing the progression of the narrative according to legal doctrines, he arranged the legal discussion according to the chronology of events.⁹⁷ This move exploded the illusory sense of continuity with the practices of normal life that the application of contract law to the Nazi era created. In Agranat's opinion, the chaotic times (and not contract law) provide the only framework in which we should interpret the meaning of the so-called, "contract" between Kastner and Eichmann. Thus, the judge allowed the impact of history (the approaching end of the war, the increasing number of trains to Auschwitz, the delay in the West's response, and so forth) to dawn on the reader. This undermined the possibility of producing a legal narrative with moral closure.⁹⁸ Instead, the justice's opinion reads like a chronology that leaves us with many open-ended moral questions and with legal answers that do not pertain to absolute knowledge and certainty. A humble opinion.

Agranat's choice of legal doctrine affects not only the narration of the historical facts but also invites readers to consider Kastner the man as opposed to the archetypal figure of Dr. K. Kastner was a Zionist committed to the Enlightenment ideals of activism, self-help, and self-assertion. Indeed, unlike many Hungarian Jewish leaders who could not conceive of breaking the law, Kastner and his rescue committee aided illegal Jewish refugees by providing them with forged passports and by helping them settle in Hungary even before the Nazi invasion.⁹⁹ Moreover, as a Zionist, Kastner did not see himself limited to conventional ways of action (which

97. Instead of Halevi's dramatic subtitles like "Preparation for the Temptation," "The Temptation," "K's Dependency on Eichmann," "The Origins of Secrecy," Agranat divided the decision chronologically: "From 19.3.44 to 7.7.44 (the holocaust in the provincial towns)"; "From 8.7.44 to 14.10.44 (time of recess)"; "From 15.10.44 to the end of December 1944 (the partial expulsion of the Jews of Budapest)." Appeal, *Attorney General v. Gruenvald*, 2022.

98. For the difference between narrative and chronology in terms of moral closure, see Hayden White, "The Value of Narrativity in the Representation of Reality," in *On Narrative*, ed. W. J. T. Mitchell (Chicago: The University of Chicago Press, 1981), 1–23. Bernstein rejects the need to produce historical narratives with closure in order to allow "the point of view of any single moment in the trajectory of an ongoing story [to have] significance that is never annulled or transcended by the shape and meaning of the narrative as a (supposed) whole." See Bernstein, *Foregone Conclusions*, 28.

99. Bauer, *Jews for Sale?* 156: "The official Judenrat leaders were of the upper-middle-class Jewish elite; they were loyal and law-abiding Hungarian citizens whose life styles and views made them utterly unprepared for the calamity." See also Hansi Brandt's testimony in Eichmann's trial about the illegal activities of the rescue committee, *The Eichmann Trial: Testimonies*, 911. See also the documentary film *Free Fall* (director Peter Forgacs, Hungary, 1996) based on home-movie footage that was produced between 1939–1944 by a Hungarian Jew (Gyorgy Peto) from a wealthy assimilated environment. The film demonstrates these

relied on the help of Hungarian authorities) and was willing to try radical action such as negotiations with the Nazis over fantastic plans such as the “blood for trucks” idea.¹⁰⁰ The aims of the Rescue Committee were indeed grand—to save a million Jews of Europe, with the financial and material help of the Western allies and Jewish funds all over the world (through the Jewish Agency). Kastner was not of the passive brand who would sit and wait for the Nazis to approach him; rather, as we saw, he initiated many of the meetings and designed grandiose proposals for the Nazis.¹⁰¹ Paradoxically, it was this very activism of Kastner that attracted Eichmann’s attention. The latter especially feared an uprising similar to that of the Warsaw Ghetto and, therefore, directed his best efforts at deception to disarm Kastner and his committee. In fact, Kastner’s story could shed some light on the limits of Zionist action under a totalitarian regime. However, Judge Halevi preferred myth to the bleak reality. For example, when the judge dealt with the failure of the Israeli paratroopers who were sent to Hungary to organize the rescue of Jews, he simply attributed their failure to betrayal by Kastner, thereby retaining the Zionist myth of heroism.¹⁰² Justice Agranat, on the other hand, deliberately expelled myths from the court of law and tried to learn from this incident the limits of “heroic action,” given the historic conditions of the Jews at the time.¹⁰³ His judgment combines a legal doctrine more receptive to uncertainties and ambiguities, a sociological jurisprudence that insists on situating the actors in their socio-historical circumstances, and a methodical chronological account open to side-

observations by juxtaposing images of private life among Szeged’s wealthy assimilated Jewish family and written texts (citing the “Jewish laws” passed by the Hungarian Parliament) and vice-overs that situate these happy scenes in their grim historical context.

100. Freudiger, a member of the Budapest Judenrat and an orthodox religious Jew, emphasized this point in his testimony on the “trucks for blood” plan:

I told him [Kastner] that it would not be any good. First of all, one cannot provide the enemy with trucks . . . money can be exchanged . . . but trucks?! How do you intend to get them? From whom? He [Kastner] said: In Istanbul there is a rescue committee, there are representatives of the Jewish Agency, and we can fix it. I told him that I didn’t think this would work. *He said: You are not a Zionist, this is why you think it will not work. I said: Yes, I am not a Zionist, but aside from this I do not think this is possible . . . Attorney General v. Gruenvald*, 66 (my emphasis).

101. The Nazis on their part used the grand aims of the Zionists against them. For example, when Kastner and his friends approached Eichmann and suggested allowing a limited number of Jews to emigrate, Eichmann reacted by saying that this plan was not big enough to provide a total (in Nazi terms “final”) solution to the Jewish problem. *Attorney General v. Gruenvald*, 49–50 (quotation from Brand’s report, 20–22).

102. *Ibid.*, 178–189.

103. Appeal, *Attorney General v. Gruenvald*, 2176. (He referred to conditions such as no statehood, no international support, terror and deception, and so forth.)

shadowing and lacking a narrative closure. In retelling Kastner's story, Agranat also changed the tone from that of an ironic, omniscient judge to that of an empathic one who explicitly acknowledges the limits of his knowledge and warns against taking his account for the "final arbiter" of truth about this affair.

Concluding Remarks: Law and Literature, an Antinomy?

By choosing to study the Kastner trial with the help of narrative theory, I join the growing field of law and literature.¹⁰⁴ This scholarship has different branches and interests such as the study of representations of law in works of literature, the study of the uses of narrative techniques in legal argument and judgment, and the introduction of narrative theory into academic legal scholarship. Here I have examined ways in which a narrative approach affects legal reasoning and judgment, especially in times of a crisis of judgment such as the one created by the need to confront the Holocaust in a court of law. A common approach to the subject is to distinguish between two models of judgment: scientific/abstract and contextual/historical. The argument often made in support of the narrative approach is that the introduction of literary sensitivities to the process of legal reasoning will enrich the law and help produce more contextual judgments sensitive to human differences and historical contingencies. Thus, for example, Martha Nussbaum relates the two modes of judgment to two visions of human beings: "an abstract pseudo-mathematical vision of human beings and a richly human and concrete vision that does justice to the complexity of human lives."¹⁰⁵ She argues that aspects of the literary imagination such as *sensitivity to qualitative differences, individual separateness, and appropriately constrained emotions* can help develop a new type of legal neutrality, one that does not depend on detachment and abstractness, but on the ability to "visit in the imagination" the social worlds of people from marginal and subordinated social groups.¹⁰⁶

104. See, for example, Richard Weisberg, *Poetics and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992); Robin West, *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1993); Richard Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, Mass.: Harvard University Press, 1988); James Boyd White, *Heracles' Bow* (Madison: The University of Wisconsin Press, 1985); Peter Brooks and Paul Gewirts, eds., *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1996).

105. Martha C. Nussbaum, "Poets as Judges: Judicial Rhetoric and the Literary Imagination," *University of Chicago Law Review* 62 (1995): 1477–1519, 1479.

106. *Ibid.*, 1480–81.

Robert Weisberg has doubts about the validity of such an approach:

Does it show that humans tend to think more narratively than conceptually and deductively? Doubtless true. Does it mean that progressive legal reform or moral enlightenment, or political revolution will occur when we stress and celebrate the narrative part of law and condemn as reactionary or irrelevant the supposedly old world of cold abstraction? This seems highly questionable, yet it is exactly what many scholars posit as the logical—and correct—consequence of enhancing the link between law and literature.¹⁰⁷

Although I agree with Weisberg, I believe that the main problem is not the false expectation that literature will enrich legal reasoning and produce nuanced and contextual judgments, but rather the assumption that literature is somehow inherently connected to only one type of jurisprudence (sociological). Throughout the article I sought to show that there is no necessary connection between literary imagination and contextual legal judgments. Indeed, a more historical approach to the law and literature school in American law reveals that this connection was the result of a specific historical development: the movement away from legal formalism, begun in the Thirties by legal realists, was continued by contemporary schools of legal thought as diverse as law and economics, critical legal studies, feminist legal theory, and the narrative approach to law. However, as the Kastner affair teaches, the connection between the narrative approach and legal antiformalism is a contingent one. Indeed, the Kastner trial suggests a very different constellation in which literary tropes support a formalist approach to law. This combination can be explained by the deep affinity between law and literature as two practices trying to satisfy (in different ways) the yearning for coherent reality and mastery over chaos.¹⁰⁸ This need becomes all the more urgent when we are confronted with the radical chaos, contingency, and arbitrariness that was experienced by the victims of the Holocaust. Judge Halevi tried to gain some comprehension and a sense of control by adapting this reality to the abstract categories of human action and motivation offered by law and literature. The senseless deaths of the 400,000 Jews of Hungary was assigned its legal meaning by

107. Robert Weisberg, "Proclaiming Trials as Narratives: Premises and Pretenses," in *Law's Stories*, 61–83, 65.

108. As early as 1930 the legal realist Jerome Frank identified this function of law: "Man . . . driven by fear of the vagueness, the chanciness of life, has need of rest. Finding life distracting, unsettling, fatiguing, he tries to run away from unknown hazards . . . [and] to postulate a legal system . . . free of the indefinite, the arbitrary and the capricious." Jerome Frank, *Law and the Modern Mind* (1930; Garden City, N.Y.: Anchor Books, 1963), 196–97. For an interesting discussion of the relations between law and literature in this respect, see Gretchen A. Craft, "The Persistence of Dread in Law and Literature," *Yale Law Journal* 102 (1992): 521–46.

identifying the moment (the signing of the contract) at which the catastrophe could and should have been avoided. Relying upon a system of cause and fault, the arbitrary was made predictable and comprehensible. And lacking legal precedents about the phenomenon of collaboration, the judge resorted to literary precedents and interpreted Kastner's actions in the light of literary tropes about evildoing from the Faust and the Trojan Horse legends. As the study of the Kastner trial shows, the use of literature by the court supported the erasure of the historical context from the judgment and helped to obscure the individuality of Kastner, who was presented as Dr. K.—the symbol of the decay and corruption of Jewish leaders during the Holocaust.

Ironically, the errors in the judge's narrative were first detected not by a legal expert but by the acclaimed Israeli poet Nathan Alterman, who was quick to notice and condemn the judgment in a series of polemical poems that were published in his weekly column "Hatur Hashvii" in the newspaper *Davar*.¹⁰⁹ In his private notes Alterman wrote:

When he [the judge] surveys this chapter [the Kluj story] alone, in isolation from other chapters—presenting an isolated survey and reaching general conclusions—he in no way assists the nation to learn the necessary lesson. He contributes not at all to the knowing and comprehension of the reasons and processes . . . The cerebral and seemingly rational structure rests on a single chapter, thus distorting the content [of the whole] . . . and perhaps even distorting the chapter itself.

The error that Alterman identified stems from one of the fundamentals of legal reasoning—the restriction of the investigation to a particular event. Alterman argued that this technique, beneficial in answering legal questions, not only created serious distortions in the historical understanding of the period but also was unable to shed light on Kastner's psychological motives, since his actions could not be understood outside this historical

109. The first poem (1 July 1955) "Around the Trial" consists of three parts that are devoted to different aspects of the trial ("Two Paths," "The Nature of the Accusation," "The Tone of Discussion"); second poem, "More about the 'Two Paths'" (22 July 1955); third poem, "Judgment by Principle" (29 July 1955); fourth poem, "About the Moral to the Generation" (12 August 1955). The poems appear edited and revised in Alterman's *Ketavim Be-Arbaa Kerachim* (Tel Aviv: Ha-Kibbutz Ha-Meuhad, 1962) 3:421–40. For explanations of the poems and a detailed discussion of the Alterman controversy, see the interpretive essay by Dan Laor in Nathan Alterman, *Al Shtei Ha-Derachim* [Between Two Roads], ed. Dan Laor (Tel-Aviv: Ha-Kibbutz Ha-Meuhad, 1989), 114–55, especially 122–23. For a comparison between the Arendt and Alterman controversies in the light of the role of the intellectual in the Holocaust trials, see Leora Bilsky, "In A Different Voice: Nathan Alterman and Hanna Arendt on the Kastner and Eichmann Trials," *Theoretical Inquiries in the Law* 1(2) (July 2000): 509.

context. Alterman concluded his diary entry by saying, “In the many sections in which he [the judge] treats the underlying personal motivations, the judgment reads like a *psychological novel*; and it is primarily on the basis of these chapters of psychology, which the judge serves to us on a platter, that the verdict is reached.”¹¹⁰ A similar criticism of law can be found in a short essay on the trial of Dominici by the literary critic Roland Barthes :¹¹¹

Periodically, some trial, and not necessarily fictitious like the one in Camus’s *The Outsider*, comes to remind you that the Law is always prepared to lend you a spare brain in order to condemn you without remorse, and that, like Corneille, it depicts you as you should be, and not as you are. (44)

Justice and literature have made an alliance, they have exchanged their old techniques, thus revealing their basic identity, and compromising each other barefacedly. (45)

Barthes distinguishes between two types of literature used by law: “literature of repletion” and “literature of poignancy.”¹¹² In his view not literature as such, but a literature that was content to use psychological typologies and literary conventions to elide differences in human subjectivity and social conditions proved to be fatal to Dominici’s attempt to explain his actions in the courtroom. Indeed, when we view Kastner’s trial in this light, we see that the literature enlisted to condemn Kastner, and which may have led to his assassination, was the kitsch, moralistic version of the Faust legend. But, as we have seen, other more ambivalent and complex versions of this legend, which were developed in different periods, could have better equipped Judge Halevi to address the Jewish leaders’ decision to cooperate with the Nazis. My rejection of an essentialist approach to literature also applied to my reading of the different legal judgments of Kastner. I attempted to show that there was nothing inherent in legal judgment that constrained the judge from “visiting in the imagination” the worlds of those who lived under Nazi rule and had to make difficult decisions, as indeed was demonstrated by the appellate judge, Agranat. Interestingly, Agranat’s attempt to reintroduce the historical context that had been eliminated from

110. Alterman, *Kastner’s Notebooks* (private notes, not published) (on file in Alterman’s Archives, Tel Aviv University).

111. Roland Barthes, “Dominic, or the Triumph of Literature,” in *Mythologies*, trans., Annette Lavers (London: Vintage, 1972), 43–46. Gaston Dominici, the eighty-year-old owner of the Grand Terre farm in Provence, was convicted in 1952 of murdering Sir Jack Drummond, his wife, and daughter, whom he found camping near his land.

112. Barthes, “Dominic,” 46. In the original French text they are called: “la littérature de réplétion” and “la littérature du déchirement.” Roland Barthes, *Mythologies* (Paris: Éditions du Seuil, 1957), 53.

the trial court's judgment was reinforced by his refusal to narrativize the drama of Kastner. His chronological, deliberately anti-narrativist account supported the shift in legal discourse from contract law to administrative law and from legal formalism to sociological jurisprudence.

Applying a narrativist approach to the Kastner affair suggests that law cannot promise moral enlightenment or progressive politics. By paying attention to the narrativist aspects of legal judgment I have tried to reveal the more general significance of the Kastner trial—an important juncture in the political struggle over the meaning of the Zionist revolution and its promise to create a new Jew. In Halevi's judgment the legal, political, moral, and literary discourses were blended in a particular way to produce a representation of the Holocaust that dominated Israelis' perception of the period until the Eichmann trial.

A Man Lost in the Gray Zone

DAVID LUBAN

The Rudolf Kastner trial was one of the three great scandals that rocked Israeli party politics in the 1950s (the others were the negotiations with Germany for Holocaust reparations and the so-called “Lavon affair”). Although Leora Bilsky describes it as an “almost forgotten trial,”¹ it has not been forgotten by subsequent writers: it makes an important cameo appearance in Arendt’s *Eichmann in Jerusalem*; it features prominently in Tom Segev’s *The Seventh Million* (1991); Yehuda Bauer’s *Jews for Sale?* (1994) takes pains to refute the charges against Kastner; and it inspired two novels—Amos Elon’s *Timetable* (1980) and Neil Gordon’s cerebral thriller *The Sacrifice of Isaac* (1995). But the legal opinions have never until now attracted the thought or analysis they warrant, and Bilsky deserves gratitude for remedying this omission. With admirable insight and ingenuity, Bilsky focuses on the construction of the legal opinions as a form of literature. Her reading of Judge Halevi’s and Justice Agranat’s opinions centers on the way in which law is driven by metaphor—in Halevi’s case, the metaphor of contract; in Agranat’s, the metaphor of administrative decision making. Her article is a major contribution to our understanding of the Kastner case and to the way that, in a situation of intense moral ambiguity, legal analysis can be predetermined by a choice of metaphors.

I found Bilsky’s critique of Halevi’s opinion illuminating and accurate, with a few qualifications that I discuss below. Her analysis of Agranat’s opinion and her own view of Kastner (which closely resembles Agranat’s) raise more doubts. At the end of the day, however, I still find myself unable to answer the two basic questions, Who is Kastner? and How shall we judge what he did?

1. Leora Bilsky, “Judging Evil in the Trial of Kastner,” *Law and History Review* 19 (2001): 118.

David Luban is Frederick Haas Professor of Law and Philosophy at Georgetown University Law Center.

It seems that everyone has a story to tell about Kastner. For Arendt, “the strange Mr. Kastner”² is an emblem of the feckless *Judenräte*, who turns out to be morally less interesting than Eichmann, the “devil” to whom Halevi’s opinion says he sold his soul. For Segev, Kastner is a sympathetic figure, deluded perhaps, but ultimately someone enmeshed in the same Sophie’s-Choice-like game that every Israeli rescuer had been playing for years. The real story for Segev is the politics of the trial itself. Bilsky is more sympathetic to Kastner’s plight than either of these authors, following Agranat and Bauer in viewing Kastner as a resourceful Zionist rescuer taking a bold but unsuccessful gamble to save Jewish lives. By contrast, Kastner’s persecutors saw him only as a symbol of the moral evil represented by the Mapai (Labor) Party, a self-seeking collaborator with Nazi evil. But, after pondering all these accounts of the Kastner story, I cannot escape the suspicion that the man and the choices he made remain fundamentally opaque and inscrutable.

I have three aims in this comment: first, to explain the few hesitations I have about Bilsky’s interpretation; second, to place Bilsky’s work in the historiography of the Kastner case by contrasting it with Arendt’s and Segev’s accounts; third, to explain why, at the end of the day, I fear that Kastner himself remains a cipher lost in the gray zone.

I

“The gray zone” is Primo Levi’s label for the demimonde of Lager and ghetto inmates who imitated, collaborated with, or assisted the Nazis in return for marginally better treatment for themselves or others. They include the kapos in Auschwitz who bullied and brutalized their fellow inmates, the Special Squads who performed the physical labor of the gas chambers and crematoria, the clerks and helpers and camp administrators and ghetto bosses. Their motives varied widely: “terror, ideological seduction, servile imitation of the victor, myopic desire for any power whatsoever, even though ridiculously circumscribed in space and time, cowardice, and, finally, lucid calculation. . . .” Importantly for understanding Kastner, some were heroes playing a dangerous game of double agency. And some only thought they were heroes.

Levi believes that we are fully entitled to exonerate or to condemn some of the inhabitants of the gray zone. But about others, he confesses *impotentia judicandi*. Consider the Auschwitz Special Squads—snatched direct-

2. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. (New York: Viking, 1963), 197.

ly from the boxcars, exhausted, bewildered, starving, then placed immediately to work in the crematoria, on pain of instant death (only to be killed a few months later by their own replacements). Levi pleads as follows: "I ask that we meditate on the story of the 'crematorium ravens' with pity and rigor, but that judgment of them be suspended." Consider Chaim Rumkowski, the bizarre self-anointed "king of the Jews" who ruled at Nazi sufferance over the Lodz ghetto, minting coins with his own image, yet sometimes taking substantial risks on behalf of his "subjects." Levi writes that man "becomes all the more confused . . . the more he is subjected to tensions: at that point he evades our judgment, just as a compass goes wild at the magnetic pole."³

Levi's effort to probe and chart the gray zone is tremendously important, but even more important is his very acknowledgment that it exists. Compare his nuanced approach, for example, with the view of Lucy Davidowicz, who categorically asserts that no Jewish leaders ever cooperated or collaborated with the Nazis. Davidowicz is able to reach this conclusion only because she identifies collaboration with treason: a collaborator was a Jew who hoped for a German victory. Yet she, too, acknowledges that, as the Final Solution took shape, some Jewish leaders tried to buy time by outfitting and supplying the German army and that eventually none of them had any option except "bargaining with the Devil"—the very phrase that Judge Halevi hurled at Kastner, borrowed by Davidowicz, obviously with the Kastner case in mind, to *defend* the Jewish leadership. Surely, bargaining with the Devil places them in the gray zone; etymologically, anyone who worked side-by-side with Nazis collaborated. But Davidowicz refuses to acknowledge shades of gray. Instead she quotes Zelig Kalmanovich: "'All are guilty, or perhaps more truly, all are innocent and holy.'"⁴

By contrast, Levi writes from a sense of two irresistible pressures. On the one hand is the pressure of the facts themselves, a pressure to withhold judgment where the moral preconditions of judgment seem so sparse. On the other hand is the fundamental human need to make sense of morally significant events by passing judgment on the men and women who, whatever their role, brought them to pass. That is: despite his repeated pleas not to judge the unjudgeable, Levi understands that remaining agnostic in the face of evil is a defeat. We need a map of the gray zone. And that is not just because we have an emotional need to judge the unjudgeable, but also because not all of its inhabitants are unjudgeable.

3. All the quotations come from Primo Levi, *The Drowned and the Saved*, trans. Raymond Rosenthal (New York: Vintage, 1988), 43, 60, 64.

4. All passages quoted from Lucy S. Davidowicz, *The War against the Jews, 1933–1945* (New York: Bantam, 1975), 348, 352, 353.

Where in the gray zone do we find Kastner, negotiating for the lives of his fellow townsmen and relatives, bargaining out Eichmann and Himmler's insane trucks-for-blood deal, testifying after the war on behalf of his Nazi bargaining partners? That Kastner belongs in the gray zone seems undeniable; but where he belongs in it, and whether he belongs among those who can be judged, remains obscure.

II

It was in April and May 1944, mere weeks before the beginning of the Final Solution in Hungary, that Kastner—a former journalist, a member of the Labor Zionist organization in Hungary, and vice-president of the Rescue Committee—negotiated the deal with Eichmann that formed the heart of the case against him. There are two differing accounts of the deal. Kastner said that it was a Nazi offer to sell six hundred Hungarian Jews—later bumped to almost 1700—for six million pengö (about \$1.6 million), which the Jewish community succeeded in raising. Eichmann reported the terms of the deal differently (although this was not known at the time of the Kastner trial): Kastner, said Eichmann, “agreed to keep the Jews from resisting deportation—and even keep order in the camps—if I would close my eyes and let a few hundred or a few thousand young Jews emigrate illegally to Palestine. It was a good bargain.”⁵ No matter which version of the deal is correct—both Eichmann and Kastner had ample motive to lie if the other's version is true—a total of 1684 Jews, carefully culled to include representatives of all major sections of Hungarian Jewry, were placed on a train to safety.⁶ (Borrowing Kastner's own biblical metaphor for the rescue train, let me label this the “Noah's-ark deal.”) Damningly for Kastner, they included almost four hundred from his hometown of Kluj, including several of his relatives. The implication that Kastner had helped Eichmann by deliberately failing to warn the Hungarian Jews of the fate in store for them, and that he had done so in return for saving “his” 1700 people, is the most serious accusation against him.

What was it like to negotiate with Eichmann? To get some sense of it, we may examine a second negotiation that Kastner was involved in, the trucks-for-blood deal. This story begins with Yoel Brand, a former Communist activist, Zionist, and expert on the underground rescue of Jews.

5. Quoted in Raul Hilberg, *The Destruction of the European Jews* (New York: New Viewpoints, 1973), 543, from *Life*, 5 Dec. 1960, 146. The six million pengö figure also comes from Hilberg. I have not examined the newly released Eichmann memoirs on this episode.

6. Bilsky says 1685 (“Judging Evil,” 126), but the sources I have consulted all say 1684.

Around the time of the “Noah’s-ark” deal with Kastner, Eichmann summoned Brand to his office in the Budapest Hotel Majestic and said:

Do you know who I am? I have carried out the *Aktionen* in the Reich—in Poland—in Czechoslovakia. Now it is Hungary’s turn. I let you come here to talk business with you. Before that I investigated you—and your people. . . . And I have come to the conclusion that you still have resources. So I am ready to sell you—a million Jews. All of them I wouldn’t sell you. That much money and goods you don’t have. But a million—that will go. Goods for blood—blood for goods. You can gather up this million in countries which still have Jews. You can take it from Hungary. From Poland. From Austria. From Theresienstadt. From Auschwitz. From wherever you want. What do you want to save? Virile men? Grown women? Old people? Children? Sit down—and talk.⁷

As the negotiations proceeded, Eichmann agreed to a piecemeal deal to demonstrate his honesty (“You think we are all crooks. You hold *us* for what *you* are. Now I am going to prove to you that I trust you more than you trust me.”)—first, one hundred thousand Jews for a thousand trucks, then, for every additional thousand trucks an additional hundred thousand Jews. Eichmann told Brand that, as a sign of good faith, he would blow up Auschwitz as soon as the deal was consummated (a blatant lie, as Eichmann had no authority to do anything of the kind). As a reassurance to the Western Allies, Eichmann added that the trucks would be used only on the eastern front.

That this “deal” was fantasy is obvious, and Brand understood at the time that the Allies would never turn over ten thousand trucks to their enemy. Nevertheless, he thought that by keeping negotiations alive he might buy time for the Hungarian Jews. In mounting urgency, Brand relayed the deal to Zionist authorities, who in turn communicated it to the British and the Americans, where it apparently went all the way to the desks of Churchill and Roosevelt. The result was an ill-fated journey by Brand to Istanbul and Aleppo, where (as predicted by Irgun agents who forewarned Brand as he boarded the train to Aleppo) he was promptly arrested by the British and spirited away to detention in Cairo. From the point of view of the British and the Americans, the deal represented nothing more than an effort to drive a wedge into their alliance with Stalin.⁸ (Besides, as one British official in

7. Quoted in Hilberg, *Destruction of the European Jews*, 724–25, from Alexander Weissberg, *Die Geschichte von Yoel Brand* (Cologne: Kiepenheuer and Witsch, 1956).

8. Hilberg, *Destruction of the European Jews*, 542–44, 723–28; Tom Segev, *The Seventh Million: The Israelis and the Holocaust*, trans. Haim Watzman (New York: Hill and Wang, 1993), 94. For a detailed discussion of the complex deliberations and machinations of the Allies in the trucks-for-blood deal, see Yehuda Bauer, *Jews for Sale? Nazi-Jewish Negotiations, 1933–1945* (New Haven: Yale University Press, 1994), 172–95.

Cairo exclaimed, "But Mr. Brand, what shall I do with those million Jews? Where shall I put them?"⁹)

Kastner resumed the trucks-for-blood negotiations after Brand's fiasco, but to no avail. He continued to work with Eichmann's pliantly corrupt assistant Becher until almost the end of the war, and in June he succeeded in bartering money and coffee for eighteen thousand Hungarian Jews, two-thirds of whom lived out the war in Vienna.¹⁰ None too soon: when the Final Solution ended in Hungary in July, just two months after it began, more than four hundred thousand Hungarian Jews were dead.

Apparently, Kastner viewed all of his negotiations as a continuous heroic effort of rescue; taken as a group, they make the Noah's-ark deal seem less exceptional and less suspicious. After the war Kastner moved to Israel, where he eventually became press spokesman for the Ministry of Commerce and Industry and a Mapai Party candidate for the Knesset. The final episode relevant to the Kastner trial occurred when Kastner testified on behalf of Eichmann's assistant Becher at the latter's postwar denazification trial. Kastner's affidavit stated that Becher (a self-dealing conniver whose specialty was financial extortion from desperate Hungarian Jews) had saved 85,000 Jews. It went on:

There can be no doubt that Becher was one of the few SS leaders who had the courage to take a stand against the extermination program and who made an attempt to save human lives. . . . Becher did everything he could, given his position, to save innocent lives from the blind, murderous rampage of the Nazi leadership. For this reason I never for a minute doubted his good intentions, even if the form and basis for our negotiations were of an objectionable character.¹¹

The affidavit would return to haunt Kastner at his trial.

The trial itself, we should remember, was a libel action against the semi-crank semi-journalist Malkhiel Gruenvald, who had accused Kastner of collaboration with the Nazis, of conniving to save his own kinfolk and favorites, of enriching himself, and of secretly defending Becher. Gruenvald's accusations threatened to embarrass Mapai, so the attorney general (a Mapai member) pressured the reluctant Kastner into what is surely the most improvident libel suit since Oscar Wilde.

Gruenvald was represented by an ambitious and talented right-wing law-

9. Hilberg, *Destruction of the European Jews*, 728.

10. *Ibid.*, 545.

11. Quoted in Segev, *The Seventh Million*, 269. Segev claims that Becher's help to the Jews was merely an effort to create an alibi for himself, and Bauer reaches the same conclusion. Becher, who had substantial blood on his hands, lived out his years as a "respectable" multimillionaire bon vivant, with a taste for horseback riding and adultery.

yer named Shmuel Tamir. Tamir's defense was quite straightforward: he argued that Gruenvald had not libeled Kastner because the accusations were true. And one of Tamir's coups was to find and produce in court Kastner's affidavit in the Becher trial, after Kastner had testified that he had not really tried to help Becher.

After Kastner was caught out in that small, embarrassed semi-lie, things only got worse.¹² Tamir produced as a witness Yoel Palgi, one of the daring Jewish paratroopers who had secretly dropped into Hungary on a mission of warning and resistance.¹³ He testified that Kastner, fearful that their presence would land the Hungarian Jews in trouble, persuaded Palgi and a fellow paratrooper to turn themselves in to the Gestapo. Palgi eventually escaped, but the other paratrooper perished. And Tamir got Palgi to admit that he had lied about this incident earlier to cover for Kastner.¹⁴ Judge Halevi's initially favorable views began to turn increasingly against Kastner. Eventually, Halevi produced the opinion that forms the centerpiece of Bilsky's essay—an opinion that Segev describes as “one of the most heartless in the history of Israel, perhaps the most heartless ever.”¹⁵

III

The most important part of Halevi's opinion, which Bilsky so incisively dissects, is this:

The temptation was great. K. was offered the opportunity to save six hundred souls from the impending Holocaust. . . . To rescue them would be both a personal achievement and a Zionist victory. . . . No wonder he accepted the offer without hesitation. But “*timeo Danaos et dona ferentis*” [beware of Greeks bearing gifts]. In accepting the offer, K. sold his soul to the devil.¹⁶

Bilsky rightly treats this passage as the centerpiece of Halevi's opinion, but we should not forget that his judgment turned on other findings as well. Halevi found that Gruenvald had written the truth about Kastner's postwar aid to Becher and that Kastner had lied about it on the stand. He dismissed as irrelevant the evidence of the trucks-for-blood bargain, even though it would have displayed the Noah's-ark deal in a more favorable light by

12. I am taking this account of the trial from Segev, *The Seventh Million*, 266–71.

13. The most famous of the paratroopers was the twenty-three-year-old poet and Israeli national heroine Hannah Senesh, who was captured by the Nazis, tortured (bearing up with legendary bravery and dignity), and executed.

14. Segev, *The Seventh Million*, 272.

15. *Ibid.*, 282.

16. Quoted in *ibid.*, 282–83.

showing that both were episodes in a continuing effort to save Jews, an effort involving many people besides Kastner. On the basis of Palgi's testimony, Halevi held that Kastner double-crossed the paratroopers and, again, that Kastner lied when he stated that he had done all he could to help them. And Halevi held that Kastner had collaborated with the Nazis by bargaining for blood with them.

So far as I can tell, Bilsky's analysis touches only the last of these findings, not the Becher or paratrooper findings, which themselves are quite damaging to Kastner. Even if Halevi had not concluded that Kastner had made a diabolical contract with Eichmann, he might well have found that Kastner's behavior in the paratrooper episode—sabotaging their mission to avoid trouble—amounted to collaboration. By neglecting the Becher and paratrooper findings, I fear that Bilsky has moved Kastner into a whiter part of the gray zone than he deserves.

Yet surely she is right that Judge Halevi's contract analysis, highlighted by his image of Faustian bargains and Greek gifts, presupposes a condition of arm's-length business normalcy wholly absent from the catastrophic world of terror and death that Kastner inhabited. A more telling case of being blinded by a metaphor would be hard to find.

IV

In *Eichmann in Jerusalem*, Arendt twice quotes Halevi's judgment that Kastner sold his soul to the Devil.¹⁷ But she does not have the legal imagery of contract on her mind. Rather, she sees in Kastner evidence for the major theses of her own book.

The Eichmann book stirred a storm of controversy over two central theses. The first was that the Jewish leadership, the Jewish councils or "*Judenräte*," had actively assisted the Nazis in peaceably rounding up the Jews—not, to be sure, out of treachery, but out of the catastrophically false belief that expediting the roundup would make it less cruel. In Arendt's eyes, the leaders engaged in a kind of communal auto-euthanasia, behaving as if extermination was inevitable and their sole responsibility was to make it as painless as possible. Instead, the fact is that when the Jews did not actively aid their enemies, more of them survived, but when their leaders organized their own deportation, most perished. Her second thesis is that Eichmann's personality was not that of a sadist, a fanatic, an antisemite, a monster, a Richard III, or—please note—a devil. Rather, he exhibits the banality of evil. The Kastner affair sheds light on both theses.

17. Arendt, *Eichmann in Jerusalem*, 42, 143.

A reader who examines the dozen passages in *Eichmann in Jerusalem* discussing Kastner quickly realizes that he is Arendt's poster child for the sins of the *Judenräte*. (She either did not know or chose not to mention that Kastner never belonged to a *Judenrat*.) She accepts Eichmann's improbable account of the Noah's-ark deal, namely that in return for some Jewish lives Kastner promised to help keep the Hungarian Jews docile.¹⁸ And her thesis could not be more condemnatory: "To a Jew this role of the Jewish leaders in the destruction of their own people is undoubtedly the darkest chapter of the whole dark story." Arendt expresses little doubt about their motivations—"we can sense how they enjoyed their new power"—and when she turns to Kastner "[t]he truth is even more gruesome." Why? Here she focuses on his efforts to include prominent Jews and functionaries among the 1684 destined for rescue. Analyzing what was "morally so disastrous in the acceptance of these privileged categories," she paraphrases Kastner's thinking as follows: "it went without saying that a famous Jew had more right to stay alive than an ordinary one."¹⁹

It went without saying because, of course, Kastner never said it. My sense is that although Arendt *may* have been right about Kastner, her judgments outstrip what we actually know, which is precious little. No one ever accused Arendt of *impotentia judicandi*, and there is no sign in *Eichmann in Jerusalem* that she shares Levi's reluctance to judge anyone and everyone in the gray zone. To be sure, the language she scornfully quotes from Kastner—that selecting who should live and who should perish "required more courage than to face death"²⁰—is bathetic and self-serving, particularly coming from someone in comparative safety who was consigning others to their deaths. But it also strikes me as the way that an egotistical man (as Kastner apparently was²¹) might phrase his authentic sense of awe and inadequacy at the horrifying responsibility that had fallen his lot. Ego-tism is a vice, not a sin.

Arendt's merciless diagnosis of Kastner, seizing on his disagreeable phraseology as part of her indictment of him, exemplifies one of *Eichmann in Jerusalem's* central ideas: that in the "moral collapse the Nazis caused in respectable European society"²² wickedness invariably came cloaked in elevated phrases and orotund words. Arendt's method as a moral critic is to rip through those words and plainly describe the reality they try to con-

18. *Ibid.*, 42. However, elsewhere in the book, apparently without noticing the inconsistency, Arendt also accepts Kastner's version that the deal was a strict cash-for-lives trade. *Ibid.*, 143.

19. *Ibid.*, 117, 118, 132.

20. *Ibid.*, 132.

21. Bauer, *Jews for Sale?* 259.

22. Arendt, *Eichmann in Jerusalem*, 125.

ceal. Indeed, the central insight of the book, her diagnosis of Eichmann, is that he is a man whose inability to confront reality without resorting to slogans and clichés rendered him incapable of thinking and therefore incapable of moral judgment.²³

This brings us to her treatment of Judge Halevi's image of Kastner selling his soul to the Devil. Astoundingly, Eichmann on the witness stand praised Kastner as someone who (like Eichmann himself) would do anything for his ideals. Arendt comments with utmost sarcasm, "in Halevi's opinion, Kastner had 'sold his soul to the devil.' Now that the devil himself was in the dock he turned out to be an 'idealist,' and though it may be hard to believe, it is quite possible that the one who sold his soul had also been an 'idealist.'"²⁴

But of course what she really thinks is that Kastner had sold his soul, not to the Devil, but to a mediocre bureaucrat whose every attempt at self-explanation made him seem ridiculous: "everybody could see that [Eichmann] was not a 'monster,' but it was difficult indeed not to suspect that he was a clown."²⁵

And it is also difficult not to suspect that Halevi's metaphor was in the forefront of Arendt's mind as she sat in the Jerusalem courtroom while the very same Halevi presided over a trial in which Eichmann was testifying about Kastner. If so, must she not have been thinking that Halevi, too, had resorted to a grand-sounding but false phrase, referring to Eichmann as the Devil when in fact he was not a devil, but a clown, and his bargaining partner was not Dr. Faust, but Dr. Kastner? Her reflections on the Kastner case may well represent the origins of her "banality of evil" idea. That idea, I think, is one of the major moral discoveries of the twentieth century. For all her insight, however, it is far from obvious that Arendt actually cared whether she got Kastner right.

V

To Tom Segev as well, Kastner matters only as an episode within two larger stories. The first, which Segev relates in great and depressing detail, is the story of how the Zionists of Palestine, both Labor and Revisionist, responded to the Nazi crisis. The story, in brief, is that they viewed it almost en-

23. *Ibid.*, 47–48. This central idea of the book was elaborated in her essay "Thinking and Moral Considerations," *Social Research* 38 (1971): 417–46, perhaps her most important contribution to moral theory.

24. Arendt, *Eichmann in Jerusalem*, 42.

25. *Ibid.*, 54.

tirely from their own parochial political standpoints. Nothing expresses this better than an amazing statement Segev quotes from Ben-Gurion: "If I knew that it was possible to save all the children in Germany by transporting them to England, but only half of them by transporting them to Palestine, I would choose the second. . . ." ²⁶ Agents of both Labor Zionism and Revisionism combed through Europe, looking for "the best human material" to rescue (and trying to ensure that those they rescued would support the rescuer's politics once they arrived in Palestine). A leader of the Rescue Committee, to which Kastner belonged, wrote a memorandum in 1943 that asked, "Whom to save: . . . Should we help everyone in need, without regard to the quality of the people? Should we not give this activity a Zionist-national character and try foremost to save those who can be of use to the Land of Israel and to Jewry?" ²⁷

Viewed in this light, Kastner's careful gleaning of those 1684 Jews takes on a different coloration than either Halevi or Arendt gives it. To Segev, it represents something like the unofficial policy of the Zionist movement. (Segev does not mention, however, that Kastner conscientiously included virulently anti-Zionist Satmar Hasidim, and anti-Labor Revisionists, on the Noah's-ark train.) ²⁸ It was, furthermore, a policy that both Labor and Revisionism indulged in. ²⁹ But it took on a slightly more complex twist because Labor wanted to save those most committed to the pioneering spirit, while the Revisionists' constituency was largely the less politicized, nonsocialist East European masses. For that reason, Revisionism's politicized selection criterion was to be unselective, to rescue as many as possible. This made the Revisionists look less elitist and more impartially humanitarian, but Segev stresses that their calculation was every bit as political as that of Labor.

The latter point is important to the second part of Segev's story, the politics of the trial itself. It was, in contemporary terms, not unlike the Paula Jones case: right-wing lawyers trying to humiliate the left and, if possible, to bring down the government. (It should be noted that the trial took place in an election year.) Not only was Kastner a Labor stalwart, his actions made a convenient symbol of what the right took to be Labor's orientation toward rescue during the war. The Revisionists hated him—hated him

26. Quoted in Segev, *The Seventh Million*, 28. To be fair to Ben-Gurion, at the time he made this statement (December 1938), almost no one actually believed that Hitler meant to murder all the Jews. On the efforts of Ben-Gurion and the Jewish Agency to save Jews, even at the cost of nation building in Palestine, see Bauer, *Jews for Sale?* 184, 188.

27. Quoted in Segev, *The Seventh Million*, 100.

28. Bauer, *Jews for Sale?* 199.

29. Segev, *The Seventh Million*, 40–45, 99–109.

enough, in fact, to assassinate him shortly before he was exonerated on appeal.

There is more. In order to show that Kastner's "collaboration" with the Nazis had actually cost Jewish lives, Tamir argued that Kastner had deliberately withheld all he knew about Auschwitz and the Final Solution from the Hungarian Jewish community in order to remain on Eichmann's good side. Had he sounded the tocsin, Tamir intimated, the Jewish masses could have fled or resisted. Kastner and the *Judenräte* had exhibited the typical sniveling mentality of the exile, the very opposite of the tough and combative mentality of Israelis.³⁰

Tamir's argument was based on two false assumptions: that the Hungarian Jews did not already know what the Nazis had in store for them, and that had the Jews been warned they had opportunities to fight or flee. In fact, many escapees and refugees had come to Hungary bearing news of the Final Solution; the Hungarian Jews knew. The problem was that there was no place to run and hide in the Hungarian plain, and no time to organize resistance.³¹

According to Segev, Tamir's questionable argument played to a kind of collective neurosis that prevented Israelis from acknowledging the Holocaust or admitting that they had been just as helpless as the European Jews to do anything about it. Until the Eichmann trial in 1960, the Holocaust was something that happened to *them*, the other kind of Jew, the grovelers and connivers of the Diaspora. And Kastner's persecutors used the trial to forge an association in the mind of the Israeli public between Kastner, the *Judenräte*, the exile mentality, and Labor's policy toward rescue and immigration. It was a lethal mix.

But Segev's analysis of the politics of the Kastner trial has very little to do with Kastner himself. Although he never states his own view of Kastner explicitly, Segev makes it clear that he sympathizes with the appellate opinion that cleared Kastner. He does not, however, say why. His point is basically that Kastner had only been doing what Zionist functionaries across the political spectrum did—compromise, rescue, and select on the basis of their movement's needs.

30. On this theme in the Kastner trial, see Asher Maoz, "Historical Adjudication: Courts of Law, Commissions of Inquiry, and 'Historical Truth,'" *Law and History Review* 18 (2000): 598–99.

Notice that Tamir's is a different accusation against the *Judenräte* than Arendt's. She never indulged in Tamir's fantasy that the Jews might have fled or resisted, and in fact she argued that to accuse them of going like lambs to the slaughter is merely cruel. Her point was not that the *Judenräte* undermined resistance, but that they actively, if unwittingly, facilitated slaughter.

31. Bauer convincingly refutes all Tamir's assumptions; see *Jews for Sale?* 150–61.

VI

What shall we say of Justice Agranat's opinion, which (as Bilsky analyzes it), subsumes the Kastner case to the categories of administrative law, asking whether Kastner discharged his responsibilities reasonably under the circumstances? Here, the guiding metaphor is not the private law of contract, but the public law requiring officials to balance the risks and benefits of their policies in a reasonable way, given the information available to them when they decide.

One problem with this analysis is that Kastner was not a public official and had no political mandate for engaging in utilitarian calculation involving the lives of the community. A bigger problem is that the whole question of what is reasonable under such insane circumstances, what counts as an appropriate weighing of risks and benefits, seems profoundly unanswerable. The trucks-for-blood negotiation is unimaginable, even after we somehow get over the threshold insanity of bartering trucks for blood. Did Eichmann (or Himmler, who masterminded the deal) actually think that Brand or Kastner could get the Allies to give ten thousand trucks to Germany during the thick of the war? Could Himmler have believed Nazi propaganda about the cabalistic power of World Jewry over the highest counsels of the West? Did Kastner believe it?³² Did Himmler believe that the West was fighting the war solely on behalf of the Jews and would jump at the chance to save them?³³ Did he think that by assuring the Western allies that the trucks would be used only on the eastern front, he would excite their anticommunism? Did he actually want the Allies to reject the deal so that they, too, would have Jewish blood on their hands—or so that they would be placed in the perverse position of ratifying the Nazi view that Jewish lives count for nothing?³⁴

For that matter, did Eichmann or Himmler think that they had the authority to release a million Hungarian Jews in return for the trucks? Even though the Führer valued Jewish lives at less than zero, Eichmann and Himmler knew only too well that he placed an enormous value on Jewish deaths. Why think that Hitler would relinquish them?

All these questions about the motivations of Eichmann and his superiors must have been going through the minds of Brand and Kastner. Even in the upside-down universe they inhabited, how could they have divorced themselves from the realization that the negotiation was entirely imaginary?

32. According to Bauer, the answer is yes, although Brand was never under any similar illusions. See Bauer, *Jews for Sale?* 170.

33. Hilberg, *Destruction of the European Jews*, 544.

34. On this motivation, see Bauer, *Jews for Sale?* 167, 178, 186.

Did Kastner decide reasonably? On the one side lies the certain moral wrong of trying to deliver war materiel to the Nazis and of trafficking with murderers for months. On the other lies the gamble: a minuscule probability of saving a great number of Jews. Risk-benefit calculation is at its most dubious in “zero-infinity dilemmas,” when probabilities are tiny and consequences enormous—that is why there is no such thing as an objectively reasonable price for a high-stakes, one-in-ten-million chance Lotto ticket. In such cases calculation is only a caricature of rationality. Yet a zero-infinity dilemma is precisely the gamble that Kastner anted in to at the cost of morally clean hands. For that reason it is deeply unclear that Justice Agranat was entitled to conclude that Kastner acted reasonably. Recall Levi’s imagery: the reasonableness of Kastner’s decision evades our judgment, just as a compass goes wild at the magnetic pole. Bilsky has not persuaded me that the metaphor of administrative law is less misleading than Judge Halevi’s metaphor of private contract. How can we speak of reasonable choice in circumstances where no choice is reasonable? Agranat was surely correct that Kastner did not act treacherously, but that conclusion has little if anything to do with administrative law.

VII

Near the end of her article, Bilsky paints her own portrait of Kastner. For her, the sheer grandiosity of the plan to save a million Jews explains why Kastner found the gamble appealing. “Kastner was a Zionist committed to . . . activism, self-help, and self-assertion. . . . [A]s a Zionist, Kastner did not see himself limited to conventional ways of action . . . and was willing to try radical action such as negotiations with the Nazis over fantastic plans such as the ‘blood for trucks’ idea. . . . Kastner was not of the passive brand. . . .”³⁵

In other words, Kastner’s actions can be explained by the fact that he had the *opposite* of the exile mentality that his persecutors and Judge Halevi tagged him with. Nor was he as feckless as Arendt painted him. On the contrary: he was bold and resourceful, a visionary, unconventional, “can-do” Zionist Zorro. According to Bilsky’s interpretation, Justice Agranat’s opinion, insisting that a judge put himself in Kastner’s shoes and Kastner’s mentality, recognizes that a high-stakes gamble might be reasonable for such a man under the circumstances.

Perhaps Bilsky is right; but, like Arendt’s opinion in the opposite direction, it seems to me to overstep the evidence. Bilsky’s portrait of Kastner

35. Bilsky, “Judging Evil,” 154–55.

does not readily square with Eichmann's testimony that Kastner offered to help pacify the Hungarian Jews in return for 1684 lives (perhaps Bilsky thinks Eichmann was lying, or that Kastner was just buying time); nor with Kastner's self-serving selection of his relatives and people from his hometown for the Noah's-ark train; nor with Kastner urging the two paratroopers to turn themselves in; nor with Kastner's efforts on Becher's behalf after the war.³⁶

Levi doesn't call it the gray zone for nothing.

IX

"From many signs," Levi writes,

it would seem the time has come to explore the space which separates . . . the victims from the persecutors, and to do so with a lighter hand, and with a less turbid spirit than has been done. . . . Only a schematic rhetoric can claim that that space is empty: it never is, it is studded with obscene or pathetic figures (sometimes they possess both qualities simultaneously) whom it is indispensable to know if we want to know the human species. . . .

Was Kastner obscene or pathetic? Was he reasonable or heroic? Even after reading the insight-studded treatments of Kastner by Bilsky, Arendt, Segev, and Bauer, it seems to me impossible to answer these questions. In that case, how should a court of law have treated him and his accuser Gruenvald? Here I will turn to Levi for the last time: "The condition of the offended does not exclude culpability, which is often objectively serious, but I know of no human tribunal to which one could delegate the judgment."³⁷

If Levi is right, no court should have been placed in the position of condemning or exonerating Kastner—but, of course, the libel action and Shmuel Tamir's truth-defense left no room for the passive virtues: the court must either accept the truth of Gruenvald's accusations or reject them.³⁸ It seems that whatever illumination we seek of the gray zone must come from

36. Why did Kastner help Becher? His accusers intimated that it was to buy Becher's silence, while Segev quotes a friend of Kastner's who believed that Kastner wanted to experience one more time the power over life and death. See Segev, *The Seventh Million*, 268. Bauer believes that Kastner simply thought Becher deserved help because he had helped to save lives. See Bauer, *Jews for Sale?* 250. I suspect Kastner had to believe that Becher was a worthy partner in order to believe that he himself played an honorable role working with him.

37. Levi, *The Drowned and the Saved*, 40, 44.

38. As Maoz explains, this point was made in Justice Goitein's opinion in the Kastner appeal. See Maoz, "Historical Adjudication," 593–94.

elsewhere than the law. For Arendt, it comes from her theories of politics and moral psychology; for Segev, from his understanding of Zionist politics; for Kastner's enemies, from the contempt they felt for the mentality of the exile and their Labor adversaries; for Bilsky, from her idea of what is reasonable for a bold Zionist rescuer. Unfortunately, it may no longer be Kastner that is illuminated.

Language, Judgment, and the Holocaust

LAWRENCE DOUGLAS

In *The Failure of the Word*, Richard Weisberg asks how legal scholars can “justify the substitution of imaginative for legal prose.”¹ By way of response, scholars such as Martha Nussbaum and Weisberg have sought to demonstrate the power of literature to better render moral ambiguity and situational complexity than the language of the law. The most attractive images of the art of judgment, these scholars argue, are not to be found in the decisions duly compiled in the *Federal Reporter*, but in works of the literary imagination. These works, by capturing a world of nuance largely absent from the Manichean terms of law, offer a critical “school of moral sentiments” and, as a consequence, can help the legal scholar to better appreciate the law’s exclusion and to extend the law’s discursive ken.²

Such is the view interrogated in Leora Bilsky’s essay “Judging Evil in the Trial of Kastner.” The trial, the most important to take place in the young state of Israel before the Eichmann proceeding in 1961, tested a court’s capacity to situate itself with sensitivity in an impossible history. Yet instead of focusing directly on the fraught legal and historical questions raised by the case, Bilsky adopts an unusual and rewarding approach, focusing instead on the justificatory rhetoric deployed by Judge Benjamin Halevi in his judgment that basically absolved Gruenvald of having libeled the Mapai official. (Finding Gruenvald liable for only a single inconsequential libel, Halevi, following the English practice, awarded Kastner the symbolic and deeply sarcastic sum of one lira in damages.) Bilsky finds the flawed logic of Halevi’s opinion encapsulated in one line of his judgment where the judge mixed his literary metaphors, at once conjuring the spec-

1. Richard Weisberg, *The Failure of the Word* (New Haven: Yale University Press, 1984), 178.

2. Martha Nussbaum, *Law’s Knowledge* (New York: Oxford University Press, 1990), 100.

Lawrence Douglas is an associate professor in the department of law, jurisprudence, and social thought at Amherst College.

ter of the Trojan Horse and the character of Faust to describe and condemn Kastner's self-servingly collaborationist behavior. At the very least, Halevi's charge that Kastner had sold his soul to the Devil, namely, Eichmann, explains why, years later, many within Israel demanded, to no avail, that Halevi recuse himself from the Eichmann trial. Indeed, lingering concerns regarding Halevi's handling of the Kastner case led the Knesset to amend its criminal code specifically to guarantee that Halevi would not preside alone over the trial of Adolf Eichmann. (Originally by law, Eichmann would have been tried by the president of the Jerusalem Court, who was, at the time, Halevi. The amended law required that any person tried under the 1950 Nazis and Nazi Collaborators Law—the charging statute under which Eichmann was prosecuted—be tried by a three-person tribunal that included a sitting member of the Israeli Supreme Court.)

According to Bilsky, Halevi's conjuring of Troy and Faust did more than encapsulate his harsh condemnation of Kastner. Instead, Bilsky argues, it tells us something more general about the relationship between legal argument and literary example. Halevi's provocative (mis)use of literary tropes reveals, then, that the "turn to literature" does not necessarily result in a more nuanced or morally sophisticated understanding of history on the part of the jurist. Challenging any tendency to essentialize discourse, Bilsky makes the important argument that law is not intrinsically limited as a representational discourse; conversely, literature cannot claim a monopoly on representational completeness or a superior capacity to portray historical fact in its ineluctable complexity.

Bilsky's point is significant, although it is not entirely clear whether her close reading of Halevi's judgment actually supports her position. The problem, I believe, is that she asks Halevi's invocation of the Trojan Horse and the Faust legend to do too much: to stand as a larger example of law's appeals to, and appropriations of, the world of literature. Indeed, Bilsky turns Halevi's mixed metaphor into a second order metaphor, one that stands as a figure for the intersections between legal and literary discourse. Yet Halevi's fleeting invocation of Faust can hardly serve as an example of the kind of robust engagement with the world of literature that Martha Nussbaum and Richard Weisberg believe would humanize legal discourse. Neither Nussbaum nor Weisberg is so naïve as to believe that the language of legal judgment can be substantially humanized by the occasional insertion of a literary reference into a legal opinion. Instead, their defense of the humanizing powers of the literary imagination insists that the legal scholar and jurist take seriously the vision of richly embodied human subjects trying to wrestle meaning from a complex reality present in serious literary works. Their argument, then, does not simply call for peppering High Court opinions with lines from Yeats and Stevens (and here I mean

Wallace and not John Paul); instead, they argue that the goal of extending the law's ken can be accomplished only through a serious and sustained examination of the dramas of judgment contained in works of the literary imagination.

In this regard, Bilksy's essay offers less a direct challenge to the arguments of Nussbaum and Weisberg than it reinforces a central claim of scholars such as Peter Goodrich, who insist that, like any professional grammar, the language of law is structured in terms of tropes and metaphors that make intelligible its central concepts.³ Bilksy's discussion of Halevi's reliance upon contract law to characterize Kastner's interactions with the Nazis reminds us that even the most formal areas of law are structured around tropes such as "the meeting of the minds," rhetorical figures through which the law's doctrinal commitments speak. From this perspective, Halevi's invocation of the Trojan Horse and the legend of Faust does not represent the anomalous or unexpected insertion of a literary trope into the arid discourse of legal formalism. Instead, it reminds us of the ways that even legal formalism is structured as a rhetoric, based on metaphors and tropes that shape and make intelligible the content of, say, the law of contract.

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Bilksy's piece, however, can also be seen as a contribution to a separate, though not entirely unrelated, debate about the representational powers of legal discourse. Although scholars of law and literature tend to defend the prerogatives of the literary imagination, scholars of the Holocaust, such as Berel Lang, sternly question the appropriateness of creative or figurative representations of traumatic history. Here the argument is that figurative representations of the Holocaust tend to aestheticize genocide by subjecting senseless horror to the organizational imperatives of narrative.⁴ As Adorno wrote, "through the aesthetic principle of stylization—an unimaginable fate—becomes transfigured, with some of the horror removed."⁵

This skepticism about the capacity of imaginative literature to do justice to the Holocaust has not, however, worked to the comparative advantage of law. On the contrary, numerous scholars have argued that legal discourse, for altogether different reasons, cannot be relied upon to do justice to the history of the Holocaust. Ian Buruma, for example, writes that a trial "can only be concerned with individual crimes" and, as a result, "histo-

3. Peter Goodrich, *Legal Discourse* (London: Macmillan, 1987).

4. Berel Lang, *Act and Idea in the Nazi Genocide* (Chicago: University of Chicago Press, 1990).

5. Theodor Adorno, "Engagement," in *Gesammelte Schriften*, ed. Rolf Tiedmann (Frankfurt: Suhrkamp Verlag, 1974), 420.

ry is reduced to criminal pathology and legal argument.”⁶ Other scholars, such as Michael Marrus, have argued that the formal norms of evidence and procedure that govern a trial, as well as the substantive criminal law into which mass atrocity must be pigeonholed, render the trial a flawed tool for comprehending traumatic history.⁷ These critiques insist that the judicial process inevitably fails to grasp the most disturbing and fundamental issues raised by the Holocaust, issues more satisfactorily explored through the discourse of history.

At first blush, Bilsky’s study of the Kastner trial seems to support critiques of both literature’s and law’s ability to represent traumatic history. Halevi’s insistence on translating the tragic choices confronted by Kastner into the formal idiom of the law of contract seems like a grotesque act of reductionism, a crude example of law’s fetishization of form over content, a dramatic example of the failure of the legal mind to comprehend a world of duress, coercion, and moral ambiguity. According to this view, Halevi’s comparison of Kastner to Faust merely underscores the futility of attempting to illuminate the anguish and moral insanity of genocide by appeal to a literary model of the tragic. As the quintessential drama of the individual’s wager for meaning and mastery over nature and self, Faust has painfully little to say about the desperate attempt to negotiate survival in the face of collective death. In both its reliance on literary tropes and the structure of its juridical argument, Halevi’s decision reveals the limits of literary *and* legal discourse to do justice to the Holocaust.

Yet this is only half of Bilsky’s story. For in the judgment of Israeli Chief Justice Simon Agranat that reversed Halevi’s decision, we find precisely the attention to the tragedy of moral choice so conspicuously absent from Halevi’s opinion. Here, then, we encounter an excellent example of the plasticity of legal discourse, of its power to bend to accommodate and give word to a complex historical and moral reality with nuance and fairness. Importantly, Bilsky’s essay demonstrates that Agranat succeeded in stretching law’s discursive range not through a “turn to narrative” or by appropriating representational techniques from literature, but by remaining firmly within the language of law itself. This fact alone reminds us of the capacity of legal discourse to accommodate the unprecedented. Specifically as a response to the atrocities of the Holocaust, one can point to a number of changes in the law’s idiom of criminality, the most important being the concept of genocide and the concept of crimes against humanity. It is not within the scope of these comments to review the evolution of these two

6. Ian Buruma, *The Wages of Guilt* (New York: Farrar, Straus, and Giroux, 1994), 153.

7. Michael Marrus, “History and the Holocaust in the Courtroom” (unpublished manuscript).

concepts or to discuss the very substantial problems that attended the definition and prosecution of crimes against humanity at the International Military Tribunal in Nuremberg. But the importance of these concepts cannot be gainsaid, both in terms of the trials they have made possible, and in terms of their larger significance as tools of cultural meaning.⁸ Here, then, we find the law, as a discourse, contributing to historical and cultural understanding, forging the terms and concepts that have helped fill the gap between language and deed caused by the Holocaust.

Yet Agranat's juridical performance highlights another aspect of the plasticity of legal discourse. For Agranat was able to capture the dilemma of the survivor by finding a sophisticated conceptual vocabulary in the unlikelyst of places: administrative law. The idea of trying to represent the lived history of the Holocaust through this arid idiom sounds like a venture destined to grotesque failure; yet, as Bilsky observes, Agranat's reliance on the language of public law peculiarly and unexpectedly succeeded at capturing, illuminating, and doing justice to a reality it was never intended to describe.

How are we to make sense of this surprising and anomalous success? On one level, we might be tempted to find some special affinity between the parlance of administrative law and the thoroughly bureaucratized nature of the Holocaust, inasmuch as it was through such an administrative argot that the killing was accomplished in the first place. Alternatively, one could challenge Bilsky's account, insisting that, in fact, Agranat's judgment succeeded at vindicating Kastner both legally and morally only by creating a new set of caricatures, replacing Halevi's craven collaborationist with the intrepid Zionist resister, the picture of the survivors that was to be painted in broad strokes by the prosecution in the Eichmann case. Or finally, we might find in the person of Agranat the living exemplar of Nussbaum's and Weisberg's literate judge: the man or woman whose judgments are humanized by a life of deep reading.

In her excellent biography of Agranat, Pnina Lahav reminds us that as a young man, the future Chief Justice was attracted to a career in journalism and was a passionate reader of the social realist novels of Upton Sinclair.⁹ Later in life, Agranat became a votary of Trollope, the great master of character and plot. As a jurist, Lahav notes that Agranat repudiated legal formalism, finding his juridical voice in the more nuanced inflections of a sociological jurisprudence. Was his embrace of such a jurisprudence

8. For a longer discussion of this matter, see Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001).

9. Pnina Lahav, *Judgment in Jerusalem* (Berkeley: University of California Press, 1997).

simply the byproduct of his voracious reading? Clearly such a crude argument betrays the very claims of scholars of the law and literature movement, as one of the central qualities of literature is the refusal to reduce the greatness of character to the formulaic and monocausal. Perhaps that, then, is the final lesson that the legal scholar and practitioner can extract from literature: that the ability of those like Agranat sensitively to “reach out across a chasm of suffering . . . that cannot be shared”¹⁰ is a gift that resists simple explanation and emulation, at the same time that it constitutes the core of juridical greatness.

10. Lawrence Langer, *The Holocaust and the Literary Imagination* (New Haven: Yale University Press, 1975), 29.

Judging and Understanding

LEORA BILSKY

What is the relationship between judging and understanding? Does the process of understanding undermine our ability to judge? Or maybe the contrary is true, that judgment is possible only when its subject is understandable? If judgment requires distance and understanding requires empathy (overcoming distance), is there an inherent impossibility in trying to judge the Holocaust by trying to understand it? Language itself betrays a sense in which understanding and judgment conflict. The popular saying *tout comprendre c'est tout pardonner* rings true in our everyday experiences. What are we to do when the subject of our inquiry is of such moral magnitude that understanding becomes a duty we owe to ourselves, and yet any progress in understanding seems to be meaningless if it does not enhance our capacity of judgment. The two thoughtful responses by David Luban and Lawrence Douglas to my essay "Judging Evil in the Trial of Kastner" are directed at disentangling this complex relationship between judgment and understanding. Luban asks for more judgment. Douglas insists on more understanding.

Writing his report to the Jewish Agency about the efforts to save the Jews of Hungary, Kastner anticipates these questions and cautions:

It was a slippery slope that almost always led to destruction. Everywhere the Jew was faced with the same problem: should I be the traitor so that here and there I'll be able to help or even be the savior, the rescuer, or should I abandon the community to its fate and let others decide its fate? Is not the flight from responsibility merely another kind of betrayal? And if I do take this upon myself, what is the line that I should never cross? Should I release myself from responsibility at the cost of destroying myself through suicide or being executed? Common sense is almost incapable of drawing the line between self-sacrifice and betrayal. It is not surprising then, that in every place that still had a Jewish community this question was raised again and again. To judge the Judenrate after the fact, on the basis of testimonies, documents and sources—this is a task that is beyond the capacity of any human tribunal.¹

1. Israel Kastner, *Report of the Rescue Committee in Budapest, 1942–1945* (submitted to

The epistemic and moral crisis that was left in the wake of the Holocaust confronts the judge with the limits of law, literature, and historiography.² As Kastner reminds us, the Jewish Councils had to make their judgments of where to draw the line without the perspective of time and under immense pressures from their Jewish communities and from the Nazis commanders. This puts them in the “gray zone,” as Luban rightly observes.

The Israeli court had to address this phenomenon when judging Kastner’s efforts to save the Jews of Hungary as vice president of the Rescue Committee, especially in regard to what is known as the Kastner train.³ I discussed two decisions, the one by Judge Halevi of the Jerusalem District Court and the other by Justice Agranat of the Supreme Court. I argued that these judgments are revealing not only because of their opposing conclusions about Kastner’s guilt, but more importantly because of the ways in which the judges attempted to overcome the epistemic and moral crisis they were facing. This approach allowed me to shift the emphasis from the familiar question of which field is better suited to the task of judgment (literature, history, law) to the less explored question of how we go about judging a radically new phenomenon. Surprisingly, it turned out that in confronting the novel and often incomprehensible facts of the Holocaust, the judges relied heavily on our common cultural heritage of law, history, and literature. Moreover, success or failure here depended less on *which metaphor* was used but rather on the creative and sensitive use the judge made of his chosen metaphor in order to reach beyond his own world. Thus, the Faust metaphor as it had been developed by Goethe and Mann could have helped explore the “gray zone” of action where good intentions result in evil deeds, but it was used instead by Judge Halevi to turn the gray shadings of Kastner’s actions into a black-and-white morality play. Likewise, contract law could have been used to demonstrate the conditions of illegality, inequality, force, and deception

the Zionist Congress), 108 [Hebrew]. Cited by Judge Halevi, Cr.C. (Jm.) 124/53 *Attorney General v. Gruenvald*, 44 P.M. (1965) 3, at 115 [my translation, L.B.].

2. Saul Friedlander, ed., *Probing the Limits of Representation* (Cambridge, Mass.: Harvard University Press, 1992).

3. The exact number of passengers remains unclear according to the different sources. Bauer mentions 1684, Segev—1685, and Weitz—1685. See Yehuda Bauer, *Jews for Sale? Jewish Negotiations, 1933–1945* (New Haven: Yale University Press, 1994), 198, 199; Tom Segev, *The Seventh Million: The Israelis and the Holocaust*, trans. Haim Watzman (New York: Hill and Wang, 1993), 265; Yehiam Weitz, *Ha-Ish she-Nirtsah Paamayim* [The Man Who Was Murdered Twice] (Jerusalem: Keter, 1995), 33. In the appeal, the figure was given as 1684 (Cr.A. [Jm.] 232/55 *Attorney General v. Gruenvald*, 1958 [12] P.D. 2017, at 2046, 2048). Maybe the source of the confusion is Kastner’s own report (*Report of the Rescue Committee*) that states at one point that the number was 1685 (47) and in other places that it was 1684 (105, 115).

under which Kastner and Brand had negotiated with Eichmann, but it was used instead to create an omnipotent actor out of Kastner. For this reason I do not believe that there is one correct answer to the question of which legal or literary metaphors best capture the ambiguities of the “gray zone.” The crucial factor is how these metaphors are used to shed light on the historical context under consideration. My response, therefore, is intended to clarify not my choice of metaphor but my evaluation of the use made by the court of the different metaphors.

In Judge Halevi’s decision I focused on the contract metaphor and the Faustian story. Douglas argues that although the Faustian metaphor is very powerful, its “fleeting invocation . . . by Halevi can hardly serve as an example of the kind of robust engagement with the world of literature that Martha Nussbaum and Richard Weisberg believe would humanize legal discourse.”⁴ However, I sought to show how this metaphor was not a momentary allusion happened upon by the judge but rather revealed the underlying perceptions that shaped the entire narrative of the court and consequently the moral condemnation of Kastner. Halevi relied heavily on literary images of evil doing (Faust and the Trojan Horse) and skillfully developed them in order to demonstrate the unique nature of Jewish collaboration with the Nazis (a combination of fraudulent gifts and contractual obligations). And yet, these same literary sensitivities blinded him to the complexity and ambiguity of the historical circumstances under which Kastner had acted. In this way Kastner (K. in Halevi’s opinion) could be made into a symbol of the Judenrate member, devoid of human face and stranger to the fragility of the human condition. This is why Halevi’s judgment serves as an interesting counterexample to Nussbaum’s model of judgment.

Luban, on the other hand, while conceding the centrality of the contract metaphor to Halevi’s judgment, wonders whether the cumulative force of the other episodes (such as the paratroopers’ affair and Kastner’s affidavit in support of Kurt Becher) do not tilt the balance against Kastner nevertheless.⁵ I believe they do not. In another article devoted to the politicization of the trial by defense attorney Shmuel Tamir, I discuss at length the paratroopers’ affair and how it was misrepresented in the court.⁶ Here I will just note that historians have concluded that the Gestapo’s information about the

4. Lawrence Douglas, “Language, Judgment, and the Holocaust,” *Law and History Review* 19 (2001): 178.

5. David Luban, “A Man Lost in the Gray Zone,” *Law and History Review* 19 (2001): 168.

6. Leora Bilsky, “Performing the Past: The Politicization of the Holocaust in the Kastner Trial,” in *Lethe’s Law*, ed. Emiliios Christodoulidis (forthcoming).

paratroopers came not from Kastner but probably from their Hungarian contacts.⁷ Learning that the paratroopers were under surveillance, Kastner explained to them that by contacting him they endangered the entire rescue efforts regarding the train. Still, Kastner and other members of the Rescue Committee left it to the paratroopers themselves to decide how to act (whether to hide, run away, or surrender to the Gestapo). The paratroopers' affair reveals to what extent the Yishuv's conception of heroic action was ill fit to the reality of conquered Europe, a tragic realization that was later shared by Palgi and his heroic friends. Moreover, from a legal point of view, since Gruenvald's pamphlet did not deal with the paratroopers' affair, it was irrelevant to the libel case.⁸ The Becher affair deserves more consideration of whether Kastner's fault stemmed mainly from lying about his affidavit in the court, or whether it was morally unacceptable to give an affidavit in support of a Nazi officer whose greed (and need of alibi) had facilitated the committee's efforts of rescue at the time.

Agranat's judgment raises a more difficult question, since it is here that I find a more constructive attempt at judging the "gray zone." Luban has two reservations about the value of applying administrative law to Kastner's actions. On the one hand, he claims that since Kastner was not a public official he "had no political mandate for engaging in utilitarian calculation involving the life of the community"; and, on the other hand, he argues that "the whole question of what is reasonable under such insane circumstances . . . seems profoundly unanswerable."⁹ I disagree on both points. Kastner was certainly not acting as a private agent but as a representative of the Zionist movement, as vice-president of the Rescue Committee.¹⁰ Although at the time the Zionists constituted a minority among the Jews of Hungary, nonetheless, unlike other segments of the Jewish community, they were not paralyzed by the Nazi occupation and sought ways to influence the Jews' fate.¹¹ Kastner, unlike the representative of the Orthodox Jews (Fulop von Freudiger), for example, did not flee.¹² It is true that Kastner

7. Weitz, *Ha-Ish she-Nirtsah Paamayim*, 39–40.

8. Appeal, *Attorney General v. Gruenvald*, 2179.

9. Luban, "A Man Lost in the Gray Zone," 173.

10. Indeed, this is the reason that he was under an obligation to submit a report on their rescue efforts to the Zionist Congress in 1946.

11. Bauer, *Jews for Sale?* 154–55

12. The fact that many of his relatives and friends from his hometown Kluj were included in the train can be attributed to the Nazis' well-known manipulative technique. In many cases they showed more willingness to save the families of the Jewish functionaries in order to increase their dependence on them. Maybe, as a public official, Kastner should have refused to go along with this. But, from a moral point of view, the answer to this question is unclear. Indeed, Neil Gordon's novel *The Sacrifice of Isaac* (New York: Random House, 1995) presents the opposite scenario (a Zionist, given certificates by the Nazis to rescue his

was not a Judenrate member appointed by the Nazis, but in this case it is the authority that he acquired in the eyes of the Jewish community when negotiating on their behalf that is the crucial factor. These were among the reasons that convinced Justice Agranat to attribute to Kastner the duties of a public official.¹³ The second question that Luban raises about the criteria of judging Kastner's actions is more difficult. One interpretation of Luban's objection might be that the "reasonableness" or rationality of Kastner's actions simply cannot be judged, but this seems to go against the central point that Luban takes from Primo Levi, that is, that "remaining agnostic in the face of evil is a defeat."¹⁴ It is more likely, therefore, that Luban deems Kastner's actions as profoundly unreasonable because, as he writes, the probabilities were tiny and the consequences enormous.¹⁵ But could it not be the case that in such extreme circumstances when all norms of behavior had collapsed, when the inconceivable had become reality, when the "unreasonable" ruled, the "unreasonable" way was the only option and hence should be judged by us today as reasonable?

An Israeli historian has suggested that in order to better understand the epistemic crisis of judging the Holocaust, historians should attempt to adopt the viewpoint of the Judenrate.¹⁶ From this perspective we begin to grasp how the Jewish leaders' attempts to use utilitarian calculation in judging the Nazis' intentions were genuine and inevitable, but at the same time, trapped them and led to failure. The rational calculation of trying to avert the worst evil by means of the least evil constantly changed and in the end backfired. Studying the Judenrate attempts at evaluating the Nazis' intentions reveals in a striking way how rationality was transformed by the Nazis into counterrationality. Agranat's method of judgment—his attempt to put himself in Kastner's shoes—enables us to retain this sense of dissonance between our rationality and the counterrationality of those times. It can serve as a key to understanding the abyss that the Holocaust presents to us.

older relatives, replaces them with young men) and raises difficult moral questions that stem from this decision.

13. Agranat's opinion, Appeal, *Attorney General v. Gruenvald*, 2080: "As a result of the committee's connections with the Jewish Agency and the Joint on the one hand, and its contacts with the 'Juden Commando' on the other, it acquired in the eyes of the Jews of Hungary the status of the authoritative Jewish body in all matters relating to protecting their lives and rescuing them. For this reason, it is evident that the *moral* duty that Kastner owed to the Jews of Hungary derived from the *public*—if you will the *political*—functions he was charged with fulfilling" [my translation, emphasis in the original, L.B.].

14. Luban, "A Man Lost in the Gray Zone," 163.

15. *Ibid.*, 174.

16. Dan Diner, "History and Counter-Rationality—The 'Judenrate' as a Point of View," *Zmanim* 53 (1995): 45–53.

I believe that we should retain an awareness of the abyss when we form our judgments of the people who occupied the “gray zone” of the Holocaust. What made Kastner able to act in the face of minuscule probabilities and enormous dangers was precisely his tendency to exaggerate, his egotism, his willingness to embark on illegal activities, and yes, even his Zionism, which led him to “think big” and creatively. And yet, ironically, these same qualities doomed him in the Israeli court of law. The “gray zone” of black times can easily be mistaken for black deeds in brighter times.