

Transformative Justice

Law, Meaning, and Violence

The scope of Law, Meaning, and Violence is defined by the wide-ranging scholarly debates signaled by each of the words in the title. Those debates have taken place among and between lawyers, anthropologists, political theorists, sociologists, and historians, as well as literary and cultural critics. This series is intended to recognize the importance of such ongoing conversations about law, meaning, and violence as well as to encourage and further them.

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Transformative Justice: Israeli Identity on Trial, by Leora Bilsky

Transformative Justice

Israeli Identity on Trial

LEORA BILSKY

With a Foreword by Richard J. Bernstein

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To my mother, and in memory of my father.

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Foreword

Leora Bilsky, a law professor at Tel Aviv University with a strong philosophical background and sensitivity to literary issues of narrative, has written a remarkable book that can be read on a number of levels and from a variety of perspectives. She begins by asking an apparently straightforward question, “Can Israel be both Jewish and democratic?” When the State of Israel was founded in 1948, its Declaration of Independence embodied a bold confidence that Israel would be a Jewish state based on strong democratic principles—one that recognizes the rights of *all* its citizens regardless of religion. But during the more than fifty years of its history, there have been extraordinary tensions in reconciling its commitment to being a Jewish state and its democratic aspirations. With nuanced lucidity Bilsky brings forth the complexities of this uneasy tension by examining four extremely controversial trials: the Rudolf Kastner trial (1954–58); the Adolf Eichmann trial (1960–62); the Kufr Qassem trial (1956–57); and the Yigal Amir trial (1996).

The Eichmann trial is the most famous, but the other three, which occurred at crucial stages in the history of Israel, also raised fundamental questions about Israeli collective identity. Rudolf (Israel) Kastner was a Hungarian Zionist who negotiated with Nazis (including Eichmann) in order to save Hungarian Jews from extermination. He did succeed in saving more than a thousand Jews, then immigrated to Israel and became an important member of the Mapai (Labor) party. When a polemical pamphlet was published in Israel condemning him for his collaboration with the Nazis, Kastner sued the author for libel. Although Kastner was the plaintiff, the trial turned into a prosecution of Kastner (and the Mapai party). In the original trial (there was appeal in which the judgment was reversed), the presiding judge, Benjamin Halevi, condemned Kastner for having sold his soul to the devil. The Kufr Qassem trial dealt with the conduct of a unit of Israeli soldiers who murdered forty-nine Arab civilians for violating a curfew of which

they had not prior knowledge. Yigal Amir was notorious because he claimed at his trial that his assassination of Yitzhak Rabin, the popular Israeli general who became prime minister, was “justified” on the basis of Halakhah (Jewish law). Because these trials were not primarily concerned with the status of Jewish law, they are not typically considered relevant to Israel’s status as a Jewish democratic nation-state. Bilsky brilliantly demonstrates not just their relevance but their centrality to the question of Israel’s future as an open democratic society. But there is much more to what Bilsky has achieved.

All four of these trials were political trials, trials in which government authorities sought to advance a political agenda through a criminal prosecution. Normally we think of “political trials” in a negative manner, as “show trials” in which legal procedures are a mere facade concealing the cynical use of brute power. But one of the most provocative features of Bilsky’s study is its defense of the legitimacy and importance of political trials. Political trials need not be “show trials.” Indeed, Bilsky develops a positive theory of political trials based on a creative appropriation of themes from the work of Hannah Arendt. In this respect, *Transformative Justice* has legal and political significance far beyond the book’s Israeli context. A political trial, as Bilsky characterizes it, is a transformative one. Its purpose is to foster a transformation in the collective consciousness of a people. Bilsky at once articulates the criteria for such trials and defends their importance in furthering democratic practices. Thus, her work connects with the larger issue of transitional justice. But Bilsky argues that transitional justice is not just a problem that occurs at moments of crisis when legal procedures are used to judge those accused of committing criminal political acts. Because Israel has been in a constant and continuous process of *transition*, transformative trials play a critical role in the ongoing process of defining a democratic identity.

Bilsky does not restrict herself solely to what occurs within each of these trials, but also examines some of the striking commentaries that they provoked. In each of these trials there was a battle between a dominant narrative and a counternarrative. The Israeli poet Nathan Alterman, for example, incisively challenged the simplistic binary opposition between Jewish collaborators and heroes of the Holocaust that dominated the Kastner trial. Hannah Arendt was insensitive to the important role of testimony by Holocaust survivors in the Eichmann trial, but she nevertheless raised important philosophical and political

issues about the conduct of the trial and Israeli society. *Transformative Justice* thus addresses the subject of the role of narrative in shaping legal processes. Although Bilsky is a master of details, she is always raising more general questions about the limits of the law, the criteria for legitimate political trials, the ways in which they can deeply influence collective identity. She concludes by relating her discussion to the practice and principles of the truth and reconciliation commissions that have sprung up in different parts of the world.

Bilsky's book is engaging and stimulating because she deftly moves among these different levels and perspectives. She has constructed a compelling narrative that is at once gripping and thought-provoking, raising profound questions about the relationship of politics, history, social identity, and the law.

Richard J. Bernstein
New School for Social Research

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Tel Aviv, May 2004

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Chapter 1 appeared as "Justice or Reconciliation? The Politicisation of the Holocaust in the Kastner Trial," in *Lethe's Law*, ed. Emilios Christodoulidis and Scott Veitch (Oxford and Portland, OR: Hart Publishing, 2001).

Chapter 2 appeared as "Judging Evil in the Trial of Kastner," *Law and History Review* 19 (1) (spring 2001): 117–60.

Parts of chapters 3 and 6 appeared as "In a Different Voice: Nathan Alterman and Hannah Arendt on the Kastner and Eichmann Trials," *Theoretical Inquiries in Law* 1 (2) (July 2000): 509–47.

Chapter 5 appeared as "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.

A small portion of chapter 8 appeared as "Law and Politics: The Trial of Yigal Amir" (in Hebrew), *Plilim* 8 (December 1999): 13–75.