

## 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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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."<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> Kastner, unlike the representative of the Orthodox Jews (Fulop von Freudiger), for example, did not flee.<sup>12</sup> 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.<sup>13</sup> 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."<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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 counter-rationality. 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 counter-rationality 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.