Strangers Within: The Barghouti and the Bishara Criminal Trials

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How does domestic criminal law contend with those who are conceived by the state as strangers, as the enemy, falling under the rubric of "terror"? This question has recently gained urgency in light of growing efforts by democratic states to bring "terrorism" within the scope of criminal law. This development challenges the structure of criminal law in liberal democracies since it mandates addressing the lack of a fundamental condition that grants legitimacy to the court: a common legal basis shared by the two groups (represented by the prosecution and the accused) upon which to adjudicate the actions under consideration. The difficulty is compounded by the fact that modern criminal law has anchored its claim for legitimacy (or nonpoliticization) in the exclusion of political "motive" from the court's deliberation regarding the responsibility of the defendant.[1] This exclusion becomes problematic in "terror trials," since the very definition of terror is at the heart of the dispute. For one side it is a legitimate act of resistance against occupation and is based on the right of self-determination, while for the other side it is a violent action no different from ordinary murder. I call this condition "radical difference" and ask what changes should be introduced to criminal law to allow it to confront the problems it presents.

My claim, which I will seek to establish on the basis of the *Barghouti* and *Bishara* criminal trials, is that it is precisely in situations lacking shared community values and an inclusive democratic process that domestic courts are called to delineate the boundaries of political discourse, distinguishing legitimate criticism from illegal violence. The court can restrict the conditions for political deliberation that have been threatened by the growing violence, or it can enhance them. In other words, it becomes the court's decision whether and

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to what extant to ensure that the opposition is given space, that the defendant's narrative is heard, and to ensure the equal and inclusive enforcement of the law on members of both sides to the dispute.[2]

However, this role of the court is often obscured and it is particularly so in criminal trials. My question is what changes are needed in the criminal law if it is to contend with its new political role of judging the "terrorist" as an ordinary criminal. In order to understand the need for this reform we should first examine how the terror trial reverses the standard order of things: instead of working within the well-known boundaries of a political community from which it draws its legitimacy, the court itself participates in the act of drawing the boundaries of the political discourse community to which it belongs, while deciding questions of procedural and substantive criminal law. I claim that forcing the criminal court to decide such political cases engenders a crisis of legitimacy for the court, which cannot be addressed if we continue to ignore or deny the new political role of the criminal trial. This essay investigates the relation between criminal law and a political community and maintains that it is a dynamic and a constitutive one.[3] The court in the terror trial is an active participant in the redrawing of the boundaries of political community by taking certain arguments outside the scope of political discourse and defining them as criminal actions, or by resisting this attempt. When the democratic system functions in an inclusive way the groups that are threatened by such a move can oppose this process before the legislator. However, when there is a democratic deficit—for example, when one of the groups is denied access to the political process—this opposition is channeled to the criminal trial itself. However, under the ordinary criminal process there is no place to seriously consider such political challenges since they undermine the claim of the law for neutrality and the exclusion of politics from its domain. This position of traditional criminal law cannot be maintained in terror trials without undermining their legitimacy. Since I do not believe that terror trials are going to disappear anytime soon, we should address this problem. We need to develop a legal channel to discuss the political question raised by the terror trial, as a way to enhance its legitimacy. Instead of denying any place for politics in the trial, we should find ways to confront the political issue directly. The tools for this change can be adopted from constitutional jurisprudence that has long been struggling with similar issues.

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My argument relies on the works of various liberal thinkers who have suggested ways to allow liberal theory to contend with the existence of political trials.[4] In this essay I concentrate on the level of criminal law doctrine. I suggest that constitutional law, and the doctrines it has developed over the years for addressing the problem of the political trial, can offer insights into ways of facing the new challenge of criminalizing the "terrorist." In particular, it is useful to consider how constitutional law attempts to walk the fine line between legitimacy and legality by granting various discretionary powers to the court. In this context I examine what jurist Alexander Bickel has termed "the passive virtues,"[5] and ask whether and to what extent it is desirable to allow criminal courts to develop similar mechanisms of judicial discretion. More specifically, I compare two ways to infuse the criminal court with political discretion—the defense of "abuse of process" (which has been adopted and developed by the Israeli court in recent years), and the practice of jury-nullification (which has been recognized in Anglo-American law)—both of which, I argue, can give the criminal court (judge or jury) much needed discretion for examining the broader constitutional ramifications of the case. As we shall see, under traditional liberal theory these doctrines have been given a narrow interpretation, and were therefore shorn of their full potential for confronting structural problems of group discrimination through the criminal law. I suggest reinterpreting the scope of these doctrines in light of the new challenges introduced by the jurisprudence of terror.

Radical Difference in the Court

Criminal law cases and constitutional law cases are usually regarded as separate fields, at both the substantive and institutional levels (in Israel the former is decided by the ordinary courts and the latter by the Supreme Court sitting as the High Court of Justice). The general view is that there are only narrow points of convergence between the two fields—with regard to the constitutional rights of the defendant and, recently, also with regard to the rights of the victim.[6] Instead of asking what are or should be the constitutional rights of the defendant or the victim, I suggest asking what is or should be the constitutional role of the criminal trial in a liberal democracy. In other words, I am more interested in the deeper layer of constitutionalism affected by criminal law. I call

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this the question of "boundary drawing": identifying how criminal law actually participates in delineating the boundaries of citizenship, of who belongs and who does not belong to a political community of discourse.

Boundary drawing is much more apparent in constitutional law cases. A recent decision of the Israeli Supreme Court [May 2006] regarding law of citizenship and denial of the right of family unification for Israeli citizens who are married to a Palestinian from the "territories" can demonstrate this role, and the choices made by the judges in this regard.[7] Thus, for example, Justice Cheshin, leading the majority position of court, focused on the Palestinian spouse, who was described as "foreigner" and as belonging to an enemy state, and therefore, not enjoying a constitutional right to become a member of the Israeli state. Justice Barak, the president of the court, leading the minority position, focused on the Arab Israeli spouse, and thus could see clearly how his or her constitutional rights to equality and family life in Israel were breached. In other words, the preliminary decision on whom to focus, and how to see the Palestinian—as foreigner or as belonging to the political community through family ties—determined to a large extent the legal outcome reached by the different justices.

The process of boundary drawing is not explicit in criminal law adjudication. Since modern criminal law is connected to the nation-state, it presupposes the existence of a political community over which it has authority (monopoly of violence). It assumes that the issue of effective sovereignty has been settled.[8] Challenges to the authority of the court are therefore relegated to a preliminary stage of the criminal trial involving questions of jurisdiction, which, it is assumed, can be properly answered with the tools supplied by domestic criminal law. This preliminary process is not seen as relevant to the constitutional matter of determining the boundaries of the political community.[9] I would like to look more closely at this process—namely, how criminal law actually participates in drawing the boundaries of a political community.[10]

Political trials often begin with what can be characterized as a situation of radical difference in which two groups with antithetical or irreconcilable ideas about law and society meet in court. The conflict is radical in the sense that the two sides cannot agree on the substantive law that governs the dispute or on the evidentiary and procedural rules that can be legitimately applied to resolve it. The controversy cannot be resolved solely by legal means, since it does not

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concern a legal question such as the interpretation of the law or a disagreement about facts, but raises the preliminary question of which legal system has the right to adjudicate the conflict and which tribunal has jurisdiction over the case. In effect each side calls for the recognition of a different normative system, anchored to a different historical narrative, which determines which court should adjudicate the case. In such cases, the triad structure of the trial collapses into a binary structure of two parties facing each other in a power struggle without an accepted overriding law that can function as arbiter. In an ordinary trial, the two disputing parties can bring their case before a third party, whose position as an outsider to the dispute can guarantee its impartiality and thus endow its ruling with legitimacy.[11] In cases of radical difference, there is no such third party, because the court itself is deemed by one of the parties (and the group he or she represents) as its adversary, and hence illegitimate. This crisis occurs, for example, after a war or a revolution when one regime judges its predecessor's crimes, or in cases of a national uprising against a colonial power, or in situations bordering on civil war, when the courts of the current regime are called upon to judge those who seek to change it. In all such situations, the judiciary is identified with one of the parties to the dispute. But this can also occur in criminal trials in nontransitional situtaions, especially when there is an unresolved conflict between ethnic, religious, or national groups over the basic values of the polity.

The problem of "radical difference" has been central to two "terror" cases that have been tried before the Israeli courts: *The State of Israel v. Azmi Bishara*,[12] and *The State of Israel v. Marwan Barghouti*.[13] These cases are of special interest since here the state chose to conduct ordinary criminal trials instead of resorting to the military courts' system.[14] This decision has been informed by political changes that have taken place since the outbreak of the second uprising (*Intifada*) in 2000. During that time and under the growing circles of violence between the groups, Palestinian political leaders have undergone a process of delegitimization in the Israeli media and in political discourse.[15] Criminal law carried a central role in this process, in particular when it was directed against public leaders whose criticism of Israeli policy in relation to Palestinians was formally considered a legitimate part of the political discourse in Israel. This transformation, when it takes place incrementally, is very hard to trace. But when we examine criminal trials of central Palestinian public figures,

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these subtle processes can be identified, and the role of the law in this transformation can be analyzed. The trials of Palestinian leader Marawan Barghouti, and Arab Israeli leader Azmi Bishara, provide us with such an occasion. Both trials, I maintain, partake in a process of boundary drawing of Israeli political community vis-à-vis the stranger within, the political leader whose familiarity has to be rejected, and who has to be redefined as falling squarely beyond the pale of legitimate political discourse.[16]

Both trials were directed against Palestinian political leaders, but one, Bishara, is an Israeli citizen while the other, Barghouti, is not a citizen of Israel. Both defendants were viewed by the Israeli political authorities as involved in "terrorist" activities to different degrees. In particular, both were charged for making speeches inciting to terrorist attacks against Israeli citizens. Since they were both political leaders the trials had the further potential of delegitimizing the groups they represented. For the purposes of this essay, the difference between the two cases is no less important than what they had in common. Legally, Bishara was indicted for speech related offenses while Barghouti was charged for complicity in murder. Politically, Bishara was an elected Arab member of the Israeli Knesset (parliament)—representing a group that is considered de jure an integral part of the Israeli polity, but de facto suffers from discrimination,[17] while Barghouti was an elected member of the Palestinian parliament, a political leader in the Fatah faction and the military Tanzim faction, representing a group that was engaged in a violent struggle for national liberation and self-determination.

How did the problem of "radical difference" manifest itself in the two trials? The trial of Bishara dealt with two speeches he delivered, in Umm el-Fahem, Israel, and in Syria, in favor of the Palestinian right to "resist" Israeli occupation. The trial of Barghouti revolved around speeches he made in support of the violent uprising against the Israeli occupation and his role in supplying weapons and financial support to members of his organization who had carried out terrorist acts. He was charged, among other things, with murder. In both cases, the path to the criminal trial passed through the category of "terror," which was translated into specific criminal offenses,[18] and in both cases the defendants advanced oppositional narratives competing with the hegemonic narrative about the basic values of the state of Israel. Bishara was the leader of a political party that advocates turning Israel into "a state of all its citizens" as opposed to a

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"Jewish and democratic state" as the basic (constitutional) laws of Israel define it.[19] Barghouti advocated military resistance to the Israeli military occupation, but, in contrast to some more radical Palestinian leaders, he favored limiting the violent resistance to the Occupied Territories (that is, against soldiers and settlers), claiming that this restriction makes the resistance actions legitimate under international law.[20] This argument collided with Israel's claim that these distinctions do not stand and that all acts of violent resistance are terror.

In both cases, the underlying theme of the two competing narratives is the ongoing conflict between Jews and Palestinians in the region. The one important difference between the trials is that Bishara, as an Israeli citizen and an elected MK (member of Knesset), was able to compete with the dominant Israeli narrative at the political level and to work to incorporate his views (and his political motive) into the law.[21] His demand that the Israeli polity become more inclusive of its Palestinian citizens can explain his decision not to question the competence of Israeli courts. to rule on the legality of his speeches. Instead, he claimed that, under existing law, he was answerable only to the Knesset, since political speeches by MKs enjoy parliamentary immunity under the law.[22] Bishara argued that if the court ruled against him on this preliminary question of immunity, and asserted its authority to adjudicate the case, it would be redrawing the lines of legitimate political speech in Israel, thus de facto criminalizing Arab opposition to the Zionist ethos of the state.[23] He further claimed that such a decision could change the balance between the legislative and the judicial branches, thus undermining two cornerstones of Israeli democracy—the separation of powers and freedom of speech. The state prosecution denied the validity of this claim, maintaining that Arab citizens of Israel and Arab MKs most certainly do enjoy freedom of speech, but that Bishara had crossed the line between legal and illegal activity when he had advocated violent actions of resistance by Palestinians to the Israeli occupation.

The problem of "radical difference" was even more pronounced in the trial of Barghouti where the two parties not only disagreed about the legitimate jurisdiction of the court but were also divided over which law should govern the dispute (the international law of war or domestic criminal law). This latter disagreement had to do with the place of "political motive" in the criminal trial, since international law still recognizes the legitimacy of resorting to armed conflict in certain situations, while criminal law is premised on the idea

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that violence is never a legitimate response to conflict, and that its use is the exclusive prerogative of the state. The only justified resort of individuals to violence is in cases falling under certain defenses (such as "self-defense"), but there is no recognition of a right to "collective self-defense."[24] These opposing legal categorizations of the case relied in turn on two contrasting historical narratives of the Second Palestinian *Intifada* (uprising). While Israel characterizes the *Intifada* as acts of terror that pose a severe threat to the state, Palestinians, relying on a historical narrative of occupation and oppression, see it as a collective struggle over their right to self-determination. These differences were pronounced in the trial. Barghouti tried to distinguish between legitimate violent resistance (aimed against Israeli soldiers and settlers) and terror acts (against civilians within pre-1967 Israel). The prosecution argued that no such distinction is legally recognizable and that they should all be viewed as terrorist attacks that amount to ordinary crimes of murder and assault.

The Law of Jurisdiction

The issue of legitimacy is central to the political trial. As explained by jurist and political philosopher Otto Kirchheimer,[25] a political trial can be crudely characterized as an attempt by political authorities to eliminate a political opponent by legal means. They resort to the court because it provides legitimacy, placing their actions within the "rule of law," giving them a legal rather than a political coloring. The role of legitimization played by the criminal trial is therefore a key to understanding the choices of the prosecution. This problem of legitimization is also the main reason for the defendant to search for ways to raise his political concerns to the court without endowing it with legitimacy.

The jurisdiction stage of the trial is the only stage in which such division between participation and legitimation can be made. At this stage the parties do not have to engage the substantive claims about the guilt or innocence of the defendant but, rather, to debate what the proper tribunal is for addressing these questions. Interestingly, unlike liberal theory's general insistence on maintaining the ideal of the "rule of law" by preserving a distance between the tribunal and the parties to the dispute,[26] at this preliminary stage the opposite is required. Before the parties can present their substantive arguments, the court requires that its jurisdiction over the dispute be established, that the par-

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ties show a meaningful link between the case of controversy and the court. In a criminal trial, the most important connection is based on a territorial link—that the acts causing the dispute occurred on the territory over which the court has jurisdiction (the territoriality principle). Another link is a personal one, in cases where one of the parties to the dispute is considered a member of the political community over which the court is authorized to judge (the nationality principle). In addition, a temporal connection has to be proven—that there is no statute of limitations applicable to the act under consideration. These three links establishing the court's jurisdiction are also the three basic relations that constitute a political community—space, time, and people.[27] In other words, in order to establish its jurisdiction, the parties have to establish the court's proximity to the dispute, that there is a meaningful link to the court. The community basis of criminal law is thus exposed.[28] The principle of territorial jurisdiction represents the modern understanding of criminal law as one of the most important expressions of state sovereignty, which is usually delimited in terms of territory and geography (promising to apply the criminal code in an equal manner to all the inhabitants of a certain territory).[29] The law of jurisdiction can thus give us a first hint about the connection between criminal law and political community, a connection that might be too easily overlooked in an age of "universal jurisdiction."[30]

Given the problems of "radical difference," "legitimacy," and "divided community" in the Barghouti and Bishara trials, it is not surprising that the two defendants concentrated their arguments regarding the broader constitutional aspects of the trials at the jurisdiction stage—the only stage in a criminal trial in which engaging in legal arguments does not endow the court with legitimacy on part of the defendant. In the Bishara trial the "external" quality of this stage acquired an institutional character. The question whether an Israeli MK enjoys parliamentary immunity from criminal charges is first decided by the Knesset Committee. Only after immunity is removed by the Knesset can the court acquire jurisdiction over the case. In the Bishara case the trial court decided to postpone its decision regarding the issue of immunity to the end of the trial, after the substantive issues of criminal responsibility were decided.[31] The defendant petitioned the Supreme Court sitting as High Court of Justice on this decision, and on February 1, 2006, the Supreme Court ruled in his favor. In the Barghouti case the jurisdiction stage did not bear an institutional char-

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acter, since the same tribunal decided both the question of jurisdiction and the substantive question of criminal liability (the decision can be appealed only as a whole). However, Barghouti, as a political defendant, attributed considerable weight to this qualitative difference and acted accordingly. Thus, regarding the issue of jurisdiction he was legally represented and submitted a legal answer, while he refused to have legal representation or to cooperate with the Israeli court or the Public Defense Office on any other issue so as to avoid the effect of legitimization.

In the Bishara case, the main claim against the court's jurisdiction concerned the issue of parliamentary immunity: since his political speeches had been made as a MK and a political party leader, in order to fulfill his political mandate, he claimed that they were protected by his parliamentary immunity. Thus, the Knesset Committee had erred in removing his immunity, and any criminal proceedings advanced against him were therefore void. In other words, the argument about the court's lack of jurisdiction was presented as an internal one, pertaining to the separation of powers between the legislative and judicial bodies within Israel as a democratic state. Barghouti's claim against jurisdiction was far more radical: since the Palestinian people base their right of violent resistance on their collective right to self-determination, and since Israeli law does not acknowledge such a right, Israeli courts cannot serve as legitimate arbiters. He translated this claim into five main arguments against the jurisdiction of the Israeli court.[32] Barghouti relied on the Oslo accords, which he claimed had effectively ended Israel's jurisdiction over Palestinians who injure Israelis, and on international law, which he claimed does not recognize Israel's right to bring him to trial since he was a "freedom fighter" resisting military occupation. Further, he argued that he had been illegally kidnapped by the Israeli army (IDF) and should enjoy "prisoner of war" status. Barghouti also claimed that he enjoyed immunity from criminal prosecution as a member of the Palestinian parliament, and that the indictment was purely political, amounting to an indictment against the Palestinian people as a whole, and therefore should be withdrawn. The court rejected all these claims,[33] insisting that Barghouti's actions were not political but criminal, and therefore "it is the duty of the state of Israel to bring the likes of Barghouti to trial."

It is clear from both cases that issues relating to the political nature of the trial underlay the defendants' argument regarding the jurisdiction of the court.

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Both defendants sought to expose the political underpinning of the trial by showing the unequal treatment that they received—Bishara stating that his trial constituted a first precedent for prosecuting an Israeli MK for political speeches, and Barghouti maintaining that Israel was deviating from the norms of the international law of war by treating him as criminal defendant instead of a "war prisoner" and conducting a political trial against him. Both defendants thus questioned the legitimacy of resorting to domestic criminal law. For this reason both also stressed the collective nature of the prosecutions—that in each case, the real defendant was the group represented by the legal defendant.

The doctrines of jurisdiction point to the basic problematic of modern criminal law. Barghouti, who bases his claims against Israeli jurisdiction on the general right of resistance, is more radically opposed to the jurisdiction of Israeli courts, maintaining that criminal law allows no distinction between legitimate and illegitimate acts of resistance (exclusion of political motive). As I pointed out, the exclusion of "political motive" from modern criminal law depends on the guarantee of equal citizenship (and the ability to contest the terms of criminal law before the legislator). However, since this condition is not satisfied in the case of military occupation, and an ongoing national conflict, a domestic criminal court can no longer be justified in ignoring the political motive of the defendant.

The jurisdiction stage of the trial was thus haunted by the political motive excluded by criminal law. The question is whether dividing the criminal trial into two stages, and delegating the "political" question to the preliminary stage of jurisdiction, can allow the court adequate discretionary powers to contend with the political basis of the trial and its constitutional ramifications. I believe the answer is negative. This is so because jurisdiction in criminal law is binary (it either exists or not),[34] and is therefore not adequate to addressing cases that require a more subtle balancing of legal and political issues. For example, in the Barghouti case, even according to the principle of territorial jurisdiction, the Israeli court clearly enjoys jurisdiction since the violent attacks were directed against Israeli citizens and were not confined to the West Bank but also within the June 4, 1967, borders, and not only against soldiers but also against civilians. Although Barghouti claimed that these "transgressions" were carried out by members of his organization against his explicit orders, this fact could not bear on the jurisdiction issue, since it concerns matters of substantive law

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(law of participation in a criminal enterprise). The jurisdiction of Israeli courts stems from the basic understanding of sovereignty. If the court cannot establish its jurisdiction in a case where the life of Israelis within Israel is taken, then the very basis of state sovereignty (monopoly of violence) is placed in question. Nevertheless, the defendant's need to shape his constitutional concerns in terms of jurisdiction seems to miss an important component of the problem. Even if Israeli courts can claim valid jurisdiction over the case, the political aspects of the trial remain to be addressed. The neutrality and impartiality of the court are undermined when the defendant belongs to a collective engaged in a violent struggle with the state to which the court belongs. In our case, while one side to the conflict enjoys de facto immunity from criminal prosecution for what Israel defines as collective acts of "self-defense,"[35] the other side to the conflict is exposed to criminal prosecution for what it defines as justified acts of "resistance." But does such bias that is endemic to situations of radical difference mean that Israeli courts should be exempted in principle from judging such cases? I would like to suggest that we abandon the binary understanding of the law of jurisdiction and develop more refined tools that could enable the defendant to raise his concerns about the neutrality of the prosecution and the court. In other words, I suggest that Israel can assert legitimate jurisdiction over such cases only if its legal system develop legal tools that enable the courts to address concerns about unequal enforcement of the domestic criminal law on both sides to the violent conflict.

The jurisdiction stage seems to better serve the Bishara case since his actions were doubly distanced from violent acts. First, he was not charged with participating in the violent acts of "resistance" but only with speaking in their favor. And second, since Bishara was an elected MK, he did not challenge the constitutionality of the substantive criminal law proscribing such speeches, but only insisted on an MK's immunity from prosecution under such laws. He also enjoyed the institutional advantage of bringing his claims before the Supreme Court sitting as High Court of Justice, once the trial court rejected his claims (an option closed to Barghouti, whose appeal on jurisdiction could take place only after the conclusion of the trial). However, also in the Bishara case, the law of jurisdiction was ill suited to illuminating one important aspect of Bishara's claim, the unequal treatment he was receiving by the political bodies.[36]

"Terror" trials present us with the risk of selective prosecution, of crimi-

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nalizing only one side to the conflict in domestic national courts. It might be argued that domestic courts are so "tainted" that the only solution is to transfer such cases to international tribunals. I believe that this solution is problematic. First, it is unlikely that national courts will relinquish such cases, which are often viewed as the very symbol of the state's sovereignty (the right to adjudicate those who claim unrestricted "war" against the state and its citizens). This may lead to direct conflict between domestic courts and international tribunals. Second, if domestic courts are prevented from adjudicating such cases, the political authorities are likely to resort to the alternative—the use of brute force (which is of great concern to liberal thinkers dealing with problems of state authorized assassinations, administrative detentions, or military committees in the war on terror.)[37] The solution of recognizing universal jurisdiction to third-party courts, which is proposed in order to enhance the "rule of law," may in fact create its own problems of politicization. In any case, the controversy over universal jurisdiction deserves a separate article. In this essay I restrict myself to contemplating an alternative solution, one that invests domestic courts with legal tools to address the issue of selective prosecutions in trials of terror.

Midway Conclusion

The law of jurisdiction can teach us that the key to solving the problem of political trials in national courts does not necessarily lie in trying to maintain the strict separation of politics and law. "Blind justice" does not always result in a just trial. We are used to thinking about the rule of law in terms of maintaining a distance between the court and the parties to the dispute, but at the same time, as noted above, the rule of law requires that a meaningful link be established between the court and the community injured by the deed. The problem of a political trial can arise when there is too much distance between the tribunal and the disputing parties, just as it arises when there is too much proximity. It is therefore necessary to devise more creative ways to balance the political bias of national courts by endowing the courts with more subtle tools of discretion for handling the political issues that such cases inevitably raise—in particular, the problem of equal treatment before the law in situations where the national "community" is divided (such as in the Bishara case), or where two communities are engaged in an ongoing violent conflict against a military oc-

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cupation (such as in the Barghouti case). My contention is that the legitimacy of applying criminal law to such cases should not be conditional on the (fictional) existence of one community of shared values, but rather that we should try to develop constitutional tools that can enable the criminal trial to address these concerns about equal treatment by national courts under conditions of radical difference.

The Constitutional Analogy

During the years in which the constitutional balance of powers between courts and the other political branches has been shaped, jurists have given much thought to the problem of how to strike the proper balance between legality and legitimacy when faced with the political question. Two main approaches to this problem can be broadly identified: implicit and explicit. The former can be called the "passive virtues" approach, the other the "substantive discretion" approach.

In his book *The Least Dangerous Branch,*[38] American jurist Alexander Bickel suggested that it is crucial for a court adopting an active stance of judicial review on constitutional matters to insist on developing what he terms the "passive virtues"—that is, various legal doctrines such as "standing," "ripeness," "non-justiciable questions," and so forth, all of which enable the court to choose to confront the political branch at the time and with a case that seems most suited to maintaining both the rule of law and the legitimacy of the court. These tools allow the court to avoid deciding cases on merit when they are too explosive politically, without taking a principled position in favor of the executive decision. These are therefore "silent" tools of avoidance that permit the court to balance prudence and principle.

The opposite approach to the danger of politicization has been to endow the court with explicit discretionary powers. Instead of a "yes-no" approach to judicial review (valid and void decisions), it is proposed that the court should develop doctrines of degrees such as "reasonableness," "proportionality," "partial voidance" and so forth,[39] which admit the existence of gray areas in which the executive and the court should resort to discretion. These doctrines, while allowing the court the needed leeway (between principle and prudence), stipulate that such balancing will be carried out explicitly, in the reasoning of the

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court.[40] These tools are no longer "silent"; rather, they require elaborate justification. Although constitutional law jurists in Israel and elsewhere have long debated the advantages and disadvantages of each of these approaches,[41] here I propose to extract from this complicated controversy those elements that may be useful for dealing with the political question in criminal law.

I have argued that when "terror" enters the realm of criminal law, it can create a crisis of political legitimization, since the very act of judging the terrorist as a common criminal carries a huge symbolic message. Historically, courts in democratic societies have resorted to the law of procedure to handle such difficulties. For example, in the United States, giving a constitutional basis (4th and 14th amendment) to doctrines for excluding tainted evidence ("the fruit of the poisonous tree") was designed to discourage the police from overzealousness in prosecuting suspects and it could be used to temper unequal enforcement of the law on different groups.[42] In general such doctrines invoke the equity idea of "estoppel"—that is, that the authorities are barred from proceeding with the case if they violate the accused's procedural guarantees of due process. Such doctrines allow the court to dismiss cases suspected of abuse of power without ruling on the merits.[43] In the area of criminal law, resorting to tools of avoidance may lead to public criticism of the courts for allowing criminals to go free because of a seeming "technicality," or for preserving the constitutional rights of defendants at too high a cost to society. Indeed, in Israel the court decided against resorting to this rigid sanction in criminal law cases and instead opted for a more discretionary approach to the problem.[44] Another, more explicit way to mitigate the political tendencies of the prosecution, can be found in the interpretation of substantive criminal law in light of constitutional concerns. Of special concern for liberal courts are crimes that undermine the principle of individual fault (such as crimes of criminal conspiracy),[45] crimes undermining freedom of political speech (libel, incitement), and crimes directed against the polity (treason, espionage).[46] Courts that were willing to restrain the political authorities' tendency to misuse these crimes against political adversaries relied on strict construction of the criminal law.[47] As Kirchheimer indicated, notwithstanding the natural tendency of national courts to identify with the position of the authorities in times of "security emergency," they often find ways to resist such pressures.[48]

These traditional tools of criminal law, important as they are, are not suf-

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ficient to deal with the dangers of the political trial. Therefore, I would like to suggest applying the constitutional framework of the "passive virtues" and "substantive discretion" approaches to examine discretionary tools available to courts in the field of criminal law. Particularly, I will be looking at two ways to address issues of selective prosecution. One way, that of jury nullification in Anglo-American law, can be characterized as a "silent" tool, opening up the binary structure of jurisdiction by allow a "third way" for the court: a means for acquitting defendants that suffer from discrimination or abuse of process without involving the judges themselves in a direct collision with the political authorities. The second way, the defense of abuse of process (developed by Anglo-American courts and recently adopted by Israeli courts), is a discretionary tool that demands explicit reasoning. It allows the court to delay or dismiss a case based on broad constitutional consideration of factors such as selective prosecution and discrimination. In the following sections I discuss the possible contribution of these tools to contending with the problems presented by trials of terror.

The Defense of "Abuse of Process"

We have seen how the very question of whether the defendant has to answer to the court in a political criminal trial carries with it constitutional ramifications. The problem stems from the situation of radical difference, as well as from the court's apparent proximity to one party to the conflict. The very willingness of a national court to adjudicate the case is viewed by the defendant as undermining the court's authority, making it a party to the dispute. The alternative possibility, of making the court answerable to the defendants for the constitutional basis of the trial, has not been seriously considered by jurists.[49] In this section I argue that finding ways to address this problem can enhance the legitimacy of the trial by creating a deliberative space that has previously been closed to the defendant by the political authorities.

We have seen that arguments about jurisdiction in criminal law are not tailored to tackling the problem of political bias. I therefore suggest that we should not consider the jurisdiction phase as exhausting the constitutional arguments against the trial. Rather, we can explore an intermediate approach—that the jurisdiction of the court might be valid, yet, because of various concerns about selective prosecution the court has to further establish its authority by meeting

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the condition of answerability to the defendant. This can be done, for example, by changing legal presumptions. In cases of alleged radical difference we could consider adopting a presumption of the "partiality" of national courts because of their structural closeness to one of the parties. The court will then have to overcome such presumption before it can adjudicate the case.[50] But short of such radical solutions we can consider a more moderate tool for reviewing the constitutional basis of the case through the introduction of the "abuse of process" defense.

In recent years, Israeli courts and legal scholars have been deliberating the introduction of the defense of "abuse of process." Scholars argued that this defense has the potential of bridging the gap between criminal law and constitutional law, since it directs the court's examination to the larger political framework of the trial.[51] The need for such a defense is especially acute in legal systems like the Israeli one, in which the prosecution enjoys broad discretion whether to press criminal charges.[52] Since broad prosecutorial discretion creates the potential for abuse of power, the Israeli Supreme Court, sitting as High Court of Justice, has gradually recognized its power of judicial review over decisions of the public prosecutor and attorney general, but applied it in very rare occasions in which the decision not to prosecute seemed highly unreasonable.[53] A similar power of review, however, was not exercised by criminal trial courts. For many years Israeli courts have not recognized their power of acquitting a defendant on the basis of a preliminary argument of "bar to trial" such as "I was illegally brought to trial" (Eichmann, Barghouti), or "I was discriminated against—the state charges me for a crime while letting others commit similar crimes." The need for reform was first acknowledged by the courts that developed the defense of "abuse of power" relying on their discretionary powers to interpret the law, and in 2007 the Israeli legislature amended the criminal procedure act and recognized this defense.[54]

The defense was first recognized in the Yefet case [1996], which dealt with the conviction of bankers and banks for the manipulation of their shares. The defense claimed that the state was barred from prosecuting the defendants because of its own involvement in the matter. The court recognized the defense of "abuse of process" in principle but limited its application to very rare cases of "unbearable and scandalous conduct of the authorities that amounts to persecution and oppression of defendants . . . cases that shock the conscience and

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affront the universal sense of justice."[55] Thus, the court restricted the defense to cases of "gross misconduct" and "bad intent" on the part of the prosecution (subjective criteria).[56] One reason for limiting the defense to cases of "subjective" discrimination might be to protect the court from having to decide political issues that it lacks the expertise to decide. However, this narrow scope of review left the problem of structural bias and group discrimination unaddressed. Under this interpretation the defense could not be used to address the difficulty raised in cases of "radical difference" when the law is applied against people belonging to only one side to the conflict.[57]

In the Borowitz case (Borowitz, 2005),[58] the Israeli Supreme Court adopted a broader test for examining "abuse of process," and it therefore opened the door to raise the defense in cases such as *Bishara* and *Barghouti*. In the Borowitz case, the court allowed itself more discretion to bar or limit criminal prosecutions when there is "substantial harm to the sense of fairness and justice," and was willing, in principle, to recognize discrimination also in cases in which the authorities acted in "good faith." Legal scholars called the court to adopt the broader criteria to encompass arguments that refer to the intersection between criminal law and constitutional law.[59] The legislature followed suit and article 149(10) of the amended criminal procedure law adopted the broader test for review according to which the court should examine whether the indictment by the prosecution or the conduct of the trial "stand in substantial contradiction to principles of justice and legal fairness."[60]

Adopting the broader test for review under the "abuse of process" defense has the potential of creating a better system of checks and balances on the executive by making the issue of equal treatment in criminal prosecution subject to judicial review.[61] It allows the court to refrain from judging the case on its merits, and instead, to stay, limit, or annul the charges until the concerns about equal protection of the laws are addressed. Thus, the defense of "abuse of process" in its broader interpretation can create a new incentive for the prosecution to eradicate unjustified immunities enjoyed by certain classes of defendants. It can thus work to enhance the legitimacy of domestic courts in adjudicating cases of "radical difference." In principle it can discourage the prosecution from targeting only one side to the conflict and hence also reduces the need to send the case to a "third-party" court or to an international tribunal (an option that creates new kinds of problems of selective prosecution, as I elaborated elsewhere).[62]

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How could the defense of "abuse of process" have changed the dynamic of the Barghouti and Bishara cases?[63] As we saw, Bishara as an Israeli citizen and a parliament member chose not to raise this defense and relied instead on the substantive immunity enjoyed by MKs. This choice reflects the current state of law in which constitutional claims against the criminal proceedings are often channeled to the jurisdiction phase. Given the difficulty of establishing the defense of "abuse of process," and given the uncertainty about the proper criteria for its application (subjective or objective), Bishara's lawyers opted to rely solely on the Law of Parliamentary Immunities. But if, for the sake of argument, Bishara had raised claims of discrimination under the abuse of process defense, and if the court had opted for the broader test adopted by the Borowitz case, how could the defense have been applied to Bishara? The court could have examined Bishara's criminal prosecution in relation to the Israeli attorney general's policy of refraining from prosecuting, for instance, leaders of Israeli settlers in the Occupied Territories for speeches advocating violent resistance to the August 2005 withdrawal from the Gaza Strip.[64] However, we should bear in mind that there are substantial legal barriers to the success of such "abuse of process" claims: 1. Selective prosecutions as such are not prohibited. 2. The courts have a choice between a "subjective" or an "objective" criterion for review. 3. The proper criterion for comparing classes of defendants is not clear and subject to political contestation (should Jewish rabbis be compared with Arab political leaders?). All these difficulties might well have convinced Bishara to stick with the parliamentary immunity argument that constitutes a general block for prosecution and does not require a substantive review by the court of the prosecution policy of the attorney general. Obviously, this constitutional channel available to an elected MK is not an option for other Arab citizens of Israel who might find themselves accused of incitement to violence.[65] The Supreme Court's decision to uphold Bishara's immunity without deciding on the merit of his speeches only underlines the need to create a more general doctrine that would allow the court to review the constitutional ramifications of the criminal prosecution in ordinary criminal cases.

A similar case for the defense of "abuse of process" can be made with regard to the Barghouti trial. Under this defense Barghouti could have claimed that he was facing criminal charges for the killing of innocent civilians, while leaders of the Israeli army enjoy de facto immunity for killing civilians during acts of

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"targeted killing."[66] One answer to such criticism can be that there is a principled way to differentiate between the two cases (intentional killing of civilians is nothing like killing civilians unintentionally, as "collateral damage"). However, this answer presupposes the existence of a legal channel through which such claims can be raised and examined by the courts. As long as the legality of the policy of "targeted killing" is left outside the jurisdiction of Israeli courts in principle, and the petitions to the Supreme Court about their legality are not accepted, the preliminary claim about unequal treatment (and hence the abuse of process defense) remains the only channel in which to raise the constitutional concern. This can be done through the "abuse of process" defense. Applying the defense to the Barghouti case raises difficult problems for an Israeli court, since it would have to compare the nonprosecution of Israeli soldiers for 'targeted killing' with the prosecution of Barghouti for terrorist attacks. Moreover, since the defense amounts to a "bar to trial," the more horrendous the crime, the less likely it is that the court will stay the proceedings (balance between fairness to defendant versus public security).[67] These difficulties seem to make the "abuse of power" defense in the Barghouti case into a theoretical possibility at best.

The hypothetical attempt to apply the "abuse of process" defense to our cases clearly shows its limitations, which can be attributed to its explicit character. Although this defense allows the claim of discrimination to be directly addressed, and the court's decision to acquit or to stay the process on the basis of discrimination has the potential of creating incentives to the prosecution to apply the criminal law in a more equal and universal manner, the obstacles nevertheless seem to outweigh the benefits. The very fact that domestic courts tend to apply the "abuse of process" defense only on rare occasions and under stringent conditions reveals their difficulty in intervening in such cases, especially with regard to serious crimes. Moreover, since cases of radical difference implicate the court as well as the prosecution, asking the court to recognize the "abuse of process" defense requires it to make a statement about the structural bias of the legal system to which the court has contributed. Finally, the defense of abuse of process places the court in direct confrontation with the executive, and could undermine the legitimacy of the court in the eyes of large sectors of its domestic public.[68]

The "abuse of process" mechanism offers only a partial solution, as it raises

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another problem—that of the court's own legitimacy. Once the court begins to openly deliberate questions of group discrimination, for example having to compare between Palestinian leaders (who are indicted) and the settlers' political leaders (who aren't), or between Palestinian terror attacks on civilians and the policy of "target killing" by the Israeli Army (with civilians killed as "collateral damage"), the court is bound to lose its legitimate status in the eyes of the broad Israeli public. I therefore turn in the following section to consider an alternative to this explicit review, based on the Anglo American practice of jury nullification.

Jury Nullification

"Jury nullification" has been practiced in English and American courts for hundreds of years, but it has been on the decline since the nineteenth century.[69] Even though this solution is purely theoretical in Israel, which does not have a jury system,[70] it is an interesting option to consider, since it tackles the problem of the community basis of the criminal trial from the opposite direction. We saw that the "abuse of process" defense requires that the court explicitly engage the constitutional issue of equal enforcement of the law, and in cases of accepting the defense, provide an elaborate justification. Jury nullification, on the other hand, is recognized only implicitly, as it is not a recognized right. This practice has not been acknowledged or justified in the open court and therefore its scope remains ambiguous and uncertain. While "abuse of process" is practiced in the light of day and vigorously scrutinized and reviewed by the Supreme Court, jury nullification needs the dark of night and at most, is silently recognized. For this reason the two solutions offer a strong analogy to the constitutional framework that contrasts the "explicit discretion" approach and the "passive virtues" approach to the problem of the political question.

Jury nullification is a controversial doctrine that recognizes that jurors have the right (or enjoy the power) to refuse to enforce the law against defendants whom they believe in good conscience should be acquitted. They can acquit defendants for conduct that formally falls under a criminal prohibition and does not enjoy any recognized defense. This power was first recognized in 1670 in England, following the refusal of a jury to convict two religious leaders of the Quaker movement (William Penn and William Mead) for unlawful assembly and breach of the peace. After the court fined the jury, one of the jurors, Ed-

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ward Bushel, refused to pay the fine, was imprisoned, and appealed. This appeal changed the course of jury history. In a landmark decision the appellate court ruled that jurors might never be fined or imprisoned for their verdicts.[71] This meant a de facto recognition of the power of jurors to acquit on grounds other than the existing law. However, the practice has not been recognized as a right of the jury, and its current power comes from the fact that under American law there can be no appeal on jury acquittals (on the basis of the constitutional guarantee against double jeopardy). Thus it has become a corrective device to the criminal system. Jury nullification bears special importance in cases that reflect an unresolved clash of values within society, when criminal defendants rely on their oppositional value system that collides with the one expressed by the law. Modern examples are the legality of abortions, the illegality of mercy killing, the illegality of drug use, and so forth.[72] Jury nullification in such cases can be viewed as an extension of civil disobedience, since it invites the jury not to punish what they believe to be justified acts of lawbreaking. But it can also be exercised as a protest against an unequal and discriminatory application of the laws over certain classes of people in society.[73] The danger in jury nullification results from its unaccountability. Juries might, and often did, resort to this practice not just to enhance noble causes but also out of various prejudices (racism, sexism and the like).[74]

Since jury nullification has not been recognized as a right (but only as a power), and since juries do not provide reasoning for their verdicts, the practice amounts to an implicit power of abstention from applying the law. Judges cannot instruct juries to exercise their power of nullification, since it is not a right. Indeed, much of the current debate about the practice revolves around the formal issue of whether to instruct or not.[75] This debate touches on the question that interests us here—what form constitutional deliberations should take in the criminal process: explicit or implicit.

Israeli scholar Amnon Lehavi argues that the power of jury nullification lies in its secrecy, which enables it to ameliorate injustices inherent to the criminal system without undermining the integrity of the court and without creating bad precedents.[76] The tool of jury nullification is regarded as "just" as long as it remains "silent"—that is, as long as the jurors' opinions are unanimous, as long as their discussion is held behind closed doors, and their considerations remain concealed. Practically, this means not knowing when exactly the jury has used

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the power of nullification and when it is actually convinced that the accusation is unfounded. In this manner, jury nullification upholds the formal commitment of criminal law to the exclusion of political motive from its deliberation, and simultaneously enables the court to reach a "just" result based on these considerations. In other words, the secretive nature of the practice enhances the legitimacy of the trial by preventing an unjust result without forcing the judge to distort the law for that purpose. According to this analysis jury nullification offers a way to protect the integrity of the system, while correcting local injustices to specific defendants. This solution is a manifestation of a broader structure of the criminal law that has been previously identified by Meir Dan Cohen as "acoustic separation." The idea is to allow both the affirmation of the rule of law and the needed deviation from the law in cases of gross injustice. Such devices help the court achieve conflicting goals of the criminal law.[77]

The question is whether this mechanism is suited only to correcting individual cases of injustice, or whether it should be used to correct "structural" problems stemming from racism, sexism, and other biases in the implementation of the criminal law such as in cases of "radical difference." For example, when criminal law definition of "self-defense" does not encompass the needs and life-experiences of battered women, should we put our hopes in jury nullification as a corrective mechanism? Or, when the criminal system is biased against one class of defendants who belong to a certain minority, should we resort to jury nullification as a corrective device? This question leads us back to an important role that jury nullification played in the past as a check against political trials. Indeed, several participants in the current debate argue that the jury should be informed of their historical role as "value" articulators of the community, a role that goes beyond and above their fact-finding role recognized today.[78] Lehavi takes a strong position against this approach. He argues that given its delicate mechanism of "secrecy and harmony," jury nullification can only work to ameliorate individual injustices. Any attempt to enlarge its scope to address structural bias against minority groups poses grave risks to the integrity of the criminal system, and is likely to produce more harm than good (as the case of O. J. Simpson demonstrates).[79]

I agree with the diagnosis (that the power of jury nullification lies in its secrecy) but do not agree with the prescription (against applying it as a check in political trials). My reasons can become clearer if we compare "jury nullifica-

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tion" to the "abuse of process" defense. Both doctrines offer opposite directions for tackling structural problems that are typical in cases of "radical difference." I suggested that the problem of legitimacy faced by the court in such cases is the result of a lacuna in criminal law adjudication—the lack of discretionary tools for addressing the political question. In other words, the problem does not lie in the substance of the accusations, but in the constitutional framework of the trial. Both approaches are meant to infuse the court with discretion to address the constitutional structure, either explicitly or implicitly. Here we can see the relative advantage of the "jury nullification" mechanism over the "abuse of process" defense. Since the latter requires that the court justifies its decision explicitly and therefore puts the court in direct conflict with the political authorities, the court is likely to narrow down its scope, thus avoiding dealing with the most difficult cases of radical difference. In contrast, jury nullification allows the court to reach the same result of avoiding ruling on the merit, without explicitly condemning the executive policy of unequal enforcement of the law. This said, I agree that jury nullification is unlikely to work in cases where it is most needed—namely, where the democratic system suffers from endemic problems of democratic participation.

The history of the jury shows that although its conception and roles have changed over time, the jury has consistently been perceived as being connected to a concept of participatory democracy (either active participation in the shaping of a community's laws, or more passive participation in restraining the power of nonelected judges). The jury represents a popular instinctive justice, the "conscience of the community," and can thus contribute to the legitimacy of the criminal trial by implementing the widely agreed values of the community.[80] Thus, the power of jury nullification to remedy the problem of legitimacy in political trials derives not from the jury's "expertise" in the law or from its special capacity to determine the facts, but from its perceived connection to a political community. As the notion of "community" has changed in modern times from homogeneity to heterogeneity, the belief in the jury as the articulator of common values of society has been abandoned. However, the jury can still help connect criminal law to a political community by serving as a negative check against abuse of power by prosecutors or judges. Although the practice of jury nullification can cause havoc to all attempts of systematization and harmonization of the laws, it is "tolerated" precisely because it preserves

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the connection between criminal law and a living community.[81] It thus fulfills the promise of "self-rule" vis-à-vis the most feared aspect of sovereignty—relinquishing the monopoly over violence to state officials. As a corrective device it reflects a democratic suspicion of "perfect laws" or "perfect judges" as sufficient in and of themselves to protect the liberties of the people in whose name the laws were legislated.

Having recognized this modern reason for acknowledging the power of jury nullification, it seems unjustified to limit it to instances of "individual injustice." Rather, we should see jury nullification as capable of ameliorating also structural biases that are endemic to a heterogeneous society. Juries from local communities can offer a check on discrimination and unequal enforcement of the law over minority groups. However, this also suggests the limits of such a corrective mechanism. It can work only when some kind of political representation and participation is given to a minority group. In situations of military occupation this condition cannot work and hence the practice loses its corrective function. Under such conditions, it is left to the court to exercise review over the constitutional foundation of the criminal law.

In this essay I cannot offer a definite answer to the question of which tool, jury nullification or abuse of process defense, is better suited to deal with situations of "radical difference," but I maintain that without some kind of check over the equal enforcement of the criminal law, terror trials in domestic courts will lose their legitimacy. Adopting a mechanism to address these problem into the process of criminal law is essential to address the problems of politicization created by such trials. [82]

How does this analysis bear on the Barghouti and Bishara cases? The practice of "jury nullification" points to an essential difference between the cases that is related to the factor of community. The Bishara case exposes the discord between two communities: within the Israeli polity, the majority community of Jews, and the minority community of Arabs. Although both communities are part of a larger civil community, Israel's Basic Laws endorse a specific conception of the state (Jewish and democratic) that is tilted toward the majority community, thus creating a tension that is exacerbated when it is translated into provisions of the criminal code.[83] An amendment from 1995 that proscribed incitement to violence or terror (art. 144d2) remained neutral between the two communities. However, Bishara argued that it was applied unequally to lead-

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ers of the two communities. The case was adjudicated by the Nazareth district court, the domicile of Bishara.[84] If Israel had a jury system, a jury constituted of the inhabitants of the district of Nazareth might have had a good chance of nullifying the verdict as an act of protest against state discrimination against Arab leaders by means of political prosecutions. This is all hypothetical, but given the history of African American discrimination by the criminal law system in the United States, analogies to cases of jury nullification there could be telling.[85] The need to enhance the legitimacy of courts in criminal cases bearing on internal Jewish conflicts has been also acknowledged by Israeli legal system by appointing "representative" judges in political trials that dealt with defendants from various Jewish minority groups.[86] Of course, this midway solution (between professional judges and jury system) is more cosmetic than real, given the centralized structure of the court system in Israel. But it points to a growing understanding of the problem in terms of equal representation. Adopting the jury system in Israel would bring some of the risks of the practice (judging according to local prejudices) as well as some of its advantages (infusing the legal system with local community values). In either case it could have introduced a check on political persecution of Arab Israeli leaders and to mitigated their political overtones.

The Barghouti case, by contrast, is unlikely to benefit from a hypothetical adoption of a jury system in Israel. Under the current political conditions of Israeli occupation over Palestinian land, and terror attacks of Palestinian organizations against Israeli citizens, it is hard to find a jury that can remain neutral. In an explosive political case such as the Barghouti case any Israeli jury would most likely be susceptible to the general public mood and conform to the conception of the political authorities. Moreover, a jury system embodies a conception of participatory democracy, while Palestinians under Israeli occupation are not citizens of Israel and thus do not enjoy even the elementary right to vote for the Knesset, let alone the right to participate in our hypothetical jury. Hence, the systemic bias of the trial can hardly be corrected by exposing it to a jury of Israeli citizens. Nevertheless, our hypothetical experiment shows that the problem lies not in the attempt to bring Barghouti to a criminal trial, but in the weak constitutional basis of the trial. The exclusion of the political motive as irrelevant to a criminal trial, combined with the exclusion of the group represented by the defendant from any participation in the democratic process

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in Israel, creates a structural bias against him. This problem is unlikely to be identified, let alone addressed, within the current structure of criminal law. The two legal mechanisms that I have explored as a way to address the problem also point to the source of the problem as lying in the larger political context of democratic participation. Thus, they expose the connection of criminal law to a conception of democratic participation as the main source of legitimacy for the court, a connection that a formalist understanding of jurisdiction tends to overlook.

From Hypothetical Trials to Real Trials

Given the very limited margins of maneuver enjoyed by the criminal court and the lack of direct doctrines to address the political bias of the trials, what were the solutions adopted by the Israeli court? In particular, how did it try to walk the fine line between legality and legitimacy? We can identify two distinct approaches. The Barghouti trial court rejected the claims against its jurisdiction and was thus left only with the interpretive tools of substantive criminal law to balance the political overtone of the case of the prosecution. The Bishara trial court proceeded in a similar manner until it was barred by the intervention of the High Court of Justice, which accepted Bishara's argument of parliamentary immunity and barred the trial against him. These two opposite approaches require some clarification because they do not accord with what we would expect in cases of "radical difference"—that the more radical the "difference," the less inclined the court will be to judge on the merit and will try to resort to the "passive virtues" of avoidance in order to protect its own legitimacy. My explanation is that lacking discretionary tools to confront the political question, the different results of the two cases reflect the different circumstances of the two cases. The Bishara court could rely on the constitutional tools provided by the law of parliamentary immunity and thus avoid direct confrontation with the political authorities, while the Barghouti court had no such tools at its disposal. It is interesting that the Barghouti court did attempt to "control" the damage with the only tools available to it—tools of legal interpretation—but these tools were ill fitted to addressing the problem of legitimacy. Having come to this point, let me summarize briefly the results of the two trials.

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The Barghouti Trial

We have seen that the prosecution had the choice between conducting a criminal trial in the civil courts or relegating the case to military courts. In order to gain legitimacy in the eyes of the international community, and in order to strip Barghouti of his political pretensions in the eyes of segments of the Israeli public, it opted to conduct an ordinary criminal trial. However, in order to convict him of murder on the basis of speeches and the supply of finance and weapons, the law of criminal partnership had to be greatly expanded. Indeed, Barghouti was charged with thirty-seven counts of murder based on his general support of terror attacks through speeches and supply of weapons. The Israeli prosecution argued that since Barghouti advocated and supported the *Intifada*, any terror attack by his group could be attributed to him. The court decided to reject this grand conception of the trial promoted by the prosecution, which sought to build a case similar to the Eichmann trial in which the defendant is found guilty for all the acts committed by subordinate members of his organization. The political need to make Barghouti into an ordinary criminal threatened a cornerstone of Israeli criminal law—individual responsibility. In order to convict Barghouti the court would have had to erase the distinction between principal actor and accomplice, between political speeches and criminal actions. The judges therefore dismissed thirty-three of the thirty-seven counts of murder and found him guilty only in four instances where his direct involvement could be proven. The court explained that political speech encouraging military resistance, or the supply of finances or weapons to the terrorists, did not constitute participation in murder.[87] In terms of criminal law this was a legal victory for the prosecution, since Barghouti was convicted of four counts of murder. In terms of politics, however, the Israeli authorities failed to criminalize the political leadership of the Palestinian people for abandoning the Oslo agreements in favor of violent resistance. However, this did not help Barghouti to change Israeli public opinion. Lacking a legal channel to raise his concerns about the politicization of the trial, he was perceived by the Israeli public as a terrorist, a common criminal. The trial, however, carried the opposite effect on the Palestinian public, who saw Barghouti as a persecuted political leader.[88] Thus, the bifurcated perceptions of the trial manifest the condition of "radical difference" that was only enhanced by conducting a criminal trial.[89] As of 2010,

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Barghouti is still arrested. The Palestinians often compare him to Nelson Mandela, and his popularity and influence has only increased since the trial in the eyes of his own people. In the elections that were conducted in August 2009, Barghouti was elected a member of the central committee of Fatah.

The Bishara Trial

To repeat the main facts of the criminal case against Bishara: On November 7, 2001, the Knesset voted to lift Bishara's parliamentary immunity, and on November 12, 2001, the attorney general filed two indictments against him. The first indictment charged Bishara with violating the Prevention of Terror Ordinance [1948] in two public speeches he had made, one in the city of Umm al-Fahem on June 5, 2000, and the other in Kardaha, Syria, on June 10, 2001, at a memorial service marking the first anniversary of President Hafez al-Assad's death, which had been attended by leaders of the Hizballah Party. The indictment claimed that Bishara's speeches were a call to commit terrorist acts against Israelis. He was indicted for supporting a terrorist organization.

We have seen that Bishara based his defense on the preliminary argument of parliamentary immunity. After the trial court decided to postpone the decision on this issue to the end of the trial, Bishara petitioned the Supreme Court, which, in its decision of February 1, 2006 (in a majority of 2:1) granted his petition and barred the criminal proceedings against him.[90] In deciding the case the justices considered the impact of their decision on the constitutional structure of Israeli democracy, in particular the relation between the criminal proscription against incitement to violence and support of terrorist attacks and the protection of political speech. The court relied heavily on its prior decision to annul the decision of the Election Committee to disqualify Bishara's party from participating in the elections because of its platform of transforming Israel into "a state of all its citizens." The Supreme Court did not see this policy as contradicting the Basic Law of the Knesset that declares Israel to be a "Jewish and democratic" state. In our case the Supreme Court decided to go a step further and to recognize the application of parliamentary immunity to speeches that seem to fall under the criminal proscription against incitement to violence and terror. In both these decisions the court struggled to uphold the distinction between protecting political speeches while not endorsing the content of the speech. The court expanded the protection granted to elected representa-

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tives of the Arab citizens in order to allow them to continue to criticize the fundamental values of the polity without fearing criminal prosecution. The constitutional value of equal opportunity for political representation seems to outweigh the value of the rule of law.[91]

The decision of the Supreme Court reflected the need to find a way to infuse the criminal process with tools of constitutional discretion. Since Bishara was an MK, the court could rely on the availability of such a tool. It offered a third way for the court between acquittal and conviction—one that addresses the constitutional problematic of the criminal prosecution without deciding on the merits of the case.[92] The "passive virtues" solution, which was available only to Bishara through the parliamentary immunity channel, highlights the urgent need to create such constitutional tools for the criminal court in its jurisprudence of terror.

On April 8, 2007, it became public that Bishara had left Israel. On May 2 it became known that another criminal investigation had been carried against him for allegedly contacting a Hizballah agent and supplying information that could risk Israeli security interests and receiving in return money. In a newspaper interview Bishara claimed that this investigation amounted to political persecution, as he was conducting friendly conversations discussing the common knowledge that Hizballah's missiles hit Arab villages in the north of Israel. Nevertheless, Bishara decided to leave the country instead of having to face the possibility of a criminal trial about charges of espionage.

The two Palestinian leaders, the Stranger within, had become a criminal prisoner and a fugitive from the law; Israeli society was far from facing the challenge of treating the "stranger within" as an equal. Using the criminal law had a direct effect on limiting the boundaries of political discourse in Israel.

Epilogue

Our journey has brought us a long way. We witnessed the crisis of legitimacy faced today by criminal law given its systemic failure to adjudicate on equal terms crimes such as "crimes against humanity" and "war crimes." Our cases focused on the danger of selective prosecution of one side to a violent political conflict via the criminalization of terror. We identified the double function of such trials—convicting the criminal, while depoliticizing his or her ac-

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tions—which makes these trials vulnerable to the dangers of the political trial (advancing a political agenda under the guise of law). I argued that the sources of this problem lie in the situation of "radical difference" and the inability of the criminal law to remain reflective about its own inability to overcome such biases.

Our theoretical examination helped expose a lacuna in the heart of criminal law—the lack of formal ways to raise concerns about the universal application of the law in an unbiased manner toward different groups. This lacuna is made all the more problematic in the age of "terror trials" conducted by national criminal courts. In the absence of legal venues to address these concerns, the legitimacy of these trials is undermined in the eyes of the international community, and by groups identified with the defendant. Parallel to this development we witness the growth of third party courts exercising universal jurisdiction over "war crimes" and "crimes against humanity," thus piercing the shield of sovereignty and advancing a regime of accountability. One might say that the two developments should be understood together—as balancing each other, and correcting structural biases in the system of national criminal law. Elsewhere I have argued that universal jurisdiction cannot really fix the problems of politicization in international law, and in many cases it might increase these problems. In this essay I therefore turned to explore the road of "terror trials"—trying to see if there exist internal mechanisms that can control the inherent political bias of such trials. I looked at ways to supply domestic courts with improved legal tools to review the political question. The two "tools" I examined: the defense of "abuse of power" and "jury nullification" were found wanting precisely in cases where the community basis of the criminal law is undermined by the systematic exclusion of the defendant and his group from equal participation in the political process. However, as a heuristic exercise, our investigation can help us identify the crisis of legitimacy that criminal law is now facing and to find its source in the organizing principle of modern criminal law—the principle of territoriality. This organizing principle found its expression in the principle of territorial jurisdiction, which set a bright line limit to the reach of criminal law. This principle has been undermined from without (universal jurisdiction) and from within (terror trials), and a new balance has to be found that will help reconnect the criminal law to the community that is its subject.

Let me conclude by relating to an academic debate between Alan Norrie

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and Anthony Duff regarding the ability of criminal law to stand up to its liberal values. Norrie criticizes liberal criminal law for containing a fundamental contradiction that cannot be resolved. On the one hand, the law is committed to the establishment of individual guilt as a condition for criminal liability. On the other, criminal law removes the motive from the trial deliberation and thereby expresses its unwillingness to distinguish between categories of individual guilt. Particularly troubling is the exclusion of "political motive." Norrie claims that while the liberal legal system is committed to the principle of individual guilt, it nonetheless discounts completely subjective motives that have direct ramifications for the moral guilt of the accused. This inconsistency, he claims, is intrinsic to the liberal legal system, which is obliged to ignore political/ideological motives but cannot admit to this.[93]

Duff responds that Norrie does not succeed in showing such a fundamental contradiction in the liberal legal system, since he overlooks important distinctions in criminal law.[94] Criminal law does not ignore the subjective motive. Rather, it distinguishes between the role of the legislator and that of the judiciary: the legislator decides which among the possible motives is relevant, and the judge applies this determination. As long as the democratic system functions, all citizens in the community must accept these decisions. In grounding his thesis, Duff rejects outright the radical subjective approach to criminal law. The law's commitment is to arbitration according to the defendant's understanding of the facts, not according to his or her value system. In order to establish subjective guilt on the basis of a community's value system, it is sufficient under criminal law that the defendant could have understood the community's values even though he or she preferred his or her own values.

This response in fact rests on a theory of political legitimacy. It is the role of the legislator and not the (nonelected) court to determine the values according to which we assess the defendant's actions. Duff emphasizes that the criminal law is the law of the community—the values of the community are channeled to the law by way of the elected legislative body. The judiciary must implement these values, and as long as the democratic process functions—whereby the political opposition can present its alternative values—the criminal law (with its value system) legitimately applies to all members of the polity.

This short exchange can cast light on our two cases. I argued that it is precisely this kind of sensibility that directed the Supreme Court to grant Bishara's

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petition and bar his criminal prosecution. The exclusion of political motive from criminal law is premised on the working of the larger democratic structure—the legislature's ability to deliberate the distinction between different political motives. However, if the court had removed Bishara's immunity in the hard case of political speech in support of the Palestinian *Intifada* (the right of violent resistance to military occupation), it would have undermined the very legitimacy of applying the criminal law to cases of incitement to violence and support of terror. Another way to look at it is in terms of equal membership in a political community. The legitimacy of applying the criminal law to members of the territorial community is based on the premise of a working democracy. The decision of the Supreme Court in Bishara's case concerned the problem of how to draw the boundaries of the political community in a way that will legitimize the exercise of criminal law over a deeply divided society. The Barghouti court, on the other hand, could only restrict the political overtones of the trial, but it could not resist the very act of using the criminal law to redefine a political adversary as a criminal, a stranger to Israeli political community of discourse.

Notes

Assistant Professor, Tel Aviv Law Faculty. Thanks to Hanoch Dagan, Tali Fisher, Daphne Barak Erez, and Kenneth Mann for their comments on earlier drafts; and to Inbal Djalovski, Magi Ostri, Avi Lubin, Michal Saliternik and Rivka Brot for their help in research. I would like to thank the Minerva Center for Human Rights and the Cegla Center for Interdisciplinary Research of the Law in the Buchman Faculty of Law at Tel Aviv University for their generous financial support.

1. See exchange between Antony Duff and Alan Norrie. Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law,* 2d ed. (London: Butterworths, 2001), 35; Anthony Duff, "Principle and Contradiction in the Criminal Law: Motives and Criminal Liability," in *Philosophy and the Criminal Law: Principle and Critique,* ed. Antony Duff (Cambridge: Cambridge University Press, 1998), 176, 179–84.

2. I developed a theoretical model for such a role in my book, Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor: University of Michigan Press, 2004).

3. James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990).

4. Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends*

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(Princeton: Princeton University Press, 1961); Judith N. Shklar, *Legalism* (Cambridge: Harvard University Press, 1964); Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Transaction Publishers, 1997), Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

5. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962): 111–98.

6. Douglas E. Beloof, *Victims in Criminal Procedure* (Durham, NC: Carolina Academic Press, 1999).

7. HCJ 7052/03 Adalah—*The Legal Center for Arab Minority Rights in Israel v. The Minister of Interior,* PADOR [Hebrew data base] 217 (10) 06.(2006) [Hebrew]. The petitions demanded the annulment of the Nationality and Entry into Israel Law (Temporary Order) 2003. A 6–5 Majority of the Supreme Court approved the law.

8. Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (London: Yale University Press, 2007). Ackerman opposes the resort to criminal law in addressing the problem of terrorism because the terrorist threatens the effective sovereignty of the state while the criminal law presupposes it (pp. 43–44). I agree with Ackermann's diagnosis, but do not accept his prognosis of designing an "emergency constitution," since I do not think terror can be simply moved into a discrete category neatly separated from ordinary criminal law cases, as the Barghouti and Bishara cases demonstrate. Ackerman concedes that indeed the Palestinian uprising demonstrates this difficulty (p. 185 fn 28).

9. Although it is understood that the very issue of jurisdiction of the court is a constitutional matter, once decided by the legislative body, the role of the court is viewed as one of application. My view is that the community basis of criminal law cannot be reduced to questions of jurisdiction, and it is often this reduction that does not allow us to see the constitutional role of the judges conducting criminal trials against alleged terrorists. For debate in Israel regarding the scope of jurisdiction and its larger implications for the concept of sovereignty, see Yoram Schachar, "Against Extra-Territorial Application of Criminal Law on National Grounds," *Plilim: Israel Journal of Criminal Justice* 5, no. 1 (1996): 5–64; and Shneor Zalman Feller and Mordechai Kremnizer, "Reply to Yoram Schachar," in ibid.: 65–99 [Hebrew]; in the U.S., see Ronald Dworkin "What the Court Really Said," *New York Review of Books* 51, no. 13 (August 2004) (discussing recent terror trials in the United States: *Rumsfeld v. Padilla,* 542 U.S. 426 [2004]; *Rasul v. Bush,* 542 U.S. 466 [2004]; *Hamdi v. Rumsfeld,* 542 U.S. 507 [2004]). Dworkin recognizes the political aspects of jurisdiction issues and suggests that the jurisdictional rule that aims to discourage "forum shopping" should apply not only to defendants but also to the government.

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10. Ackerman, *Before the Next Attack*, 24–38. Ackerman believes that the abandonment of criminal law in the cases of Hamdi and Padlila (U.S. citizens who were denied a trial by jury, since the American authorities saw them as falling under the rubric of "war on terror" and not "criminal law") demonstrates the real danger that "war against terror" poses to civil liberties in the United States, but he also argues that the traditionalist attempt to view these cases as falling easily into domestic criminal law is misguided. He therefore suggests that a constitutional change is due, but it should not be "judges made." In contrast, I call to recognize the court's constitutional role in such trials. One important aspect of how such awareness can shape the court's response is revealed in the decision of the British House of Lords in December 2005 to strike down antiterrorist legislation that authorized the government to detain aliens (and not citizens) for indefinite periods without trial (*A and Others v. Secretary of State for the Home Department,* UKHL 56 [2005] AC 68).

11. Martin M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981).

12. Cr.C. (Nazareth) 1087/02 *The State of Israel v. Bishara* (unpublished, on file with author) [Hebrew]; H.C.J. 11225/03 *Mk Dr. Azmi Bishara v. The Attorney General,* PADOR 294 (3) 06 (2006) [Hebrew].

13. S.C.C. 1158/02 (Tel Aviv) *The State of Israel v. Marwan Barghouti,* PADOR 664 (4) 04 (2004) [Hebrew].

14. Although in the Bishara case the military court was not an option since he is a citizen of Israel, a security investigation by the security forces was feasible under certain conditions. The decision to bring a Knesset member to face criminal charges for political speeches marked the irregularity of this case. The decision to conduct a criminal trial to Barghouti in an Israeli civil court instead of a military court, stood out against a policy of turning away from the court system. Such was the assassination of Sheikh Yassin and the general policy of target killing, administrative detentions, and military trials against Palestinians suspected of involvement with terror. The decision to conduct an ordinary criminal trial against Barghouti can be explained as an attempt by the Israeli general prosecution to gain legitimacy in the international community. See Amos Harel and Avi Isacharoff, *The Seventh War* (Tel Aviv: Miskal, 2004): 163 fn 60 [Hebrew].

15. The outbreak of the second *Intifada* in October 2000 signified the eginning of the use of overt violence by and against Arab citizens of Israel on the grounds of their alleged support of the Palestinian struggle. During the first week of October 2000, thirteen Israeli Arabs who participated in violent demonstrations against the Israeli government were killed by the Israeli police forces, and many other demonstrators were injured and detained. According to an official report of the Israeli government, more than 200 Israeli Arabs were involved (most of them in cooperation with Palestinian organizations) in the execution of terrorist attacks during the first four years of the conflict (a

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summary of the report can be found at http://www.intelligence.org.il/sp/pa_t/i_a.htm [Hebrew]).

16. Until their trials both Bishara and Barghouti were considered by the Israeli mainstream as political adversaries who are legitimate members of a larger discourse community of Israelis and Palestinians. The change in their image can be noticed when we follow the reports in the Israeli daily *Ha'aretz* about the two leaders. See, for example: Lili Galili, 23.04.96; Gideon Alon, 22.10.01; Shaul Seter, 22.3.06 (regarding Bishara); and Amira Hess, 23.1.02; Vered Levi-Barzilai, 3.5.02; Shamay Leibovich, 29.9.02 (regarding Barghouti).

17. See report of the Israeli Association for Civil Rights (ACRI) on discrimination of Arabs in the Israeli criminal system, from December 1999. Summary can be found at http://www.acri.org.il/hebrew-acri/engine/story.asp?id=306.

18. In the Bishara case the charges were based on article 4 of the Prevention of Terror Ordinance (1948): "4. A person who (a) publishes, in writing or orally, words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person . . . or (b) publishes, in writing or orally, words of praise or sympathy for or an appeal for aid or support of a terrorist organization; or (c) has propaganda material in his possession on behalf of a terrorist organization; . . . shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding one thousand shekels or to both such penalties." Barghouti was charged with murder and with conspiracy to murder on the basis of article 300(a)(2) (combined with articles 30–31) and article 499 of Penal Law 5737-1977. He was also charged on the basis of article 2 and 3 of the Prevention of Terror Ordinance (1948).

19. Basic Law: Human Dignity and Freedom (1992), article 1a (1992) S.H. [Sefer Ha-hukim, Israel formal laws publishing, Hebrew] 1392 at 150; Basic Law: Freedom of Occupation (1994), article 2 (1994) S.H.454 at 90; Basic Law: The Knesset (1950), article 7a(a)(1) (1985) S.H. 1155 at 196. For elaboration on Bishara's political views regarding the state of Israel, see Amal Jamal, "The Vision of the Political Nation and the Challenge of a State of All Its Citizens, Reflections on Azmi Bihara's Writings," *Alpayim* 30 (2006): 71–113 [Hebrew]; for a different view of Bishara's vision of a "state of all its citizens," see Dan Shiftan, "The New Identity of Arab Knesset Members," *Azure* 13 (Fall 2003): 23 [Hebrew].

20. Barghouti was advancing an interpretation of international law that is contested as is explained by the court decision. International law has recognized the resort to force against a colonial power as not merely an internal matter. The Consensus Definition of Aggression (1974), which was adopted by the UN General Assembly, presented in article 7 the right of people entitled to but forcibly deprived of the right to self-determination, "to struggle to that end and to seek and receive support, in accordance with the prin-

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ciples of the Charter and in conformity with the 197 Declaration." See Malcolm N. Shaw, *International Law,* 5th ed. (Cambridge: Cambridge University Press, 2003), 1036–39. UN General Assembly Resolution 3314 (XXIX). Definition of Aggression [http://jurist.law.pitt.edu/3314.htm].

21. However, see the decision of the Central Election Committee to ban Bishara's party, the NDA (National Democratic Assembly), from participating in the 2003 general elections because its policy of turning Israel into "a state of all its citizens" seemingly clashed with article 7a of Basic Law: The Knesset. This decision was overturned by the Supreme Court, Election Confirmation 11280/02 *The Central Elections Committee v. MK Tibi,* 57(4) P.D. 1 (2003). The court gave a narrow interpretation to article 7a of Basic Law: The Knesset that enables its elections committee to ban a party that denies the existence of the State of Israel as a Jewish and democratic state or supports terror activities from participating in elections. According to the court's interpretation there should be solid evidence that the party was taking actual, forceful steps to turn its ideas into reality.

22. Knesset Members Immunity, Rights and Duties Law, 5711-1951. Article 4(a) states that "a Knesset member shall not stand criminal charges for a crime committed while or before becoming a Knesset member, unless his immunity is first removed." The court ruled that the purpose of this procedural immunity is to ensure the proper working of the Knesset and to protect against the persecution of Knesset members by the government for political motives (H.C.J. 507/81, *Abu Hatzira et al. v. The Attorney General et al.,* 35(4) P.D. 561, 568).

23. See "H.C.J. 11225/03 *MK Dr. Azmi Bishara v. The Attorney General*." A summary of the claims posed by the petitioner is available at http://www.adalah.org/eng/legaladvocacypolitical.php#11225.

24. George Fletcher, "Liberals and Romantics at War: The Problem of Collective Guilt," *Yale Law Journal* 111 (2002): 1499, 1518.

25. Kirchheimer, *Political Justice*.

26. For elaboration on the triangular structure of the trial as a basis for its legitimacy, see Shapiro, *Courts*.

27. In legal terms international law recognizes five bases for jurisdiction (the territorial principle, the nationality principle, the protective principle, the passive personality, and the universality principle). See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997): 140–41. For our purposes I generalized these doctrines according to their constitutive elements in order to distill the element of community that lies behind them.

28. It has other manifestations, such as the right to jury trial in criminal law cases. For elaboration of this aspect of the jury system and for its history in English law, see

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Thomas Andrew Green, *Verdict according to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (Chicago: University of Chicago Press, 1985).

29. For a different conception during the Middle Ages that linked criminal law to a community of people rather than territory, see Marian Constable, *The Law of the Other: The Mixed Jury and the Changing Conceptions of Citizenship, Law and Knowledge* (Chicago: University of Chicago Press, 1994).

30. The question of how universal jurisdiction fundamentally changes the relations between law, tribunal, and community deserves a separate discussion. In my view the move of cases of "radical difference" to third party courts practicing universal jurisprudence does not necessarily solve the problems of politicization. See Bilsky, *The Eichmann Trial and the Legacy of Jurisdiction, in Politics in Dark Times: Encounters with Hannah Arendt,* ed. Seyla Benhabib, Cambridge University Press, forthcoming. Some writers have been raising the problem by pointing to the democratic deficit of universal jurisdiction trials. See Seyla Benhabib, "Reclaiming Universalism: Negotiating Republican Self-Determination and Cosmopolitan Norms," the Tanner Lectures on Human Values (delivered at the University of California at Berkley, March 2004), available at http://www.tannerlectures.utah.edu/lectures/documents/volume25/benhabib_2005.pdf; Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004); Diane F. Orentlicher, "Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles," *Georgetown Law Journal* 92 (2004): 1057; John B. Jordan, "Universal Jurisdiction in a Dangerous World: A Weapon for All Nations against International Crime," *MSU-DCL Journal of International Law* 9, no. 1 (2000): 1. For criticism of some of the shortcomings of universal jurisdiction, see Fletcher, "Against Universal Jurisdiction," *Journal of International Criminal Justice* 1 (2003): 580–84; Anthony Sammons, "The 'Under-Theorization' of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts," *Berkeley Journal of International Law* 21 (2003): 111; Madeline H. Morris, "Universal Jurisdiction in a Divided World: Conference Remarks," *New England Law Review* 35 (2001): 337, 342; Henry A. Kissinger, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny," *Foreign Affairs* 80 (2001): 86.

31. C.C. (Nazareth) 1087/02 *The State of Israel v. Bishara* (decision of November 12, 2003), see fn. 13.

32. D.C. (Tel-Aviv) 92134/02 *The State of Israel v. Marwan Ben-Hatib Barghouti*. Takdin (Hebrew legal data base) 2002 (4) ,18443 (2002) [Hebrew].

33. The court explained that Israel had the authority to guarantee the safety of Israelis even in the occupied territories and that this authority is specifically expressed in the Oslo accords. The court added that since the Oslo agreements had been systematically broken by the Palestinians, "by any standard of human logic" the claim that the agreement should be enforced should not be accepted. The court ruled that Barghouti was not entitled to "prisoner of war" status since he did not fulfill the requirements of

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the Geneva Convention (such as bearing a recognizable sign of being a soldier, openly carrying weapons, and not attacking civilians), and should therefore be seen as an "illegal combatant" who should stand trial for his crimes. According to the court, there was no breach of international law, which allows arrests of those who may be of risk to Israel's security interests. Moreover, the legality of the way in which Barghouti was brought to trial was a separate issue and did not bear on the jurisdiction of the court (on this argument the court relied on the Eichmann trial precedent). The court also ruled that international law does not recognize the immunity of a member of parliament in state A who commits crimes in state B.

34. It may be argued that the universal jurisdiction era we live in undermines the binary discourse (see discussion on Universal Jurisdiction, below). For elaborations on the concept of sovereignty in binary terms, see Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1991); and Carl Schmitt, *Political Theology*, trans. George Schwab (Chicago: University of Chicago Press, 2005). For a critical evaluation of the concept and an alternative history, see Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975–76,* trans. David Macey (New York: Picador, 2003).

35. For decisions of the Israel High Court of Justice not to intervene in the policy of "target killing," see H.C.J 769/02, *The Public Committee against Torture v. The Government of Israel*, PADOR 578 (31) 06; and H.C.J. 8794/03, *Yoav Hess v. Dan Haluts,* PADOR 677 (40) 08 (2008) (available also at http://www.stoptorture.org.il/eng/images/uploaded/publications/76.pdf).

36. The issue of discrimination and political persecution was raised in the discussion of the Knesset Committee. See protocol of Knesset committee, September 25, 2001, and November 5–7, 2001, pp. 655–85 (esp., pp. 661, 668, 670–71, 674) (unpublished, file with author).

37. A striking example is the U.S. administration's position on Guantánamo. For a critical discussion and alternative to "war on terror" solutions, see Ackerman, *Before the Next Attack*.

38. Bickel, *The Least Dangerous Branch*.

39. On the use of "proportionality" and "reasonableness" in European administrative law, see Jurgen Schwarze, *European Administrative Law* (Luxembourg: Office for Official Publications of the European communities, Sweet and Maxwell, 1992): 677–867. On the use of these principles in Israeli law, see Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006): 248–60.

40. For a critical evaluation of the use of these doctrines in the jurisprudence of Justice Aharon Barak, see Ronen Shamir, "The Politics of Reasonableness," *Theory and Criticism* 5 (1994): 7 [Hebrew]; Menny Mautner, "The Reasonableness of Politics," *Theory and Criticism* 5 (1994): 25 [Hebrew].

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41. See Ruth Gavison, Mordechai Kremnitzer, and Yoav Dotan, *Judicial Activism: For and Against the Role of the High Court of Justice in the Israeli Society* (Jerusalem: Hebrew University Press, 2000); Dotan, "Ripeness and Politics in the High Court Justice," *Tel Aviv University Law Review* 20 (1996): 93 [Hebrew]; Mautner, "The Decline of Formalism and the Rise of Values in Israeli Law," *Tel Aviv University Law Review* 17 (1993): 503 [Hebrew].

42. For historical interpretation of this move, see Potter Stewart, "The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases," *Columbia Law Review* 83 (1983): 1365.

43. For discussion of estoppel doctrines, see R. A. Duff, "'I Might Be Guilty, But You Can't Try Me': Estoppel and Other Bars to Trial," *Ohio State Journal of Criminal Law* 1 (2003): 245; John W. Lundquist, "'They Knew What We Were Doing': The Evolution of the Criminal Estoppel Defense," *Wm. Mitchell Law Review* 23 (1997): 843; Anne Bowen Poulin, "Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight," *California Law Review* 89 (2001): 1423; Cynthia L. Randall, "Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence," *University of Pennsylvania Law Review* 141 (1992): 283.

44. Eliahu Harnon, "Illegally Obtained Evidence: Has the Law Been Affected by the Basic Law on Human Dignity and Freedom?" *Bar Ilan Law Studies* 13 (1996): 139 [Hebrew].

45. Neal Kumar Katyal, "Conspiracy Theory," *Yale Law Journal* 112 (2003): 1307.

46. See Michal R. Belknap, ed., *American Political Trials* (Westport, CT: Greenwood Press, 1981). For discussion of various degrees of politicization of crimes, see Otto Kirchheimer, "Politics and Justice," *Social Research* 22 (1955): 408, 413–22.

47. See, for example in Israel, F.H. 8613/96 *Muhammad Yusef Jabareen v. The State of Israel*, 54(5) P.D. 193; C.A. 2831/95 *Alba v. The State of Israel*, 50(5) P.D 221; F.H. 1789/98 *Kahana v. The State of Israel*, 54(5) P.D. 145.

48. Different factors contribute to this possibility: the special institutional position of the courts, their concern with precedents and consistency, and their need to adhere to procedural safeguards.

49. Duff relates briefly to this matter with the following: "[If] the law is to be a rational enterprise that treats its citizens as responsible agents, such 'opposing political ideological reasons' must be heard: There must be a space for dissenters to try to persuade others of their opposing values, and thus to change the law . . . . [We] could imagine a legal system in which the courts provide part of this space: in which courts had not only to apply the law, but to justify it to the defendant, to attend to any opposing view he wanted to offer, and to acquit him if persuaded by this view." Duff, "Principle and Contradiction in the Criminal Law," 181.

50. For similar suggestions in the context of African American defendants suffering

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from racism under the U.S. criminal law system, see Andrew D. Leipold, "Symposium on Race and Criminal Law: Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in Criminal Law," *Chicago-Kent. Law Review* 73 (1998): 559.

51. Zeev Segal and Avi Zamir, "Abuse of Process, Fairness and Judicial Stays: Constitutionalism of Criminal Proceedings," *Hapraklit* 47 (2003): 42 [Hebrew].

52. Gavison, *Discretion in Enforcement of the Criminal Law: The Power to Stay and Renew Criminal Proceedings* (Jerusalem: Hebrew University of Jerusalem, 1991); Daniel Fridman, "Judicial Discretion in Criminal Prosecution," *Hapraklit* 35 (1983): 155 [Hebrew].

53. It was recognized initially in regard to cases in which the prosecution decided *not* to press criminal charges. H.C.J. 935/89 *Ganor et al. v. Attorney General*, 44 (2) P.D. 485 (1990).

54. Criminal Law Procedure Act (Amendment No. 51) 5767—2007, Article 1) S.H. 2095 at 308, adding Article 149(10); Yisgav Nakdimon, Judicial Stays of Criminal Proceedings (2d ed. Nevo, 2009), 47–205.

55. CA. 2910/94 *Yefet v. State of Israel,* 50(2) P.D. 221, 370. The defense was recognized but was not applied here, nor in later cases. See, for example, H.C.J. 1563/96 *Katz v. Attorney General et. al.,* 55(1) P.D. 529; H.C.J. 6781/96 *Olmert v. Attorney General,* 50(4) P.D. 793; C.A. 10960/03 *Hason v. State of Israel,* PADOR 280 (14) 05 (2005).

56. This narrow formulation of the defense can be traced back to English law where it originated as an estoppel type of argument See *Connely v. D.P.P.,* [1964] 2 All E.R. 401 (H.L.); and also, for example, *R. v. Heston-Francois,* [1984] 1 All E.R. 785 (C.A.); *R. v. Brentford JJ*, ex parte Wong [1981] 1 All E.R. 884 (Q.B.). In U.S. as well as Canadian law, we can trace two sources for the defense, common law, and constitutional law. In both we can find instances in which the criterion that was adopted by the court was the objective one. See, for example, in U.S. law *Hampton v. U.S.,* 425 U.S. 484 (1976); *U.S. v. Russell,* 411 U.S. 423 (1973). In Canadian law, see *R. v. Keyowski*, [1988] 1S.C.R. 657 (adopting the objective test); *R. v. O'Connor,* [1995] 4 (explaining the relations between the common law defense, and the Canadian charter).

57. Such is the problem, for instance, both with the under-prosecution of "crimes against humanity" and "war crimes" by national courts (discretion not to prosecute) and with the selective prosecution against one side to a military conflict on the basis of "terror"-related crimes, while the other side enjoys de facto immunity (discretion to prosecute).

58. C.A. 4855/02 *State of Israel v. Borowitz,* 59 (6) P.D. 776 (2005).

59. For Israeli literature recommending the injection of constitutional considerations to the criminal process through the defense of abuse of process, see Boaz Okon and Oded Shahm, "Due Process and Judicial Delay of Proceedings," *Hamishpat* 3 (1996): 265 [Hebrew]; Zeev Segal and Avi Zamir, "Abuse of Process, Fairness and Judicial Stays:

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Constitutionalism of Criminal Proceedings," *Hapraklit* 47 (2003) 47 (2003): 42 [Hebrew]; Mordehai Levi, "About the Essence of 'Abuse of Process' Defense and the Criteria for Accepting It," *Hamishpat* 19 (2005): 80 [Hebrew].

60. Criminal Law Procedure Act (Amendment No. 51) 5767—2007, Article 1, S.H. 2095 at 308, adding Article 149(10). For discussion of this test, see "Yisgav Nakdimon . . . ," 77–125.

61. For a similar call to adopt "objective" tests to discrimination of African American defendants, see Leipold, "Symposium on Race and Criminal Law," 559.

62. Bilsky, "Territory, Community and Political Trials: A New Challenge for International Law," *Tel Aviv University Law Review* 27 (2003): 655.

63. The abuse of process defense had been raised by Bishara in another criminal trial, C.C. (Nazareth) 5196/01 *State of Israel v. Bishara*, TAKDIN 9 (02) 2003, in which Bishara and his parliamentary assistants were indicted for assisting Arab Israelis to cross the border into Syria in order to meet their families. Assisting a person to cross the Israeli-Syrian border is a felony according to Regulation 18 (a) and (d) and Regulation 5 of the Emergency Regulations (Foreign Travel) Ordinance 5709-1948. Bishara raised the Abuse of Process defense, claiming that this was a humanitarian act, that the authorities were aware of the very public actions and did not prevent them, and that the authorities also behaved in a discriminatory and abusive manner toward the defendants. However, these claims were discussed only in regard to Bishara's assistants, since Bishara himself was acquitted by the court because of his parliamentary immunity.

64. Nadav Shragai, "Mazuz: There Shall Be No Investigation on Elitzur Comments Regarding the Eviction," *Ha'aretz*, September 28, 2004. Yoaz Yovel, "Another Link in the Chain of Weakness," ibid., December 21, 2005. Nana Editorial board, "Rabbi Eliyahu Commanded, and the Soldiers Refused to Follow Orders," *Nana News*, July 18, 2005 (available at http:// news.nana.co.il/Article/?ArticleID=194374&sid=16)%20" Rabbi).

65. Compare F.H. 8613/*96 Muhammad Yusef Jabareen v. State of Israel,* 54(5) P.D. 193, in which the court acquitted Muhammad Jabareen, who had published several articles in support of throwing stones at IDF soldiers, of the felony of supporting a terror organization, under the Prevention of Terrorism Ordinance. In this case, the court's protection of freedom of speech was achieved by strict construction of the ordinance due to the lack of other constitutional tools at its disposal.

66. For decisions of the Israel High Court of Justice not to intervene in the policy of "target killing," see "H.C.J 769/02 *The Public Committee against Torture v. The Government of Israel*"*;* and "H.C.J. 8794/03 *Yoav Hess v. Dan Haluts*." Note, however, that the High Court of Justice of Israel has intervened and completely banned the army practice of using Palestinian civilians as "human shields" against attacks during arrests of terror suspects, in H.C.J. 3799/02 *Adallah v. GOC Central Command*, IDF PADOR 586 (22) 05 (2005). (English version available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.)

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67. "C.A. 4855/02 *State of Israel v. Borowitz,*" at paragraph 21 ("[T]he more severe the crime, the more weight should be given to public interest in prosecution").

68. These difficulties may be reduced if the case is removed from the trial court to the Supreme Court sitting as High Court of Justice, which is indeed an option when dealing with the conduct of the prosecution [C.A. 4855/02*State of Israel v. Borowitz*, at paragraph 2]. It can be argued that these are constitutional matters that are not for the criminal trial court to decide and should be brought before the Supreme Court. Indeed, in a previous criminal case against Bishara (dealing with the assistance he gave Israeli citizens in order to visit their relatives in Syria), it was ruled that the proper forum for deciding discrimination contentions raised by the defendant under the "abuse of process" defense should have been the High Court of Justice [C.C. (Nazaret) 5196/01*The State of Israel v. Azmi Bishara*), paragraph 36]. The judge reasoned that since the issue was the reasonableness of the attorney general's decision to press charges against the defendant and not against others, it should be brought as a petition before the Supreme Court. Academic articles have left this question open. I believe that a distinction can be drawn between different types of contentions brought currently under the "abuse of process" defense. It might be preferable to leave arguments requiring a factual decision about the specific circumstances of the criminal charges to the trial court. However, in cases of structural discrimination that require a broad perspective on the attorney general's policy of criminal prosecution against different classes of defendants, the better forum is the Supreme Court acting as High Court of Justice. This could also create an institutional separation that is often needed in political trials.

69. The historical background on jury nullification cited here is based mainly on Jeffrey Abramson, *We the Jury: The Jury System and the Ideal of Democracy* (New York: Basic Books, 1994); Green, *Verdict according to Conscience.*

70. The historical reasons why the British refrained from creating a jury system in Palestine are not clear, although it is common knowledge that the political tensions between Arabs and Jews were the source of this reluctance. The practice of "jury nullification" may have been one reason to fear this system, since historically it was used most successfully against colonial power by local communities.

71. Bushell (1670) 1 Vaufhan 135, 124 Eng. Re. 1006 (C.P. 1670).

72. For elaborate discussion of such trials, see Abramson, *We the Jury,* 57–95.

73. Several famous acquittals of African American defendants in the United States can be attributed to this kind of jury protest—for example, the trial of African American mayor Marion Barry for use and possession of narcotics (1990); the trial of O. J. Simpson (1995).

74. Thus it was used in the United States both to acquit defendants who helped runaway slaves and to acquit Ku Klux Klan members who murdered African Americans. See Abramson, *We the Jury.*

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75. A. Scheflin and J. M. Van Dyke, "Jury Nullification: The Contours of a Controversy," *Law & Contemporary Problems* 43 (Autumn 1980): 51; D. C. Brody, "Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right," *American Criminal Law Review* 33 (1995): 89.

76. Amnon Lehavi, "Discreet Actions, Happy Ends? On 'Harmony through Secrecy' in Criminal Law," *Plilim* 10 (2001): 9 [Hebrew]. Lehavi argues that although the formal reason to keep jury deliberation secretive is to protect free deliberation, it also reflects the goal of the criminal law to protect the superiority of the rule of law and harmony in society through the use of secrecy. It allows the court to diverge in certain cases from the letter of the law, as long as this decision remains secret.

77. Meir Dan Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in 97 Criminal Law," *Harvard Law Review* (1984): 625–77. The article demonstrates that by relying on acoustic separation between conduct rules (addressed to the public) and decision rules (addressed to the officials who apply conduct rules), society accommodates competing values at stake in criminal law.

78. For a history of jury nullification, see Green, *Verdict according to Conscience*.

79. Lehavi, "Discreet Actions, Happy Ends?" 31–38.

80. On the relation of the jury and the community, and specifically the tension between the notion of local jury that reflects the community's moral values, and the impartiality of the jury, see Abramson, *We the Jury,* 18.

81. Ibid., 88–90.

82. Cf. Robert F. Schopp, "Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience," *Southern California Law Review* 69 (1996): 2039. The author argues that the necessity defense is more consistent with the values of political liberalism. The explicit defense of necessity is better equipped to reflect the balancing of values in a rational way. This position, however, ignores problems of "radical difference"—situations in which criminal law cannot reflect the true values negotiated within a heterogeneous society, given some systemic problems of participation in the democratic process by minority groups. For such problems, I argue, both explicit defenses or implicit mechanism of jury nullification are needed in order to legitimize the application of criminal law over all sections of society.

83. For example, when it explicitly prohibits travel to "enemy" countries, thus placing an unequal burden on the Arab citizens of Israel who often have relatives in those countries (see the first Bishara case, C.C. (Nazareth) 1087/02 *The State of Israel v. Bishara*).

84. The original indictment was submitted to the court in Jerusalem. However, Bishara's request to transfer the case to the court in Nazareth where he resides (based on the Courts Law [consolidated version], 5744-1984, Section 78), was accepted by the Supreme Court, despite the prosecutor's objection.

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85. Two famous examples from recent years are the Rodney King and O. J. Simpson trials. For a discussion of their relationship, see Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge: Harvard University Press, 2002), 54–105.

86. The appointment of a religious Mizrahi Jew (of North African and Middle Eastern origin) to preside over the trial of Aryeh Deri (leader of the ultraorthodox Mizrahi Party, Shas, who was accused of various corruption felonies, and also over the trial of Yigal Amir (the religious Mizrahi Jew accused of assassinating Prime Minister Yitzhak Rabin). For in depth discussion of the two cases, see Bilsky, "J'accuse: Deri, Political Trials and Collective Memory," in *Shas: The Challenge of Israeliness*, ed. Yoav Peled (Tel Aviv: Miskal, 2001), 279 [Hebrew]; Bilsky, *Transformative Justice,* 202–36.

87. It wrote that the defendant "cannot be attributed with the general and sweeping crime of premeditated aiding and abetting of murder for each and every terrorist attack only due to his general awareness that his people were executing attacks using weapons and funds that he secured for them" (paragraph 171).

88. Indeed, Barghouti participated from Israeli prison in the 2006 elections to the Palestinian Authority and was elected to the parliament. He also initiated and signed the "prisoners agreement" between the various Palestinian sections regarding the borders of '67 (*Haaretz*, May 11, 2006).

89. Interestingly, after the army capture of Ahmed Saadat for his alleged participation in the assassination of Israeli minister Rehavaam Zeevi, the Israeli prosecution decided not to conduct his trial in civilian courts, but in a military court. See *Haaretz,* April 27, 2006.

90. HCJ 11225/03 *Mk Dr. Azmi Bishara v. The Attorney General.*

91. Interestingly, even the dissenting judge, who thought that the immunity should not apply to these speeches, agreed that greater protection should be given to elected members of parliament even in cases where their speech seems to infringe criminal proscription.

92. This tool was not available in a previous case brought against an Arab journalist (the Jabareen case) in which the court opted for acquittal on the basis of a strict construction of the law. "F.H. 8613/96 *Muhammad Yusef Jabareen v. The State of Israel.*"

93. Norrie, "Crime, Reason and History," 35–58.

94. Duff, "Principle and Contradiction in the Criminal Law," 179–84.

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