

Facts on the Ground
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Creating Facts on the Ground – The Israeli Case. Forty years ago, in the immediate aftermath of the Six Day War, Israel embarked on a policy of what is widely known as “creating facts on the ground.” The attacks and counter-attacks that culminated in the 1967 war ended with Israel in possession of four geographic areas formerly under Arab control: the West Bank, envisaged as part of a separate Arab state under the United Nation’s original partition plan, but annexed by Jordan after the War of 1948; the Gaza Strip, also originally been slated to be part of the Arab state under the U.N. partition plan, but which had been occupied by Egypt since the War of 1948; the Sinai Peninsula, part of Egypt proper; and the Golan Heights, which Israel captured from Syria. Israel’s sudden acquisition of these territories in the wake of its defeat of the Jordanian, Syrian, and Egyptian armies, combined with the Arab states’ refusal to accept Israel’s offer to withdraw from most of the conquered territory in exchange for a full peace treaty and recognition of Israel’s right to exist, left Israel with a fateful choice. Either it could abide by the international law of belligerent occupation, which requires an occupying power to refrain from settling or expropriating property and to apply the laws formerly in force (except as required for military necessity.) Or it could pursue the maximalist vision of a “Greater Israel,” including within its borders all of the territory deemed necessary for security purposes and associated in the collective Jewish memory with the biblical “land of Israel,” (“a vague geographical concept at best,”¹ but one which encompasses at least East Jerusalem and the West Bank.)

¹ Gershon Shafir, Land, Labor and the Origins of the Israeli-Palestinian Conflict, 1882-1914, p. 78.

Since the late 1970s, the most zealous champions of the cause of Greater Israel have been members of the radical religious settler movement, then a newly emergent political force that staked its claim to the “redemption” of the land on a messianic religious theology. But at the time the occupation began, it was Labor leaders like Israel Galili who were the strongest proponents of settlement. Territorial maximalism was neither the invention, nor the exclusive pursuit of religious Zionists, nor was its support limited to members of the hawkish Likud Party, led by Menachem Begin. “Earlier dreams of territorial maximalism”² had animated the predominantly secular and socialist mainstream of the Zionist movement in the pre-state period, and the Labor Party, which constituted the ruling party from the establishment of the state in 1948 until the fall of the Labor government in 1977. Some students of early Zionism, like the sociologist Gershon Shafir, have argued that the labor movement, which dominated Israeli society in the period leading up to the establishment of the state and throughout the first three decades of its existence, “start[ed] out with the maximalist aim of Jewish territorial supremacy in Palestine.” But “under the un auspicious circumstances of colonization in both land and labor markets” that existed in pre-state mandatory Palestine, “the aims of the Zionist mainstream were transformed.” According to this analysis, it was only because it was apparent that its maximalist aims were impossible to achieve that “the Israeli labor movement perforce limited its ambition and condoned ... a bifurcated model of economic development leading to territorial partition,” a “strategy” that “originated not in the appreciation of Palestinian aspirations but in the inescapable facts

² Shafir, p. xxiv.

of Palestinian demography.”³ Others argue that the early Zionists did not pursue these maximalist dreams out of a mixture of ideological and practical motives. There were always voices of caution within the labor movement and in the Zionist movement at large that argued against territorial maximalism on grounds of principle and justice as well as collective (Jewish) self-interest.

At the time the occupation began, these voices, which included such prominent spokespersons as David Ben Gurion, argued strenuously against settling the territories. But these voices were soon overwhelmed by the proponents of Jewish settlement.⁴ Caught up in the euphoria that swept through the Israeli Jewish community and the Jewish community worldwide, the Labor Government, which was still in power when the Israeli occupation of the territories began, and which remained in power for the next decade, declared the newly united Jerusalem to be the “eternal undivided city of the Jewish people.” Overriding internal objections, the government set about establishing the legal and political apparatus that would, over the next forty years, support the creation of over 300 settlements, inhabited by almost 400,000 Jews, in Gaza, East Jerusalem, and West Bank.⁵

Facing international criticism, and anticipating the possibility of an eventual political settlement on the final status of the territories, the Israeli government adopted a policy early on of creating settlements with a civilian rather than a military character, residential communities which were intended to constitute irreversible realities, or faits accomplis,

³ Shafir, xxiii

⁴ David Myers

⁵ Like every other fact, the counting is controversial. About 200,000 of the Jews counted in this figure live in East Jerusalem. Whether East Jerusalem is properly regarded as occupied territory is a subject of controversy. Subtracting this figure, there remain over 200,000 Jews settled in the West Bank and Gaza.

that would have to be accommodated if and when a resolution of the final status of the territories ever took place. It is this policy of creating de facto if not de jure extensions of the Jewish state that is known as the policy of creating facts on the ground.⁶ Whether they would ripen into de jure annexations of the state of Israel, or be used as bargaining chips in the eventual political settlement, facts on the ground were expected to alter the terms of that eventual settlement (or, as it happened, indefinitely postpone a final settlement) to the advantage of the Israeli state.

The dramatic consequences of this policy have been vividly described:

“Numbers alone cannot express how the landscape of occupied territory has changed. East of Jerusalem, the apartment buildings of Ma’aleh Adumim rise starkly from the desolate slopes leading down toward the Dead Sea. The settlement that [a radical settler] sought to establish surreptitiously as a ‘work camp’ has grown into a bedroom community of thirty-one thousand people, the single largest Israeli community in the West Bank (excluding East Jerusalem.) North of Jerusalem, a highway built to serve the settlements runs through the hill country, bypassing Ramallah and other Palestinian towns and villages. On the way to Ofrah, now a gated exurb of over two thousand people, the road passes settlement after settlement – Adam, Kokhav Ya’akov, Psagot – carpets of houses with red-tile roofs on the hilltops overlooking Palestinian towns and villages. On other hills stand ‘outposts,’ the newest wave of settlements, clumps of mobile homes lacking official approval but established with the active assistance of government agencies, often on privately owned Palestinian land.”⁷

Within the city of Jerusalem itself, the consequences of the policy of creating facts on the ground are even more dramatic. While the population and character of East Jerusalem are still predominantly Arab, the Israeli government has succeeded in carving out areas where Jewish settlements are now so deeply rooted that it seems inconceivable that they could be returned to Arab hands, or that they ever rightfully belonged to Arabs in the first place. The “Jewish quarter” of the Old City, where property was confiscated from Arab

⁶ Etymology

⁷ Gershom Gorenberg, The Accidental Empire, p. 364.

owners by the Minister of Finance in 1967 “on the grounds of restoring the ‘natural ethnic’ quality of the quarter and righting the wrongs carried out by the Jordanians between wars,” is one case in point.⁸ French Hill, the Jewish neighborhood surrounding the campus of Hebrew University, is another. As described in “Israeli Settlement Policy in Jerusalem: Facts on the Ground,” a detailed analysis of the process of settlement in Jerusalem put out by PASSIA, the Palestinian Academic Society for the Study of International Affairs,

“Walk into the Dominos Pizza outlet in French Hill and make the following statement: ‘This neighborhood is a settlement. It is illegal according to International Law and must be dismantled in the event of a peace settlement between Israelis and Palestinians.’ Even if made in perfect Hebrew, the statement would most likely be met with confused stares or laughter. Make this same statement about French Hill to Palestinian Jerusalemites from the nearby village of Issawiya and it will most likely result in the same response. The only difference will be the acknowledgment that the Jerusalem neighborhood was built on land from the village. These reactions attest to the effectiveness of the Israeli strategy of creating facts on the ground as a method of holding territory acquired by war.”⁹

Coming from a Palestinian advocacy group that condemns the policy, this testimony to its effectiveness is all the more powerful a statement of how it succeeds in creating “irreversible realities,” demographic, geographic, and psychological facts that are expected on all sides to alter the outcome of any political settlement regarding the boundaries of Israel and a future Palestinian state. As the PASSIA report goes on to state,

“Established in 1968, the 30-year-old settlement is an accomplished fact. Parents that have raised children in French Hill now have their grandchildren living just around the corner. It is inconceivable that any of these residents would see themselves as settlers in an impermanent settlement project. Its weathered buildings and well-worn strip malls are a testament to the

⁸ Allison B. Hodgkins, Israeli Settlement Policy in Jerusalem: Facts on the Ground, p. 27.

⁹ PASSIA report, p. 41.

neighborhood's permanence. ... [N]ot even the most idealistic of Palestinian negotiators would ever dream of French Hill being dismantled as part of a final status agreement."¹⁰

"Nevertheless," as the report concludes, "French Hill is a settlement, built on land expropriated from Palestinians in an area that was under Jordanian control prior to 1967, when it was annexed to Israel."¹¹

Of course, no fact is ever truly irreversible, as demonstrated by the Israeli pullout from Gaza in 2005, which involved the evacuation of thousands of families from Jewish settlements, the demolition of over a thousand homes, and the uprooting of communities and businesses of long standing. But, as the PASSIA report confirms, no one on either side of the conflict has any expectation that all of the settlements developed in East Jerusalem and the West Bank will be dismantled.¹² Whatever the fate of the less developed Jewish settlements will be, the annexation of the outer suburbs of Jerusalem is regarded as a political inevitability by most observers. Apart from radical rejectionists who remain committed to the destruction of the entirety of the Israeli state,¹³ and the segment of the more general public which supports a peace settlement but has come to doubt that a settlement will ever occur,¹⁴ the widespread expectation is that a settlement

¹⁰ PASSIA report, p. 41.

¹¹ PASSIA report, p. 41.

¹² The question of whether East Jerusalem is properly regarded as part of the West Bank or a separate territorial entity is, like virtually every other "fact" concerning territorial boundaries in this context, itself a disputed matter.

¹³ There are of course radical rejectionists on both sides. On the Jewish side, the rejectionists see themselves as committed not to the destruction, but to the sanctification, of the state of Israel. I would argue that these are the same thing. To make that argument more than a rhetorical gesture requires a careful explication of the effects of breaking down the distinction between religious and secular realms. In the longer version of this paper, I mean to examine this breakdown in more detail.

¹⁴ See the latest results of the Peace Index.

will have to accommodate those Jewish settlements which have become “established facts.” As outlined in a U.S. Government report,

“Insofar as planning and construction is concerned, the relevant Jewish settlements in the West Bank will be functionally detached from the authority of the Civil Administration (the Military Commander) and, in essence, will come under the direct control of civilian Israeli authority. In terms of planning and construction, these settlements will be empirically indistinguishable from those towns and cities in Israel proper... Until now, and even after Oslo, there has been a clear, binary distinction between Israel proper (the rule of Israeli Law) and the West Bank (despite all discounts, Military Rule). The proposed umbrella municipality plan blurs this distinction, rendering the ‘green line’ meaningless – even as a term of reference ... The term “Greater Jerusalem’ has to date been a rather amorphous, and not terribly binding, declaration of intent. After this proposal the same term will constitute geographically and ethnically defined entity, clearly expressed in legally defined borders, in which [Israeli] civilian control is exerted over territories previously deemed ‘occupied.’

This is precisely what the policy of creating facts on the ground was designed to achieve.¹⁵

This paper is an attempt to deepen our understanding of the concept of facts on the ground. The aims are primarily descriptive (to describe *how* the policy of creating facts

¹⁵ Using the term “policy” to refer to the practice of facts on the ground may be somewhat misleading inasmuch as it implies a degree of intentionality and coherent and deliberate action on the part of policymakers. In fact the practice of establishing facts on the ground has been a good deal messier than that. Not only has there been internal division among the policymakers and government leaders responsible for determining what happens in the territories and in Israel proper with regard to “Arab land.” It is also the case that the actual practice of settlement in the territories has largely been propelled by grass-roots movements. The relationship between the government and the radical religious settler movement is complex, and while the latter has undoubtedly received substantial support from the former, the two cannot be collapsed into one another. This makes the imputation of intentionality, implicit in the concept of a deliberate policy, as well as the characterization of the intentions and aims lying behind the “policy” extremely complex. These are issues to be taken up in a longer version of this paper. For here, suffice it to note that I am using the term “policy” to refer to the implementation of facts on the ground advisedly, bearing in mind that in many instances it was more the result of stumbling and the convergence of overlapping agendas and actions than the result of deliberate planning.

on the ground *works*) and conceptual/definitional (to clarify what the concepts of “creating facts” and “facts on the ground” *mean*), as opposed to more normative aims, such as adjudicating the conflicting claims to justice that underlie the policy, or evaluating the terms of one or another peace settlement or proposed political negotiation. This is not to assert any pretense to neutrality. It is neither possible to sidestep the moral and political issues raised by Israeli settlement policy, nor desirable to do so since, after all, these are the issues that lend the policy its interest and significance. No one who confronts the policy of facts on the ground can fail to have some kind of position or at least intuition about the fundamental moral and political issues that it raises. Like everyone else who enters this thicket, I have my own views about injustices that were committed in the past, and about what would constitute a just or unjust resolution of the conflict over land in the future, and I will make no attempt to disguise these views or to claim that they are “objective.” If I refrain from taking a position about the more fundamental issues of justice, peace, security, and political stability that are ultimately implicated by the policy of facts on the ground, it is not because I subscribe to an ideal of the detached academic observer, an ideal which, if not always illusory, is surely unobtainable in this context. Rather, it is because I believe that that the moral and political issues in this context are as complex as they are unavoidable.¹⁶ It is beyond the scope of this paper to address all of the factors that need to be considered before reaching a judgment about the aims and the consequences of the policy of creating facts on the ground from the standpoint of either justice or the practical prospects for peace.

¹⁶ Cf., Shafir, p. xxiii (“Most Israelis are accustomed to view early Zionist history, as indeed most people view the dawn of their national histories

I myself am rather doubtful that there *is* a just *and* viable political resolution to be found, at least so long as we continue to view the conflict over Israel and Palestine through the prism of property. One of the main points that I hope will come through my analysis of facts on the ground is that the conceptual framework of property rights and property law on which this policy rests is not well suited to a resolution of the conflict. A conceptual framework based on the logic of property fosters the kind of zero-sum thinking, including a fixation on land, a fixation on the past, and an exclusionary conception of ethnic and national identity, that is all but guaranteed to sabotage the “Israeli-Palestinian search for peace.”¹⁷

One may well ask why the logic of property is worth examining, if, as I have suggested, it is not a useful framework for analyzing, let alone resolving, the underlying conflict over land. There are three reasons why developing a richer understanding the particular logic of property that propels the creation of facts on the ground is worthwhile, notwithstanding its obvious deficiencies. First, this is the conceptual framework that actually dominates debates about land allocation – indeed it dominates the thinking of *both* sides of the debate, the supporter’s of Israel’s facts on the ground policy, as well as its critics. Even when people invoke conceptual frameworks that seem to avoid or transcend the framework of property rights, as when they talk about the right of self-determination or the right of return (conceived not as a right to property but rather as a right to reside or become a citizen in the state), they still find themselves pulled back into the logic of property rights. This is related to the second reason why the logic of property underlying facts on the ground remains an important subject of discussion. Ultimately, as

¹⁷ This rather hopeful formulation comes from Israeli Settlement Policy in Jerusalem, p. 1.

I suggest at the end of this essay, the logic of property may be something that we simply cannot transcend. Basic conditions of human existence – our physicality, our physical and economic needs, our material nature and interests – may condemn us to property.¹⁸ Finally, there is a third reason why the logic of property underlying the creation of facts on the ground is worth examining. The idea of facts on the ground rests on a particular, one might say peculiar, theory of property rights that is grounded on the moral and practical force of actual possession – “possession is nine tenths of the law.” This is a theory about the basis of property rights (a theory known in legal doctrine as “prescription”) that is based on a sophisticated understanding of moral and practical ambiguities that make the binary categories that undergird ordinary property claims impossible to apply. The theory of prescription can be, and has been, tied to the exclusionary logic of property rights. But it can also be detached from that logic, inverted, and used to deconstruct the exclusionary, binary approach to property rights. Indeed, the doctrine of prescription has two aspects or phases: first, an analytic phase, that recognizes that there are circumstances in which the distinctions that are ordinarily observed and that ordinarily serve to protect property rights (e.g., the distinction between legal and illegal modes of acquiring property) *can't* be observed; second, a practical phase that attempts to reconstitute the circumstances in which these distinctions can be observed, and property rights can be recognized and protected, once again. Usually, this reconstitutive phase involves effecting a *transfer* of property rights from one party to another through some kind of extraordinary means, though sometimes it involves not *changing* the allocation of property rights but simply giving legal sanction to an informal

¹⁸ Footnote on communism (Marxist and religious varieties.)

transfer took place in compliance with ordinary norms of consensual transfer but without proper legal documentation.

While the reconstitutive phase or aspect of the doctrine of prescription is tied to the binary logic of property, the analytic aspect is decidedly not. When we look at how facts on the ground work in practice, it is easy to overlook the complex conceptual work embodied in the theory that endorses the practice of “turning facts into rights” and makes that practice morally and practically compelling (albeit subject to controversy). Very often, the intellectual propositions involved in the first phase of the doctrine that support the conclusion that the usual distinctions and usual rules can’t be applied go unstated. This essay takes the view that those intellectual propositions are well worth stating. Articulating the analytic premises of the doctrine of prescription that often lie buried underneath its practical effects can actually illuminate and deepen our understanding of facts on the ground and their claim to validity.

Whether or not we are capable of transcending the logic of property embodied in the second, reconstitutive, aspect of prescription, the reality is that this is the logic that informs the actual practice of land allocation in the region. The conflict over land that lies at the heart of the Arab-Israeli conflict is entirely enmeshed in the logic of property, both in theory and in practice. The practices I am referring to include not only practices of private land allocation and ownership but also the practices that determine the boundaries, and the very existence, of sovereign nation-states.¹⁹ Indeed, as I hope to

¹⁹ In the case of Israel, there is no basic agreement about its boundaries. Elaborate history of 48 war and its aftermath, the armistice agreement following the way of 67. An armistice agreement is not an internally recognized boundary-line of the sovereign state. Yet over time, widespread consensus has developed treating that armistice agreement as the basis of the boundary line between Israel and the proposed Palestinian state – a

demonstrate, these turn out to be one and the same thing. An analysis of the history of the policy of facts on the ground shows that private land acquisition and the establishment of political sovereignty in Israel (and elsewhere) have gone in hand in hand, bearing out the old legal realist dictum that property and sovereignty, private ownership and the exercise of political power, are not two distinct things, but rather, two inseparable aspects of a single phenomenon.²⁰ The legal realists made this point about established nation-states whose exercise of sovereignty was a given. But the point is equally applicable to nationalist and colonialist movements involved in the *creation* of a sovereign state. Indeed, the fusion of property and sovereignty is more readily apparent in the process of state creation and nation-building than it is in the context of established states which can more easily conceal the dependency of private rights on the exercise of power by political entities, as the realists pointed out. In quite visible ways, nationalist and colonialist movements and the proto-state organizations that they spawn fuse the public functions of establishing and exercising political sovereignty over territory with the functions of private land allocation and ownership.

Putting aside for the moment the controversy over whether Zionism is properly characterized as a colonialist project,²¹ there is no question that this analysis of the fusion of property and sovereignty accurately describes the early state-building and nation-building activities of the Zionist proto-state and the newly established Jewish state. Well before the Six Day War of 1967, indeed well before the establishment of the State of Israel, the Zionist movement began implementing a policy of creating facts on the ground

perfect example of the evolution of a de facto reality into a (potentially) de jure territorial boundary-line.

²⁰ Morris Cohen, Property and Sovereignty

²¹ Shafir

in order to fulfill its basic aim of acquiring territorial rights and political sovereignty for Jews in Palestine.²² Indeed, the policy of acquiring property in order to support Jewish settlement and the creation of a Jewish “homeland” in Palestine preceded any explicit articulation of the objective of creating a sovereign Jewish state. In its early phases, the policy of acquiring property and settling Jews in the land of Israel was not necessarily linked to the maximalist vision of a Greater Israel (or to the idea of a Jewish *state* as opposed to a homeland). As suggested above, pragmatic calculations led early Zionist leaders to limit their territorial aspirations to only a part of Palestine, and to concede the rest to the Arab population. But the pursuit of even those limited territorial aspirations in a land that was populated by Arabs, ruled over by foreign powers (first the Ottomans, then the British), and hampered by laws that restricted the ability of Jews to purchase property, relied on the same techniques of land acquisition that would later come to be identified with the policy of “creating facts” in the occupied territories.

Every student of property law will recognize the core principle that lies at the heart of the policy of creating facts on the ground. “Possession is nine tenths of the law” is a maxim well known to Anglo-American jurisprudence and, as shocking as it sounds, it forms the basis of any number of garden-variety property doctrines, including the right of first possession, which awards title to unowned resources to the first person to take possession of them; the doctrine of relative title, which entitles the occupant of property to exclude non-owners, regardless of the validity of her own claim to ownership; and the doctrines of adverse possession and prescription, which *remove* title from the owner who “sleeps on his rights” when a non-owner takes physical possession or makes use of the

²² Shafir, p. 8.

property and stays in physical possession or continues to use the property for a sufficiently long duration of time. The same basic idea underlies the European doctrines of early international law, such as the “right of discovery” and the “right of conquest,” which were used to determine the award of property rights to whichever colonial power succeeded in conquering a particular territory first (and to justify the expropriation of the land and resources from its native inhabitants).

Doctrines like these are to be found in the property codes of most developed legal systems, including Islamic and Jewish law as well as Anglo-American law and the legal systems of continental Europe. Doctrines awarding title to property on the basis of de facto possession existed in the Ottoman law that governed Palestine when the Zionist movement first arose, and they were preserved when the British assumed their Mandate over Palestine, and laid down their own land law, which combined the older Ottoman land law²³ with their own statutory innovations, such as the Land Transfer Ordinance of 1921, which sought to limit the acquisition by Jews of Arab land and thereby prevent the transformation of the Palestinian peasantry into a volatile landless proletariat.²⁴ When the early Zionists set about acquiring land for Jewish settlement in the face of such legal obstacles, they did not invent the technique of converting de facto into de jure possession out of whole cloth; they used the materials at hand, which included the legal and ideological materials of the British and Ottoman Empires, in particular, their well-established systems of property law, in addition to models of property acquisition and

²³ Ottoman law subject to modern reform

²⁴ See George E. Bisharat, “Land, Law, and Legitimacy in Israel and the Occupied Territories,” 43 *American University Law Review* 467, 494-97 (1994).

colonial settlement borrowed from various European powers.²⁵ Where the established system of property law served their interests, the Zionists followed it. Where the rules of the established property regime were inimical to their interests, they found ways to subvert it. But even here, the general principles of property law served to endow their circumvention of the law with its own kind of legality, allowing them to claim that the ownership of land that they obtained was founded on principles of justice and moral and legal right. The doctrine of prescription underlying adverse possession, which enshrined the principle that possession is nine tenths of the law, expressed a kind of super-legality, and just as it functions in ordinary domestic contexts to “turn wrongs into rights,” it could be used to justify settlements, and sanction the transfer of ownership from Arabs to Jews, even when the initial legality, or morality, of the settlements was questionable. It thus supplied the basic legal rationale for the policy of creating facts on the ground.

Long before the occupation and settlement of Gaza and the West Bank became an issue or a reality, this policy was actively pursued by Zionist leaders. It was pursued within the constraints of British law, which sought to limit Jewish purchases of Arab property, in the period leading up to the establishment of the Jewish state during which “the lesson that the Jews learnt ... was that physical buildings had to be backed up by a demographic presence.”²⁶ And it was pursued without constraint in the immediate aftermath of the War of 1948, when the newly founded Jewish state found itself, after successfully fending off Arab attacks, in possession of both sovereignty and land – including land that was privately owned and vacated by Arabs. As has been well documented, “a massive population transfer” had occurred by the War’s end, with

²⁵ Shafir

²⁶ PASSIA, 1.

“Palestinians ... forced to flee east and Jewish residents of the Old City ... expelled west.”²⁷ The mass exodus of Palestinians provided the newly established Jewish state with the opportunity to effect a large-scale transfer of ownership from Arabs to Jews, an opportunity that was quickly seized on and implemented through a variety of legal techniques.²⁸

At the time, taking over the homes of Arab refugees satisfied pressing needs of the nascent state, needs of both nation-building and state-building,²⁹ including housing the thousands of Jewish refugees who escaped from Europe during and after World War II, and the thousands more who took flight from Arab countries and other non-European countries where it seemed that Jews would no longer be welcome. Today, more than fifty years later, the consequences of these early programs of creating facts on the ground present a formidable challenge to both critics and supporters of Israeli policy in the West Bank. Should Palestinian refugees be able to exercise the right of return by ousting the current occupants of property owned by Palestinian Arabs at the outbreak of the 1948 War?³⁰ What of the Jews who lost their homes in East Jerusalem or were forced to flee from other precincts during (and after) that war? Should every piece on the game board be restored to the status quo ante bellum, regardless of what has happened in the interim, regardless of the fact that the original owners and occupants of the properties may no longer be living and that it may be their descendants who are claiming the right, and regardless of the level of involvement that the current occupants had in the events that led to the original dispossession? Does the passage of time in any way alter the equities of

²⁷ PASSIA, p. 3.

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²⁹ Shafir on “nation-building” and “state-building”

³⁰ U.N. Resolution 194

the situation? Must acknowledging the injustice of the dispossession of the Palestinian refugees necessarily be tied to a restoration of the original holdings, or to a ratification of the justice of those original holdings? Was that distribution of property beyond reproach? Is any scheme of private property holdings really just?

The point of these questions is not to undermine the Palestinian refugees' claims or to assert a thesis of moral equivalence between harms suffered, or wrongs committed, on each side.³¹ One population overcame its condition of exile, another acquired it. Thousands of Palestinians lost their homes as a result of a war that few Palestinians chose to wage, even if many actively supported and participated in it and it was waged on their behalf.³² I take it as unarguable that this constitutes an injustice that requires redress (regardless of the validity or invalidity of claims on the part of Israeli Jews that they suffered injustices at the hands of Arabs, or that they have legitimate justifications for their actions grounded in the right to self-defense.) There are many related issues worthy of extensive discussion, including the Palestinian right to return and the parallel Jewish right of return, which grants every Jew the right to move to Israel and become an Israeli citizen as a birthright protected by Israeli law.³³ My intention here is not to engage in those discussions but simply to highlight the existence of the serious moral as well as pragmatic arguments to be made on both sides of these questions. No matter how sympathetic one is with the Palestinian plight and the case for a Palestinian right of return

³¹ Nor is it to suggest that advocates for the Palestinian right to return limit their conception of the appropriate remedy to the recovery the actual property/ouster of present occupants. Many Palestinian advocates are prepared to give up the right to restoration in exchange for a peaceful and just settlement of the conflict, either in the form of a two-state solution, or other forms.

³² Some will contest the statement that few Palestinians "chose" to wage that was waged against Israel immediately upon the announcement of its creation

³³ citations. Marmor, Waldron. Book collections.

– that is, for a right to the return of private property – one has to reckon with the competing claims to justice on the part of the current occupants. Those claims are *grounded* in the fact of current occupancy,³⁴ a fact that has long been recognized under the legal doctrine of prescription to generate a *moral* and *legal* claim to continued occupancy (albeit only under certain circumstances).

If one is inclined to repudiate these claims in the case of the settlements in the occupied territories (as I confess is my own inclination), then one has to ask what, if anything, distinguishes the settlements in the occupied territories from the Jewish settlements established on land appropriated from Arab owners before and after 1948 by similar means. If it is simply the longer passage of time, then that would seem to confirm the basic logic of creating facts on the ground, and the question then is simply, how long a time is enough? If something other than the passage of time is thought to distinguish the situations, then the question becomes what that other something might be. And if nothing is thought to distinguish the later from the earlier settlements, then the question is, which way does that cut? Must we follow the inexorable logic of property rights backwards all the way back to the restoration of original title? What would be the consequences of turning out every current occupant of property that was wrongfully taken from a Palestinian? Where would the current occupants go? And how should we assess those consequences from the standpoint of justice or from a more pragmatic point of view?

Or should we follow the logic of property in the opposite direction, the direction dictated by the doctrine of prescription and supersession, to sanction the ownership rights

³⁴ Claims of historic right

of every current occupant (of sufficiently long standing), and deny Palestinians whose property was wrongfully taken (or their descendants) the right to any remedy?³⁵ Whether we follow the logic of property rights backwards in the direction of a restoration of the past, or forwards to justify the supersession of the past,³⁶ we end up with an equally absolutist approach, a zero sum game, which awards one group property rights to the complete exclusion of the other. The only question, then, is *which* group, the Jews or the Palestinians, will be allowed to exclude the other.

I have already expressed my misgivings about basing a resolution of the underlying conflict on the logic of property. The logic of property by prescription that undergirds the policy of facts on the ground is inherently exclusionary and absolutist. This of course was (and remains) its great attraction. If one's aim is to provide a group with a territory in which it can reside in safety and satisfy its basic economic and social needs, and if one's belief is that in order to secure this aim, the group must be able to exercise political sovereignty, the basic right of self-determination affirmed by the Zionist Congress and recognized by the United Nations,³⁷ then it follows that the territory must be cleared of the "demographic facts" that would compromise the group's ability to exercise the rights of political self-determination and limit its access to the requisite property.³⁸ That is precisely why the early Zionists, and later, the state of Israel, pursued the policy of

³⁵ There are of course various alternatives intermediate between no right/no remedy and the remedy of allowing every Palestinian who lost a home to reclaim that property, including various forms of restitution/compensation/reparations.

³⁶ See Waldron

³⁷ David Myers,

³⁸ This does not necessarily entail "ethnic cleansing." What it does require, at least in a democracy, is that the "other people" remain a minority of the population, so that their exercise of political rights does not undermine the ability of the majority group to engage in collective political self-determination. Whether this is a tenable position either practically or morally is of course subject to debate.

establishing facts on the ground, creating the demographic facts (i.e., the critical mass of a settled Jewish population), and removing the demographic obstacles (i.e., the physical presence of *other* people on the land) that would prevent this goal from being attained. Of course, recent history has revealed the pursuit of facts on the ground in the occupied territories to be self-defeating: the retention of the territories, while expanding the territorial base for Jewish sovereignty and property, only worsened the so-called “demographic threat” (and exacerbated the military threat). That explains why a hawk such as Ariel Sharon ordered the pullout from Gaza. His rationale for evacuating the settlements – ceding territory in order to *reinforce* Jewish territorial sovereignty – plainly shows that the opponents of territorial maximalism rest their arguments on the same exclusionary logic as its proponents. The logic of prescription that propels the policy of creating facts on the ground is an example of this inherently exclusionary logic. But so too is the logic of property that demands the restoration of all Palestinian property, whether that demand is made on behalf of Palestinian self-determination or on behalf on Jewish self-determination by those who believe that the key to the survival of the Jewish state is to preserve a Jewish majority by amputating the land that contains the “demographic threat.”³⁹

But even though it is tied to this exclusionary logic, there is another way of understanding the doctrine of prescription which points toward a way out of that logic.

³⁹ To get a full sense of what is perceived as the demographic “threat” or “time-bomb,” consider the statistics. There are roughly 10 million people living today between the Jordan River and the Mediterranean – the territory that encompasses both Israel within the greenline and the disputed/occupied territories. That population of 10 million is divided between roughly 6 million Jews and 4 million Arabs. Demographers predict that within 10 years, the balance will tip in favor of an Arab majority. If the population in the West Bank is subtracted, then [get figures]

At its worst, prescription is a pernicious legal doctrine, legalizing theft, turning wrongs into rights, erasing history, and denying the claims to justice of the dispossessed. All of these functions can be seen to have been assiduously carried out by a combination of Israeli authorities, quasi-public agencies (like the Jewish National Fund), and private actors who together employed a variety of legal techniques to transfer ownership from Arabs to Jews – and to efface the morally questionable history of that transfer.

But, as suggested above, the doctrine of prescription can also be understood and applied in a different way. Rather than erasing the history of unjust or morally questionable transfers, the legal doctrine of prescription that underlies the policy of facts on the ground can offer us a way of confronting that history. At its best, prescription is a morally and politically sophisticated doctrine that recognizes and responds to factual and moral *ambiguity*. At its best, prescription neither rewrites the past, nor seeks to restore it. At its best, prescription is neither blind to claims of past injustice, nor indifferent to the claims of the present. Rather, it recognizes the need to *balance* the claims of the past with the claims of the present. Recognizing the competing rights on both sides of the equation, the doctrine of prescription is (at its best) resolutely non-absolutist and pragmatic, combining considerations of justice and *realpolitik* in a single embracing perspective.

While the exclusionary logic of property to which prescription is tied is ill suited to a resolution of the conflict, the logic of prescription itself is thus singularly appropriate as a tool of analysis. True, that logic can be exploited, as it is when people deliberately try to *create* “facts on the ground,” knowing that their expropriation of property is unjust, and calculating that the development of attachments to property will acquire a moral and

practical force over time that will come to outweigh the moral force of the claims of the dispossessed. That is the doctrine of prescription at its worst. But even in the doctrine at its worst, the ingredients of the doctrine at its best are present. Follow the logic of creating facts on the ground closely, “unpack” that logic, and it is not so difficult to turn that logic inside out.

When we do so, several crucial aspects of the conceptual work that the doctrine does come into focus. First, as I hope to examine in greater detail, the doctrine of prescription operates to break down a number of fundamental conceptual distinctions, distinctions that, outside the contexts in which the doctrine operates, are normally observed both in theory and in practice. Second, the doctrine operates to “normalize” conditions that have arisen out of this breakdown of the normal. The distinctions that are broken down under the operation of prescription are the basic conceptual ingredients of what we ordinarily think of as “normal life” as opposed to the state of emergency or “state of exception,” in which the rules of ordinary life are suspended.

There are a great number of different conceptual distinctions that are conventionally observed but observed no longer when facts on the ground are recognized and attributed with legal or moral force. The most obvious distinction to break down under the logic of facts on the ground is that between legal and illegal actions, in particular, legal versus illegal modes of property acquisition. A number of other basic distinctions are constellated with the legal/illegal distinction and accordingly undermined by facts on the ground: such fundamental distinctions as those between fact and value, present and past, right and wrong, intentional and unintentional wrongdoing, intentions and effects, or

intentions and accidents, are all called into question by a doctrine that renders the distinction between legal and illegal modes of property acquisition irrelevant.

But perhaps the most basic distinction to lose its meaning under the force of facts on the ground is the distinction between property and sovereignty. I have already suggested that the history of land settlement in Israel demonstrates a fusion of public and private functions, with private land acquisitions serving as the basis for establishing political sovereignty (and communal institutions providing the means to acquire private property.) The early Zionists developed a variety of collectivist institutions and modes of economic organization, which subsumed private ownership to collective forms of governance, and the public distribution of resources and employment, and other public (e.g., nationalist) ends. Ironically, these collective modes of property ownership gave Jews the competitive edge they needed to prevail (or even just survive) in the market for labor (and property) in their competition with the local Arab population. As Shafir and others have observed, while non-market methods and values determined relations within the Jewish population, relations between Jews and Arabs took place primarily accordingly to the norms of the market. One implication of this is that many, though certainly all, of the property transfers from Arabs to Jews occurred through the “normal” means of the market.

Yet the mere fact that a land transfer may have occurred through the mechanisms of the market does not dispose of the question of its initial validity. It might be legally valid, but that does not necessarily make it morally valid..

The doctrine of prescription renders the basic distinction between legal and illegal modes of property transfer moot. And in doing so, it renders the basic distinction between market and non-market transfers moot. The legal/illegal distinction that is

mooted by prescription depends heavily on the fundamental distinction drawn between market and non-market modes of property allocation. This is because, although the circumvention of market transactions is not the only circumstance that renders property transfers illegal, and although market-circumvention is not always illegal (for example, property can be transferred via the power of eminent domain), there is a close affinity between what counts as a legal land transfer and the norms of the market. The legal/illegal distinction broken down by facts on the ground is largely subsumed under the market/non-market distinction and the broader distinction between the private realm of voluntary individual action and the public realm of coercive governmental regulations and sovereignty in which the market/non-market distinction is contained.

Many other distinctions are subsumed under the public/private distinction and correspondingly broken down by facts on the ground. Time does not permit a full amplification, but I can at least gesture at a few of them. Intent/effect, intent/accident, idealism/pragmatism – all of these are conventional distinctions that bear on the characterization of the aims of the settlers or the organizations that sponsored them, and that in turn are necessary to support a characterization of their actions as moral as opposed to immoral, legal as opposed to illegal, “colonialist” or reflective of an ideology other than colonialism. Yet all of these distinctions are difficult to maintain or apply to a process that unfolds over decades, is implemented by a sprawling network of individuals, public and private organizations with differing, often conflicting, agendas, and imperfect coordination.

The virtue of the doctrine of prescription is that it renders these distinctions largely irrelevant. Accepting that motives are mixed, that the morality as well as the facts of the

situation are ambiguous, it refuses the demands of framework like that of corrective justice which requires drawing bright-line distinctions between good and bad intentions, intentions and effects, intentional harms and accidents. And while that might seem to undermine the ability to make statements of moral condemnation (e.g., of the settlers or of settlement policy in general, it could just as well be spun the other way – to hold the collective responsible for compensating the losses of the victims (without rooting that collective accountability in a theory of corrective justice or intentionality-based moral blame).

The blurring of the distinction between political sovereignty and private ownership, collective and individual action, is directly related to the collapse of the conventional distinctions between intents and effects, intentional harms and accidents, noble and ignoble aims. There is yet another distinction related to the public-private distinction, which is broken down by the logic of facts on the ground, and that is the fundamental distinction between religious and secular, spiritual and material, domains. The relevance of the distinction between spiritual and material realms to the logic of facts on the ground is invisible in the ordinary adverse possession case. But conceptual breakdowns that usually stay hidden in more conventional applications of prescription and adverse possession are vividly dramatized in the setting of “the Holy Land,” where both Jews and Arabs ground their claims of ownership not only in the facts of occupancy, but also in claims to historic and divine right.

The foreword to the PASSIA report vividly captures the religiosity with which the ancient city is imbued, observing that⁴⁰

⁴⁰ PASSIA report, p. i.

“It is this intangible nature of Jerusalem that makes the city so ethereal, so unreal, and so spiritual. Jerusalem is much more than the city or the holy sites: Jerusalem is a symbol, yet it is a symbol for a multitude of changing things. Jerusalem is intensely personal, yet, at the same time, it is also universal. The inherent holiness of the city, built on millenniums of faith, has given it a quality so intensely spiritual that it almost floats above the earth in our minds. Jerusalem is the essence of sacred space.”⁴¹

That quality of holiness is conventionally understood to be one part of a polarity, linked to but necessarily separated from its opposite quality. Thus:

Jerusalem is the essence of sacred space. However, Jerusalem is also a modern city with modern problems. The authors of the Hebrew scriptures were very wise in pointing out this distinction by separating Jerusalem into *Yerushalayim Shel-Malah* and *Yerushalayim Shel-Mata*: ‘Jerusalem of the Sky’ and ‘Jerusalem of the Earth.’ According to this separation, a distinction was made between the sacred and profane: thus, Caesar could be responsible for garbage collection without sullyng the city as a place for prayer.⁴²

As the PASSIA report goes on to note, “[u]nfortunately, in the throes of the modern struggle, this distinction has been lost.” The modern struggle responsible for the “loss” of the distinction is, of course, the pursuit of “facts on the ground.” In Jerusalem, but also elsewhere in Israel/Palestine (and in other contexts where the doctrine of prescription is applied as well), the establishment of facts on the ground is both religiously *motivated* and religious in its effects, whether those religious effects are measured by believers who see them as a fulfillment of a divine plan, or by secularists who seem them as an empowering religious groups and advancing their beliefs. Yet at the same time, the PASSIA report observes, that religious mission is clearly serving secular and material, political and economic, ends.

These are not the only ways in which the secular-religious, material-spiritual distinctions break down in the face of facts on the ground. On a deeper level, the logic of

⁴¹ PASSIA report, p. i.

⁴² PASSIA report, p. 1.

exigency that, as I will argue shortly, underlies the doctrine of prescription, eschews the limits that conceptually separate secular material interests from non-material or “spiritual” ones. This is not something that I can explicate here. But what *all* of these conceptual distinctions have in common, besides the fact that their collapse is triggered by the creation of facts on the ground, is that together they constitute the conceptual field of the normal (the material, and the secular). Having broken down this conceptual field, and having licensed the violation of the ordinary rules of law that apply in normal conditions, the doctrine of prescription operates to reconstitute the normal, “normalizing” the conditions that emerged out of the violation of the normal. As I hope to show, three different senses of “normalization” converge in the creation of facts on the ground in the Israeli context.

First, facts that were created through the violation of the ordinary rules are normalized in the ordinary, colloquial sense of the term. When we say that the policy of facts on the ground functions to normalize an extant set of conditions (e.g., the current possession of property by Israeli Jews), we have in mind, to begin with, the simple idea of adapting to existing conditions, regularizing and institutionalizing them, and giving them legal sanction. As traditional legal formulations suggest, one of the basic functions of prescription is to make it seem as if the new property arrangements that have arisen have existed “since time immemorial,” with the records of the old patterns of distribution and transfer “lost” in the mists of history. Reflecting this idea of normalization, the Anglo-American doctrine of prescription invokes the theory of the “lost grant,” implying that the current possessors acquired their property through legitimate transfers, the record of which has been lost. At the same time, the traditional doctrine acknowledges that the

legitimation of property transfers that it performs is a historical fabrication, explicitly referring to the “lost grant” as a “legal fiction.” Legal fictions in general are devices that serve to conceal normative prescriptions – rearrangements of rights and power prescribed and enforced by law – in the guise of mere descriptions. Like the doctrine of prescription to which they are closely related, legal fictions posit the facts that the lawmakers *want* to be true, and turn those factual statements into legal truths backed up by the force of law.⁴³ Having allowed the rules that safeguard the normal modes of property transfer to be violated, the normalizing function of prescription in this first sense of the term is precisely to make the results of abnormal modes of transfer “the new normal.”

In addition to this fairly familiar sense of the term, the “normalization” of facts on the ground that occurs under the doctrine of prescription conforms to a Foucauldian conception of normalization. Foucault uses the concept of normalization to describe the effects of “productive” as opposed to “juridical” power, juridical power being a top-down mode of governance, which dictates behavior through means of external coercion and violence, productive “biopower” being a mode of governance and reciprocal power relations that works through the formulation and internalization of norms. Norms operate as a system of governance outside the juridical system of the law, but they also are, increasingly, the mode through which the law itself operates, the juridical being only one of the forms that the law can take. Norms, as Foucault uses the term, are a species of rules, but unlike more traditional juridical rules that emanate from the will of a sovereign on high, norms emanate from the population and its actual social practices. Norms are a standard of measurement based on the average, which itself is derived from the aggregate

⁴³ On these functions of legal fictions, see Nomi Maya Stolzenberg, “Anti-Anxiety Law: Winnicott and the Good Enough Judger,” forthcoming in *American Imago*.

of actual events and its “observable regularities,” the “constants of social life.”⁴⁴ The standpoint of normative measurement is statistical, and from this standpoint, “the important thing about events” is not what caused them to occur, but rather “*that* they occur, or rather that their occurrence is repetitive, multiple, and regular.”⁴⁵

As Francois Ewald notes in his excellent explication of Foucault’s conception of norms and the normative, “[b]y the standards of an earlier world ... the statistician is most remarkable for his rigorous suspension of judgment. For him, events are facts with distinct boundaries in space and time – they are complete in themselves and have no cause, or past, or future,” they “become purely accidental” and “for the purposes of statistics, they remain without victims and without a cause”⁴⁶ – an account of actuarial practices which is remarkably similar to the treatment of facts in the legal doctrine of prescription. Like the practices of insurance and the health sciences that Foucault subjects to scrutiny, the legal practice of prescription is a prime example of productive power that produces the norms that it reflects, and functions to normalize facts. As with the actuarial sciences, prescription (like a legal fiction) relies on the laws of probability to give meaning to the raw data, which is otherwise emptied of normative content. “Only the science of probability allows these data to signify,” on Foucault’s account, causing “[t]he notion of mass [to] replace[] such evaluative concepts as nature or essence.”⁴⁷ What counts, in other words, is critical mass. “According to this logic, the more

⁴⁴ Ewald, p. 144.

⁴⁵ Ewald, p. (emphasis added.)

⁴⁶ Francois Ewald, “Norms, Discipline, and the Law” in Law and the Order of Culture (Robert Post, ed.), p. 143.

⁴⁷ Ewald, p. 143.

frequently a particular sort of event occurs statistically, the more real it becomes.”⁴⁸ As facts on the ground proliferate, the more entrenched they become, both empirically and normatively, giving rise to “an entirely different idea of justice.”⁴⁹ Whereas “[l]egal judgments were traditionally based on an attempt to discover the cause of damages,” motivated by the belief that “it was essential to find out whether damages were the result of an unpredictable natural event or whether they could be attributed to a particular person or institution who would they be required to bear responsibility for the damages,” in the system of legal judgment based on norms, “causality is superceded,” giving rise to “a new *rule of justice* that refers no longer back to nature but rather to the existence of the group, a social rule of justice that the group is free to determine for itself, and on its own terms.”⁵⁰

It would be hard to come up with a better description of how the doctrine of prescription actually operates, both in general and in the specific context of Israeli settlement policy. The Foucauldian conception of normalization is thus the second type of normalization exhibited in facts on the ground. But there is also a third type of normalization exhibited in this policy, one that is peculiar to Zionism, and that is the Zionist conception of restoring Jews to a condition of “political normalcy.”

It bears recalling that the Zionist movement arose in late nineteenth century Europe as a response to what seemed to be the otherwise insoluble predicament of Jewish life. Notwithstanding the existence for centuries of Jewish communities in their midst,

⁴⁸ Ewald, p. 144.

⁴⁹ Ewald, p. 147.

⁵⁰ Ewald, p. 147. See generally, Ewald, p. 154 (“What, then, is a norm? It is a way for a group to provide itself with a *common denominator* in accordance with a rigorous principle of self-referentiality, with no recourse to any kind of external reference point ... The norm implies a rule of judgment, as well as a means of producing that rule.”)

European countries persistently discriminated against Jews, shutting them out of various professions, educational and social institutions, and denying them the right to own or farm agricultural land and other civil and political rights, such as the right to hold office. The increase in the incidence of violent anti-Semitic attacks in Eastern Europe, and the concomitant disillusion with the path of assimilation in Western Europe convinced the early Zionists that the only cure for the “abnormal” status of the Jews was “political normalcy.” “To become a people like all other people” was the basic prescription of all Jewish political ideologies at the time that sought to find a cure to the problem of anti-Semitism.

For Zionists, that meant that Jews must “become a nation like all other nations.”⁵¹ As the historian Yuri Slezkine put it, Zionism “argued that the proper way to overcome Jewish vulnerability was not for everyone else to become like Jews but for the Jews to become like everyone else.”⁵² And to become like everyone else, in the context of nineteenth-century Europe, was to become a political nation, possessed of its own nation-state, within which Jews would be allowed to exercise all of the economic and social rights denied them by gentile states. The recent rise in anti-Semitism was seen as proof that even when host states extended legal rights and privileges to Jews, they could not be relied on to continue to afford Jews tolerance or equal treatment. And the Dreyfus Affair was seen as proof that even when gentile society professed to accept Jews (so long as they shed their offensive “tribal” ways), and even when Jews accepted this invitation to assimilate (through conversion or other forms of cultural “self-betterment”), anti-Semitism was bound to resurface and express itself in ugly forms of persecution. The

⁵¹ Herzl.

⁵² Yuri Slezkine, The Jewish Century, p. 2.

long and the short of it was that there was no solution to “the Jewish question” other than overcoming the “abnormal” condition of being a religious minority, a stateless nation, a landless people, dwelling in another nation-state. And to overcome that abnormal condition was precisely to attain the status of “political normalcy,” which, according to the Zionist diagnosis and prescription for the Jewish problem, entailed *Jewish political sovereignty* over land, *Jewish ownership* of land, and *Jewish labor* on the land. *What land* was initially up for grabs, as early Zionists considered the possibilities that were dangled for creating a homeland for the Jews in other parts of the world, such as Uganda. But the cult of the land and the basic idea that a nation-state with territorial sovereignty – “a nation like all other nations” – was necessary to solve the “pathology” of the Jewish condition in the Diaspora were central tenets of the Zionist movement.

It has often been noted that the Zionist diagnosis of “the Jewish question” exactly mirrored the diagnosis of the Jewish problem found in European anti-Semitism. The problem for (or with) Jews (depending on whether one’s perspective was that of the anti-Semite or the Zionist who sought to combat anti-Semitism) was that they were “pariahs,” “unproductive,” “parasites” who, failing to perform the productive work of tilling the land, were forced into the role of “usurers” in the budding capitalist economy. Jews, on this analysis, had produced both an overly large capitalist class and a landless proletariat, which explained their overrepresentation among both capitalists and communists.⁵³ What

⁵³ On the stereotyping of Jews as pariahs, parasites, and usurers see The Jewish Writings of Hannah Arendt, in particular, “Antisemitism,” p. 52 (“The core conceptual charge leveled by our foes is – in general terms – that Jews are *foreigners*”), id. (“Since Herder first defined Jews as ‘an Asian people foreign to our continent,’ his charge has moved in many directions”), pp. 73-74 (“Proceeding from more or less anti-Semitic biases, all modern definitions of Jews as a people – with the one exception of definition by race – have their historical basis in medieval and late medieval conditions. The Jews as

they sorely lacked was a core of landed cultivators and a self-sufficient economy based on the “dignity of labor.”

Just as the Zionist diagnosis of Jewish “abnormality” mirrored the stereotypes of the anti-Semite, so too their proposed cure of political normality mirrored the contemporary visions of political and economic independence that abounded in the larger European culture. To find in nationalism the cure for political and economic dependence and physical vulnerability was nothing more than to subscribe to the reigning political ideology of the day. That said, relatively few people subscribed to the Zionist vision of establishing a Jewish nation-state until the close of the Second World War.⁵⁴ As David Myers and Gershon Shafir have observed, the period in which Zionism arose was a

parasites, as a nation of *pariahs*, as a *caste* – all that, with the exception of a few, but very crucial remnants, was eliminated economically in the course of the eighteenth and nineteenth centuries, while at the same time, by means of a kind of political (anti-Semitic) countermovement, Jews were actually redefined as a caste of pariahs and parasites. The *parasites* were Jewish usurers – parasites of the disintegration and destruction of the feudal social order. Their corresponding needs were born out of a dying world that assigned them the fateful role of supplying usurious capital, which served consumption, but had only a destructive influence on production. The Jews were *pariahs* as long as they remained politically powerless. This corresponded to the “sponge policy” of the princes, the intent of which was to prevent the wealth that Jews were amassing from becoming “primary accumulation of capital” and thus a first step toward capitalism itself. Jewish capital was constantly being decimated and dispersed by pogroms, expulsion and confiscation. Living in uncertainty and [dependency] ... the Jews were the pariahs of developing European capitalism. The Jews were a *caste* ever since they lived segregated from and unincorporated in the history and economic life of the world around them, existing on their own or at best parasitically on others.”)

⁵⁴ See David Myers, “Statism.” Also see Shafir, p. 7 (“In a remarkable outburst of creativity Jews experimented with a variety of potential identities in the modern era: in the few areas of Central Europe where the benefits of modernity were extended to Jews, large numbers chose assimilation; in the Pale of Settlement, many elected universal or Jewish socialism, “cultural nationalism,” or orthodoxy, which was in part also a novel response; while multitudes emigrated to the New World. Before 1933, only a small minority chose Zionism.”)

period of enormous intellectual and political ferment in which most Jews absorbed with solving “the Jewish question” gravitated toward other political ideologies, including various forms of socialism, internationalism, and non-statist (or even anti-statist) forms of Jewish cultural autonomy or religious rebirth.⁵⁵ Only a narrow segment of the Jewish population endorsed Zionism. Non-Jewish support was even weaker, though Zionists did succeed in obtaining some backing for their political project of establishing a Jewish homeland in Palestine, most crucially from the British, who sometimes thwarted but other times supported the Zionist goal of creating a Jewish homeland in mandatory Palestine. However, it was not until the full horror of the Holocaust had been revealed that the majority of Jews, and the world community at large, endorsed the creation of a Jewish state and, with that, the Zionist aspiration for “political normalcy.” As Gershon Shafir observes, “territorial nationalism – so different from and alien to the [traditional] ethnic Jewish way of life – was, as it were, imposed on Jews as a last resort, in response to Nazi persecutions and genocide, and forced migration from Eastern Europe, North Africa and the Middle East.”⁵⁶ The support for the creation of the State of Israel following World War II, like much of the support for Israel today, rested on the perception that “in this century, the potentially tragic consequences of the severance of Jews from a territory of their own were only too clearly revealed, justifying a desire for *political normalcy* by standards of the modern world order.”⁵⁷

All three of these kinds of normalization – Zionist normalization, Foucauldian normalization, and conventional normalization – are achieved through the Israeli

⁵⁵ Myers

⁵⁶ Shafir, p. 8.

⁵⁷ Shafir, p. xxii (emphasis added.)

settlement policy of creating facts on the ground. Whether those achievements will remain in place, and whether they *ought* to remain in place, are matters subject to debate. But what I hope that my analysis shows is that achieving these forms of normalization is what the policy of facts on the ground *does*. Further, the analysis is meant to show that these forms of normalization are achieved through breaking down the basic distinctions that constitute the conceptual field of the normal, and then reconstituting the normal in the image of the abnormal. This, of course, is an example of a broader phenomenon that has received a lot of academic attention in recent years through the theoretical writings of Agamben, building on the earlier work of the political theorist, Carl Schmitt. The normalization of the state of exception, turning the state of emergency into a permanent dispensation from the rules of ordinary law, is a subject of increasing concern, as more and more countries around the world invoke states of emergency and institute emergency law without any foreseeable end. Though the policy of creating facts on the ground is not based on an official declaration of a state of emergency, an examination of its underlying conceptual premises shows that it is fueled by the basic logic of emergency law, which holds that exigent circumstances justify overriding the laws that “ordinarily” protect civil rights. Normalizing the state of emergency and legitimating the changes in the distribution of rights and power that result in emergency conditions is the ultimate function of the policy of creating facts on the ground.

In a longer version of this paper, my intention is to examine in more detail the various conceptual distinctions that are broken down by facts on the ground. As suggested above, all of these distinctions can be subsumed under the fundamental public/private

distinction. A full listing would include, in addition to public/private and sovereignty/property the following:

PRIVATE/PUBLIC
PROPERTY/SOVEREIGNTY
MARKET/NON-MARKET
LEGAL/ILLEGAL
INDIVIDUAL/COLLECTIVE
 INTENTIONS/EFFECTS
 INTENT/ACCIDENT
 IDEALISM/PRAGMATISM
 MORAL STANDARDS/POLITICAL AND PRACTICAL NEEDS
 PRESENT (NEEDS)/PAST (INJUSTICE)
 FACT/VALUE
 DESCRIPTION/PRESCRIPTION
 RIGHT/WRONG
LIBERAL/COMMUNAL MODES OF SOCIAL & ECONOMIC ORGANIZATION
INTEGRATION/SEGREGATION
RELIGIOUS/SECULAR
SPIRITUAL/MATERIAL

A full explication of these distinctions and what it means for them to be broken down, conceptually and practically, is impossible here. But we can recognize that these distinctions are constellated by the basic distinction between legal and illegal property transfers that is effaced by the doctrine of prescription. We can recognize that observing these distinctions defines the conditions of “normalcy,” which are suspended by the operation of the doctrine to sanction facts on the ground. Only with a fuller picture of the practical and conceptual conditions of normalcy that are broken down can we understand what precisely is involved in the normalization of “the abnormal,” whether the reference is to the abnormal condition of “a people without a land,” or to exigent conditions that lead to the suspension of the rules that ordinarily govern land transactions.

The interesting thing about the case of Israel/Palestine is that here these constitute the same thing. The abnormal political condition of the Jews *is* the (permanent?) exigency that justifies the Jewish acquisition of privately owned “Arab land” – or doesn’t, depending one’s political perspective.

Since time and space constraints don’t permit a full explication here, let me close with a few brief remarks about the flip side of normalization – what we might call “exceptionalization.” Claims of exceptionalism have dogged Jewish ventures throughout Jewish history, even when the venture is trying to escape the condition of exceptionalism for a condition of “normalcy.” There are two versions of Jewish exceptionalism that I am anxious to avoid. The first is the congratulatory version (or, in the case of Jewish invocations of Jewish exceptionalism, *self-congratulatory*.) Just as American exceptionalism is invoked to justify the expansionist policies of American “manifest destiny,” invocations of Jewish exceptionalism are often used to justify expansionist Israeli settlement policies. (Conversely, justifications of Israeli policy are also often based on the claim of normalcy – the idea being that if Israel has acted with less than perfect conformity to standards of justice, it is just acting like all other nations.) I do not wish to partake of these justifications of Israeli settlement policy based on claims of Jewish exceptionalism. None of my statements should be taken as a justification of the policy, though it is true that I call into question some bases for criticizing that policy.

On the other hand, there is another version of Jewish exceptionalism that I am also anxious to avoid. (This is the version of exceptionalism to which justifications based on the “normalcy” of Israel directly respond.) In the debates over Israeli policy and the Palestinian question, double standards abound. And they cut both ways, to the detriment

of both Palestinians and Israeli Jews – and certainly to the detriment of the prospects for peace. Many of the features of Israeli settlement policy, including features that may incline us to condemn or criticize the policy, are exhibited in the policies of other countries, other nations, and other groups (including some of the platforms for Palestinian self-determination.) There is always a danger that, in singling out the Israeli case, one is participating in the phenomenon of holding Israel to blame for actions that are excused, accepted, or even justified when they are engaged in by other countries or other groups

Both of these versions of Jewish exceptionalism are unattractive. That said, the question arises, why use the example of Israeli settlement policy to illustrate the meaning and functions of the policy of facts on the ground? After all, one of my claims is that the Israeli policy of creating facts is not unique, but is actually a rather common policy, codified in the doctrines of prescription and adverse possession and used by other countries and groups in the service of colonizing settlement projects. Why, then, not pick a different example, one that would avoid the dual dangers of Jewish exceptionalism?

I must say that I was tempted. This is a paper that I have avoided writing for years. But the fact of the matter is that there is a reason why, in a discussion of the policy of facts on the ground, the Jewish case looms large. Casting about for alternatives, I could come up with some other examples of groups engaging in the policy of creating facts on the ground. Given my own interests, the examples that come most readily to mind feature private groups, subgroups, engaged not in the projects of nation-building and state-building, but rather in the parallel project of establishing a territorial base in which they could enjoy some limited forms of cultural and political autonomy – “nation-building” writ small. Such examples support my thesis that the distinction between public and

private actions, political sovereignty and private ownership, collapses in the face of facts on the ground. Drawing on my own work, the examples that came readily to mind included Rajneeshpuram, a religious commune inspired by the Hindu religion founded in Oregon, and the ultra-Orthodox community, and official municipality, of Kiryas Joel established through amassing private property – another Jewish case!

Certainly there are innumerable examples of groups engaging in the creation of facts on the ground, amassing private property through whatever available means, and transforming private property into political sovereignty, groups, be they nation-states or subgroups, which have nothing (directly) to do with the Jewish experience. But I think that there is a reason that the Jewish case, featuring Israel, looms large.

Jews epitomize the features that lead groups in general to seek to form colonies and that lead them, further, to adopt the strategy of creating facts on the ground order to overcome the obstacles to achieving that end. As seen in the analysis above of “the Jewish problem,” the “problem” with Jews in the Diaspora has always been their “refugee status,” their status as “pariahs,” “parasites,” a landless nation within another nation, the quintessential Malthusian “surplus population.” Other European colonialist movements also were motivated by the desire to solve the problem their “surplus populations.” They had other motives as well, of course, but the motives of greed are not easily separated from the motives of need, in particular the need to satisfy the basic needs of economic and physical survival of these “surplus populations.”

Inasmuch as other groups have assumed the status of refugees, diasporic populations, surplus populations whose basic needs can't, or won't, be met by the “home country,” all these groups are now (the social equivalent of) Jews. That is, they occupy

the same place as the Jews occupied in the Jewish question – which is to say, they occupy no place that they can call their own. What the Jew in the Jewish question attests to is the stubborn physicality, the sheer materiality, of human existence. The problem with a population deemed to be “pariah” or “surplus” is that it has to go somewhere. Ruling out “the perennial suggestion for solving the Jewish question by slaying all the Jews,”⁵⁸ it has to *be* somewhere, and that means that there has to be a *place* for them to be. This alone may explain why the logic of property – inherently exclusionary, innately absolutist, fixated on such base, materialist concerns as land and other physical and economic resources – is difficult, if not impossible to transcend. Even the most integrationist, “anti-groupist” social philosophy must come to the terms with people’s basic need for a physical place to be – a place in which to live and work and satisfy one’s basic physical and economic needs. And that means coming to terms with the competition for scarce resources, and the complex group dynamics that competition sets in motion.⁵⁹

Of course, the need for *a* place to be does not by itself dictate the choice of *where* to be, and it is always possible to fantasize another place devoid of the “demographic problem” that necessitates the exclusionary tactics of facts on the ground – and to castigate the group that has engaged in those tactics for failing to find that mythical other place. It is possible, in other words, to fault the Zionists not for seeking to fulfill their basic aims – sovereignty over land, property rights in land, labor on the land – but for seeking to fulfill them in Palestine where another population already had established the moral (if not the legal) rights to territorial sovereignty and ownership. But where, then, should the Zionists have sought to fulfill their aims? Here again we confront the

⁵⁸ Arendt, pl 47.

⁵⁹ Cf., Daria Roithmayr’s work on

stubborn materiality, the sheer physicality, of human existence. Follow every counterfactual (e.g., the Uganda option) to its bitter end and you will find there – a bitter end. Because the bitter fact is that there is no place on earth where the basic aims of Zionism could have been pursued with any realistic chance of success without displacing another population.

The equally bitter irony is that in implementing their aims, the Zionists recreated the Jewish question as the Palestinian question. It has been said that the Palestinians have become the Jews' Jews and the Arabs' Arabs – as sure a testimony to the troubling persistence of “the Jewish question” as one could find. Whoever occupies the status of the refugee, the displaced person, the dispossessed, is destined to become the pariah, the parasite, the “surplus” population so long as the logic of property (and economic competition between groups) persists. That logic will inevitably motivate attempts on the part of the pariah population to establish facts on the ground in a desperate attempt to try to get back “home.” This may not constitute a justification for a policy that inflicts the same harm on others that those who engage in it are trying to heal. But it helps us to understand what motivates the policy, and what that policy entails, both conceptually and practically. And with that understanding in place, we can move towards a less simplistic assessment of the policy's moral and political validity.