PROPERTY AND COMMUNITY

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5. FACTS ON THE GROUND

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Walk into the Domino's 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 and 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.[1]

What is being described here? On the most literal level, this passage, taken from a report put out by PASSIA, a Palestinian think tank, is describing the neighborhood of French Hill, a place, a space, a physical, geographical area in the northeast corner of Jerusalem that is part of the physical and social geography of Israel/Palestine. On a less physical level, the passage is describing a practice, a social practice, a "strategy" or "method," known as "creating facts on the ground." Also conveyed in this passage is a remarkable array of effects seen to issue from this practice: profound alterations and transformations in the fabric of social existence that somehow result from "creating facts on the ground." These include internal psychological effects (the "confused stares and laughter" signifying the cognitive and emotional states of disbelief that greet the supposedly absurd proposition that French Hill is a "settlement"), in addition to outward social and economic effects, that is, *changes* that have occurred in the objective demographic situation and in the distribution of land.

The most direct, tangible, and widely noted result of the practices called "creating facts on the ground" is that property changes hands. As the PASSIA report explains, the acquisition of the territory that is now French Hill was an outcome of the 1967 war between Israel and its Arab neighbors (Jordan, Syria, and Egypt), as were the subsequent transfers of property from Palestinians to Jews that took place not only in the Jerusalem neighborhood of French Hill but in many other parts of the land of Israel/Palestine. With regard to the particular

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1. Allison B. Hodgkins, ISRAELI SETTLEMENT POLICY IN JERUSALEM: FACTS ON THE GROUND, 27.

case of French Hill, the 1967 war was crucial. The attacks and counterattacks that culminated in the 1967 war ended with Israel in possession of four geographic areas that had been under the control of Syria, Egypt, and Jordan since the end of the first Arab-Israeli conflict in 1948. These territories included the Golan Heights (formerly under the control of Syria), the Sinai Peninsula and the Gaza strip (controlled by Egypt), and the expanse of land that extends from the eastern half of Jerusalem through the Judean desert up to the Jordan River. This is the territory widely known as the West Bank,[2] an area that was originally slated to be part of a newly created Arab state under the United Nation's partition plan for Palestine,[3] but which fell under Jordanian control immediately after the establishment of the Jewish state and the ensuing 1948 war.

It was here, in the occupied territories of the West Bank and Gaza, that the concept of "creating of facts on the ground" gained wide currency. One commentator after another has used the term to describe the Israeli settlement policy that emerged soon after the 1967 war as, overriding internal objections, the Labor Government set about establishing the legal and political apparatus that would, over the next forty years, support the creation of over three hundred settlements, inhabited by almost four hundred thousand Jews, in Gaza, the West Bank, and East Jerusalem. "Facts on the ground" has been the term of choice both for proponents of the radical settler movement, which has been the leading force in establishing Jewish strongholds in the occupied territories, and for critics of Israeli settlement policy, who use the term to issue dire warnings about the impact of the settlements on the peace process and their injurious effects on the local population. Countless journalistic reports and white papers have been produced in which the term appears as a kind of policy jargon, summarizing the techniques and aims of the radical settler movement and of the government policies supporting them in a few pithy words.

But "facts on the ground" is not a technical term. It is not a legal concept (though it bears more than a passing resemblance to the legal doctrines of adverse possession and prescription, which enshrine the maxim that "possession is nine tenths of the law"), and it is certainly not a scientific term. Far from a technical concept, "facts on the ground" is simply a highly evocative colloquial phrase that has gained popularity in this and other contexts because it seems to capture something obvious but elusive and hard to put into words. It is, in essence, a metaphor, albeit one that succeeds precisely because it seems to be so literal. Especially when applied to the *de facto* possession of property, the phrase, "facts on the ground," seems to be referring to concrete facts that are literally on, or

2. The place names, like all facts and issues in this area, are disputed. Supporters of the religious settler movement dispute the West Bank appellation and call the area Judea and Samaria.

3. *See* Charles D. Smith, PALESTINE AND THE ARAB-ISRAELI CONFLICT: A HISTORY WITH DOCUMENTS, 190–195 (2001).

of, the ground. It is only on further reflection that we realize that the term is referring not just to physical facts of geography and possession of a particular piece of land, but to the myriad psychological and social effects unleashed by these facts, in addition to the complex processes whereby these facts were "created."

Indeed, "facts on the ground" is so evocative a term, and seems so aptly to describe the nature of the Jewish settlements in the occupied territories, that it sometimes seems as if it had been invented just to describe them. But the usage of the term long predates its application to the Zionist settler movement, and it continues to be employed to refer to a wide variety of phenomena in a wide variety of contexts. Which raises the question: what is the similarity between these diverse phenomena? What, if anything, do Israeli settlements have in common with other things that have been described as "facts on the ground"? And what do the circumstances of their creation have in common?

Answering these questions requires having some sense of what the terms, "facts on the ground," "creating facts on the ground," "establishing facts on the ground," *mean*. But, evocative as all of these terms are, and as intuitive as they seem to be, their meaning is actually deeply obscure. Not only do these terms fail to disclose what the defining features are that distinguish "facts on the ground" from other land settlement and real estate development projects and all the other facts and empirical states of affairs that we never call by that term. They also are frustratingly vague and ambiguous with regard to the all-important question of how, by whom, or by what, they are created. The idea that they *are* created, through some sort of human action or social process, rather than just appearing as naturally occurring facts, is built in to the very terms. Words like "creating" or "establishing" are clearly meant to imply human agency. Indeed, the idea that facts on the ground are human artifacts is so central to the concept that we tend to infer the existence of a human agent, deliberately bringing about the facts at issue, even when we don't use verbs like "create" or "establish," and opt instead for the shorter usage ("facts on the ground") without any modifying verb. All of this forms a striking contrast to the more commonplace view that facts are "not made, but found."

Yet, at the same time that the idea of a human agent is built into the concept, the precise identity of that agent, its nature, its methods, and, most importantly, its responsibility for the acts it commits (and the unfolding consequences of those actions), are rarely adequately specified. The passage quoted at the beginning of this chapter is typical in this regard. We learn (as if we didn't know already) that the practice of creating facts on the ground is an "Israeli strategy." But what, or whom, precisely does "Israeli" refer to? The Israeli state? The government? The Israeli people? The Jewish people on whose behalf the country was ostensibly established, and in whose name the settlement project is carried out (despite the protestations of many Jews)? Should we point our finger at the private individuals who promote and fund the settlements without themselves going to

live there? What about the many settlers who moved to the occupied territories because of economic incentives, lured by government housing subsidies, with little awareness that the developments they were being offered a chance to live in were anything other than ordinary suburban developments at a bargain price, and little commitment to the ideological tenets of the settler movement? In the final analysis, is it the government or private actors who bear responsibility for establishing the settlements—or both? Is every settler equally responsible, or do we need to distinguish between the ideologues and the moderates, the leaders and the followers, the violent and the nonviolent, the grownups and the children who were born on the settlements or brought there without their consent?

Anyone with any knowledge of the complexities of the settlement process, and the divisions of opinion within the Israeli public (and the Israeli government), knows that these are not simple questions to answer. That does not necessarily negate the responsibility of the state—or of the "Israeli people" or the "Jewish people" at large—if one finds it meaningful to speak of such collective entities bearing collective responsibility. But it does mean that it is necessary to stake out a view on such issues as collective responsibility, and to match that view with a grasp of the facts regarding who did what, when, and where, and with what intention, before one can arrive at any sound conclusions about responsibility and agency.

In other words, it requires attending to the normative dimension of facts on the ground. Facts on the ground have both normative *effects* and human *causes* that give rise to claims (or charges) of moral responsibility. As already noted, facts on the ground are not just physical, because the physical aspects of facts on the ground—the facts of geography, demography, and physical possession of land—embody and engender myriad psychological, economic, and social trans-formations. That the simple physical act of occupying property or territory can bring about all of these inward and outward, psychological and social, empirical consequences is by itself remarkable. But observable empirical realities are not the only kinds of consequences brought into being through the creation of facts on the ground. There is also a host of less tangible but equally powerful *normative* consequences that issue from the practice of establishing facts on the ground—political consequences (such as the alteration of territorial boundaries, the expansion of a sovereign nation's jurisdiction, and even the establishment of new sovereign entities), and moral consequences as well.

These normative consequences bear on the questions of human agency and responsibility raised above, since the question of moral responsibility for the creation of facts on the ground is naturally tied to the question of what the responsible agent is responsible *for*. But if the usage of the concept of facts on the ground is frustratingly vague regarding the important question of who, or what, the morally responsible agent or agency is, it likewise tends to cloud the issue of how facts on the ground generate their normative consequences, and what, precisely, those normative consequences are. Both the normative inputs

(the agents and their methods) and the normative outputs (the political and moral force that facts on the ground somehow acquire) are deeply obscure. The metaphorical phrases we use to describe them give expression to our intuitive recognition that there *are* such normative inputs and outputs, but they rarely illuminate the specific processes whereby facts on the ground acquire their normative power or clarify the nature of the normative power that they acquire. These are the deep mysteries buried in the heart of the concept of creating the facts on the ground.

On one level there is nothing surprising or mysterious about the normative consequences generated by facts on the ground. The social and economic changes effected by facts the ground, such as land redistribution and changes in the demographic and cultural character of a particular area, are almost always morally and politically controversial, giving rise to charges of unjust disposses-sion and other wrongful acts and consequences. It is precisely because there are prior occupants of the land or resource in question, and contestation over its ownership, that resort is made to the unorthodox methods of acquiring resources characterized as establishing facts on the ground in the first place. The very reason that phrases like "facts on the ground" were coined is that we need a way of distinguishing these methods from the standard methods of land acquisition and demographic movement. The methods of staking out possession that are used to establish facts on the ground constitute a deviation from the normal, sanctioned, legitimate methods of acquisition. Presumably, they are resorted to because the usual methods of acquiring or establishing ownership are unavailable—or unavailing. And perhaps there are good justifications for engaging in such deviant practices in some circumstances.[4] But whenever the rules defining the orthodox methods of land transfer are violated, it is natural that charges will be made on behalf of the people who have *lost* the resource (who have literally and figuratively *lost ground*) against the people who brought this about and took possession of the resource—claims that hold the latter to be morally responsible, or *guilty*, if the circumstances of the transfer are deemed to be in violation of fundamental moral principles.

These claims, and the counterclaims made in defense of the legitimacy of the land transfers described as facts of ground, are obviously normative in nature, and there is nothing surprising or mystifying about them. But the normative dimension of facts on the ground goes beyond the positions that are taken in the political debates that rage about the legality and morality of Israeli settlement practices (or about the morality and legality of *any* practice characterized as creat-ing facts on the ground). It's not just that facts on the ground and the practices that generate them are adjudged to be immoral or illegal (or, contrariwise, perfectly in accordance with the relevant standards of judgment). Israel's critics and its

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4. *See* Eduardo Peñalver & Sonia Katyal, PROPERTY OUTLAWS (2010).

would-be defenders both take positions about the conformity of Israeli settlement policy with standards of morality and international and domestic law. But these judgments, be they positive or negative, are what we might call second-order normative effects of the practice of establishing facts on the ground. By that I mean they are judgments *about* the practice's *first-order effects*, which include, in addition to their observable psychological, social, economic, and political consequences, *normative* effects—political and/or moral effects that exist independently of the moral and political judgments that we make about them.

These first-order normative effects consist specifically in the pressure exerted by facts on the ground on the resolution of the disputes that routinely arise about whether they should be preserved, that is, whether the people who have taken *de facto* possession have a *de jure* legal or a moral right to keep it. The recognition that *de facto* possession has a strong tendency to ripen into *de jure* possession, or at least into some kind of social acceptance of the legitimacy of the current occupants' occupation, is part of what we *mean* by facts on the ground. Everyone understands the power of the status quo not only to perpetuate itself but also to legitimate itself. We recognize that practical reality has a kind of normative power or force that affects the outcomes of disputes, biasing the outcome in favor of the established status quo and, hence, against a restoration of the status quo ante. It is our intuitive appreciation of this normative pressure generated by "reality"—by facts on the ground—that leads people to offer phrases such as "fait accompli," "accomplished facts," and "irreversible facts" as synonyms or glosses on "facts on the ground." These phrases convey our appreciation of the pressure or resistance to reversing the established status quo that is generated by the status quo's sheer existence. All of these formulations reflect our sense that the actions necessary to reverse the facts on the ground are difficult if not impossible to undertake—not because they are physically impossible, but because they are somehow, for reasons that have yet to be explained, socially, psychologically, politically, and, arguably, even morally, impossible to undertake.

This is the basic "first order" normative effect of facts on the ground. It is not just a random or accidental consequence of the establishment of facts on the ground, but rather, an expected and, very often (although not always), a deliberately intended result. Thus, the radical religious settler movements that have, since the 1970s, been the most zealous proponents of establishing Jewish settlements in the occupied territories, have established them with the deliberate aim of making them "irreversible facts," i.e., realities that will have to be accommodated if and when a resolution of the final status of the territories ever takes place (and which, in the meanwhile, shape the political situation to their advantage).[5] So, too, government policy supporting the radical settler movements was formulated with the deliberate aim of having the settlements eventually become annexed to

the Israeli state. Alternatively, the settlements have been conceived as bargaining chips, leverage to be used in future negotiations, with the expectation of extracting an eventual concession to a land swap. Thus, as outlined in a U.S. Government report on the "umbrella municipality plan" for Jerusalem and its environs:

> 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 a geographically and ethnically defined entity, clearly expressed in legally defined borders, in which [Israeli] civilian control is exerted over territories previously deemed "occupied."[6]

Behind this vision of the umbrella municipality, behind the settlers' vision of a Greater Israel, behind all of these government and settler visions is the common goal of creating communities that "couldn't" be uprooted.

With this aim in mind, the policy adopted by the government early on was to create settlements with a civilian rather than a military character. In this regard at least, government policy was perfectly in harmony with the radical settler movement. The standard procedure adopted was first to establish a settlement as an army outpost, under cover of the laws of belligerent occupation, which restrict the taking of property and building of settlements by an occupying military force to military encampments serving legitimate security purposes. Legally, such "military outposts" are temporary, since by law the property expropriated for their establishment has to be returned to its owners once the "military necessity" that justified its taking has ended. But the settlers of such outposts, and the military and civilian authorities that oversaw their establishment, operated with the tacit understanding that these "temporary military outposts" established for "military security purposes" would soon be converted into multipurpose communities of a civilian and hence more permanent character. Thus, hundreds of settlements that began as supposed security outposts were very quickly transformed into densely populated residential communities, where families raise children, and members of the community establish schools and synagogues, run

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stores and businesses, have homes and all of the accoutrements of ordinary life—precisely what international law seems intended to prohibit.

The dramatic consequences of this covert policy are vividly described in the PASSIA report:

> 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, Kohav Ya'akov, Psagot—carpets of houses with red-tile roofs on the hilltops overlooking Palestinian towns and villages. On the 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]

This description reveals the dynamic heart of facts on the ground: the passage from an initial stage of exceptionality to a later stage of seeming normality, and with that, a kind of normativity or legitimacy—or at least a very strong pressure to be accepted as legitimate. The settlements, as described above, start off as "exceptional" both in a legal sense and a sociological sense, and end up normalized, or de-exceptionalized, again in both legal and sociological terms. Insofar as their legal status is concerned, the settlements are, at the start, either flatly in contravention of the laws governing occupied territories—"illegal," as many would have it—or, alternatively, as their defenders would have it, they conform to and are governed by the exceptions to the prevailing legal prohibitions on expropriation and settlement in the occupied territories provided for (and limited to) cases of "military necessity." Either way, their status is that of a legal exception, that is, an exception to the laws that (are supposed to) generally prevail.

In a sociological sense, as well, the settlements are in their initial stage exceptional, insofar as the initial *character* of the settlements is military (or pioneering), rather than civilian (and established), without any of the infrastructure of normal life, e.g., roads, buildings, businesses, schools, permanent structures, etc. Perhaps the sharpest indication of the transition to ordinary civilian life is the presence of women and children and the prominence of childrearing as an activity, which clearly signals a shift away from military purposes, at least as they

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are commonly defined. Tellingly, the settlements lose their exceptional sociological character and their exceptional legal status at the same time. Or, more precisely, they acquire a normative character by the second sociological stage that either "supersedes"[8] their initially illegal or legally exceptional character, or, if a change in legal status isn't fully accomplished, at least challenges that extra-legal character with a competing, potentially overriding norm.

This, indeed, is the core idea of the concept of facts on the ground: the conversion of a *de facto* reality into a *de jure* reality, either a newly and fully legalized state of affairs, or if not that, then a state of affairs that nevertheless cannot be undone—"cannot" not in the sense of a physical necessity, but, rather, in the sense of a normative necessity—because the social costs of doing so are unacceptable. When we say that facts on the ground "cannot" be undone, we do not mean that they "cannot" be undone in a literal sense. (Of course they *can* be undone; all it takes is physical force, as the pullout from Gaza boldly demonstrated). Rather, "cannot" is a normative term, referring to political or moral "impossibilities." This is both the core idea and the basic mystery of facts on the ground.

It is true that the changes introduced into the normative landscape are not always dispositive—they can be, and sometimes are, offset by competing political or moral considerations, considerations that demand a restoration of the status quo ante or the establishment of a new, presumably more just or politically acceptable arrangement. In the face of countervailing moral and political imperatives, some militating in favor of a preservation of the current status quo, others militating against it, it is never preordained which side will win out. We might, as we say, "refuse to accept reality," recognizing the superior force of the moral principles or political considerations that dictate tearing down the facts on the ground. But the fact is, societies are notably reluctant to tear down established facts on the ground, an indication of the normative as well as the practical hold that they have on us. And even when it is determined that countervailing normative concerns outweigh the normative claims that facts on the ground generate, facts on the ground are still exerting their normative force, even if that force hasn't prevailed over the forces that demand their destruction.

To resort to a different metaphor, it is as if facts on the ground generate a kind of invisible force field, a normative force field that can only be penetrated with great effort and at a high (perhaps an "impossibly high") moral/political cost. And this is perhaps the most radical transformation of all: above and beyond the changes effected externally by the possession of land (in the allocation of land and resources, the "exchange" of populations, the redefinition of territorial borders,

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8. The allusion is to Waldron's theory of supersession. *See* Jeremy Waldron, *Settlement, Return, and the Supersession Thesis*, 5 THEORETICAL INQUIRIES IN LAW 237 (2004). For a lucid critique of Waldron's supersession thesis, see Chaim Gans, *The Palestinian Right of Return and the Justice of Zionism, in* ISRAEL AND THE PALESTINIAN REFUGEES, 256–293 (Eyal Benvenisti, Chaim Gans, and Sari Hanafi eds., 2007).

and establishment of new political jurisdictions) and in addition to the changes effected internally (in people's feelings and beliefs about what's possible in the future and what happened in the past), this normative force field cloaks all of these changes in empirical reality with a kind of moral or political force. This is why we are so often sympathetic to claims put forth on the part of current occupants who claim the right to be protected from dispossession (or at least a right to compensation in the event of being dispossessed) even when we think they acquired their occupancy through a wrongful act. Such rights claims, and the deference they are widely given, reflect the widely shared sense that there are either political reasons or reasons of principle not to undertake to "reverse the facts."

An important distinction is being finessed here between reasons of principle and pragmatic calculations of *realpolitik*, which might support the conclusion that the facts on the ground should not be disturbed. The point here is that, however the distinction between moral and pragmatic considerations is resolved (or not resolved), the existence of some combination of considerations counseling against the dismantlement of facts on the ground—some kind of "normative force field"—emerges as yet another by-product of the physical fact of possession. That force field does not emerge overnight. It takes time for facts to acquire their normative power, and the strength of that power grows over time. Recognizing this point, the PASSIA report emphasizes the signs of the passage of time in its description of French Hill as an example of the "effectiveness of the Israeli strategy of creating facts on the ground." Thus, the report continues:

> 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 testament to the 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.[9]

Vividly conveyed here is not only the importance of time to the construction of facts on the ground and their endowment with normative power, but also the particular kinds of things that transpire over time, which generate that normative endowment. This nutshell portrait of life in French Hill also shows how the external social, internal psychological, and intangible normative effects all intertwine, forming a skein of perceptions and self-perceptions, beliefs about the past and attachments to the present, memories, false memories, and, above all, *a sense of normality*, all of which conspire to make a reversal of the status quo "inconceivable."

The psychological dimension of that "inconceivability" is crucial. Three psychological phenomena, in particular—collective memory, attachment, and adaptation, the psychological counterpart to *normalization*—play particularly important roles in constituting this "skein" and the normative force field that it holds together. Perhaps the most obvious psychological force at work in the construction of facts on the ground is collective memory. As described by students of the phenomenon, collective memory refers to "the subjective use of the past to sustain a vision of individual or collective identity."[10] Unlike "scientific" historical scholarship or "critical history," which attempts to establish "objective knowledge of what actually happened in the past"[11] and seeks to prevent present-day interests from distorting our understanding of the past, collective memory is frankly "presentist," shaping and reshaping our understanding of what happened in the past (and its importance) in the service of present-day needs and understandings. Above all, collective memory serves "a *group's* consciousness,"[12] at once reflecting and constructing a people's sense of its identity. Such a process of reconstructing the past to construct and conform to a group's sense of identity clearly lies behind the "inconceivability" of the residents "see[ing] themselves" as settlers.[13] It is not that the residents have necessarily forgotten that the area now known as French Hill was conquered in the 1967 war. Any Israeli schoolchild knows *that*. Nor is the point that no one in French Hill knows, or would accept, the fine points of international law, according to which this historical fact of military conquest means that French Hill is technically a settlement in occupied territory subject to international law (in particular, the laws governing military occupations). What *has* been forgotten, or, if not literally forgotten, then conveniently suppressed, is the fact that the land on which French Hill was developed was expropriated from the Arab village of Issiwaya, in violation of the laws governing military occupations. To be sure, some residents of French Hill know this fact, and are aware of the international law perspective, according to which French Hill is an illegal settlement on occupied territory; some of them concur with that perspective and others dispute it. But those individual judgments do not represent the collective memory of the community. Most of the residents (and fellow-citizens of Jerusalem and Israel) simply do not concern themselves with such matters, at least not most of the time. Instead, they go about the business of their daily lives, without giving the legal—or illegal—origins of French Hill much thought. After all, there is no visible trace of the original Arab owners or of the Arab village of which this area used to be a part to

10. Elisheva Carlebach, John M. Efron & David N. Myers, eds., JEWISH HISTORY AND JEWISH MEMORY: ESSAYS IN HONOR OF YOSEF HAYIM YERUSHALMI, xiii.

11. *Id.*

12. David N. Myers, RE-INVENTING THE JEWISH PAST: EUROPEAN JEWISH INTELLECTUALS AND THE ZIONIST RETURN TO HISTORY, 31 (1995).

13. FACTS ON THE GROUND, 41.

serve as a reminder. Instead, all of the visible markers of the community's past—its "weathered buildings and well-worn strip malls" and, most especially, its "grandchildren living just around the corner"—lend the impression that French Hill originated as an ordinary residential development. They foster a "memory" of the community's origins from which the history of land expropriation and unwilling transfer from the original Arab owners of the properties is conveniently erased.

This is a textbook example of how the mechanisms of collective memory operate. In contradistinction to critical historical scholarship, which looks behind the always potentially misleading visual cues of the present, collective memory takes its cues from the visible, external, physical surroundings[14] in a reflexive process that simultaneously imbues the present-day facts on the ground with meaning (including historical meaning) while being shaped by those same external facts. In the case of French Hill, the surface features of the community make its historical origins and status under international law "inconceivable" because they make the community *look like* any other (Jewish) neighborhood in Jerusalem—and not like a stereotypical settlement. As the U.S. government report on the Jerusalem "umbrella plan" stated (referring to nearby communities outside the city), such surface features "blur[] the distinction" between "Israel proper" and the West Bank, "rendering the 'green line' meaningless."[15] The real feat accomplished in French Hill, through the mechanism of collective memory, is that, since its founding, the area has been radically transformed yet, at the same time, normalized, rendered utterly ordinary.

This blurring of the "binary distinction" between the two sides of the Green Line, between "Israel proper" and the West Bank, legal and illegal settlements, civilian law and military rule subject to the international law of belligerent occupation, is the stated aim of the policy of establishing facts on the ground. The whole idea is to make settlements seem so much like ordinary places where ordinary people live and civilian law applies that the thought that they *are* settlements, whose dismantlement is required under international law, becomes unthinkable. This is the cognitive work accomplished through the processes of collective memory. It is a familiar time-bound phenomenon. As time passes, our memories fade, allowing newly constructed memories, which take their cue from the visible visual and cultural character of a community, rather than from any invisible legal line, to crowd in. The role of collective memory is thus revealed to be a critically important causative factor in endowing facts on the ground with their normative power.

It is in this regard that the concept of facts on the ground is more than a little reminiscent of the legal doctrines of adverse possession and prescription.

14. For a particularly evocative description of this process, see Meron Benvinisti, SACRED LANDSCAPE: BURIED HISTORY OF THE HOLY LAND SINCE 1948 (1995).

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Adverse possession and prescription are legal doctrines that enshrine the maxim that "possession is nine tenths of the law." As counterintuitive and even shocking as it sounds, this ancient maxim forms the basis of a number of longstanding, 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 occupants of property to exclude nonowners; and the doctrines of adverse possession (which applies to real property) and prescription (which applies to other forms of property and other rights), which take the logic of possession one step further by *removing* title from the owner when a nonowner takes physical possession and makes use of the property in stipulated ways for a sufficiently long duration of time. The same basic logic of possession informed the European doctrines of early international law, such as the "right of discovery" and the "right of conquest," which were used to determine which colonial power had the right to colonize a particular area by awarding property rights and the rights of territorial jurisdiction to whichever one succeeded in conquering a particular territory first. (This also served to "justify" the expropriation of land from its native inhabitants).[16]

Doctrines such as these are to be found in the property codes of most every developed legal system, including Islamic and Jewish law as well as Anglo-American law and the legal systems of continental Europe. This includes the Ottoman law codes (derived from Islamic law) that governed Palestine in the late nineteenth century when the modern Zionist movement to establish a Jewish homeland in Palestine first arose.[17] These Ottoman laws were largely preserved when Great Britain made Palestine its "mandate" following World War I. The land laws enforced by the British in mandatory Palestine were a combination of those inherited from the prior Ottoman regime (which the Ottoman authorities had already begun to modernize and reform in the years directly preceding the British mandate) and their own statutory innovations, such as the Land Transfer Ordinance of 1921, which restricted the ability of Jews to purchase Arab-owned land. When the Israeli state was established in 1948, and when it later assumed military control over the occupied territories in 1967, these British and Ottoman laws continued to be applied, albeit selectively (naturally, the British restrictions on land transfers to Jews were repealed) and, in the main, opportunistically, with new land laws passed by the Israeli parliament and new judicial doctrines developed that sometimes supplemented and sometimes supplanted the old

16. On the doctrines of discovery and conquest, see Joseph William Singer and Joseph P. Kaltt, MYTHS AND REALITIES OF TRIBAL SOVEREIGNTY: THE LAW AND ECONOMICS OF INDIAN SELF-RULE (2004).

17. *See* George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 491–95 (1994); Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948–1967*, 33 N.Y.U. J. INT'L L. AND POLITICS 923, 932–936, 949–966 (2001).

Ottoman and British land laws. In the 1950s, the laws of adverse possession were substantially modified with the aim of preventing Palestinians in Israel from establishing adverse possession claims.[18] But some version of the doctrines of adverse possession and legal prescription always remained in force, attesting to the utility and ongoing normative pull of the basic principle that *de facto* possession should, in certain prescribed circumstances, be recognized as constituting *de jure* rights to possession.

There are two major theories of adverse possession, each of which assigns a leading role to the psychological attachments formed by current possessors to their possessions. One of these, the utilitarian theory, also focuses on the practical problems of proof that arise when there is no reliable historical record, and the past is "lost in the mists of history." According to this utilitarian theory, the doctrine of adverse possession serves two basic functions. The first is to impose a statute of limitations on claims against trespassers because of the inevitable uncertainties that arise out of the vagaries of memory. On this account, adverse possession represents the (appropriate) triumph of "pragmatics" over "principle." In a perfect world, wrongs are "instantly uncovered" and the principles of corrective justice are vindicated.[19] But in the real world, problems of proof and the unreliability of memory and representations about the past mean that wrongs are frequently not uncovered for a long time, or not uncovered at all, and in any event, difficult to prove. "With time, memories fade and witnesses die: no one can recall who did what to whom," and even the "documentary evidence" may be "forged, lost, altered or destroyed."[20] In a world with such faulty means of reconstructing the historical record, it is better, on this view, for pragmatics to triumph over principle.

The second function attributed to adverse possession on the utilitarian account is to "quiet title." Eliminating lingering uncertainties about who owns what is thought to serve the positive utilitarian functions of enhancing the marketability of property and maximizing its productive use. By simply declaring the current possessor (who meets certain conditions) to be the legal owner, the uncertainty is dissolved. The utilitarian explanation for favoring the current possessor over other contenders is that "what comes last is more reliable and certain" than what came earlier for the simple reason that is more readily identifiable. Furthermore (and here is where a psychological attachment theory kicks in), to this is added the supposition that current occupants derive

18. On the changes implemented in adverse possession law, *see* Alexandre (Sandy) Kedar, *Legal Transformation*, at 952–966. For an overview of the various methods used to acquire Arab property and the legal regimes under which they were implemented, see generally Kedar, as well as Bisharat, *Land, Law, and Legitimacy*.

19. Richard Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667, 675 (1986).

20. Epstein, *Past and Future*, 675.

a higher subjective utility from the property for no other reason than the fact that, because they currently occupy it, they have "developed expectations of continued control."[21]

As critics have observed, this is a somewhat dubious assumption, since the existence and strength of expectations are highly contingent matters, and, as the Palestinian refugee situation makes painfully clear, it is entirely possible for a nonpossessor to harbor expectations of coming into control of the resource, and to make continued emotional and economic investments in reliance on that expectation. (Conversely, an indifferent current occupant might have no expectations regarding the property at all.) In such situations, we can't rule out the possibility that the strongest degree of attachment and the highest level of emotional and economic investment are made by the party not in possession.

There could hardly be a better case in point than the Palestinian refugees— except, of course, for the Jews, who nurtured at least as strong an attachment to the same land over the course of two thousand years of exile. These mirror images of psychological attachment to a lost homeland more than suffice to demonstrate the falsity of the assumption that attachments to property necessarily wax with ongoing occupancy and wane with absence. But regardless of the correctness of its psychological suppositions, what is important is that conventional utilitarian reasoning about adverse possession makes psychological suppositions that grant importance to the psychological investments we make in land and the expectations we form when we do occupy land regarding its continued presence.

In American jurisprudence, this utilitarian theory of adverse possession is commonly associated with Oliver Wendell Holmes's famous saying that "man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life."[22] "Roots," according to the conventional utilitarian way of thinking, are understood to be a great personal benefit, both in and of themselves and as the source of innumerable further benefits, or gains in personal well-being. Conversely, being uprooted is understood to generate great personal, and social, costs.

A similar psychological assumption about the importance of "roots" and rootedness is given a different, less economic, and more psychoanalytic (or Hegelian) spin by the "personhood theory" of property, according to which a "bond develop[s] between adverse possessor and object over time"—not just an expectation of continued possession or an economic investment, but an emotional bond, in which a person's sense of self or "personhood" becomes

21. Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L. Q. 739, 744 (1986).

22. *Quoted in* E. Allan Farnsworth, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 199 (2000).

bound up with the property.[23] On this theory (as on the utilitarian account), the converse assumption is also usually drawn, namely that, as the original title-holder is separated from the property, her "interest fades."[24] Why both theories make this assumption, belied by the all too common experience of exile, is worth pondering.

Despite the counterexample of exile, attachment is by its nature a present-oriented psychological mechanism, closely connected to the psychological mechanism of adaptation. Whereas collective memory is concerned with reconstructions of the past, attachments are what we form to the things that we *have*—to our present surroundings and holdings, to the people, places, and things that constitute our environment, to our experience and our reality in the here and now.

The fundamental psychological insight shared by personhood theory and the utilitarian/Holmesian conception of "man . . . gradually shap[ing] his roots to his surroundings" is that the psychological processes of attachment and adaptation are important features of our psyches. We all become attached to our present surroundings, and suffer a loss, sometimes a grievous loss, when we are forced to leave them.

It is hard to see what else could explain the otherwise shocking disregard for the past, and past injustices, displayed by the legal doctrine of adverse possession and the concept of facts on the ground. Perhaps the most shocking thing about the normative authority conferred on adverse possessors and other "creators" of "facts on the ground" is the flagrant disregard that it seems to display toward the canons of corrective justice. "Legalized theft" is perhaps the pithiest expression that commentators have offered to describe the paradox that seems to inhere in granting normative power to facts on the ground and thereby "turning facts into rights" and even wrongs into rights. The psychological and normative value accorded to "attachment," recognized by utilitarian and personhood theories of property, seems to play an important role in explaining this seeming disregard for the claims of corrective justice.

This psychological perspective may also help us to better understand what the presence of families adds to the case for subordinating the past-oriented claims of corrective justice to the present-day interests and needs of the current possessors. Obviously, the presence of children is not a necessary element for making out a successful adverse possession claim,[25] or for successfully establishing a "fact on the ground." But it is the case that the presence of children and family units greatly enhances their chances for success. That line in the PASSIA

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23. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

24. Radin, *Time, Possession, and Alienation*, 748–49.

25. To be clear, in drawing a connection between the concept of facts on the ground and the legal doctrine of adverse possession, I am *not* suggesting that the settlements in the territories satisfy the requirements of the legal doctrine.

report describing "the grandchildren living around the corner" is not a throwaway; it is doing a lot of powerful rhetorical work. Similarly, I would suggest that it is no accident that populating the settlements with families is a central component of the settlers' strategy of creating facts on the ground. (So, too, a large preponderance of successful garden-variety adverse possession cases feature family homes). Indeed, it could well be said that children are the ultimate "facts on the ground."

But what exactly does the presence of all those children signify, and what work are they doing that leads the mere fact of possession to acquire its evident normative power? It is not just that many of the families in the settlements are ultra-Orthodox Jews committed to a literal interpretation of the biblical injunction to be fruitful and multiply. The typical settlement in the territories exhibits a much higher birth rate than a place like French Hill, which, with its mix of secular and religious, mainly modern orthodox Jews, looks more like the secular and mixed Jewish neighborhoods of "Israel proper." The physical presence of each and every child contributes to the population count, and the siege mentality that sees the demographic "imbalance" as a threat to the Jewish character of the state might well conceive[26] of Jewish children as filling a security need in addition to fulfilling a biblical injunction. From the point of view that sees the "demographic threat" as a danger to the Jewish state as grave as any military attack, children are the ultimate physical facts on the ground, and procreation is the ultimate method of fact-creation.

But just as the fact of physically possessing land has more than a physical dimension, there is more to the presence of children on a settlement than their sheer physical, demographic presence. The presence of children also highlights the psychological features of attachment and adaptation that lead to the prioritization of needs of the present—and the needs of those who *are present*—over claims of right rooted in the past. The attachments that the children of the settlements have formed epitomize the attachments that hold all of the members of a settlement together. Furthermore, children are the ultimate innocents, singularly blameless for creating these attachments. We understand, as the psychological theory of attachment tells us, the need that children have for continuity, and the trauma that they will consequently experience if they are displaced—and we understand that the adults, too, have this need. A significant part of what makes the dismantlement of French Hill "inconceivable" is our reluctance to inflict this trauma, particularly on those who, like children, bear no responsibility for their being there or establishing the settlements in the first place.

In addition to attachment, children also highlight the psychological process of adaptation, which works together with the mechanisms of attachment and collective memory to make the present seem normal and dismantlement "inconceivable."

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26. Pun intended.

To put it simply, children and families are markers of normalcy. Despite (and in considerable tension with) the conception of children as weapons in the demographic "war," children, and the domestic activities and enterprises that constellate around them, are the epitome of normal, civilian life—and the antithesis of the activities and social functions associated with the military needs or survivalist imperatives that characterize a military or pioneering "outpost." The more domestic life there is in a settlement, the more normal it looks, and the less it looks like a settlement.

Every settlement in the territories aims to achieve this sense of normalcy. But not every settlement has been as successful in achieving it as French Hill. In part this is a function of time—the more time passes, the more normalcy sets in. In part it is a function of proximity—the closer a community is to what is perceived to be Israel proper, the more normal it looks. (Being contained *within* the boundaries of a city widely viewed as an indivisible political entity was obviously a huge advantage). But success in producing a sense of normalcy is also, importantly, a function of the psychological perceptions we have about who we are and the kind of activities we are engaged in. Along with collective memory, which reshapes our sense of the origins of the community, and attachment, which bonds us to the community and makes it feel like "home," the psychological mechanism of adaptation plays a key role in producing this sense of normalcy.

But normalization is not an exclusively psychological phenomenon. To fully grasp the phenomenon, there are other facets of normalization that need to be understood, and for this we need to look beyond psychology to other theoretical frameworks. Three theories of normalization seem particularly well-suited to analyzing the phenomenon of facts of the ground, one being Foucault's conception of norms and normalization, another drawn from Carl Schmitt's theory of the state of emergency, and finally a third theory of normalization, the theory of "political normalization" developed by early Zionist thinkers as a response to European anti-Semitism and the perceived "abnormality" of being a stateless people. Each of these conceptions of normalization offers a different perspective on what transpires when facts on the ground undergo the transition from a state of apparent abnormality or social and legal "exceptionality" to a state of seeming normalcy and legal or quasi-legal acceptance.

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.[27] Norms, as Foucault describes them, operate as a system of governance

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27. I rely here on Francois Ewald's excellent explication of Foucault's concept of the norm. *See* Francois Ewald, *Norms, Discipline, and the Law, in* LAW AND THE ORDER OF CULTURE, 138–160 (Robert Post ed., 1991).

outside the juridical system of the law (although they have increasingly become the mode through which the law itself operates, the juridical being just one of the many forms that the law can take). Norms 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 of actual events and its "observable regularities," which constitute the "constants of social life."[28] 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."[29]

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 approach of 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."[30] Here we see the rudiments of an explanation for why this empirical approach entails a rejection of corrective justice. 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 be required to bear responsibility for the damages," in the system of judgment based on norms, "causality is superseded" and "a new rule of justice" is adopted, one that refers not to the past events and actions, "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."[31]

Although Foucault nowhere, to my knowledge, analyzes the doctrines of adverse possession and prescription or the practice of establishing facts on the ground, this "new" normative paradigm that Foucault sees expressed in the practices and disciplines of the modern sciences and professions that shape modern society (e.g., medicine, psychology, insurance, etc.) is breathtakingly similar to the normative paradigm expressed in the legal and extralegal practices described as facts on the ground. As in the case of the actuarial sciences and other disciplines Foucault analyzes, the practices that grant normative force to facts on the ground rest on "an entirely different idea of justice"[32] from the one that animates the normal rules of property rights—an idea of justice that is derived from empirical behavioral norms rather than the principles of corrective justice, and that indeed

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28. *Id.* at 144.
29. *Id.* (emphasis added).
30. *Id.* at 143.
31. *Id.* at 147.
32. *Id.*

contravenes the principles of corrective justice. It would be difficult to come up with a more apt description of these practices than the Foucauldian vision of the production of "biopower" and the translation of empirically observable norms into forces of normalization.

What this account of normalization leaves open is the question of why, or more precisely *when* the paradigm of corrective justice will be exchanged for this new "idea of justice." After all, the "old idea of justice," the juridical mode, based on the principles of corrective justice, persists alongside the norm-based conception described by Foucault, and it is not exactly clear when the norm-based conception will be favored over the traditional conception, or what causes this to occur. A theory that may help to shed light on this crucial issue is the theory of the state of emergency or "state of exception" developed by the controversial political theorist, Carl Schmitt.

Unlike Foucault, Schmitt does not explicitly address the concept of the norm, normalcy, or normalization. But his concept of the state of emergency as "the state of exception" points us toward an explanation of why and when the rules of corrective justice—and the rule of law more generally—will be suspended. And his idea of the permanent state of emergency offers an alternative understanding of the transition that abnormal situations, like facts on the ground, undergo as they come to seem normal and acquire normative force.[33]

As Schmitt helped us to see, a state of emergency (whether or not it is officially declared) is a "state of exception" in which the ordinary rules don't apply. In theory, the state of exception is triggered by the existence of an emergency, that is, an existential threat, which threatens our survival or our basic rights. In the state of emergency, our conduct is governed not by the rules of law that ordinarily apply to protect the rights of others, but rather, by the logic of necessity or exigency, which authorizes actions that violate the rights of others if undertaken to serve overriding needs, such as self-defense. An exception is built into the paradigm of corrective justice itself for such overriding needs, which in theory explains why and when such conduct will be justified. According to the conventional view of the state of emergency, emergency situations are by nature temporary, ending when the threat ends, and the necessity that justifies suspending the ordinary rules no longer obtains. Schmitt's innovation was to contend that the state of emergency is permanent, and that, in effect, we are always in a state

33. Schmitt expounded his theory in a number of books, including Carl Schmitt, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (1922) and THE CONCEPT OF THE POLITICAL (George Schwab trans., 1976). His leading modern expositor is Giorgio Agamben. *See* Giorgio Agamben, STATE OF EXCEPTION (2003). Another helpful expositor on whom I have relied is David Dyzenhaus. *See* David Dyzenhaus, *Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?, 27 CARDOZO L. REV. 5 (2006); and LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN, AND HERMANN HELLER IN WEIMAR (1999).

of emergency, whether or not one is formally declared. Instead of ending after it is formally declared, the state of emergency is, according to Schmitt, perpetuated. And with the perpetuation of a state of emergency comes a perpetuation of the state of exception to the law—a perpetual suspension of the rule of law and all the "ordinary" rules that "ordinarily" subject our actions to the constraints that flow from the recognition of the rights of others. From the standpoint of empirical incidence, the state of legal exception and the state of legal normalcy have in effect traded places. What in theory is the rare, exceptional state of affairs—the suspension of "normal" law—has become "the new normal." And what in theory is the normal state of affairs—the state of affairs in which the normal rules of law apply—has become an illusion, as the exception swallows up the rule. In short, the state of emergency/the state of exception has been normalized.

Like Foucault's, this theory of normalization seems like a singularly apt description of the dynamics that propel the establishment of facts on the ground and their attainment of normalcy and normative force. The circumstances in which facts on the ground are created always entail some kind of emergency or exigent situation that justifies (or purports to justify) overriding the "usual" rules, be it a relatively minor emergency (such as the "cloud over title" that arises out of evidentiary ambiguities making it impossible to ascertain if a transfer was voluntary or forced and clouding the identity of the true owner), or be it a major emergency, such as a threat to personal or national security. There is always some exigency generating a need to override the rights that we "ordinarily" protect asserted in a facts on the ground situation.

It is telling in this regard how many transfers of Arab-owned or occupied land have occurred in Israel/Palestine under the mantle of some kind of emergency law, or military necessity, on *both* sides of the Green Line. The occupied territories are subject to military administration, and even though the international law that governs military occupations requires the military administration to enforce the preexisting civilian laws, it provides an *exception* to that requirement for situations when "military necessity" or security needs require overriding civilian law. Settlements have thus been founded under the exceptional "legal authority" of an exception to an exception to an exception, as, by law, civilian law is expected to give way to military rule, which in turn is expected to give way to the civilian laws of the prior rulers, which in turn is expected to give way to military necessity. On the other side of the Green Line, a formal declaration of a state of emergency has been in place since the 1948 war. Although not applied to most Jewish transactions, this state of emergency has never been repealed, and it has been selectively applied to Palestinian residents and citizens living within the boundaries of the Green Line to sanction property expropriations and transfers.[34]

34. Bisharat, *Land, Law, and Legitimacy*, 514–518.

The question is whether to accept this logic as a justification. It is always in the interest of those who are grabbing power or grabbing land to claim that they are justified in doing so, and the logic of necessity that defines the state of emergency is a justification that comes readily to hand. But if the justification is nothing more than a self-serving rationalization, then there is no reason for us to accept it, and therefore no reason to grant facts on the ground any normative force. We are back to nothing but brute facts and brute force, arbitrary power stripped of any normative claim to legitimacy or legality.

This was Schmitt's chief claim, that political power is essentially and necessarily arbitrary, and that the liberal aspiration to subject political power to the rule of law is an illusion. But one does not have to accept his diagnosis of the impossibility of establishing the rule of law in order to appreciate the challenge to the rule of law and the rules of corrective justice created by real and perceived emergencies. Even if the existence of an emergency is always a matter of subjective perception, the possibility that an emergency might arise is also reality that has to be reckoned with even by adherents to the rule of law. The real value of Schmitt's analysis is that, by pointing us away from the objective existence of an emergency, it points us toward an understanding of the other conditions that trigger the state of emergency. And, at the same time, it moves us toward an understanding of what perpetuates the state of emergency (and what perpetuating a state of emergency involves) that even those of us who remain committed to affirming the rule of law and applying the principles of corrective justice have to contend with.

What triggers the state of emergency after all is not anything as simple as the objective existence of an emergency or threat to personal or national security. On Schmitt's view, the assertion that such a threat exists is inherently subjective and subject to the inherently arbitrary authority of the sovereign, and he goes to great lengths to establish the lack of any necessary correspondence between what the sovereign declares and what an objective observer would agree is an emergency situation that justifies overriding rights and suspending the rule of law. And he is surely right to warn us against thinking that in every situation in which the logic of the state of emergency prevails, there is an objective threat. What *is* a constant feature of the situations in which the logic of the state of emergency is applied (above and beyond the ever-present element of arbitrary power) is a breakdown in the conditions that enable us to apply the ordinary rules of justice—not just a breakdown in the objective political conditions, but a breakdown in the *conceptual* distinctions on which the ordinary rules of justice depend.

Take the most basic conceptual preconditions for establishing the rules of corrective justice. In order to apply the rules of corrective justice that protect property rights and ensure just transfers, it must be possible to distinguish just from unjust transfers and to make clear assignments of moral responsibility for the commission of unjust acts (e.g., unjustified forced expropriations). It must be possible in other words to distinguish the victims and the perpetrators.

Facts on the ground confound these distinctions. They do not necessarily confound our ability to discern the victims of the situation, but they do make it extremely difficult to discern the perpetrators or to separate them from a broader, blameless or at least less blameworthy population, in which they are embedded. In short, they make it very difficult to make the requisite judgments about agency and moral responsibility. Facts on the ground confound our ability to assign moral responsibility to the present-day *de facto* occupants of the property by dispersing responsibility across multiple actors, by generating innocent parties (blameless children and good faith purchasers) and interspersing them amongst the present-day occupants, and by embodying a mixed set of motives that blurs the distinction between morally culpable actions and actions that are justified by "necessity" (even from the standpoint of corrective justice). Together, the diffusion of moral responsibility and the mixture of motives make it near to impossible to draw the clear-cut distinctions that the canons of corrective justice demand.

The diffusion of responsibility accomplished by facts on the ground is intimately related to the condition of "normalcy" toward which established settlements tend. A community in which people go about the ordinary business of civilian life, working, having a family, setting up businesses and homes, grabbing a slice of Domino's Pizza, and visiting their grandchildren around the corner is a state of affairs in which the presence of at least some people who are blameless seems undeniable, and in which a still greater number of people have only a tenuous connection to the original acts of wrongdoing that led to the founding of the community.

In the case of Israeli settlements and land development projects intended for Jews, there a diffusion of responsibility across multiple actors and a further diffusion of responsibility across time, as one generation gives rise to another and the original founders become outnumbered by new residents who were not directly involved in the actions that led to the founding, and may not even be aware of them. The diffusion of responsibility is exacerbated by the blurring of the distinction between public and private action that has been a significant feature of Zionist land settlement practices since the earliest efforts were undertaken to establish Jewish settlements in pre-state Palestine. The blurring of the boundary between public and private action has been a feature of virtually all of the Jewish property development projects undertaken before and after the establishment of the Israeli state and is by no means confined to the occupied territories, although it is a salient feature there as well.

The point is made with its greatest force when we look at the Zionist land acquisition practices that would seem to conform most closely to the prevailing norms of private, voluntary, market-based legal transfers, the land acquisition practices implemented by the budding Zionist organizations and their purchasing agents in the period prior to the establishment of the Jewish state. In its early phases, the three guiding objectives of the Zionist movement were "Jewish political autonomy," "Jewish labor," and "Jewish land," the understanding being

that each was a prerequisite for the others. The pursuit of these three objectives was not necessarily linked to the maximalist of vision of a Greater Israel—that was a matter over which the Zionist movement was philosophically divided, and even those who supported an expansionist vision philosophically were led by pragmatic calculations to limit their territorial aspirations to only a part of Palestine and to concede the rest to the Arab population.[35] Likewise, the pursuit of the right of political self-determination wasn't necessarily linked to the idea of a Jewish *state*—that too was a matter of internal controversy, with some schools of Zionist thought favoring the establishment of a Jewish "homeland," a sub-state form of political autonomy within a larger multiethnic state, and only gradually succumbing to the emergence of the statist vision as the dominant school of Zionist thought. But the pursuit of even these limited territorial and political 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, had to rely on the same basic technique of land acquisition that would later come to be identified with the policy of "creating facts" in the occupied territories. Notwithstanding the predominance of technically voluntary land sale transactions as the preferred mechanism for acquiring land, and notwithstanding the nominally private nature of these transactions, the political and legal constraints that the early Zionists faced forced them to adopt as a conscious strategy the establishment of *de facto* possession with the aim of gaining *de jure* recognition. This strategy was used to pursue a constellation of collectivist and nationalist goals, carried out by quasi-public, quasi-private, proto-state institutions with a mixture of market-oriented and socialist features.

Thus, in the first phase of Zionist settlement, which took place in the pre-state period from the late nineteenth century until the eve of the 1948 war, the favored mechanism for acquiring land was private purchase and sale agreements. Privately funded and owned corporations were established by Zionist organizations with the specific purpose of purchasing land. Their purchasing agents would enter into land sale agreements with the self-designated owners of "Arab land," local "notables," whose legal authority to sell the land was contested within the Arab community in light of the feudal arrangements that prevailed, but who simply disregarded concerns about the "proletarianization" of the Palestinian peasantry in pursuit of their own profit. Notwithstanding the passage of a British statute aimed at prohibiting these sales, willing buyers and willing sellers found ways to circumvent the legal restrictions on purchases by Jews,[36]

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35. Gershon Shafir, LAND, LABOR, AND THE ORIGINS OF THE ISRAELI-PALESTINIAN CONFLICT (1996), xxiii.

36. On the British Land Transfer Ordinance of 1921, which restricted the sale of property to Jews, *see* Bisharat, *Land, Law, and Legitimacy*, at 494–97.

and most of the land acquired for Jewish settlement prior to the establishment of the Jewish state was acquired through this means.

In the same way that the conventional distinction between private (voluntary) and public (forced) transfers breaks down in the context of the early history of land settlement in Israel, this context also demonstrates a fusion of public and private *functions*, with private land acquisition serving as the basis for establishing political sovereignty—and communal institutions providing the means to acquire private property, which in turn was dedicated to collectivist labor and economic organizations. 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. Although, from a strictly legal point of view, these organizations were private—privately funded, privately owned and operated, staffed by private purchasing agents and other private officers—their internal organization was collectivist, and their aim was to lay the groundwork for a socialist Jewish nation and a socialist Jewish nation-state. Yet these socialist practices could no more be divided from the capitalist practices of a market economy that governed the larger economy than could the public, political dimension of these practices be divided from their private aspect. Ironically, the collective modes of property ownership developed by Zionist organizations served to give 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. Nonmarket methods and values determined relations within the Jewish population, but relations between Jews and Arabs took place primarily according to the norms of the market. One implication of this, as we have seen, is that many of the property transfers from Arabs to Jews occurred through the "normal" means of the market. Yet the mere fact that a land transfer occurred through the mechanisms does not dispose of the question of its initial—or later—validity.[37]

Many other distinctions that are usually subsumed under the basic public/private distinction can be seen to collapse as a result of the legally, politically, and morally ambiguous circumstances of the time. Such basic distinctions as intent versus effect, intentional harms versus accidents, fact versus value, past versus present, legality versus illegality, even the seemingly fundamental distinction of principle versus pragmatism breaks down. The supposed opposition between considerations of moral principle (i.e., corrective justice) and considerations of practical necessity and *realpolitik* itself collapses in light of the fact that *every* action undertaken in this volatile context is fueled by perceived, urgent needs. Even the fundamental distinction between religious and secular, spiritual and material domains, breaks down in the context of the "Holy Land," where both

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37. *See* Shafir, LAND, LABOR, AND ORIGINS, 45–90.

Jews and Arabs ground their claims of ownership not only in the facts of occupancy and the urgency of present needs, but also in claims of historic and divine right.

This, then, is the chief distinguishing characteristic that marks almost every land acquisition project undertaken to advance the Zionist objectives of Jewish land settlement and sovereignty in Israel: not just the urgency of the needs that propelled the pursuit of these objectives, but the collapse of the most basic conceptual distinctions that together constitute the conceptual field of the normal (i.e., the material, the secular, the legal, the politically acceptable, the moral). The practice of creating facts on the ground both instantiates and responds to this condition of conceptual breakdown. Having broken down this conceptual field, and having licensed the violation of the ordinary rules that apply in normal conditions, the practice of establishing facts on the ground then operates to reconstitute the normal, "normalizing" the conditions that emerged out of the violation of the normal.

Regardless of the particular method employed by the public/private agents of Zionist policy—market transactions executed by nongovernmental or quasi-private actors, forced expropriations implemented by the state under the emergency laws or the laws of eminent domain—we see the same basic strategy of establishing *de facto* possession (whose legal or moral validity is susceptible to challenge) with the aim of having it turn into a kind of *de jure* possession, insulated by law, or if not by law, then by morality, or if not by morality, then by the prevailing winds of political opinion, from challenge. This is the basic "lesson that the Jews learnt" during the pre-state period of settlement, namely "that physical buildings had to be backed up by a demographic presence."[38] It is this lesson that led them to pursue the basic strategy of establishing as significant a *de facto* demographic presence as they could, through whatever means were most likely to gain *de jure* recognition. Where the established system of property law served their interests, the Zionists followed it. Where the established property regime thwarted their interests, they found ways to subvert it. But even when the law stood in the way, the basic logic of legal exceptions served to endow the circumvention of the law with its own kind of legality, allowing Zionists to claim either that their purchases were within the letter of the law, or alternatively, that (following the basic legal logic of prescription) holdings that were initially illegal had ripened into a *de jure* right to possession.

This was the strategy 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. And this was the strategy 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

38. FACTS ON THE GROUND, I.

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 "Palestinians ... forced to flee east and Jewish residents of the Old City ... expelled west."[39] 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. At the time, taking over the homes of Arab refuges satisfied pressing needs of the nascent state, needs of both nation-building and state-building, 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 Jews were no longer welcome.[40]

These needs point not only to the blending of public and private objectives and merging of public and private agents, but also to the mixture of motives that, as much as the diffusion of responsibility, confounds our ability to draw the conceptual distinctions on which the ordinary law of just versus unjust transfers depend. The oft-heard condemnation of Zionism as a colonialist project, like most condemnations of colonialism, rests on easy distinctions between motives of "need" and motives of "greed."[41] But how is one to draw the distinction between need and greed (let alone settle the question of whether "Zionism is colonialism") in a context like that outlined above? If ever there were a situation governed by the emergency logic of necessity, one would think that housing refugees from the Holocaust (or providing refuge for the Jews of Europe *before* they were caught up in the maw of Holocaust) would be it. Yet it is also the case that expansionist dreams of a Greater Israel have fueled some of the settlement activity, and even the nonexpansionist policies of settlement have involved land grabs, i.e., forced, and in many cases, unjustified dispossession. Terms like colonialism, and sloganeering like "Zionism is colonialism," presuppose a facile distinction between motives of greed (e.g., land grabs, power grabs) and motives of need (e.g., survival and autonomy), which a nuanced grasp of the complex motives behind Israeli and Zionist settlement policy belies.

The needs for safe refuge and political self-determination highlighted by the Holocaust, which provide the indispensable backdrop to the history of Jewish land settlement in Israel/Palestine, bring us to the third theory of normalization that helps to shed light on the phenomenon of facts on the ground—the Zionist conception of restoring Jews to a condition of "political normalcy." It bears recalling

39. FACTS ON THE GROUND, 3.

40. *See* Bisharat, *Land, Law, and Legitimacy*, 505 (describing the "exigencies facing the new state of Israel" that "intensified the Zionist movement's impetus for land acquisitions.")

41. *See, e.g.*, Kedar, *Legal Transformation*, 996 ("I believe ... that like in other settlers' societies, greed for land was the crucial motivating force.").

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, 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."[42] 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."[43] 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 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.[44] *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

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42. *See* Anita Shapira, *Herzl, Ahad Ha-'Am, and Berdichevsky: Comments on their Nationalist Concepts*, 4 JEWISH HIST. 59 (1990).

43. Yuri Slezkine, THE JEWISH CENTURY 2 (2004).

44. *See generally* SHAFIR, LAND, LABOR, AND ORIGINS.

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" mirrored the diagnosis of the Jewish problem of the European anti-Semite. The problem for (or with) Jews from both perspectives 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.[45] What 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 World War II.[46] As David Myers and Gershon Shafir have observed, the period in which Zionism arose was a 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 nonstatist (or even antistatist) forms of Jewish cultural autonomy or religious rebirth.[47] 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 at 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,

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45. On the stereotyping of Jews as pariahs, parasites, and usurers, *see* THE JEWISH WRITINGS: HANNAH ARENDT (Jerome Kohn and Ron H. Feldman eds., 2007), in particular, "Antisemitism," *id.* at 52.

46. *See* Shafir, LAND, LABOR, AND ORIGINS, 7; *see also* David N. Myers, "Beyond 'Statism': A Call to Rethink Jewish Collectivity," unpublished manuscript on file with the author.

47. *See id.*

North Africa, and the Middle East."[48] 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."[49]

Only with a fuller picture of the practical and conceptual conditions of normalcy 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, as in a state of emergency. Insights drawn from Foucault and Schmitt's conceptions of normality/abnormality provide us with that understanding. The fascinating thing about the case of Israel/Palestine is that from a Zionist perspective all these different conceptions of abnormality converge: the abnormal political condition of the Jews *is* the exigency that, from a Zionist perspective, serves to justify the Jewish acquisition of privately owned "Arab land." On this view, Jewish life is a perpetual emergency, which justifies the creation of facts on the ground, which in turn generate a new condition of normality.

The siege mentality of the emergency theory of rights and power encoded in Zionism is not, of course, unique to Zionism. The Zionist case is but an example of a much broader phenomenon, the use of emergency powers to establish a new regime, and the subsequent normalization of that state of emergency. The phenomenon that Schmitt examined and that formed the disturbing core of his theory of politics, the normalization of the state of exception, 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. The practice of creating facts on the ground is fueled by the same basic logic as 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.

This understanding can help us see more clearly the range of practices to which the concept of facts on the ground applies, and to get a better grasp of the normative implications of the practice in light of that conceptual range. What I hope this analysis shows is that the concept of creating facts on the ground applies to a much broader range of practices than is commonly understood. The distinguishing features that my analysis has tried to reveal are not limited to the

48. Shafir, Land, Labor, and Origins, 8.
49. *Id.* at xxii (emphasis added.)

case of settlements in the occupied territories; they are present in the land settlement practices implemented on the other side of the Green Line in Israel Proper—and innumerable other land acquisition and development projects around the world. Indeed, the main conceptual implication of this analysis is that it is very difficult to draw a clear line between land settlement projects that partake of the logic of creating facts on the ground and those that do not. On my analysis of the meaning of the term, it should be understood as applying not only to clearly illegal occupations of property of the sort that we see in the occupied territories but also to acquisitions of property of merely questionable validity and perhaps even to some acquisitions that comport with the rules defining legally valid transfers but are nonetheless of dubious, or ambiguous, moral validity. So understood, the term applies to a broader range of practices in the Israeli case, not limited to the occupied territories, and also to a wide variety of phenomena outside the Israeli case. Besides the obvious examples of states engaged in classic projects of colonialism, there are innumerable examples of states, sub-state groups, and other actors (e.g., squatter movements) engaging in the creation of facts on the ground, amassing private property through whatever available means, circumventing legal obstacles, and transforming private property into political sovereignty or sub-state forms of political autonomy.

Widening our understanding of the practices appropriately described as creating facts on the ground should help to correct a disturbing tendency toward exceptionalism that dogs the discourse about Israeli policy, and that indeed has dogged Jewish ventures throughout Jewish history, even when the venture is to try to escape the condition of exceptionality for a condition of "normalcy." The exceptionalism of the pro-Israel camp is a "positive exceptionalism" that insists on the moral superiority of the Jewish state as supposedly evidenced in such doctrines as the Israeli military doctrine of purity of arms, according to which Israeli soldiers are supposed to answer the highest moral standards even on the battlefield. Alongside (and in considerable tension with) the more pragmatic Zionist vision of becoming a "nation like all other nations," this more lofty moral vision of Israel as "a light unto other nations" has led many supporters of Israel to *disbelieve* the claims of Israel's critics, according to which its land settlement practices in the territories (and elsewhere) are unjust and unjustifiable, and have to be reversed.

On the other side of the debate, anti-Zionist discourse presents a perfect mirror image of the Zionist claim of Israeli moral exceptionalism, only here the exceptionalism is of a negative sort, singling Israel out for criticism, ignoring comparable or still more egregious actions undertaken by other political actors around the world, and subjecting Israel to a double standard. This practice of selectively subjecting Israel to a higher moral standard than other nations and actors, which is blind to the ubiquity and the occasional benignity of the practices dubbed "creating facts on the ground," is another disturbing variant of Israeli exceptionalism.

Both of these forms of exceptionalism need to be rejected. In my own view, the Israeli case is not exceptional but rather exemplary. It is exemplary because 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 in 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 of their own "surplus populations." They obviously had other motives as well, 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,"[50] 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 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.

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

50. Arendt, JEWISH WRITINGS, 47.

sought to fulfill their aims? Here again we confront the 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—and tragedy—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 toward a less simplistic assessment of the policy's moral and political validity.

From the earliest days of modern Zionism, private land acquisition and the establishment of political sovereignty have gone hand in hand in Israel, 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.[51] 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 movements involved in the *creation* of sovereign states. Indeed, the fusion of property and sovereignty is more readily apparent in the processes 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. In quite visible ways, nationalist movements, 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 acquisition, allocation, and ownership. They do so in pursuit of objectives that cannot always be neatly separated into morally justificatory ("need") and morally blameworthy ("greed") categories. And they do so through agents and via methods that cannot be cleanly separated out into morally blameworthy as opposed to blameless actors and actions. It is in recognition of these ineliminable political, moral, legal, and factual ambiguities that we have coined the concept of creating facts on the ground.

51. *See* Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 11 (1927).