Facts on the Ground

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Abstract

The phrase “creating facts on the ground” is commonly used to refer to Israeli settlement policy in the occupied territories. What does it mean? Intuitively, we understand that it connotes the establishment of de facto possession with the aim of attaining de jure possession, but how exactly does the conversion of de facto into de jure possession come about? And what are to make of it when it does? In addition to the myriad empirical effects it produces, the practice of creating facts on the ground generates two orders of normative consequences: the “first-order” normative effect consisting in the pressure that the status quo ground exerts on dispute-resolution; the “second-order” normative effect consisting in the various moral and political judgments we make about the achievement of such first-order effects. This essay undertakes to provide a deeper understanding of how the practice of creating facts on the ground achieves such normative effects, and to tease out the kinds of first-order normative effects achieved – whether moral, pragmatic, or some fusion of the two. Drawing insights from the law of adverse possession, this essay proposes that the practice of creating facts on the ground serves to (a) respond to (and/or instigate) an abnormal situation or “state of emergency” in which the conceptual distinctions on which the ordinary rules of justice depend collapse, and then (b) to “normalize” that abnormal situation. Israeli settlement policy exemplifies three different concepts of normalization: (1) the Foucauldian conception of normative ordering, in which norms are derived from empirically observable statistical realities; (2) Schmitt’s conception of the permanent state of emergency, in which the conditions of the state of emergency, governed by the laws of exigency and necessity, supplant the ordinary rules of law, and become permanent/normalized; (3) the Zionist conception of political normalization, offered by early Zionist thinkers as a prescription for the “abnormal” condition of Jews in the Diaspora. The conceptual analysis offered in this essay suggests that the term applies to a significantly broader range of practices than is commonly
assumed, not limited to the practice of establishing illegal settlements in the occupied territories, but extending to Zionist land settlement policies first developed in pre-state mandatory Palestine to thwart limits placed on Jewish settlement by the British authorities, and extending to land settlement practices outside the context of Israel/Palestine as well. That broader conceptual understanding serves as a corrective to the disturbing tendency to exceptionalize Israeli land settlement policy, whether the normative judgment is critical or apologetic. Indeed, the practice of creating facts on the ground describes a much wider set of practices by which nations and sub-state groups seek to overcome practical and legal impediments to the establishment of a territorial base for exercising the rights of individual and political self-determination, and thereby converting property into sovereignty (even as property and sovereignty are wrested from another group).

(The first 30 pages of this document contain a new introduction for a revised version of this work. Page 31 outlines the projected revisions, which the author is still working on. The ensuing pages are the unrevised, original essay as posted earlier.)
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Walk into the Dominos Pizza outlet in French Hill and make the following statement: “This neighborhood is a settlement. It is illegal according to International Law and must be dismantled in the event of a peace settlement between Israelis and Palestinians.” Even if made in perfect Hebrew, the statement would most likely be met with confused stares 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 “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,

¹ Allison B. Hodgkins, Israeli Settlement Policy in Jerusalem: Facts on the Ground, 27.
that is, changes that have occurred in the objective demographic situation and in the distribution of land.

Of course, 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 Jerusalem and the land of Israel/Palestine. With regard to the particular case of French Hill, the 1967 war was crucial. The attacks and counter-attacks 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 (which had fallen under Syrian control following the 1948 war), 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 known as the West Bank, an area that was originally slated to be part of a newly-created Arab state under the United Nation’s partition plan for Palestine.

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2 Explain disagreement over nomenclature: “land of Israel,” “Palestine.”
3 Explain status of these areas prior to the 1948 War
4 Jewish settlers refer to the land area as Judea and Samaria, and dispute the use of the term, “occupied territories,” maintaining that... Also disputed is whether to classify East Jerusalem as part of the West Bank, or rather as a separate geographic entity, a part of an undivided Jerusalem, or an independent entity, but either way as separate from the contiguous West Bank.
5 U.N. Partition Plan. Citation, description.
but which fell under Jordanian control immediately after the establishment of the Jewish state and the ensuing 1948 War.

That war had the ironic effect of leading to the loss of all of the territory that had been proposed for an Arab state under the U.N. partition plan. Instead of preventing the Jewish state from being established, as the Arab states waging war against Israel had intended, the 1948 war (known to Israelis as the War of Independence and to Palestinians as “the Naqba” or the catastrophe) ended up scuttling the establishment of the state intended for the Palestinians, as all of the territory designated for that projected state was lost. Some of the territory originally designated for an Arab state in Palestine was gained by Israel, allowing it to expand its borders well beyond the territory originally allotted to it under the U.N. plan. The rest (Sinai, Gaza, the West Bank and the Golan Heights) wound up in the hands of Arab states that had invaded Israel. Even though it was Israel that was victorious, and Israel largely succeeded in driving the Arab forces out, at the time the war came to a close, Arab forces were still in control of a number of border areas in the territory that had been British mandatory Palestine. These de facto possessions were recognized in the various armistice agreements that were negotiated at the war’s end.

The so-called “Green Line” hammered out in the cease-fire agreement between Israel and Jordan is the best-known example of the provisional borders that emerged from these truce agreements. The line agreed to by Israel and Jordan

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6 Not all of the Arab states that participated in the invasion wound up winning territory. Egypt, Jordan and Syria won territory, while Iraq and Lebanon did not.

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as part of their cease-fire agreement was neither intended nor presented as
establishing a permanent border, and the international community never formally
recognized it as such. But because it was written into the 1949 armistice agreement
that brought the 1948 war to a formal close, and because the expectation that it
eventually be succeeded by a peace treaty hammering out de jure borders was
never realized, the Green Line served as the de facto border between Israel and
Jordan for almost twenty years – and continues to serve, in the minds of many, as
the measure of the legitimate border to this day. From 1949, when the first Arab-
Israeli war ended, until 1967, when Israel’s decisive victory over Jordan, Syria and
Egypt led to its occupation of the territories seized by the Arab states in the 1948
war, the Green Line functioned as the effective border between Israel and Jordan.

The establishment of the Green Line had a number of dramatic effects,
including the inhibition of movement between the two countries, the prevention of
the return of the hundreds of thousands of Palestinian refugees who had fled across
what was subsequently erected as the (de facto) border, and the division of
Jerusalem into two impermeable halves. The western side of the city fell under
Israeli sovereignty, but the eastern side was controlled by Jordan and quickly
subjected to Jordanian administration. The result was that even the Palestinians
who remained within the precincts of the city (or returned to the city after their
initial flight) found themselves locked in the eastern half of Jerusalem, unable to
return to the homes that many of them had lived in and owned in West Jerusalem, or
even to visit the western side of Jerusalem (or any part of Israel). Conversely, Jews
who had resided in the eastern part of the city prior to the war also lost their homes,
while all Israelis (and visitors to Israel), regardless of where they lived, found themselves completely cut off from access to East Jerusalem, where all the holy sites as well as the original campus of Hebrew University were located.\(^8\)

It was adjacent to this campus of the Hebrew University, that, twenty years later, the Jewish neighborhood of French Hill would take root. And it was here that the Israeli policy of establishing facts on the ground would come to full fruition, at the same time as it was being implemented in other parts of East Jerusalem and its West Bank environs, and in Gaza and the Golan Heights as well. But none of this would come to pass until yet another war had taken place, altering the de facto borders yet again.

In 1967, border clashes between Israel and its Arab neighbors culminated in a war between Israel and Egypt, Jordan and Syria.\(^9\) Israel's victory in the 1967 war left it in possession of the territory (the West Bank and East Jerusalem) that Jordan had seized in the first Arab-Israeli war in addition to the Sinai, the Golan Heights and Gaza. The sudden acquisition of these territories\(^10\) left Israel with a fateful choice. Either it could abide by the international law of belligerent occupation, which requires an occupying power to refrain from settling or expropriating property and to apply the laws formerly in force (except as required for military necessity) until de jure borders are re-established.\(^11\) Or it could pursue the

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\(^8\) See PASSIA, p. 3; other citations, standard histories.  
\(^9\) The facts concerning the instigation of the 1967 war have always been disputed. Summarize dispute.  
\(^10\) fact-check: Arab states’ refusal to accept Israel's offer to withdraw from most of the conquered territory in exchange for a full peace treaty and recognition of Israel's right to exist.  
maximalist vision of a "greater Israel," incorporating within its borders all of the territory deemed necessary for security purposes and associated in the collective Jewish memory with the biblical "land of Israel" ("a vague geographical concept at best," but one which encompasses at least the West Bank and East Jerusalem).\[12\

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\[12\] See Gershon Shafir, *Land, Labor and the Origins of the Arab-Israeli Conflict, 1882-1914* (1996), 78. Since the 1970s, the most zealous champions of the cause of Greater Israel have been members of the radical religious settler movement, then a newly emergent political force that staked its claim to the "redemption" of the land, as they referred to it, on a messianic religious theology. But at the time the occupation began, in 1967, it was Labor leaders like Israel Galili who were the strongest proponents of settlement. Territorial maximalism was neither the invention nor the exclusive pursuit of religious Zionists, nor was its support limited to members of the hawkish Likud Party, led by Menachem Begin. As noted by the Israeli sociologist, Gershon Shafir, "[e]arlier dreams of territorial maximalism" had animated the predominantly secular and socialist mainstream of the Zionist movement in the pre-state period, and the Labor party, which constituted the ruling party from the establishment of the state in 1948 until the fall of the Labor government in 1977. (Shafir, xxiv). Some students of early Zionism, like Shafir, argue that the Labor movement, which dominated Israeli society in the period leading up to the establishment of the state and throughout the first three decades of its existence, "start[ed] out with the maximalist aim of Jewish territorial supremacy in Palestine," but that "under the unauspicious [sic] circumstances of colonization in both land and labor markets" that existed in pre-state mandatory Palestine, "the aims of the Zionist mainstream were transformed." According to this analysis, it was only because it was apparent that its maximalist aims were impossible to achieve that "the Israeli labor movement perforce limited its ambition and conformed ... a bifurcated model of economic development leading to territorial partition," a "strategy" that originated not in the appreciation of Palestinian aspirations but in the inescapable facts of Palestinian demography." Shafir, xxiii. Others dispute that only practical considerations guided the early Zionists in this area, and argue that they abandoned the maximalist dream for a mixture of idealistic/ideological and practical reasons. Indeed, there were always voices of caution with the labor movement and in the Zionist movement at large that argued against territorial maximalism on grounds of principle and justice as well as collective (Jewish) self-interest. At the time the occupation began, these voices, which included such prominent spokespersons as David Ben Gurion, argued strenuously against settling the territories. But these voices were soon overwhelmed by the proponents of Jewish settlement. See David N. Myers, .
In the immediate aftermath of the 1967 war, the Israeli government was still divided over which course to pursue with respect to the West Bank and Gaza.\(^\text{13}\) When it came to East Jerusalem, however, the country was united.\(^\text{14}\) Caught up in the euphoria over the reunification of Jerusalem that swept the Israeli Jewish community and the Jewish community worldwide, the Labor Government (which was still in power when the Israeli occupation of the territories began, and which remained in power for the next decade) declared the newly united Jerusalem to be the “eternal undivided city of the Jewish people.”\(^\text{15}\) For the first time since 1948, Jews (and other residents of Israel) could go the holy sites of the Old City and to Mount Scopus, where the Hebrew University was founded. Israelis, who had been denied access since the time of the state’s founding, were now permitted to enter and live in East Jerusalem. Thus the stage was set for the development of the Jewish neighborhood of French Hill, bordering the university campus. And thus commenced the Israeli occupation that would, over the course of the ensuing decades, become the site of intensifying agitation and international criticism, as settlers, representing the most extreme expansionist wing of Zionism, converged on the territory in which an increasingly desperate and restive Palestinian population dwelt.

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 this term to describe the Israeli settlement

\(^{13}\) Ben Gurion proposed retuning the territories on June 9, 1967.
\(^{14}\) See note 3, supra, on whether to regard East Jerusalem as separate or a part of the West Bank.
\(^{15}\) citations
policy that soon emerged 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.16 “Facts on the ground” has been the term of choice both for proponents of the 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.17 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 settler movement and of the government policies supporting them in a few pithy words.18

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”), nor is it a term of technical expertise, and it is certainly not a scientific term. Far from a technical concept, “facts on the ground” is a colloquial phrase that has gained popularity in this and other contexts because it seems to

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16 Like every other fact and figure in this area, the count is controversial. About 200,000 of the Jews counted in this figure live in settlements that ring Jerusalem. Whether East Jerusalem is properly viewed as part of the West Bank or occupied territory is itself a subject of controversy. Subtracting the number of Jews who live in East Jerusalem from this figure, there remain over 200,000 Jews who settled in the West Bank. Note to self: Check Peace Now’s Settlement Watch.
17 citations
18 Here provide both ample citations to examples of texts making use of the term, and note on the etymology of the phrase “facts on the ground”
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 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.”

This article attempts to deepen our understanding of this phenomenon. It aims to grasp that elusive something that is so hard to put into words, at once expressed and obscured by the evocative metaphors of “creating” and “establishing” “facts on the ground.” Both the processes whereby “facts on the ground” are “created” and the effects of these processes are analyzed here with the object of developing a better description of what the practice of creating facts on the ground entails and broadening our understanding of the range of practices that fall under this description. For, while the practices used to establish Jewish settlements in the occupied territories are unique in important regards (as is every historical event), in other regards, they are exceedingly difficult to distinguish from practices used to establish property rights (and other sorts of rights) in other contexts. Once we tease out the features that make a settlement a “fact on the ground,” we can see that these features are common to many different extraordinary and everyday practices, not limited to land acquisition and not exclusive to the context of the Arab-Israeli conflict over land.
Accordingly, the subject of this Article might best be represented as a series of series of concentric circles, with the particular case of French Hill standing in for the broader phenomenon of Jewish settlements established in the territories occupied by Israel after the 1967 war; with settlements in the occupied territories appearing as a subset of the still broader class of “facts on the ground” established throughout the land of Israel/Palestine, including “Israel proper” (i.e., the territory within the Green Line); with all the Zionist practices of creating facts on the ground falling under a still more general category of techniques of land acquisition employed in diverse national and social contexts, not limited to Israel/Palestine; with techniques of land-possession grouped together with practices that have absolutely nothing to do with the acquisition of land or the establishment of property rights but are likewise concerned with establishing a de facto presence of some kind and converting that presence into a normative claim for a right to continued existence. This Article focuses on French Hill, but is about much more than French Hill; it is about Jerusalem, but more than Jerusalem; about the occupied territories, but more than the occupied territories. The analysis extends beyond the post-1967 occupation to look at the longer history of practices of establishing facts on the ground developed in the service of Zionist project of returning the Jewish people to Israel and establishing a Jewish homeland there, from the early twentieth-century, when first the Ottomans and then Britain ruled over Palestine, to the subsequent efforts at state- and nation-building undertaken in the aftermath of the 1948 war when the Jewish state was founded. And it extends even further, beyond the Arab-Israeli context, to consider the similarities between Zionist methods of
land acquisition and methods of acquiring and settling land employed in a wide
array of different contexts by a diverse set of actors: nation-states, nationalist
movements, colonial enterprises, grass-roots movements, squatters and ordinary
people engaged in extraordinary and garden-variety acts of adverse possession all
around the globe. At the most general level, this Article is about property and the
ways de facto possession of land gets converted into de jure claims of property
rights, in particular the right to continued possession; but it extends beyond the
subject of property and practices of land acquisition to address the more general
phenomenon of establishing facts on the ground, which has at its core the
mysterious alchemy which converts “facts” and “wrongs” into “rights” – an alchemy
which works on all kinds of de facto situations, not limited to the de facto possession
of property or land.

Thus, this Article spans two levels of generality, from the most specific
(analyzing the policy of facts on the ground in the context of the Arab-Israeli
conflict) to the most general (developing an account of facts on the ground as a
general concept). It does so in the belief that we cannot adequately comprehend, let
alone judge, Israeli settlement policy if we fail to recognize the broader class of
phenomena of which it is a part. On the other hand, analyzing the Israeli case helps
us to isolate the features that make a practice of acquiring and settling land an act of
“creating facts on the ground.” Before the state of Israel was even established,
Zionists developed ways of avoiding restrictions on Jewish ownership of land that
were imposed by the British mandatory authority, which assumed control of
Palestine in 1917. After the war of 1948, when Israel found itself – within the Green
Line – in possession of thousands of properties formerly occupied by Palestinian Arabs, it developed various administrative techniques for transferring ownership of these “abandoned” properties to state and quasi-state agencies, overriding claims to legal title rooted in Ottoman, mandatory British, and international law. Later, in the 1950s, Israeli courts were instrumental in introducing doctrinal innovations into the laws of property and adverse possession, which made it difficult for Palestinians still living in Israel to maintain their property rights. And post-1967, the most well known policy of establishing facts on the ground was instituted in the occupied territories. By identifying the commonalities between these various episodes of planting facts on the ground undertaken in different areas of Israel/Palestine in different historical periods under a variety of legal regimes, and by analyzing the ways in which they do and don’t deviate from the supposedly “normal” or normative methods of acquiring and settling land, we can begin to draw a fuller picture of the contours and content of the general concept.

“Facts on the ground” is, after all, a term of distinction (though not typically a positive distinction), which purports to differentiate acts of acquisition, possession, and occupation that are legally or morally valid from those that are not, or are at least of questionable validity – at the outset. The mystery, of course, is how actions of dubious (or no) validity at the outset come to acquire a kind of validity or claim to legitimacy over time. A further mystery concerns the kind of validity or normative force that facts on the ground acquire over time, it being exceedingly difficult to distinguish moral grounds from the purely pragmatic calculations of power politics
that lead to accommodating or yielding to facts on the ground. These are just some of the mysteries to be probed in the body of this Article.

The point to be made here is that, however these mysteries are solved, the practice of creating facts on the ground involves normative as well as merely descriptive issues. The policy of creating facts on the ground doesn’t just invite but positively demands making judgments, moral, legal, and political judgments. The very phrase, “creating facts on the ground,” conveys a normative judgment, implying that the practices that fall under the term constitute deviations from the normal or normative way of establishing legal rights or moral or political claims. The question that arises, then, is just what the deviation consists in and what the normative status of such a deviation is. That in turn begs the further questions of what the supposed norm is, whether it is a norm to be obeyed and whether it is really a norm at all. These are fundamentally normative questions that demand a normative response.

That said, the normative questions surrounding the justice or injustice of the practice of creating facts on the ground in Israel/Palestine (and elsewhere) are enormously difficult and complex. I want to be clear at the outset that I do not attempt to resolve or even address all of the moral and political controversies concerning the practice of establishing facts on the ground that arise in the particular context of the Arab-Israeli conflict or in general. But I do offer a conceptual analysis of the practice that addresses its normative dimensions and, in so doing, makes what I hope is at least a modest contribution to our thinking about the fundamental issues of justice and injustice concerning the establishment of facts on the ground and their possible dismantlement.
It is tempting, in the face of the complexity and sensitivity of the issues, to avoid any normative analysis, and to settle for a merely descriptive analysis instead. Indeed, much of what follows is aimed at producing just such a descriptive account, seeking to clarify what a fact on the ground is, what makes a particular act an instance of creating facts on the ground, and what that practice involves (and how it differs from the supposedly normal ways of establishing property and other rights). But even if it were desirable to avoid the political and moral questions, it is simply not possible to effect a complete separation of the descriptive analysis from the normative issues that surround the practice. The reason for this is that the practice itself is inherently normative, but normative in a most peculiar way. To defy prevailing standards of normative judgment while simultaneously erecting an alternative normative framework under which legitimacy for the newly established de facto reality is claimed – this is the very essence of the phenomenon of facts on the ground. It simply is not possible to describe, let alone analyze, this phenomenon without at least parsing out these alternative frameworks of normative judgment. That does not mean one is required to take a position with regard to their conflicting normative claims, but one at least has to confront them.

What follows then is both a descriptive and a normative analysis. The descriptive parts (aiming to establish a working definition as well as a description of the practice of creating facts on the ground) and the normative components (analyzing the competing visions of morality and claims to legal validity and political legitimacy that surround and underlie the practice) intertwine. That said, and with an eye to the utility of using the more specific level of analysis to generate
insights about the general concept, the Article begins with a descriptive account, providing a historical overview of the different techniques of land acquisition used by Zionists to advance the project of establishing a Jewish homeland in the land of Israel/Palestine.

Part I (entitled “Property and Sovereignty: A Historical Account of the Israeli Practice of Creating Facts on the Ground”) is dedicated to this historical overview, offering a chronological summary of the different regimes under which land was acquired by (or in or for) Israel at different points in time, as well as a summary of the various legal (or illegal) instruments used to make these acquisitions. Drawing on recent scholarship that documents the development of Zionist/Israeli land policy, Part I traces the different techniques of land acquisition used in the service of the project of establishing a Jewish homeland from the earliest days of the modern Zionist movement, to the period of Israel’s founding, to the subsequent phases of state- and nation-building that unfolded in the 1950s and 1960s, to the final phase of settlement in the occupied territories that commenced after the war of 1967 and continues to this day.

One of the principal themes to emerge from this historical account is the interrelationship between property and sovereignty in the creation of the Jewish state. Confirming Morris Cohen’s famous critique of the distinction between property and sovereignty, the Zionist projects of settling the land and establishing a Jewish state in Israel were twinned. Accordingly, the history of Zionist practices of land acquisition largely defies the lines conventionally drawn between private (individual, voluntary, market-based, non-governmental) and public (collective,
forced, regulatory, governmental) modes of acquiring, transferring and governing land. Because of the dominance of socialist ideology in the early Zionist movement, collective modes of economic organization and ownership predominated over individual ownership even as the acquisition of private property stood at the center of the (socialist) Zionist agenda.

At the same time, because this is a history of revolutionary regime change and political transition, the identity of the sovereign was constantly shifting, and the very nature of political sovereignty was contested and subject to competing definitions and ideologies. In the pre-state period, Zionists’ efforts to establish a state of their own were undertaken in the face of British rule and a largely hostile indigenous population. In addition, there were competing ideological factions within the Zionist movement with different visions of the relationship between Jewish self-determination and land. As a result, various parties contended for authority, and non-governmental, proto-state institutions played many of the roles customarily played by official state agencies. These proto-state organizations operated at times in conformity and at other times in defiance of the prevailing political authorities, a state of affairs that lent those authorities and their legal regimes an ambiguous moral status. What counts as the legitimate sovereign authority whose laws of property were to be followed at any particular point in time is therefore no simple thing to make out even as a purely descriptive matter. Part I describes the competing sources of authority that vied for recognition in mandatory Palestine and in post-Independence Israel, and analyzes the status of the property transactions periods under each of these contending legal/political authorities at
succeeding points in time. It highlights the interrelationship of public and private authority within the Jewish community, as well as the adversarial relationships that divided the Jewish community from Palestine’s colonial rulers, on the one hand, and its indigenous population, on the other, in the ongoing struggle over land.

Part II (“Property and Sovereignty: A Theoretical Account of the Israeli Practice of Creating Facts on the Ground”) continues in a descriptive vein, but shifts from a historical to a theoretical mode of analysis. Here again, a principle theme is the interrelated nature of property and sovereignty, and the way in which the practice of facts on the ground confounds the distinction between public and private actions and domains. But the focus in Part II is on extracting the commonalities between the diverse modes of land acquisition and settlement described in Part I that make an act of land acquisition a practice of creating facts on the ground. One of the most important commonalities exhibited among the diverse Zionist practices of land acquisition is the fusion of public and private authority and the consequent disintegration of the lines between individual, collective, governmental and nongovernmental power. Part II seeks to develop a theoretical account of this fusion.

The theoretical enterprise commenced in Part II (and continued in Parts III, IV and V) is basically a definitional one, but it should be noted that the inquiry undertaken here is functionalist in nature, concerned as much with what the practice of creating facts on the ground does as with what the practice is. In much the same spirit, Lon Fuller famously inquired into the nature of legal fictions by
asking first, what is a legal fiction, and then, what are legal fictions for? This Article follows Fuller’s functionalist model in the belief that one cannot determine the meaning of the concept of creating facts on the ground without figuring out what purposes and functions the practice serves.

Fuller’s classic analysis of legal fictions serves a model for the analysis of facts on the ground in more ways than one. Not only does Fuller advocate a functionalist approach to defining abstract concepts, the approach adopted here. The subject matter of his classic study also is pertinent to the subject of this Article. Indeed, there are many similarities between the concepts of legal fictions and facts on the ground. One might even argue that facts on the ground are a species of legal fiction – or at least a close cousin. Facts on the ground bear a particularly strong resemblance to the legal fictions of ownership and “the lost grant” found in the doctrines of adverse possession and prescription, which function to convert de facto into de jure possession. True, “facts on the ground” is not itself, strictly speaking, a legal concept, and it is certainly not the case that every instance of creating facts on the ground satisfies the doctrinal requirements necessary to establish a claim of adverse possession. But while not every case of creating facts on the ground meets the requirements of adverse possession, the reverse does hold true: every case adverse possession involves the creation of facts on the ground. By definition, prescription and adverse possession apply in circumstances where a legally valid acquisition either never occurred or did occur but cannot be proven. The basic precondition of prescription and adverse possession is de facto possession,

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19 Lon Fuller, *Legal Fictions*
combined with the “abnormal” circumstance of not conforming to the usual rules, which demand proof that the possession arose from valid transfer.

Apart from this overlap, and besides the obvious fact that acquiring property by prescription and establishing facts on the ground are both methods of acquiring property, there are other important conceptual similarities. The core feature that unifies the legal practice of adverse possession with the extra-legal practice of creating facts on the ground is the fact that both are deemed to be *unorthodox* or abnormal methods of acquiring property. While one is a strictly legal phenomenon, and the other is not, both involve the transformation of a state of affairs of dubious validity into a state of affairs that not only gets accepted as a reality, but also makes a claim on us of a normative sort. The normative claim embodied in both adverse possession and the creation of facts on the ground is essentially a claim of ownership or, more minimally, a claim on the part of the current occupants to a right to continue to occupy the land (or at least to be compensated for its loss). In either its minimal or maximal formulations, it is a claim that makes demands on both the present and the future. In addition, both adverse possession and the establishment of facts on the ground have retroactive effects on the past. Often described as “rewriting” or “erasing” history, these effects on our received understanding of the past are what lead commentators to say of both the doctrine of adverse possession and the practice of creating facts on the ground that they create “fictions.” Fuller’s analysis of legal fictions is thus particularly well suited to explaining what a policy of creating facts on the ground does, and how it functions to legitimate the present status quo by reconstructing our understanding of the past.
Part III of this Article ("Facts as Fictions") explores these interrelated issues: the similarities (and differences) between the legal practice of adverse possession and the practice of creating facts on the ground, the fictional nature of both practices, and the strange conceptual oppositions, or lack thereof, effected as a result. It demonstrates how, just as the conventional distinctions drawn between property and sovereignty, public and private, individual and collective, break down (as shown in Parts I and II), so too, the distinctions conventionally drawn between fact and fiction, fact and value, past and present, history and memory, and even right and wrong, blur or altogether collapse in the face of facts on the ground.

Further analysis of this conceptual breakdown is presented in Part IV ("Three Theories of Normalization: How Facts on the Ground Break Down and Reconstitute the Conceptual Conditions Of Normalcy"). As indicated by the subtitle, this Article argues that the condition of abnormality in which facts on the ground are created is one in which we are unable to apply the conceptual distinctions on which our ordinary rules depend. In abnormal conditions, the conceptual distinctions that order our normative universe break down. Part IV explores the conceptual breakdowns that define the condition of abnormality in which facts on the ground are created, as well as the psychological processes that serve to "normalize" these abnormal conditions. The core thesis of this Article, presented in Part IV, is that responding to the breakdown of these conceptual distinctions is precisely what the practice of creating facts on the ground does.

Of course, the practice of creating facts on the ground may also serve to precipitate the conceptual breakdown to which it provides a response. This is an
ever-present possibility that haunts every discussion of the justice of establishing (or dismantling) facts on the ground. Part IV, however, remains on the descriptive plain, seeking to further develop our understanding of what the practice of creating facts involves, namely, the collapse of the conceptual distinctions that ordinarily govern our normative universe, and their partial reconstruction. Regardless of whether it triggers or is triggered by the practice of creating facts on the ground, the collapse of the conceptual distinctions that order our normative universe is a constant feature of the practice. The distinctions between public and private, property and sovereignty, individual and collective; the distinctions between fact and value, fact and fiction, history and memory; the distinctions between past and present, historic injustice and accident; the distinctions between idealism and realism, morality and pragmatism, corrective justice, distributive justice and power politics; even, as we shall see in the concluding section of this Article, the distinction between sacred and secular, holy and unholy, spiritual and material domains – all of these basic distinctions on which we depend to apply the ordinary rules of law and morality give way in the face of the phenomenon of facts on the ground.

In response to this conceptual breakdown, Part IV tries to explain, facts on the ground serve the basic function of normalization. Three different theories of normalization are marshaled to provide a fuller explanation of what it involves. Michel Foucault's conception of norms and normalization, invoked in Section (A) of this Part, provides insight into the process by which norms are derived from empirical realities – a process which is integral to the function of facts on the ground and serves to explain the peculiar conflations of fact and value, past and present,
and rights and wrongs that give the practice of creating facts on the ground its paradoxical flavor. Foucault’s conception of empirically driven norms helps to explain how the redistributions of land and people that result from abnormal conditions are able redefine themselves as the new normal. It also, importantly, highlights the way in which empirical realities generate norms that compete with traditional conceptions of corrective justice, and, in many circumstances, overtake them.

An understanding of precisely what those circumstances are in which corrective justice succumbs to the necessities of “reality” is provided by the theory of the state of emergency developed by the controversial political theorist Carl Schmitt and further elaborated by contemporary scholars, most notably, Giorgio Agamben. As discussed in Section (B) of Part IV, Schmitt’s theory of the state of emergency as a state of legal exception, in which we depart from the rule of law, aptly describes the situation in which our ability to make the conceptual distinctions on which our legal rules depend deserts us. Schmitt’s notion of the state of exception deals precisely with departures from the conditions of normality in which the rule of law prevails, and provides a useful way of understanding the paradoxical ways in which law licenses its own suspension, and thereby legitimates actions which violate the rules that are “normally” supposed to govern. Focusing our attention on the use of both formal declarations of states of emergency and undeclared states of emergency to justify the suspension of the ordinary legal rules (important features of the Israeli government’s land settlement policy), Schmitt’s theory reveals the logic of necessity and self-defense that fuels all practices of
creating facts on the ground. His analysis of how states of emergency become permanent provides a useful way of describing the paradoxical nature of the “normalization” achieved by facts on the ground, which involves both perpetuating and eliminating (and concealing) the logic of necessity and emergency, and the abnormal conditions under which the facts were created.

Yet a third theory of normalization most readily applies to the analysis of the normalizing function of the Israeli practice of creating facts, and that is the theory of normalization that Zionism itself proposed as a solution to the “Jewish problem” that roiled Europe in the late nineteenth and early twentieth century. As a remedy for the “abnormal” condition of being a stateless people, vulnerable to anti-Semitism and lacking in the opportunities for self-determination afforded to other peoples, Zionism prescribed a process of “political normalization” through the establishment of a Jewish state and the development of a “normal” political and economic culture in which Jews would at last be able to participate fully and assume the rights and responsibilities of citizens of a self-governing nation, while at the same time being able to defend themselves from attack. The methods of land settlement implemented by Zionist purchasing agencies in the early twentieth century in mandatory Palestine were seen as an important tool in bringing about this vision of political normalization. Once the Jewish State was established, its policies of acquiring land and promoting Jewish settlement were likewise viewed as instruments of state- and nation-building.

Section (C) of Part IV shows how the Zionist project of political normalization, implemented through the practice of creating Jewish settlements as
“facts on the ground,” makes use of the techniques of normalization theorized by Foucault and Schmitt, respectively. The Foucauldian understanding that in the modern era, empirical events that generate their own norms and rules, even when they subvert previously established realities, and traditional norms and rules, clearly animates the Zionist practice of establishing facts on the ground. The understanding that emergencies generate a logic of necessity that justifies “a state of exception” to the rules likewise propels Zionist settlement practices, which are seen as part and parcel of the larger project of collective self-defense and self-determination (i.e., political normalization). Each of the three different conceptions of normalization, Foucauldian, Schmittian, and Zionist, sheds light on a different aspect of the function of normalization served by the practice of creating facts on the ground. Taken together they provide a more complete picture of what that function entails.

Part IV seeks to provide an even fuller understanding of what the process of normalization entails by offering a separate account of its psychological aspects (discussed in Section (D), its political aspects (discussed in Section (E)) and, finally and perhaps most unexpectedly, what we might call its spiritual aspects (discussed in Section (F)). Section (D) is specifically concerned with the psychological processes that accompany the legitimation of facts on the ground and the reconstitution of the conceptual distinctions that constitute our “sense” of normalcy. Section (E) returns to the issues of property and sovereignty, discussed in Sections I and II, to clarify the way in which facts on the ground serve not only to legitimize the redistributions of property and people that occur, but also to produce changes in the boundaries of
political jurisdictions and to constitute sovereignty itself. In the final section of Part IV, we look at the religious nature of the Zionist enterprise, and the way in which the emergency logic used to justify the establishment of facts on the ground is linked to conceptions of the sacred nature of the land which break down the lines that ordinarily separate religious from secular, political matters. Part IV concludes with some thoughts about the way in which acts of creating facts on the ground can be seen as trying to “normalize” the sacred, and the impossibility of that mission.

Part V turns at last to confront the normative issues surrounding facts on the ground, beginning with the question bracketed in Part IV: In performing its characteristic functions of normalization, does the practice of creating facts on the ground merely respond to the abnormal conditions that constitute a state of emergency? Or is the condition of abnormality, which makes the ordinary rules impossible to apply, actually instigated by the practice of creating facts on the ground, and are the people implementing that practice doing so with the deliberate intention of creating conditions in which it is impossible for the ordinary rules to apply – which itself would seem to be morally culpable act? The difficulty is that, even if the implementers of the practice do bear culpability for deliberately creating circumstances which confound the application of the usual rules, once the creation of facts on the ground has transpired, it no longer matters who or what was responsible for effecting a (possibly) wrongful redistribution of property (or other resources.) It no longer matters because a new reality has arisen that makes normative demands of its own. To put it another way, the question concerning the cause of the conceptual breakdown that necessitates substituting the ordinary rules
of justice with a very different normative scheme is a question about events of the past; but what the practice of facts on the ground does is precisely to make the present take precedence over the past. From the presentist point of view that it ushers in, it is neither possible nor necessary to sort out the claims of the past. Not possible because, regardless of what caused the conceptual distinctions that usually order our normative universe to break down, once the breakdown has occurred, it is no longer possible to assess the claims of the past or to determine what caused the conceptual collapse that makes that assessment impossible. Unnecessary, because even if it were possible to sort out these historical events, it would be wrong to ignore the legitimate claims of the beneficiaries of the current status quo which are rooted in the present and supersede the claims of the past.

That, in any event, is the “supersession thesis,” articulated by Jeremy Waldron. Waldron’s supersession thesis makes explicit what has always been implicit in the related practices of creating facts on the ground and applying legal doctrines of prescription: a theory of justice, according to which the claims of corrective justice give way over time to the growing strength of more present-oriented and forward-looking normative principles, such as reliance, necessity, and distributive justice, when facts on the ground have been successfully created. Far from a simple stand-off between justice and considerations of realpolitik, the supersession thesis suggests that realpolitik is itself a composite of pragmatic and moral considerations, and, further, that there are multiple types of justice, some of which favor protecting the beneficiaries of the current status quo, while only one—corrective justice—seeks a restoration of the status quo ante.
The supersession thesis has been countered by a number of scholars who have offered a variety of compelling reasons for rejecting it. Part V of this Article summarizes the arguments of the leading theorists on both sides of this philosophical debate. To be clear up, it by no means endorses the supersession thesis. If anything, it demonstrates sympathy with the position of its critics. The main point, however, is to side with neither one position or the other, but rather to indicate the complexity of the moral issues and reasons to be wary of our ability to render a moral judgment and provide a morally “correct” solution to the conflict. That does not mean that we should avoid the normative issues, but we may make more headway by carefully parsing them, and noting their respective limitations than by rendering judgment. Accordingly, Section (A) of Part V summarizes the leading philosophical positions about the justice (or injustice) of creating (or dismantling) facts on the ground. This Section focuses on the debate over the supersession thesis that Waldron articulated, but also considers related ideas offered by legal theorists with regard to moral basis of prescription and adverse possession. In Section (B) the Article draws out the implications of the theory of normalization presented in Part IV for the application of principles of justice. It argues that one of the chief effects of the normalization process embodied in facts on the ground is precisely to break down the distinctions conventionally drawn between principles of justice and morality, on the one hand, and pragmatism and politics, on the other, greatly complicating the business of rendering or characterizing moral judgments, if not making it altogether impossible.
Having urged caution against making simplistic moral judgments, Section C nonetheless turns to a consideration of the possibility of making some at least tentative judgments about the legitimacy or illegitimacy of different methods and phases of settlement. The question here is whether is there is any basis for distinguishing legitimate settlements from illegitimate ones, and if so, what the criteria for making such distinctions are. Much of the preceding analysis tends to collapse the distinctions between different phases of settlement in different parts of Israel/Palestine implemented through the different methods under different authorities in an effort to establish the commonalities among these diverse methods and diverse instances of land settlement. But the question persists whether they really are all the same, particularly in a normative sense. Is there really no distinction to be made between the land acquisitions that were made prior to and immediately after the establishment of the state of the Israel and the settlement of the occupied territories that has taken place (and continues to take place) since the end of the 1967 War? Are the acquisitions that were made through purchase-and-sale agreements in the mandatory period more legitimate than the post-1948 expropriations of “abandoned” land that were authorized under emergency laws and implemented through the government’s power of eminent domain? What of Jerusalem? Is it, as so many have maintained, a “special case,” and if so, which way does that cut? For or against the greater legitimacy of Jewish neighborhoods established on Arab-owned property in areas of East Jerusalem, like French Hill? Finally, should Israel itself be treated as an isolated case, or should we recognize the similarities between its practices of land appropriation and those of other nations
engaged in the establishment of colonies of new settlers? For that matter, why restrict our consideration of the practice of facts on the ground to nation-states and governmental entities? Why not include the extra-legal practices of land acquisition developed by squatter movements and other “property outlaws” in various parts of the globe?

While Section C of Part V pursues the possibility of drawing distinctions (e.g., between the occupied territories and the territory within the Green Line, or between Jerusalem and other parts of Israel/Palestine), Section D. returns to reasons to be wary of making distinctions, arguing against the dangers of exceptionalism. Subsection D.(1) calls attention to two contradictory forms of Israeli exceptionalism, a “positive” exceptionalism exhibited among Israel's apologists, who insist on Israel’s moral integrity and indeed superiority and deny accusations leveled against the Jewish State, and a negative exceptionalism, which subjects Israel to a double standard. Subsection D (2) seeks to remedy both of these pernicious forms of exceptionalism by situating Israel's practice of creating facts on the ground amongst the broad range of practices which fall under that description. Drawing on the conceptual work developed in Parts II, III, and IV, this section attempts to crystallize a general definition of the concept of “creating facts on the ground” and to clarify the range of cases which fall under its definitional ambit. This section does not provide the kind of rich comparative analysis of different examples of the practice that would be desirable, but by at least gesturing at examples of practices that satisfy the definition of the practice of creating facts on the ground, it tries to demonstrate the (broad) conceptual range of that concept and, in so doing,
to combat the dangers of Israeli exceptionalism that undermine judgments on both sides of the debate. In direct opposition to this tendency toward exceptionalism in debates over Israeli policy, the final subsection (3) suggests some of the features that make the Zionist aspiration for a homeland, and the various methods of creating facts on the ground employed in the service of that aspiration, not so much exceptional as exemplary of the general human condition, in which “surplus populations” all too often find themselves in search of place with no place to call their own.

The Article concludes with some speculations about the future of the facts on the ground on Israel, suggesting that the very success of the practice could, ultimately, lead to the demise of the Jewish state. In keeping with the understanding of reality’s hold on our normative practices, and the consequent submission of our normative decisions to the “art of the possible,” the comments offered here are not so much prescriptive statements about what ought to happen as they are predictive about what is possible, now that the facts have been established. Of course, if the self-fulfilling practice of creating facts on the ground teaches us anything it is that the predictive and the prescriptive intertwine. That said, the suggestion offered in conclusion is that the deliberate attempt to shape the outcome of future negotiations over Israel’s borders through the practice of facts on the ground may, ironically, have created conditions in which the Israel will be unable to survive.
INTRODUCTION

I. PROPERTY AND SOVEREIGNTY: A HISTORICAL ACCOUNT OF THE ISRAELI PRACTICE OF CREATING FACTS ON THE GROUND

II. PROPERTY AND SOVEREIGNTY: A THEORETICAL ACCOUNT OF THE ISRAELI PRACTICE OF CREATING FACTS ON THE GROUND.

III. FACTS AS FICTIONS: COMPARING FACTS ON THE GROUND TO LEGAL FICTIONS AND THE DOCTRINES OF ADVERSE POSSESSION AND PRESCRIPTION

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   A. Foucault’s Theory of Norms and Normalization
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V. NORMATIVE DEBATE: JUDGING THE LEGITIMACY OF FACTS ON THE GROUND
   A. Waldron’s Supersession Thesis and Its Critics: The Philosophical Debate
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   C. Can We Draw Distinctions Between Legitimate from Illegitimate Settlements?
      (1) Post-1967 Settlement of the Occupied Territories versus Pre- and Post-1948 Settlement Within the Green Line
      (2) The Special Case of Jerusalem
   D. Is Israel A Special Case? Against Exceptionalism
      (1) Israeli Exceptionalism, Positive and Negative
      (2) “Facts on the Ground” Outside Israel
      (3) “If Not Here, Where?” The Jewish Condition as the Human Condition

CONCLUSION: THE FUTURE OF FACTS ON THE GROUND
Walk into the Dominos Pizza outlet in French Hill and make the following statement: “This neighborhood is a settlement. It is illegal according to International Law and must be dismantled in the event of a peace settlement between Israelis and Palestinians.” Even if made in perfect Hebrew, the statement would most likely be met with confused stares 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.

Of course, 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 case of French Hill, the 1967 War was crucial. The attacks and counter-attacks 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.

That war had the ironic effect of leading to the loss of all of the territory that had been set aside for an Arab state under the U.N. partition plan. Instead of

\(^2\) 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.

preventing the Jewish state from being established, the war waged by the Arab states ended up scuttling the establishment of the Arab state, which they professed to support, as all of the territory designated for that state was lost. Some of that lost territory was gained by the newly formed Israeli state, allowing it to expand its borders beyond the territory originally allotted to it under the partition plan. But the rest (Sinai, Gaza, the West Bank and the Golan Heights) wound up in the hands of (some of) the Arab states that had invaded Israel. Although it was Israel that was victorious, at the war’s end, Arab forces were in control of a number of territories that had been part of the British mandate of Palestine, and these areas were ceded to them under the various cease-fire agreements that were negotiated, bringing the war to a close.⁴

The “Green Line,” often invoked as establishing the border between Israel and Jordan, is the best-known example of these provisional borders. The line agreed to by Israel and Jordan as part of their cease-fire agreement was neither intended nor presented as establishing a permanent border. But because it was written into the 1949 armistice agreement that brought the 1948 war to a formal close, and because the expectation that it eventually be succeeded by a peace treaty hammering out de jure borders was never realized, the Green Line served as the de facto border between Israel and Jordan for almost twenty years (and continues to serve, in the minds of many, as the measure of the legitimate border to this day.)

From 1949, when the first Arab-Israeli war ended, until 1967, when Israel’s decisive

victory led to its occupation of the territories seized by the Arab states in the 1948 war, the Green Line functioned as the effective border between Israel and Jordan.

This had a number of dramatic effects, including the inhibition of movement between the two countries, the prevention of the return of the hundreds of thousands of Palestinian refugees who had fled across what was subsequently erected as the (de facto) border, and the division of Jerusalem into two impermeable halves. The western side of the city fell under Israeli sovereignty, but the eastern side was ceded to Jordan, whose forces had occupied it during the War, and which quickly annexed its portion of the ancient city and made it subject to Jordanian administration. The result was that even the Palestinians who remained within the precincts of the city (or returned to the city after their initial flight) found themselves locked in the eastern half of Jerusalem, unable to return to the homes that many of them had lived in and owned in West Jerusalem, or even to visit the western side of Jerusalem (or any part of Israel). Conversely, Jews who had resided in the eastern part of the city prior to the war also lost their homes, while all Israelis, regardless of where they lived, found themselves completely cut off from access to East Jerusalem, where all the holy sites as well as the original campus of Hebrew University were located.

It was adjacent to this campus of the Hebrew University, that, twenty years later, the Jewish neighborhood of French Hill would take root. But not until another war had taken place, altering the de facto borders yet again. Israel’s military victory

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5 See Facts on the Ground, 3.
6 Facts on the Ground, 22.
7 Facts on the Ground, 22-23.
in the 1967 War left it in possession of the territory (the West Bank and East Jerusalem) that Jordan had seized in the first Arab-Israeli war in addition to the Sinai, the Golan Heights and Gaza. Israel’s sudden acquisition of these territories, combined with the Arab states’ refusal to accept Israel’s offer to withdraw from most of the conquered territory in exchange for a full peace treaty and recognition of Israel’s right to exist, left Israel with a fateful choice. Either it could abide by the international law of belligerent occupation, which requires an occupying power to refrain from settling or expropriating property and to apply the laws formerly in force (except as required for military necessity).\(^8\) Or it could pursue the maximalist vision of a “greater Israel,” incorporating within its borders all of the territory deemed necessary for security purposes and associated in the collective Jewish memory with the biblical “land of Israel” (“a vague geographical concept at best,” but one which encompasses at least the West Bank and East Jerusalem).\(^9\)

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\(^8\) Law of belligerent occupation.

\(^9\) See Gershon Shafir, *Land, Labor and the Origins of the Arab-Israeli Conflict, 1882-1914* (1996), 78. Since the late 1970s, the most zealous champions of the cause of Greater Israel have been members of the radical religious settler movement, then a newly emergent political force that staked its claim to the “redemption” of the land, as they referred to it, on a messianic religious theology. But at the time the occupation began, it was Labor leaders like Israel Galili who were the strongest proponents of settlement. Territorial maximalism was neither the invention nor the exclusive pursuit of religious Zionists, nor was its support limited to members of the hawkish Likud Party, led by Menachem Begin. “Earlier dreams of territorial maximalism” (Shafir, xxiv) had animated the predominantly secular and socialist mainstream of the Zionist movement in the pre-state period, and the Labor party, which constituted the ruling party from the establishment of the state in 1948 until the fall of the Labor government in 1977. Some students of early Zionism, like Shafir, have argued that the labor movement, which dominated Israeli society in the period leading up to the establishment of the state and throughout the first three decades of its existence, “start[ed] out with the maximalist aim of Jewish territorial supremacy in Palestine,” but that “under the unauspicious circumstances of colonization in both land and labor markets” that existed in pre-state mandatory
In the immediate aftermath of the 1967 War, the government was still divided over which course to pursue with respect to the West Bank and Gaza. When it came to East Jerusalem, however, the country was united. Caught up in the euphoria over the reunification of Jerusalem that swept the Israeli Jewish community and the Jewish community worldwide, the Labor Government, which was still in power when the Israeli occupation of the territories began, (and which remained in power for the next decade), declared the newly united Jerusalem to be the “eternal undivided city of the Jewish people.” For the first time since before the War of Independence (as the 1948 War is known in Israel; Palestinians refer to it simply as the “Nakba” – the catastrophe), Jews (and other residents of Israel) could go the holy sites of the Old City and to Mount Scopus, where the Hebrew University was founded. Thus the stage was set for the development of the Jewish neighborhood of French Hill, bordering the university campus. And thus commenced the Israeli occupation that would, over the course of the ensuing decades, become the site of intense agitation and international outrage, as radical Palestine, “the aims of the Zionist mainstream were transformed.” According to this analysis, it was only because it was apparent that its maximalist aims were impossible to achieve that “the Israeli labor movement perforce limited its ambition and condoned ... a bifurcated model of economic development leading to territorial partition,” a “strategy” that originated not in the appreciation of Palestinian aspirations but in the inescapable facts of Palestinian demography.” Shafir, xxiii. Others argue that the early Zionists did not pursue these maximalist reams out of a mixture of ideological and practical motives. Indeed, there were always voices of caution with the labor movement and in the Zionist movement at large that argued against territorial maximalism on grounds of principle and justice as well as collective (Jewish) self-interest. At the time the occupation began, these voices, which included such prominent spokespersons as David Ben Gurion, argued strenuously against settling the territories. But these voices were soon overwhelmed by the proponents of Jewish settlement. See David N. Myers, Between Jew and Arab: The Lost Voice of Simon Rawidowicz (2008).
settlers, representing the most extreme expansionist wing of Zionism, converged on an increasingly desperate and restive local Palestinian population.

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 soon emerged 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 300 settlements, inhabited by almost 400,000 Jews, in Gaza, the West Bank and East Jerusalem.10 “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

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10 Like every other fact and figure in this area, the count is controversial. About 200,000 of the Jews counted in this figure live in East Jerusalem. Whether East Jerusalem is properly viewed as part of the West Bank or occupied territory is itself a subject of controversy. Subtracting the number of Jews who live in East Jerusalem from this figure, there remain over 200,000 Jews who settled in the West Bank and Gaza.
tenths of the law”), nor is it a term of technical expertise, 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 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?

On the other side of the coin, we might well ask why we don’t group the land settlement practices in the occupied territories together with Zionist land
settlement practices pursued on the other side of the Green Line? The discussion typically presupposes that land owned and occupied by Jews in Israel proper was acquired by legitimate means that bear no resemblance to the techniques of land acquisition used in the occupied territories. But this is a difficult assumption to sustain when we look at the broad history of Zionist land settlement practices, which have included (to summarize very briefly):

(a) Acquisitions of land through purchase and sale agreements executed in the pre-state period by Zionist purchasing agents and Arab landholders who claimed a dubious right to control the disposition of the land without the consent of the peasants who occupied and cultivated it, against the backdrop of a feudal system of land tenancy that was undergoing a faltering process of modernization and a British land law that imposed racial restrictions on Jews, denying them the right to buy land (a law which was circumvented by willing Jewish buyers and Arab sellers exploiting legal technicalities and loopholes);¹¹

(2) Wide-scale expropriations of Arab-owned land in the years immediately following the 1948 war undertaken in response to the pressing need to house the hundreds of thousands homeless Jewish refugees who streamed into Palestine from war-torn Europe and Arab countries from which they

now were expelled, accomplished through a variety of legal and extra-legal means, including the declaration of a state of emergency that permitted the government to suspend the application of laws protecting basic civil rights to Palestinian Arabs; the use of eminent domain and the award of paltry sums of “just compensation,” which most Palestinians refused in order to avoid legitimating the takings; the institution of parliamentary laws that declared empty properties to be abandoned, coupled with other laws and policies that prevented Arab refugees from regaining access to the properties that they had fled during the '48 war, supplemented by statutes designed to obfuscate the transfer of these confiscated properties to the Jewish state and quasi-public institutions like the Jewish National Fund, and still other laws and policies implemented by public and quasi-public authorities that (in a curious, or perhaps not so curious inversion of the British laws restricting Jews) restricted the use and transfer of these properties to Jews; (3) The intentional modification of adverse possession doctrine to prevent Arab owners who lacked the requisite documentation of their title to land from establishing title through adverse possession.

Save for the holdings of the small number of Jews who had lived in Palestine for centuries predating the modern Zionist movement, there is very little property in Israel that wasn’t acquired through one or another of these mechanisms.

12 On the Jewish National Fund, see
It is not entirely obvious what differentiates these methods of land acquisition from the methods used in the occupied territories, or what differentiates the properties acquired by these methods, other than the fact that their usage is of longer standing and far more widely accepted – but these are the factors whose normative authority we are trying to explain.

The questions remain, then, what exactly distinguishes the land settlement practices whose methods we mark as deviant by calling them “facts on the ground” from other practices of land that may also be of questionable moral or legal validity, (which is not to say they are necessarily immoral or illegal), but whose legal and moral validity nonetheless goes unquestioned? And, on the other hand, what do the land settlement practices in the occupied territories have in common with the rest of the motley set of practices designated by the term?

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

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sort of human action or social process, rather than just appearing as naturally occurring facts, is built into 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 above 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 narrow our focus to individuals, to particular government officials who advance, fund, and protect the settlement project, or to the private individuals who compose the membership of settler movements, set and carry out its objectives and actually settle in the territories? 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? What about the many Jews who form the ideological core of the settler movement, but who are not Israeli citizens? In what sense are they “Israeli,” such that their actions constitute an “Israeli” strategy? In the final analysis, is it the government or private actors who bear responsibility for establishing the settlements – or both? Have the government and the settler movements acted in concert or at cross-purposes – 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 non-violent, the grownups and the children who were born on the settlements or brought there without their consent? Were any of these people just pawns? And did the Israeli government speak with one voice and act with one accord vis-à-vis the settlements, or was it fractured? If so, what degree of responsibility is attributable to “Israel” as a whole? What of the army forces and police forces provided for the settlers’ protection? What of the Israeli military units that removed the settlers from Gaza by force in 2005?

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 transformations. 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.

Of course, 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 dispossession 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. 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 creating facts on the ground). It 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 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 to not only perpetuate itself but also 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).17 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

17 Whether it is to Israel’s advantage is highly debatable.
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.”

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 multi-purpose 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

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18 Excerpts from a U.S. State Department analysis quoted in Facts on the Ground, 86.
populated residential communities, where families raise children, and members of the community establish schools and synagogues, run 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 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.19

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

19 Facts on the Ground.
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 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”20 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

20 The allusion is to Waldron’s theory of supersession. See Jeremy Waldron,
5: No. 2 (2004). For a lucid critique of Waldron’s supersession thesis, see Chaim
Benvenisti, Chaim Gans & Sari Hanafi (eds.), Israel and the Palestinian Refugees
(2007), 256-293.
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, of course, no mystery at all that people hold all kinds of moral and political views about the practices characterized as creating facts on the ground and the radical changes that they effect, including the normative ones. But how do these practices attain their first-order normative effects? How is that they alter, or at least put pressure on, the outcomes of disputes? How is it that they are able to change the normative landscape, altering our sense of what is politically feasible and morally acceptable, in addition to changing the empirical physical, psychological, social, and political landscape? And what is the relationship between the normative changes and the empirical ones? 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, 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.”

Of course 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. This is yet another way in which the concept of facts on the ground is deeply obscure: its usage does not make clear which of these species of normative power facts on the ground acquire, even as it clearly implies that one or another these species of normative power is operative. As we shall see, that failure to distinguish between moral and political imperatives is itself no an accident; it reflects an essential feature of the situations described as “facts on the ground” – but this must await further explanation.

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. Of course that normative force field does not emerge overnight. It takes time for facts to acquire their normative power, and the strength of that normative 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.21

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.”22 Unlike “scientific” historical scholarship or “critical history,” which attempts to establish “objective knowledge of

21 Facts on the Ground, 41.
22 Elisheva Carlebach, John M. Efron, and David N. Myers, eds., Jewish History and Jewish Memory: Essays in Honor of Yosef Hayim Yerushalmi, xiii.
what actually happened in the past” 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,” 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. 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

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23 Id.
25 Facts on the Ground, 41.
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 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\(^\text{26}\) 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

\(^{26}\) For a particularly evocative description of this process, see Meron Benvinisti, *Sacred Landscape: Buried History of the Holy Land Since 1948* (1995).
surface features “blur[ ] the distinction” between “Israel proper” and the West Bank, “rendering the ‘green line’ meaningless.”27 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.

In this regard, French Hill is not unique, but rather, representative of what has happened in various parts of East Jerusalem over the past forty years. While the population and character of East Jerusalem are still predominantly Arab, the Israeli government (and the municipal government of Jerusalem) have succeeded in carving out a steadily growing number of areas where Jewish settlements are now so deeply rooted that it seems “inconceivable” that they could be returned to Arab hands or that they ever rightfully belonged to Arabs in the first place. The “Jewish quarter” of the Old City, where property was confiscated from Arab owners by the Minister of Finance in 1967 “on the grounds of restoring the ‘natural ethnic’ quality of the quarter and righting the wrongs carried out by the Jordanians between the wars,”28 is a case in point. But this same twin project of “reclaiming” property and rewriting history, or shaping it to highlight ancient Jewish links to the land while minimizing the more “recent” (millennia-old) history of Arab connections to the land, has been pursued in numerous sections of East Jerusalem, and in expanding areas outside the boundaries of the city as well.

Of course, this blurring of the “binary distinction” between the two sides of the Green Line, between “Israel proper” and the West Bank, legal and illegal

27 Facts on the Ground, 86.
28 Facts on the Ground, 27.
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.

Without that normative power, the physical facts of possession and demography wouldn't even be “facts on the ground.” They would just be “brute facts.” Precisely what distinguishes “facts on the ground” from “brute facts” is the formers’ normative force. Of course, there are people who claim that there is no difference between facts on the ground and brute facts. They claim that facts on the ground are nothing more than “brute facts,” in effect denying that facts carry any normative authority, other than that imposed or fraudulently claimed by those in power. On this view, collective memory is nothing but a mechanism for fraudulent distortion of the past, and the normative authority attributed to facts on the ground is likewise specious.
There is more than a grain of truth to this view. There is an undeniable “brutality” to the mere fact of physical possession and to the “brute force” with which possession, without legal title or a moral right to its possession, is established – although the dividing line between brute force and the legitimate use of force, which underlies every assertion of legal title, is not as clear as conventional thinking makes out.29 That said, it seems clear that the use of the word “fact” in the phrase, “facts on the ground,” is intended to convey the “bruteness” of “brute facts” and “brute force.” And so long as we confine our consideration of facts on the ground to the past and the present, their brute quality looms large.

Yet when we consider the impact of facts on the ground on the future, the distinction between facts on the ground and brute facts comes into view. Brute facts have no power to affect the future (in particular the question of their future preservation), other than through brute force, which can always be combated with superior brute force. Facts on the ground also rely on brute force to affect the future, but not on brute force alone. Somewhere along the way, through the passage of time and the operation of various psychological mechanisms, facts on the ground acquire a power to affect the future that does not depend on force alone. This is what we mean when we talk about the conversion of de facto into de jure realities, or, to capture a wider range of normative phenomena not limited to the strictly legal, the reasons of moral principle and/or pragmatic political considerations that

29 This is less to say that incidents of land acquisition involving violence or physical force aren’t “brutal” and more to suggest the old realist point that behind the apparently benign, noncoercive, “voluntary” mechanisms of land transfer there lie hidden mechanisms of force, or threats of force.
dictate preserving the status quo (or at least attaching a great deal of normative weight to it).

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. 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 un-owned resources to the first person to take possession of them; the doctrine of relative title, which entitles occupants of property to exclude non-owners; 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 non-owner 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).  

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.31 These Ottoman laws were largely preserved when Great Britain made Palestine its “mandate” following the First World War. 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, as noted above, 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 Ottoman and British land laws. At noted earlier, the laws of adverse possession were substantially modified with the aim of preventing Palestinians in Israel from establishing adverse possession claims.32 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.33 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.”34 In a world with such faulty means of reconstructing the historical record, it is better, on this view, for pragmatics to triumph over principle.

34 Epstein, “Past and Future,” 675.
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 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.”

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 non-possessor 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

36 As Radin states, “[u]tilitarianism is too empirical for such absolutes” as a rule always awarding ownership to the current possessor, and the consistent utilitarian ought to be ready to re-assign property rights to non-possessors whenever they derive the greatest subjective utility from the property in question and that utility is so great as to exceed the subjective value of developed expectations of continued
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.”

“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 control over resources and the systemic welfare gains to be derived from certain rules and the like. Radin, “Time, Possession, and Alienation,” 744.

source of innumerable further benefits, or gains in personal wellbeing. Conversely, being uprooted is understood to generate great personal, and social, costs.\textsuperscript{38}

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 bound up with the property.\textsuperscript{39} On this theory (as on the utilitarian account), the converse assumption is also usually drawn, namely that, as the original titleholder is separated from the property, her “interest fades.”\textsuperscript{40} Why both theories make this assumption, belied by the all too common experience of exile, is worth pondering.

Despite the counter-example 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 \textit{have} – to our present surroundings and holdings, to the people, places, and things

\textsuperscript{38} Unifying both sides of the cost-benefit analysis is the psychological assumption that expectations and “reliance interests” spring up wherever roots are laid down. Those costs (combined with the costs of uncertainty surrounding the question of whether they will be prevented) are in turn expected to redound to the detriment of aggregate social welfare in the form of depressed incentives on the part of possessors to invest their resources and put them to productive use.

\textsuperscript{39} See Margaret Jane Radin, “Property and Personhood,” 34 Stan. L. Rev. 957 (1982).

\textsuperscript{40} Radin, “Time, Possession, and Alienation,” 748-49.
that constitute our environment, to our experience and our reality in the here and how.

Perhaps the easiest way to understand the “presentist” orientation of psychological attachment is to think about the attachments formed by children. Children are creatures of attachment, par excellence, and the attachments that they form are governed by the needs and realities of the present. Move a child from one place to another, or remove a child from one family and place her with another, and, after an initial period of adjustment, the child will relatively quickly form deep and intense attachments to her new caretakers and surroundings. In such situations, the psychological mechanisms of attachment and adaptation work together, as the forming of new emotional attachments is what enables the child to adapt to her new surroundings while, conversely, it is the capacity to form positive emotional attachments to whatever present reality the child finds herself in that enables the child to adapt.

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 that are clearly exhibited in children are also important features of the psyche of adults.

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41 We may retain these attachments if we lose them, at which point they are folded into our personal or collective memory. And we may even have instilled in us a sense of attachment to people, places, and things that we have never known or experienced directly ourselves – this being one the characteristic functions of collective memory. But these are, as it were, modifications that attachments undergo. When they first are formed, attachments are quintessentially a phenomenon of the present.
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,42 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 report

42 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.
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.” Of course, 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 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 as grave a danger to the Jewish state as any military attack, children are the ultimate physical facts on the ground, and procreation is the ultimate method of fact-creation.

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43 Pun intended.
But just as the fact of physically possessing land entails 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.” To put it simply, children and families are markers of normalcy. Despite (and in considerable tension with) the conception of children of 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, which is widely viewed as an indivisible political entity, was obviously a
huge advantage). But success in producing in 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.

The first theory of normalization that may help to shed light on the nature of facts on the ground is Foucault’s. Foucault uses the concept of normalization to describe the effects of “productive” as opposed to “juridical” power, juridical power being a top-down mode of governance, which dictates behavior through means of external coercion and violence, productive “biopower” being a mode of governance and reciprocal power relations that works through the formulation and internalization of norms. Norms, as Foucault describes them, operate as a system of governance 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, as Foucault uses the term, are a species of rules, but unlike more traditional juridical rules that emanate from the will of a sovereign on high, norms emanate from the population and its actual social practices. Norms are a standard 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.”


Ewald, 144.
about events” is not what caused them to occur, but rather “that they occur, or rather that their occurrence is repetitive, multiple, and regular.”

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.” 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 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.”

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

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46 Ewald, emphasis added.
47 Ewald, 143.
48 Ewald, 147.
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 these legal and extra-legal practices. 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” 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 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

49 Ewald, 147.
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.50

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 of emergency, whether or not

50 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). 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).
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 – had 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 of course subject to military administration, and even though the international law that governs military occupations requires the military administration to enforce the pre-existing 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.\(^5\)

Even when emergency law or military law hasn’t served as the official basis for transferring property, government and privately-sponsored takings of Arab land have been justified by their proponents as serving urgent, overriding needs (such as the need to provide housing for the hundreds of thousands of Jewish refugees who streamed into Israel in the early years of its founding), and thus obey the basic logic of emergency and exigency. Almost all of the real estate developments developed

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for and settled by Jews in Israel, even those that have relied on private purchases and “voluntary” sales of land rather than public expropriation, have been created in accordance with the basic logic of the state of emergency, that is, the logic of necessity and overriding urgent need that purports to justify overriding the rules of corrective justice that “ordinarily” apply.

The question of course 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 of course 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 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 ensure 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.

Schmitt does not himself identify or analyze this conceptual breakdown as a feature of the state of exception/emergency; he emphasizes the arbitrary power of the sovereign decider instead. But I would submit that a breakdown in the conceptual distinctions that undergird the framework of corrective justice is built
into our intuitive understanding of the state of emergency, and that this, more than anything, is the essential feature of an emergency situation.

A state of emergency is a situation in which, as a matter of practical necessity, the conceptual distinctions that we need to make to apply the canons of corrective justice simply cannot be applied. Something about the circumstances of the situation makes it impossible to draw the requisite distinctions.

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. The moral issues here are tricky. From the standpoint of corrective justice, we may be tempted to condemn the strategy of deliberately creating such a population of “blameless” residents as a manipulative ploy, which takes advantage of the solicitude for moral innocents and the odium attached to collective punishment built into the canons of corrective justice, in effect using children and other innocents as a kind of “human shield.” But the dilemma for corrective justice that attaches to every use of “human shields” remains: even if the people responsible for creating and hiding behind human shields deserve to be punished, or to have their possessions taken away, the “human shields” themselves do not deserve this treatment; yet it may be impossible to vindicate the demands of corrective justice, to punish the wrongdoers and rectify the wrongs done to the original victims, without wrongfully victimizing these human shields.
In the case of Israeli settlements and land development projects intended for Jews, not only is 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.

Time does not permit elaboration, but every phase of Zionist settlement has been characterized by a blending of public and private, collective and individual undertakings that defies the lines that are conventionally drawn between property and sovereignty, public and private responsibility, collective and individual actions. Well before the Six day War of 1967, indeed well before the establishment of the State of Israel, the Zionist movement developed strategies for acquiring and settling land in Palestine in which private initiatives and market transactions were fused with collectivist organizations and goals to such a point that it is virtually impossible to separate private from public agents, and private from public achievements. Particularly in the pre-state period, when technically private organizations, such as
the Jewish National Fund, functioned as arms of a proto-state apparatus that would eventually evolve into the institutions of a nascent Jewish state, it seems impossible to draw a line between the private and the public actors, or to distinguish between the private achievement of privately owned land and political achievements, such as the establishment of a demographic and territorial base for exercising political self-determination, and the ultimate achievement of a sovereign nation-state. Even to the extent that we can tease out these distinctions as a factual matter, these factual distinctions seem to have little relevance with regard to the normative distinctions of ultimate significance, that is the distinction between “normal” and “legitimate” land transfers whose validity is to be accepted and the “deviant” practices of land acquisition that are to be regarded as morally and politically (perhaps also legally) suspect. Indeed, the more we examine the broader history of Jewish land settlement in Israel/Palestine, a history in which the projects of land acquisition and settlement and nation-building are inseparably intertwined, the more the conventional distinction between normal (private, voluntary, market-based, legally authorized) transactions and the ostensibly abnormal methods of creating facts on the ground itself breaks down.

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 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.\(^5\) Likewise, the pursuit of the right of political self-determination wasn’t necessarily linked to the idea of 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 multi-ethnic 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

\(^{5}\) Shafir, *Land, Labor and Origins*, xxiii.
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 the stated concerns about the “proletarianization” of the Palestinian peasantry in pursuit of their own profit. Most of the land acquired for Jewish settlement prior to the establishment of the Jewish state was acquired through this means.

By the standards that ordinarily differentiate legitimate from illegitimate land transfers, these land transfers would seem to be unobjectionable and unexceptionable. But in the complex world of mandatory Palestine, even this seemingly most normative mode of acquiring land could not adhere to the bright-line distinctions conventionally observed between de facto and de jure possession, and between private (voluntary, market-based) and public (forced) transfers that are ordinarily expected to obtain. The early Zionists who set about acquiring land for Jewish settlement confronted legal obstacles to purchasing land such as the Land
Transfer Ordinance of 1921, which sought to limit the acquisition by Jews of Arab land and thereby prevent the transformation of the Palestinian peasantry into a volatile landless proletariat.\(^5\) In the face of this legal obstacle, they – and their eager Arab interlocutors – developed techniques for staying within the letter of the law while circumventing the legal prohibition on sales to Jews, relying on legal loopholes, strawmen, and technicalities. Were the sales therefore legal or illegal? The objective for the Zionist purchasing agents was to establish a place of refuge from the anti-Semitism of Europe, and to overcome a locally imposed racially discriminatory law that on the face of it seemed hard to distinguish from the anti-Semitic policies of Europe. On the other hand, the Land Transfer Ordinance was concerned, at least in part, with preventing the Arab “notables” who were eagerly selling off their land from selling out the peasants who claimed a usufruct right in the land but had no say in whether the sales would go forward and no claim to a share of the profits from the sales. Here as elsewhere, the British were clumsily trying to balance the competing claims of Jewish and Palestinian interests, and to manage class conflict within the local population. Was the law imposing the restriction Jews therefore a pernicious racist law that, from a moral standpoint, \textit{ought} to have been circumvented (a moral position that would support viewing the sales as morally if not legally valid), or was it an appropriate response to legitimate concerns about dispossessing the Palestinian peasantry? Clearly, the answer is both – but the law of the excluded middle to which our conventional distinctions adhere does not permit the answer to be both. Were the sales voluntary or involuntary,\(^5\)

legitimate market-based transactions or forced expropriations? Public or private?
Again, there is simply no way to draw the bright-line distinctions that conventional ways of thinking about just versus unjust property transfers demand in this morally, politically, and factually ambiguous context.

In the same way that the conventional distinction between private (voluntary, legal) and public (forced, illegal) transfers breaks down in the context of laws that imposed racial restrictions on the alienation of land, and embedded landholding in feudal obligations, the early history of land settlement in Israel 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, 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. Non-market methods and values determined relations within the Jewish population, but relations between Jews an 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.\textsuperscript{54}

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 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

\textsuperscript{54} See Shafir, \textit{Land, Labor, and Origins}, 45-90.
The PASSIA report vividly captures the religiosity with which the ancient city is imbued, observing that

It is this intangible nature of Jerusalem that makes the city so ethereal, so unreal, and so spiritual. Jerusalem is much more than the city or the holy sites: Jerusalem is a symbol, yet it is a symbol for a multitude of changing things. Jerusalem is intensely personal, yet, at the same time, it is also universal. The inherent holiness of the city, built on millenniums of faith, has given it a quality so intensely spiritual that it almost floats above the earth in our minds. Jerusalem is the essence of sacred space.\(^55\)

The report goes on to state the basic distinction between secular and religious that has long been upheld as a guide to governing political entities in the real world:

However, Jerusalem is also a modern city with modern problems. The authors of the Hebrew scriptures were very wise in pointing out this distinction by separating Jerusalem into \(\text{Yerushalayim Shel-Malah}\) and \(\text{Yerushalayim Shel-Mata}\): “Jerusalem of the Sky” and “Jerusalem of the Earth.” According to this separation, a distinction was made between the sacred and the profane: thus, Caesar could be responsible for garbage collection without sullying the city as a place for prayer.\(^56\)

As the PASSIA report goes on to note, “[u]nfortunately, in the throes of the modern struggle, this distinction has been lost.” Not only Jerusalem, but throughout Israel/Palestine, the settlement of land is both a religiously motivated activity, and an activity that has religious effects, as measured by believers who see the effects as a fulfillment (or violation) of a divine plan, and by secularists who see them as an empowering religious groups and advancing their beliefs. Yet at the same time, the PASSIA report observes, that religious mission is clearly serving secular and material, political and economic ends.

\(^{55}\) PASSIA, i.

\(^{56}\) Facts on the Ground, 1.
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 non-governmental 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.”

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57 Facts on the Ground, 1.
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 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.”58 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

58 Facts on the Ground, 3.
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.59

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.”60 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 non-expansionist policies of settlement have involved land grabs, i.e., forced, and in many cases, unjustified dispossession. Terms like colonialism, and sloganeering like “Zionism is

59 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.”)
60 See, e.g., Kedar, “Legal Transformation,” (“I believe … that like in other settlers’ societies, greed for land was the crucial motivating force,”) 996.
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
belie.

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
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.” 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.” 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. What land was initially up for grabs, as early Zionists considered the possibilities that

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63 See generally, Shafir, Land, Labor, and Legitimacy.
were dangled for creating a homeland for the Jews in other parts of the world, such as Uganda. But the cult of the land and the basic idea that a nation-state with territorial sovereignty – “a nation like all other nations” – was necessary to solve the “pathology” of the Jewish condition in the Diaspora were central tenets of the Zionist movement.

It has often been noted that the Zionist diagnosis of “the Jewish question” 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. What they sorely lacked was a core of landed cultivators and a self-sufficient economy based on the “dignity of labor.”

On the stereotyping of Jews as pariahs, parasites, and usurers see Jerome Kohn & Ron H. Feldman, eds., The Jewish Writings: Hannah Arendt (2007), in particular, “Antisemitism,” (“The core conceptual charge leveled by our foes is – in general terms – that Jews are foreigners”), id. at 52; (“Proceeding from more or less anti-Semitic biases, all modern definitions of Jews as a people – with the one exception of definition by race – have their historical basis in medieval and late medieval conditions. The Jews as parasites, as a nation of pariahs, as a caste – all that, with the exception of a few, but very crucial remnants, was eliminated economically in the course of the eighteenth and nineteenth centuries, while at the same time, by means of a kind of political (anti-Semitic) countermovement, Jews were actually redefined as a caste of pariahs and parasites. The parasites were Jewish usurers – parasites of the disintegration and destruction of the feudal social order. Their corresponding needs were born out of a dying world that assigned them the fateful role of supplying usurious capital, which served consumption, but had only a destructive influence on production. The Jews were pariahs as long as they remained politically powerless. This corresponded to the “sponge policy” of the princes, the intent of which was to prevent the wealth that Jews were amassing from becoming “primary
Just as the Zionist diagnosis of Jewish “abnormality” mirrored the stereotypes of the anti-Semite, so too their proposed cure of political normality mirrored the contemporary visions of political and economic independence that abounded in the larger European culture. To find in nationalism the cure for political and economic dependence and physical vulnerability was nothing more than to subscribe to the reigning political ideology of the day. That said, relatively few people subscribed to the Zionist vision of establishing a Jewish nation-state until the close of the Second World War.65 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 non-statist (or even anti-statist) forms of Jewish cultural autonomy or religious rebirth.66 Only a narrow segment of the Jewish population endorsed Zionism. Non-Jewish support was even weaker, though

accumulation of capital” and thus a first step toward capitalism itself. Jewish capital was constantly being decimated and dispersed by pogroms, expulsion and confiscation. Living in uncertainty and [dependency] ... the Jews were the pariahs of developing European capitalism. The Jews were a caste ever since they lived segregated from and unincorporated in the history and economic life of the world around them, existing on their own or at best parasitically on others"), id. at 73-74.

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

66 Myers, supra note 64.
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, North Africa and the Middle East.”

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.”

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

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67 Shafir, Land, Labor, and Legitimacy 8.
68 Shafir, Land, Labor, and Legitimacy xxii (emphasis added.)
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.” Jewish life is a perpetual emergency, which creates 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 made the disturbing core of his theory of politics, the normalization of the state of exception, in which the state of emergency becomes a permanent dispensation from the rules of ordinary law, is a subject of increasing concern, as more and more countries around the world invoke states of emergency and institute emergency law without any foreseeable end. 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 closely the range of practices to which the concept of facts on the ground applies, and to have a better grasp of the normative implications of the practice in light of that conceptual range. What I hope this analysis has shown 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 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 both to a broader range of practices in the Israeli case, not limited to the occupied territories, and 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, 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.” Claims of Israeli exceptionalism abound both in the discourse of anti-Zionist critics of Israel and in the discourse of the so-called “pro-Israel” apologists who defend Israel from criticism at every turn. 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. This idea of Israel as a nation that upholds higher moral standards than other nations (reminiscent of the equally dubious notion of American exceptionalism that fueled the doctrine of “Manifest Destiny”) is, interestingly enough, a legacy of early Zionist thought, which held that Israel was to be “light unto other nations.” Alongside (and in considerable tension with) the more pragmatic Zionist vision of becoming a “nation like all other nations,” this lofty moral vision of Zionism 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. On their view, these practices are not only no worse than those engaged in by other states – they actually exemplify a higher moral standard and are not unjust but perfectly legitimate and moral exercises of state and private authority.

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 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 “surplus populations.” They had other motives as well, of course, but the motives of greed are not easily separated from the motives of need, in particular the need to satisfy the basic needs of economic and physical survival of these “surplus populations.”

Inasmuch as other groups have assumed the status of refugees, diasporic populations, surplus populations whose basic needs can’t, or won’t, be met by the “home country,” all these groups are now (the social equivalent of) Jews. That is, they occupy the same place as the Jews occupied in the Jewish question – which is to
say, they occupy no place that they can call their own. What the Jew in the Jewish question attests to is the stubborn physicality, the sheer materiality, of human existence. The problem with a population deemed to be “pariah” or “surplus” is that it has to go somewhere. Ruling out “the perennial suggestion for solving the Jewish question by slaying all the Jews,”69 it has to be somewhere, and that means that there has to be a place for them to be. This alone may explain why the logic of property – inherently exclusionary, innately absolutist, fixated on such base, materialist concerns as land and other physical and economic resources – is difficult, if not impossible to transcend. Even the most integrationist, “anti-groupist” social philosophy must come to the terms with people’s basic need for a physical place to be – a place in which to live and work and satisfy one’s basic physical and economic needs. And that means coming to terms with the competition for scarce resources, and the complex group dynamics that competition sets in motion.

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

69 Arendt, Collected Writings, 47.
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 is that in implementing their aims, the Zionists recreated the Jewish question as the Palestinian question. It has been said that the Palestinians have become the Jews’ Jews and the Arabs’ Arabs – as sure a testimony to the troubling persistence of “the Jewish question” as one could find. Whoever occupies the status of the refugee, the displaced person, the dispossessed, is destined to become the pariah, the parasite, the “surplus” population so long as the logic of property (and economic competition between groups) persists. That logic will inevitably motivate attempts on the part of the pariah population to establish facts on the ground in a desperate attempt to try to get back “home.” This may not constitute a justification for a policy that inflicts the same harm on others that those who engage in it are trying to heal. But it helps us to understand what motivates the policy, and what that policy entails, both conceptually and practically. And with that understanding in place, we can move towards a less simplistic assessment of the policy’s moral and political validity.

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. 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
state. 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.

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