

The Legal Experience of Injustice

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In *The Faces of Injustice*, Judith Shklar criticizes the ‘normal model’ of justice which views injustice as ‘a prelude to or a rejection and breakdown of justice, as if injustice were a surprising abnormality’.² Her central insight is that ‘the real realm of injustice ... does not stand outside of the gates of even the best of known states. Most injustices occur continuously within the framework of an established polity with an operative system of law in normal times.’³ She adds a second, Hobbesian insight: ‘[w]ithout juridical institutions and the beliefs that support them, there can be no decent, just, or stable social relations, but only anxiety, mutual mistrust, and insecurity’.⁴

Since juridical institutions and the beliefs that support them may be necessary for justice, but insufficient to prevent injustice, the insights are consistent. Moreover, the centralization of power that occurs with the institution of the modern legal state not only is insufficient to prevent injustice, but also puts into the hands of the powerful instruments to do injustice they would otherwise lack. My paper inquires into consistency, not as a matter of abstract logic, but of the logic of the legal experience of those in the ‘jural community’--the community of persons subject to the operation of a system of law. That experience is in part a normative experience--an encounter of a legal subject with authority--so not with what HLA Hart famously called ‘the gunman situation writ large’, the image in his positivist predecessor John Austin of the sovereign

¹ This paper is a draft for a lecture at the University of Sydney, the ‘Julius Stone Address’, which will also be part of a workshop on ‘Responding to Injustice’, the themes of which are informed by Judith Shklar’s reflections on that topic. It draws heavily on my *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge: Cambridge University Press, 2022), particularly chapter 5, ‘The Politics of Legal Space’. It is intended as a first step towards a book elaborating the themes of the chapter. I thank the organizers of the Online Lecture Series on the Rule of Law and Democracy at the Normative Orders Research Center of the Goethe University for the opportunity to present a draft of this paper, in particular my two commentators, Chiara Destri and Uwe Volkmann, as well as Rainer Forst for a most illuminating question, and Megan Pfiffer for helpful comments on a draft.

² Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990), 17.

³ *Ibid.*, 19.

⁴ *Ibid.*, 18.

as an ‘uncommanded commander’ whose commands backed by sanctions instill a habit of obedience in his subjects.⁵ More accurately, it is an encounter with the state’s authority as well as with its power to deploy sanctions..

Like Shklar, I wish to draw attention both to the way that grave injustices occur within operative systems of law in normal times and to the fact that such systems make possible and even legitimate legalized injustice. But I will argue that certain kinds of injustice are inconsistent with an operative system of law and create tensions in its operation. If these tensions cannot be resolved legally, that is, by using the system’s own procedural and substantive resources, the system will either change from one kind of legal order to another, or will cease to be a legal order at all since it will become a system of legally unmediated prerogative power.⁶

This argument seeks to unpack Shklar’s second insight to get a better grip on the first through a metaphor Hobbes himself deploys to understand operative systems of law. In *Leviathan*, Hobbes calls the civil law of the sovereign ‘Artificiall Chains’ that his subjects have ‘fastened at one end to the lips of the Man or Assembly to whom they have given the Sovereigne Power, and at the other end to their own Ears’. He adds that these chains are in ‘their own nature but weak’ but may ‘be made to hold, by the danger, though not by the difficulty of breaking them’.⁷

The metaphor may seem only to cement Hobbes’s authoritarian reputation. He put forward not only the first command theory of law, but also an extreme version of the ‘normal model of justice’ since, far from viewing injustice as a ‘surprising abnormality’, he excluded its occurrence altogether in insisting that there is no more to justice than the content of enacted law. On his view, subjects should understand that they are obliged to regard that content as just because they themselves have consented to be bound by the sovereign’s commands, whatever

⁵ H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’, in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49, at 59. See Norberto Bobbio, *Teoria Generale del Diritto* (Turin: G. Giappichelli Editore, 1993), 3, his emphasis: ‘*l’esperienza giuridica è un’esperienza normativa*’.

⁶ I use ‘operative system of law’ and ‘legal order’ synonymously.

⁷ Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1997, Richard Tuck, ed.), 147.

their content. I will try to show that the chain metaphor, properly unpacked, helps us to see that there are resources within any system of law that make it inherently resistant to certain kinds of legally imposed injustice merely because, to remain operative as a system, its law must be made, implemented, interpreted, enforced, and generally obeyed.

Part 1 makes more precise my understanding of the legal experience of injustice by sketching four ‘ideal types’ of state and the way in which they shape legal space so as to either enable or disable human rights lawyering, a term clarified later in this paper.⁸ I start by focussing on what Shklar regarded as striking examples of injustice within operative systems of law and build from there back to more abstract political and legal theory.

The sketch of the ideal types of state shows that if there is a legal order in existence, human rights lawyering will be possible. Lawyers can find resources in the law to contest the oppression visited by law on the clients they represent. And this legitimates the legal order not merely in that the powerful will have a claim to legitimacy bolstered by the participation of human rights lawyers in the legal order. It also actually legitimates the legal order because the sheer existence of a legal order—its facticity—provides the resources for legitimation in the normative sense.

Part 2 explains why the philosophers of law whom Shklar regarded in her influential work *Legalism* as involved as involved in a ‘tiresome’ ‘family quarrel’ about the relationship between law and morality are better understood as attempting to grapple with that process of legitimation.⁹ In her view, these philosopher—the ‘legalists’—are wedded to a methodology that

⁸ See Max Weber, *Economy and Society* (Cambridge, Mass.: Harvard University Press, 2019), 85. Interestingly, Weber adapted this idea from one of the classic texts on the juridical nature of the modern legal state, Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Verlag O Häring, 1905, 2nd edn.). See Keith Tribe at 473 of Weber, *Economy and Society*, and Jellinek, *Allgemeine Staatslehre*, 32-40. My usage here is perhaps closer to Jellinek, as he viewed the ideal type of the state as one which lives up to its ideal, whereas Weber was concerned, as Tribe puts it at 473, to find a ‘heuristic device’: a ‘thought image of the leading characteristics associated with a form or institution employed in ordering historical reality. For discussion of Weber’s reliance on Jellinek, see Andreas Anter, *Max Weber’s Theory of the Modern State: Origins, Structure, Significance* (Basingstoke: Palgrave, 2014), 13-14.

⁹ Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, Mass.: Harvard University Press, 1986), 106. See also her ‘Political Theory and the Rule of Law’, in Shklar, *Political Thought and Political Thinkers* (Chicago: University of Chicago Press, 1998, Stanley Hoffmann, ed.) 21.

ignores context and history, as well as to an ‘ideology’ that effects a ‘divorce of law from politics ... designed to prevent arbitrariness’. In addition, they regard politics ‘not only as something apart from law, but as inferior to law’ because ‘[l]aw aims at justice, while politics looks only to expediency’.¹⁰ *The Faces of Injustice* adds her main insight. Even within the legal orders of liberal constitutional democracy, a political system she wholeheartedly endorsed, those who adopt the normal model neglect the ubiquitous experience of injustice.

However, on my account, when context and history get more attention, the beliefs Shklar mentions that ‘support’ juridical institutions turn out to be also the institutions’ product. In *The Faces of Injustice*, she remarks in passing on a ‘curious division of labor’ in that philosophy ‘ignores iniquity, while history and fiction deal with little else’ and she suggests that political theory could fill this gap because ‘it lives in the territory between history and ethics’.¹¹ I agree, but add sociology, taking my cue from Austin’s command theory of law and the habit of obedience of subjects that is both a mark of and sustains operative systems of law.¹² I argue that the area of disagreement between the philosophers of law discussed in Part 2 is far from tiresome when reconfigured as about what I will call the ‘political sociology of obedience’. That makes philosophy of law exactly the kind of inquiry Shklar thought it should be. She complained once in a short follow-up essay to *Legalism* that philosophers of law tend to produce “‘legal”, legal theory’, but, with the addition of the political sociology of obedience, legal theory becomes ‘political, legal theory’, thus fully recognizing, as Shklar urged, the ‘social ethos upon which any viable legal system must be based’.¹³

¹⁰ Shklar, *Legalism*, 111.

¹¹ Shklar, *The Faces of Injustice*, 16.

¹² John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* (London: John Murray, 1885, 5th edn.),

¹³ Shklar, ‘In Defense of Legalism’, 51, 57. For ‘political legal theory’, see Dyzenhaus, *The Long Arc of Legality*. For a similar idea, see Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, Mass.: Harvard University Press, 2016) arguing that political theory pays too little attention to questions about political process, political institutions, and political structures. Waldron remarks at 7 that ‘[b]ad things happen mostly in the dark, in Fuller’s account, and unjust aims do not have the same coherence as good ones’, which he says is ‘an intriguing hypothesis, but the consensus in legal philosophy is that it cannot be pushed very far’. My aim here, as elsewhere, is to disturb that consensus.

1 Types of State and Human Rights Lawyering

In her wonderful essay ‘Political Theory and the Rule of Law’, Shklar offered what she regarded as a refutation of Lon L. Fuller’s ‘inner morality’ of law.¹⁴ Fuller had argued that if the powerful wish to rule by law, they will find that they must comply by and large with eight formal principles of legality: generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy through time, and ‘congruence’ between official action and declared rule.¹⁵ As he made clear, congruence, which he regarded as the most complex, required that rule by law respects procedural principles to do with the legal subject’s right to get an authoritative determination from an impartial and independent official, for example a judge, as to whether a particular action was congruent with the law, that is, within the limits of the official’s authority.¹⁶ A system that fails completely to meet one of these principles, or fails substantially to meet several, would not, in his view, be a legal system. It would not qualify as government under law—as government subject to the rule of law. Moreover, Fuller claimed that ‘[e]very departure from the principles of law’s inner morality is an affront to man’s dignity as a responsible agent’.¹⁷

But, Shklar claimed, Fuller’s inner morality is ‘perfectly compatible with governments of a most repressive and irrational sort’ since ‘the very formal rationality of a civil law system can legitimize a persecutive war state among those officials who are charged with maintaining the private law and its clients’. In her view, that was ‘certainly the case in Nazi Germany, whose legal caste were perfectly ready to ignore the activities of the new court, police and extermination system as long as the “inner morality” of their law could remain unaffected’.¹⁸

¹⁴ Judith N. Shklar, ‘Political Theory and the Rule of Law’, in Shklar, *Political Thought and Political Thinkers* (Chicago: University of Chicago Press, 1998) 21, 33.

¹⁵ Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969, revised edn.), 33-44.

¹⁶ Lon L. Fuller, ‘The Forms and Limits of Adjudication’ in Kenneth I Winston, ed., *The Principles of Social Order: Selected Essays of Lon L Fuller* (Oxford: Hart Publishing 2001) 101.

¹⁷ Fuller, *The Morality of Law*, 162.

¹⁸ Shklar, ‘Political Theory and the Rule of Law’, 33. *Legalism* and *The Morality of Law* both appeared in 1964, so Shklar’s critique of Fuller focused at that time on his ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 630. In ‘Political Theory and the Rule of Law’, Shklar refers to the sections of *The Morality of Law* summarized above, as well as to his essay ‘The Forms and Limits of Adjudication’ as it appeared in the 1978-79 *Harvard Law Review*. Fuller never responded in print to Shklar. However, his heavily annotated copy of *Legalism* shows that he thought, rightly in my view, that she often was in complete agreement with his main points. (I

Shklar cited in support of her claim the German lawyer and political scientist Ernst Fraenkel's *The Dual State* as one of the 'few older studies of the Third Reich that remains valid' and suggested that '[t]he paradox of slavery, that made the slave both a human person and the property of another, created a "dual state" in pre-Civil War America as well, and it was just as irrational.'

No-one can be three-fifths of a human being and two-fifths of a thing as the federal ratio had it in the original Constitution. Nor is the prohibition against murdering slaves, since they were people, compatible with their non-person status before the rest of the legal system, not to mention the exclusion from the guiding principles of the political order as a whole.¹⁹

But still this irrationality, she claimed, 'may be a model of "inner morality"' and 'may well serve to render irrationality more efficient and more attractive to those who benefit from it'. The dual state, she concluded, 'remains a constant possibility in our century'.²⁰ Shklar is right in her evaluation of Fraenkel's classic study and what seemed to her the possibility of the Dual State recurring has become something like a reality in our time.²¹ However, Fraenkel's book in fact shows why Fuller's 'inner morality' of law is *incompatible* 'with governments of a most repressive and irrational sort'. A Dual State does not give rise to a *legal* experience of injustice, but to an experience of prerogative rule; and that fact opens a window into the legal experience.

i The Dual State, the Rule-of-Law State and American Slavery

thank Ken Winston for correspondence on this topic and for sending me Fuller's copy.) Indeed, in *Legalism* Shklar, citing the Nazi order and Fraenkel (in note 120 at 208) said that 'a study of totalitarian politics' can make a 'great contribution to legal theory; in showing the 'impossibility of thinking of law as something just "there"—a given entity filled with varying values, but still a solid system to be dissected integrally and in isolation'; 207. One had to see, she thought, that 'certain ideologies and regimes are radically incompatible with any sort of stable rules' and that the 'political ends that law can serve' are 'relatively limited'; 207-08. Nazism was, she said, an 'actively anti-legalistic ideology'; 208.

¹⁹ Shklar, 'Political Theory and the Rule of Law', 33.

²⁰ *Ibid.*

²¹ See Cora Chan, 'From Legal Pluralism to Dual State: Evolution of the Relationship between the Chinese and Hong Kong Legal Orders' (2022) 16 *Law & Ethics of Human Rights* 99.

For Fraenkel, the Nazi state was a Dual State because it consisted of two states that existed side by side: the ‘normative state’, which contained whatever remained of the law and institutions of the Weimar legal order together with the statutory regimes enacted after 1933 and implemented through those institutions; and the ‘prerogative state’, which consisted of the apparatus of the Nazi Party wherein the leader’s will (his actual will or his will as interpreted by subordinate officials) was the ultimate source of authority.²² Fraenkel observed that the law of the normative state governed its subjects only so long as officials in the prerogative state did not find such government inconvenient. In other words, an official could override the law or the institutions of the normative state whenever this was considered in the interests of the Nazi Party. He contrasted the Dual State with what I will refer to as the ‘Rule-of-Law State’, roughly one governed in accordance with Fullerian principles.²³ He concluded that the rule of law did not obtain in Nazi Germany because the protections of the normative state were subject to the discretion of Nazi officials.²⁴

Fraenkel published his book in 1938 and, after emigrating to the US, he wrote and published a revised version in English in 1941. It is based on a particularly rich experience, his legal practice in Berlin from 1933 to 1938, which he was permitted to do despite being Jewish and socialist because of his service in the First World War.²⁵ In his Preface to the 1974 German edition, he said that in the final phase of his legal practice in Berlin he frequently described his work to friends as that of a “switchman”.

²² Ernest Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* [1941] (Oxford: Oxford University Press, 2017, 2nd edn.). I reserve capitalization in the text for the types of state, and so will have ‘normative state’ and ‘prerogative state’ since these are not, on my account, types of states, but the way Fraenkel described the spaces within the Dual State.

²³ Fraenkel, *The Dual State*, 156. Fraenkel found his model in A.V. Dicey’s influential work on the English constitution, which articulated a conception of the rule of law akin to Fuller’s inner morality, since he took such a state to be one in which all official action is subject to law, the officials are answerable for their actions before the ordinary courts, and the law to which they are answerable includes both the positive law that authorizes their actions and legal principles embedded in the law of that order. See A.V. Dicey, *The Law of the Constitution* (Oxford: Oxford University Press, 2013), 119.

²⁴ Fraenkel, *The Dual State*, 70-1.

²⁵ See Douglas G. Morris, *Legal Sabotage: Ernst Fraenkel in Hitler’s Germany* (Cambridge: Cambridge University Press, 2020).

That is, I regarded it an essential part of my efforts to ensure that a given case was dealt with under the auspices of the ‘normative state’, and not end up in the ‘prerogative state’. Colleagues with whom I was on friendly terms confirmed that they, too, had repeatedly worked towards making sure that their clients were punished in a court of law...²⁶

In the late 1930s, enforcement of law was thus wholly contingent on decisions of officials in the prerogative state permitting the train to run on the legal track, and, as Fraenkel pointed out, over time the space of the normative state contracted as officials in the prerogative state intervened increasingly in its matters. As a result, it was barely possible to be a lawyer in Nazi Germany, let alone a human rights lawyer, because the contours of the normative state both shrank and became more porous, the latter the result of a process Fraenkel charted that hollowed out the normative space from within. For officials in the normative state were constantly tempted to make prerogative-like decisions to avoid being overruled by officials in the prerogative state.

What then of Shklar’s other example of the Dual State as it existed through the legal institution of slavery in the pre-Civil War US? Here Shklar herself gestures toward my argument in suggesting both that slaves lived in a kind of Dual State and that the location of that state in the US constitutional order meant that the legal order was riven with tension. Shklar is right that a slave-owning society is like a Dual State in that enslaved persons live in a space where prerogative rules, though it is private individuals who wield their legally delegated power over enslaved persons, not state officials. Hence, this prerogative is granted by law and so subject to legal regulation or abolition. The example she cites of slavery in the pre-Civil War US shows that the tensions become even more palpable in a modern legal state, especially when it amounts to a constitutional democracy which not only promises freedom to all, but also is a federal state which contains several jurisdictions or legally constructed spaces in which slavery is abolished.

²⁶ Fraenkel, *The Dual State*, xix.

In constructing this complex legal order, the American founders built into the Constitution a tension which was particularly vivid to them, occasioned by the decision seven years before the Constitution came into force by the English Court of King's Bench in the case of *Somerset v. Stewart*. There Lord Mansfield held that an enslaved person brought to England could not be compelled to leave and was entitled to a writ of habeas corpus. In his judgment, Mansfield stated a wide-reaching jurisprudential basis for his decision: "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law It's so odious, that nothing can be suffered to support it, but positive law."²⁷

Somerset's case arose in private international law since the legal question was whether a court in jurisdiction B should recognize jurisdiction A's private law rules respecting ownership of property when a legal subject of A is involved in litigation in B concerning a situation created under A's law.²⁸ The American founders imported that question into their constitutional order by putting in place a federal system in which the Constitution promised liberty and justice to all, fudged the contradiction by permitting slavery without, as Shklar notes, naming it, and thereby permitted states to choose whether to permit or outlaw slavery. Since roughly it was southern states which took the former option and northern states the latter, I simplify this complex situation by treating the slave-owning states and the abolitionist states as blocks—the South and the North.

²⁷ I rely here on the report of the judgment in (1772) Lofft 1, 98 ER 499, as reproduced in Andrew Lyall, *Granville Sharp's Cases on Slavery* (Oxford: Hart Publishing, 2017), 233. For extensive discussion of the influence of Mansfield's dictum, see James Oakes, *Freedom National: The Destruction of Slavery in the United States, 1861-1865* (New York: WW Norton and Company, 2014).

²⁸ See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981); Daniel J. Hulsebosch, 'Somerset's case at the Bar: Securing the Pure Air of Jurisdiction within the British Empire' (2007) 13 *Texas Wesleyan Law Review* 699; Harold W. Horowitz, 'Choice-of-Law Decisions Involving Slavery: 'Interest Analysis' in the Early Nineteenth Century', (1970) 17 *UCLA Law Review* 588; Douglas Laycock, 'Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law', (1992) 92 *Columbia Law Review* 249; Louise Weinberg, 'Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist', (1997) 56 *Maryland Law Review* 1316; Aviam Soifer, 'Status, Contract, and Promises Unkept' (1987) 96 *Yale Law Journal* 1916; Note, 'American Slavery and the Conflict of Laws', (1971) 71 *Columbia Law Review* 74; and, of course, Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), quite likely also the author of the anonymous note.

These tensions reached their peak with ‘Fugitive Slaves’ who fled from slavery in the South to what they hoped would be freedom in the North. If they succeeded, they were required to be returned to their owners by the constitutional compromise on slavery which also permitted the enactment of a succession of federal Fugitive Slave Acts, designed in part to overcome the resistance by abolitionists in the North to the return of fugitives, a resistance often fought out by legal means in the courts.²⁹ It was precisely to address the tensions that in 1850 the South caused to be enacted the last federal Fugitive Slave Act which ‘denied the most basic right enshrined in the Anglo-American tradition: habeas corpus—the right to challenge, in open court, the legality of their detention.’³⁰ Once ownership was proved according to the property laws of South, the person was rendered back to captivity, unless the individual could offer proof of freedom, for example, emancipation papers signed by the former owner.

The 1850 law had two important and interrelated dimensions. First, it sought to turn public law cases about liberty into pure private international law matters with a foreordained result. Second, it sought to ensure that result by reducing the public law dimension of the litigation through stripping litigants’ procedural rights to the bone. Consider, for example, the problems attending the capture of Fugitive Slaves in the North who contested their rendition in court. When lawyers sought their release through applications for *habeas corpus* or other procedural devices, were the Fugitive Slaves litigating as free legal subjects in a space in which slavery had been abolished, or were they pieces of property which, once certified as such, required despatch back to the South?

This tension could be viewed as between, on the one hand, the norms of the Constitution other than the slavery-permitting Articles which transcended the enacted law of

²⁹ Article 4, Section 2 provided that ‘No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.’ It did not expressly permit the enactment of the federal legislation, but did provide a basis for it.

³⁰ Andrew Delbanco, *The War Before the War: Fugitive Slaves and the Struggle for America’s Soul from the Revolution to the Civil War* (New York: Penguin Press, 2018), 5.

both the North and the South and, on the other, private international law with the South claiming that its property law regime should govern. But the legal situation was made even more complex by other considerations.

First, public international law was itself in play. The anti-slavery principle in *Somerset's Case* was seen by abolitionists and argued in court by their lawyers to be one common to both natural law and public international law. Second, the Constitution was argued to include such principles despite the tension within it created by the combination of the slavery-permitting property Articles with the promise of freedom. Third, there was no strict division at that time between these branches of law and private international law, so that, as in *Somerset's Case*, the anti-slavery principle resisted the reach of the 'odious' rules of the South's enacted law into the space of the North. Finally, within the North, 'personal liberty' laws were enacted which sought to ensure that Fugitive Slaves had all the procedural rights of a free person when they litigated, which improved their chances of a favourable verdict.

The tensions thus resulted from the fact that abolitionist lawyers, the human rights lawyers of their day, could exploit the resources which their legal order made available to them, resources which were both procedural—the right to make an application to a judicial officer—and substantive, in that the procedural rights gave access to substantive rights in both constitutional and international law. Such tensions played a significant part in precipitating the Civil War since they forced to the fore of the political imagination of the country the resolution of the 'dilatory compromise' the founders had built into the constitution.³¹ The US had to come to terms, that is, with the legal experience of injustice of persons who faced a legal process in which they could be relegated to a space of prerogative power, and, moreover, an attempt to strip that process of any force in order to undermine access to substantive legal rights.

³¹ See Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, Jeffrey Seitzer, ed. and trans.), 84-88.

That the tensions could be resolved—to the extent that there was a resolution—only by the most extreme sort of politics is significant. It shows that ultimately existential problems about who is in the political community and who is out cannot be decided by courts. But it remains the case that these tensions arose because the constitutional compromise with slavery was built into the very commitment to govern by law. It was not, that is, that the tensions within the US legal order arose only because the founders made a promise of liberty and equality for all in the same constitutional breath that permitted slavery, nor that the federal design of the order transformed the private and public international law issue in *Somerset's Case* from a matter between state legal orders to one within a state's legal order. For these contingent features of the US legal order did not create the tension; they only exacerbated it.

The tension is contingent on there being legal order at all, since that makes the experience of injustice a legal one. It also made what would be recognizable to us today as human rights lawyering possible, though with enslaved persons it was difficult precisely because their experience was only in part legal. To the extent that they were ruled by the prerogative power of their owners, they were not subject to law any more than are the subjects of a Dual State.

Shklar is thus right that enslaved persons in the US lived in something like a Dual State. Within the space of private prerogative, they were ruled by a gunman writ small, albeit one backed by a gunman writ large, by that part of the US state committed to enforcing slavery even as other parts were committed to combating it. But that the former took place within an operative legal order meant that the issue that faced the US prior to the war was not only the moral question of slavery. It was also the legal question that arose because in some respects enslaved persons were legal subjects and in some respects not; in the US context, as we saw Shklar put it, 'three-fifths of a human being and two-fifths of a thing'.

In the Dual State in contrast, because its two spaces were held together by prudential factors not by law, the jural community within the normative state was entirely precarious. One

could be moved across the boundary between the two spaces at the will of a Nazi official. Moreover, once moved across that boundary, one was no longer a legal subject. Rather, one was an object of discretion, to be used as some official thought fit, which in the case of millions in Germany and in Germany's Occupied Territories meant fit for extermination. The significance of the construction of the legal space by prudential considerations rather than by law can be appreciated by contrasting the Dual State with the two other ideal types of state in which law is used to reduce the status of groups of subjects, though not to the extent of reducing them in some respects to things.

ii The Apartheid State and the Parallel State

The 'Apartheid State' is a perverse variant of a Rule-of-Law State. All inhabitants of apartheid South Africa were subject to the same general law. The racial laws of apartheid carved out vast exceptions to the rule of general law by creating the legal regimes that dominated the lives of black South Africans, subjecting them to severe discrimination. These regimes were for the most part run by specialized agencies and officials, and they relegated black South Africans—the majority of the population—to an inferior status in almost all aspects of life. Nevertheless, the ideal that all South Africans were equal before the law—the specifically legal ideal of human dignity³²—was maintained as an abstract ideal of the legal order throughout the apartheid-era, even as particular laws made it ever clearer that the animating political ideology of the ruling party was one of white supremacy.

To be both within the jural community in some respects and without for others is to occupy a highly problematic legal status, that of second-class citizen. Second-class status is much more *legally* problematic than the status of slavery, provided the enslaved persons are relentlessly consigned to the status of objects or things. For if one is legally recognized as having status as a responsible agent in some respects but not others, the parts of the law that seem to relegate one

³² See Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200.

to inferior status are thrown into question by those that do not in any case in which a challenge is brought to the former. Of course, the parts of the law that seem to relegate one to inferior status can be used to throw into doubt those parts that do not, to the point where inferior status for a group is so entrenched that individuals in the group are no longer second-class citizens because they are governed by an entirely different regime of law.³³

In that case, the order would change into one in which there are two separate spaces of legality, albeit held together by law. It would become a 'Parallel State', and my example here is Israel and the Occupied Territories. These two legal orders were unified during the initial period of occupation after the 1967 war when the Israeli Supreme Court became the apex court for both legal orders by starting to take jurisdiction over appeals from the military courts operating in the Occupied Territories. Within this unified legal order, a fairly clear distinction is maintained between the two sub-orders except for the fact that the Court regards the military as governed by Israeli administrative law, on the basis that as an arm of the executive it is subject to the same administrative law norms as any arm of the state.³⁴

On the one hand, within the Israeli legal order (ILO), the supreme legislative authority is the parliament, the Knesset, which legislates subject to the regime of constitutional law developed out of Israel's Basic Laws by the Court. On the other hand, within the legal order of the Occupied Territories (OTLO), the supreme lawmaker is the military which legislates subject to the regime of law developed by the same Court, but one which, while curbing some kinds of arbitrariness, in general defers to the military's say-so in security matters when it came to the

³³ See David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2010; 2nd edition).

³⁴ See David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York: Oxford University Press, 2021, 2nd ed.), chapter 3. In 2020 the Knesset enacted a law which requires that the authority to decide administrative law challenges from the OTLO is transferred from the Supreme Court to the Israeli Administrative Courts. See Tamar Hostovsky Brandes, 'The Diminishing Status of International Law in the Decisions of the Israeli Supreme Court concerning the Occupied Territories', (2020) 18 *International Journal of Constitutional Law* 767, at 770. She also points out that recently the Court has started to rely more on constitutional law than on public international law in its rulings and suggests that the effect may be to diminish even further the substance of judicial supervision and to further a process of 'creeping annexation' by permitting the Knesset to legislate for the Occupied Territories. This shift is consistent with a deliberate eradication of the distinction between Israel and the Occupied Territories by the parliament and the government.

facts and to the controls which are considered appropriate to apply. Occasionally, the Court finds that public international law is relevant to its deliberations, though it filters such norms, and occasionally ideas from Israeli public law (for example, proportionality), through administrative law. As a result, the norms are viewed as constraints on military implementation of the policy of the law, not on the policy itself, which also means that the Court will usually defer to the military understanding of appropriate policy. Hence, in this Parallel State, the law that governs the lives of Palestinians in the OTLO is not an exception to the general law of the ILO, but the system of administrative law developed by the Court.

In this light, we can see that for an Apartheid State to rid itself of the internal tensions created by the legal relegation of the majority of its subjects to second-class status, it would have to choose between two options. Either it could increase the pockets of prerogative that existed within it to become a Dual State, or it could turn itself into a Parallel State.

The actual Apartheid State of South Africa went quite far along the path to adopting both options. Statutes implementing apartheid policy made over time an attempt to set up not just one parallel legal order, but many, in the form of self-governing 'Bantustans', later called 'homelands'. In this way, it tried unsuccessfully to escape the legal tensions that will exist in any operative system of law in which law is used to impose a rigid and racialized caste grid on a society while maintaining the groups in one jurisdiction, which requires that the groups are in some respects subject to the same general norms.

In addition, security legislation designed to make it easier for the government to stamp out political opposition became ever more draconian, to the point where it permitted indefinite detention without trial on the basis of the entirely subjective opinion of the detaining officer about risk to national security. These statutes were equipped with privative clauses that explicitly and considerably narrowed the procedural rights to contest their implementation by depriving detainees of the right to see a lawyer and ousting the jurisdiction of the courts. The situation of

the targets of such legislation was thus perilously close to pockets of lawlessness, akin to the individuals who found themselves at the mercy of the officials of the Nazi prerogative state.

Still there was a difference in that the normative state in which Fraenkel's victories were won was contiguous with the prerogative state, which was not an exception to the order of the normative state in the sense that apartheid laws created exceptions—often vast—to the fundamental legal principles of the Rule-of-Law State. Rather, as Fraenkel pointed out, the prerogative state was exceptional in that it was Carl Schmitt's 'state of exception' writ large,³⁵ a space unbounded by law in which those who wielded power were like the bounty hunters and federal commissioners who in the antebellum US rendered people into a space of lawlessness, though the space was unlike the prerogative space of slavery in that it had no legal boundaries.

Thus while the apartheid policy of the governments that ruled South Africa for more than 40 years had a clear aim—the complete separation of the racialized groups considered inferior to the white population, so long as the state maintained its commitment to governing by law, the attempt to implement that policy created tensions within the legal order such that human rights lawyers could find legal resources to resist the attempt. Moreover, because the majority black population and members of other racialized groups remained subject to the legal order's general norms, they and the political organizations that represented them, including those that had resorted to armed struggle, retained a stake in the legal and political order.

In contrast, in the Parallel State created by Israel, there is an unresolved conflict between two ideologies. The official ideology is that there will be a 'two state' solution to the political conflicts—that the Parallel State that now exists will become two fully independent states. On this view, the fundamental law of the OTLO consists of the public international law norms that govern belligerent and temporary occupation as refracted by the Court through the prism of administrative law. For this reason, the Court cannot accept that the normative regime which

³⁵ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: MIT Press, 1988, George Schwab, trans.). Fraenkel's many references to Schmitt in *The Dual State* show that he regarded Schmitt as the main theorist of the Dual State.

governs the West Bank is part of the Israeli constitutional order and in fact does not assume that it has jurisdiction over the OTLO. Rather, it takes jurisdiction in the cases it decides on the basis that both the state and the lawyers for the Palestinian litigants consent to jurisdiction.³⁶

The other ideology is the policy of greater Israel with ‘creeping annexation’ the way to achieve its goal. On this view, there is no problem of belligerent occupation, since the territories were ‘liberated’ not occupied, only the problem the state encounters in dealing with Palestinian resistance and the international community. But while the logical terminus of this policy is a ‘one state solution’, it is politically unacceptable, since it would require one of two options. First, a move to a Rule-of-Law State in which there are no second-class citizens, and in which the Palestinian population would outnumber the Jewish population. Second, a move to a full-fledged Apartheid State, one riven with even worse tensions than the South African equivalent, because those who are currently Palestinian citizens of Israel would either have greater rights than Palestinians from the Occupied Territories or be stripped of their rights under current Israeli constitutional law.³⁷

In deciding matters that come out of the OTLO, the Court thus must walk two tightropes at once, one strung between the competing political ideologies, the other between Israeli public law and public international law. It stays on these tightropes by filtering constitutional norms from both its own law and from public international law through Israeli administrative law. The unfortunate effect for Palestinians in the Occupied Territories is that, in their legal conflicts with settlers, their rights weigh less because they are counted as protected interests in administrative law, while settlers’ rights are full-fledged constitutional rights, since their enclaves are treated as part of the ILO for these purposes. Moreover, there is the factor

³⁶ See Kretzmer and Ronen, *The Occupation of Justice*, chapter 2.

³⁷ I do not assume that Palestinian citizens of Israel are first-class citizens. For discussion, see Hassan Jabareen, ‘Hobbesian Citizenship: How the Palestinians Became a Minority in Israel’ in Will Kymlicka and Eva Pföstl, eds., *Multiculturalism and Minority Rights in the Arab World* (Oxford: Oxford University Press, 2014) 189.

already mentioned that the Court will defer to what it considers to be military expertise when it comes to matters of policy, especially any matter that involves security considerations.

However, the OTLO is not a prerogative state in which individuals are subject to the arbitrary will of those with power over them. The officials of the system may not disobey the standing commands or orders of the military authorities and there is even less arbitrariness because the Court's oversight has resulted in more procedural safeguards than the military authorities thought appropriate. Further, there have been some decisions, especially those brokered between lawyers in 'the shadow of the Court', which have made a substantive difference.³⁸ Here, and in contrast to the Dual State, officials in the OTLO make decisions that are more rule-of-law compliant in order to avoid a situation in which the Court will likely give a judgment that definitively and publicly declares that they are acting lawlessly.

The tensions in issue arise because that Court presides at the same time over the Israeli state, a Rule-of-Law State, which it has had a prominent role in designing. Within the OTLO, Palestinians are neither quite second- nor quite first-class citizens. To be a second-class citizen, there must be a group of first-class citizens in whose status the second-class citizens to some extent partake and the Palestinian inhabitants of the OTLO are not subject to the fundamental principles which lie at the basis of the ILO. They are also not quite first-class citizens for two independent reasons.

First, they live in areas contiguous with the enclaves in which settlers are deemed first-class citizens of the ILO which puts them into a legal relationship on highly unequal terms. Palestinians in the Occupied Territories are, that is, virtual second-class citizens because they live under an occupation which provides full status for settlers and an inferior status for them while the Court's jurisdiction over them gives them a toehold, not a foothold, in the first-class space. But even that toehold is at best precarious since the Court both offers and withdraws the

³⁸ See Kretzmer and Ronen, *The Occupation of Justice*, 507-10. They note at 510 the suggestion that government lawyers may also play a restraining role through the advice they give to the military about the legality of proposed activities.

protections of legality. It gives them procedural rights to contest official action, but at the same time narrows dramatically the substantive resources available for that contest.

Second, even abstracting from that fact, while all the subjects of the OTLO are equally subject to the law, the law to which they are subject is the commands of those who occupy their land by force. The occupation authority may seem more in that respect like what Hart described as the ‘uncommanded commander’--the ‘gunman writ large’--of Austin’s command theory of law than like a legislature which legislates by enacting the general laws which together could be said to make up a public order of law.³⁹

To be a first-class citizen is to be treated with what we saw Fuller describe as dignity as a responsible agent and within the OTLO that ideal is reduced to what Joseph Raz describes as the ‘guidance function’ of law—the law just tells people what they must do. This is not nothing. To the extent that the law is not arbitrarily enforced, Palestinians can plan their lives, which, as Raz suggests in a deliberate echo of Fuller, does provide for some measure of freedom and dignity, and indeed without which there can be neither freedom nor dignity.⁴⁰ That there is some measure of freedom and dignity is, of course, important. It shows that even as law oppresses, it must enable something of moral worth, which is what makes human rights lawyering possible, though both highly fraught and morally complex. That complexity is the foundation for the bridge that reaches from human rights lawyering to political legal theory, as I now begin to explain.

iii Human Rights Lawyering in Unjust Regimes

In his book on his practice of human rights law in the Occupied Territories, Michael Sbard argues that regime change cannot be an aim of human rights lawyers such as himself because they accept the limits the law imposes on their practice.⁴¹ Not only do their losses in court help

³⁹ Hart, ‘Positivism and the Separation of Law and Morals’, 603.

⁴⁰ Joseph Raz, ‘The Rule of Law and its Virtue’, in Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1983) 210, 213-14, 219-23.

⁴¹ Michael Sbard, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights* (New York: Metropolitan Books, 2018), especially the concluding chapter, ‘Sand on the Slope’.

to shore up the legitimacy of the regime, but also their occasional victories, because the latter support the authorities' claim to be ruling in accordance with the rule of law. That fact has made Sfarid and others wonder whether they should discontinue their practice because overall the calculus is that they do more harm than good. But they find themselves unable to give up because the victims of the oppressive regime turn to them for help.

There is another reason for continuing. The experience of human rights lawyers during apartheid looms large in Sfarid's argument.⁴² On the last page of his book, he asserts that 'one day the occupation will end, like apartheid in South Africa' and when it does 'we'll find that we are not entirely bereft of a culture of good government, that we do have moral foundations to draw on.' That provides the reason why 'human rights lawyers must hold their heads high and know that they have a role in the appearance of cracks in the occupation'.⁴³

On the way to this conclusion, Sfarid sketches the heated debate that took place in South Africa in the 1980s when Raymond Wacks, in an inaugural lecture as a professor of public law, called on the few liberal judges on the bench to resign.⁴⁴ As Sfarid notes, Wacks's challenge rested on three claims. First, Wacks suggested that the principles of apartheid ideology were so strongly embedded in the law that they had largely displaced the principles of freedom and equality that had at one point been part of the legal tradition of Roman-Dutch common law. Second, and as a result judges could in most cases give liberal or rights-protecting judgments only by lying about what the law required. Third, to the extent that South African law still offered a limited basis for such judgments, these would be overruled by legislative fiat and would in any case serve to bolster the regime's claim to legitimacy. Judges should thus resign because they 'inevitably enhanced the regime's legitimacy without any real ability to make changes for the better'.⁴⁵

⁴² Ibid, 443-4 and 447-8.

⁴³ Ibid, 455.

⁴⁴ The debate started in the national press and then continued in the *South African Law Journal*. See Raymond Wacks, 'Judges and Injustice' (1984) 101 *South African Law Journal* 266. and John Dugard, 'Should Judges Resign? A Reply to Professor Wacks' (1984) 101 *South African Law Journal* 286.

⁴⁵ Ibid, 447-48.

The main response came from South Africa's leading human rights scholar, John Dugard. He conceded both that the room for judicial manoeuvre within the law had diminished and that judges' service on the bench lent legitimacy to the regime. But, on the first point, he suggested there was more room than Wacks supposed and, on the second, he argued that the participation of human rights lawyers in court, and even that of law professors in criticizing the courts and in educating students in the basis for such criticism, served to legitimate. There was, that is, 'no clear line of moral responsibility between a judge and a lawyer, a practitioner and an academic'. In answer to Wacks's third point, he argued that the 'price of legitimacy' was worth paying because the cost of resignation would be abandonment of the victims of injustice who sought representation and 'hoped that the courts would rule in their favour'. Dugard added that the human rights lawyers of his day also had to keep an eye on the future, on the benefit of keeping alive what we saw Sfarid describe as the 'culture of good government'.⁴⁶

Sfarid does not note that Wacks based his claim about judicial duty on his understanding of Ronald Dworkin's 'interpretivist' theory of law, according to which judges must strive to show the law in its 'best moral light' by deciding 'hard cases' on the basis of the principles implicit in the relevant law. Wacks, that is, claimed that South African judges were under a duty to decide cases on the interpretation of apartheid statutes in light of the principles of the racist ideology implicit in the law.⁴⁷ Just as I said earlier that the Apartheid State is a perverse variant of a Rule-of-Law State, his intervention raises starkly the question whether in such a variant perverse Dworkinianism prevails, such that, as Raz once put it, Dworkin's position would seem to 'require a South African judge to use his power to extend Apartheid'.⁴⁸ Indeed, the Dworkinian dimension of Wacks's argument led Dugard to point out that the

⁴⁶ Ibid, 448-49.

⁴⁷ Wacks, 'Judges and Injustice', 270-8.

⁴⁸ Joseph Raz, 'Authority, Law, and Morality', in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press: 1994) 194, at 208.

statutes comprising the law of apartheid do not provide a complete system of law within themselves. These statutes must still be interpreted in light of the common law, administrative powers exercised under these laws must still be reviewed in accordance with common-law principles of natural justice, and subordinate legislation must still be tested by the common law standards of reasonableness.⁴⁹

That, he said, is ‘the nature of South African law’ since there was ‘no statutory or common law directive to judges to adjudicate the laws of apartheid in accordance with the principles’ of apartheid ideology.⁵⁰ He thus raised a doubt about whether the apartheid legal order could ever be made a system of unremitting injustice such that perverse Dworkinianism would prevail, though he left it unclear whether this was a contingent fact about this legal order or a claim about legal order in general.⁵¹

I suspect Sfarid omits these details because he asserts that he can ‘sidestep’ the ‘fervent debate between legal positivists and other schools of philosophy of law over the nature and characteristics of a legal norm’.⁵² But, relying on his accounts in his book of the dilemmas of his legal practice, he also asserts that a ‘legal norm ... does not have the power just to *dictate* but also to *justify*’ and that ‘[w]e obey laws not just because they come with mechanisms for enforcement but because we accept that following them is the right thing to do. We accept, for the most part, that a norm established through the prevailing constitutional order is justified’.⁵³ And with these assertions, he may seem to adopt a view of law that takes sides in the debate, if, as Hart following Austin understood it, it is about the proposition that the ‘existence of law is one thing; its merit or demerit is another’, and so a debate about Hart’s ‘Separation Thesis’ that there is no necessary connection between law and morality.⁵⁴

⁴⁹ Dugard, ‘Should Judges Resign? A Reply to Professor Wacks’, 289-90.

⁵⁰ Ibid.

⁵¹ See David Dyzenhaus, ‘Dugardian legal theory’, in Tiyanjana Maluwa, Max Du Plessis, and Dire Tladi, eds., *The Pursuit of International Law in a Brave New World: Essays in Honour of John Dugard* (Boston: Brill, 2017) 1.

⁵² Sfarid, *The Wall and the Gate*, 435.

⁵³ Ibid.

⁵⁴ Hart, ‘Positivism and the Separation of Law and Morals’, 52, quoting Austin.

Hart's principal concern is this debate was to equip legal subjects to be able to answer the question of obedience posed by unjust laws by helping them to avoid the trap of 'obsequious quietism'--the view that because X is the law, it will have a moral quality such that it should be obeyed.⁵⁵ But human rights lawyers like Sfard know not only that the particular laws they contest are unjust, but also that the regime as a whole is unjust. Moreover, they are keenly aware that their participation in the OTLO bolsters the legitimacy claim of the Israeli state. Indeed, his co-authored book *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* observes the OTLO almost exclusively from what Hart described as the 'external point of view', the perspective of an observer who regards law as a gunman situation writ large.⁵⁶ From this perspective, when reckoned in the currency of legitimation, the cost of participation involved in taking the 'internal point of view' of a participant in the system is prohibitively high.

The contrast between these two modes of scholarship highlights the topic of my next section on the consequences of the choice to take the internal point of view, whether it is the philosopher's choice to understand an operative system of law as more than a gunman situation writ large or the lawyer's choice to practice human rights law in the courts.

II Legitimation in the Normative Sense?

Hart might well have agreed with Sfard's claim that legal norms justify as well as with his analysis of the dilemmas human rights lawyers working in an oppressive regime face for two reasons, one empirical, the other theoretical. First, he could have pointed out that the major area of disagreement between Wacks and Dugard was about both the actual extent to which human rights lawyering was still possible in the 1980s in apartheid South Africa and a prediction as to the actual consequences of the choice of participants in the legal order to continue. If that were

⁵⁵ Ibid, 53-4. Hart takes the term 'obsequious quietism' from Bentham.

⁵⁶ Orna Ben-Naftali, Michael Sfard, and Hedi Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge: Cambridge University Press, 2018).

all disagreement amounted to, the connections between law and morality in this context would be, as his Separation Thesis insists, wholly contingent on the content the legal record happened to have and the basis for human rights lawyering in a highly oppressive legal regime would be theoretically uninteresting.⁵⁷ It would reside in the fact that law requires interpretation, so there will always be some room for judges to exercise creative judgment and human rights lawyers can try to persuade judges to decide in their favour. In Hart's terms, judges will be able to exercise discretion in 'penumbral' cases in which the law is uncertain and so may opt to decide in the most rights-friendly way.⁵⁸

Second, Hart emphasized that legal officials (including judges) must in some sense 'accept' the authority of law. He explained that the operation of legal order can't be reduced, as he took the command theory to do, to coercion and obedience, observed as empirical facts from an external point of view. Law, he argued, must be understood in the register of authority since at least the officials of the order do not obey its rules because they fear coercion. Rather, they enforce, implement and interpret the rules because they accept their legal order as authoritative; they take, that is, the internal point of view. '[A] necessary condition of the existence of coercive power is that some at least must voluntarily co-operate in the system and accept its rules' so that '[i]n this sense it is true that the coercive power of law presupposes its accepted authority.'⁵⁹

In later work, Hart accepted Raz's proposal that one should also distinguish between the 'committed' point of view of a participant in legal order who accepts its authority, and the 'detached' or 'uncommitted' point of view of individuals who recognize that the legal order depends on the existence of at least a minority of committed sorts, but do not themselves accept its authority.⁶⁰ For Hart and Raz, the distinction allows philosophy of law to fully elucidate the nature of legal order as an authoritative system, without regard to questions about the actual

⁵⁷ Hart, 'Positivism and the Separation of Law and Morals', 52-4.

⁵⁸ Ibid, 62-72.

⁵⁹ Hart, *The Concept of Law*, 203.

⁶⁰ H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982) 127, 153-61, referring mainly to Raz, *The Authority of Law*, 153-9.

legitimacy of legal order in general or of any particular legal order. As Hart explained, it identifies a ‘type of detached statement made from the point of view of those who accept the law by those who do not in fact accept it’.⁶¹

Armed with this distinction, legal positivists may seem able to take on board Sford’s observations about legal norms. They can say that participants in legal order share the committed point of view of those who suppose that acting as they do is the right thing because legal norms do justify. In addition, legal positivists can accept that such participation amounts to what we can, at least for the moment, think of as ‘legitimation work’ in contrast to ‘legitimacy work’. The former is work that bolsters a regime’s claim to legitimacy without making it actually legitimate. In this sense, one can describe the work of human rights lawyers during apartheid as legitimation work that supported the state’s inevitable claim to legitimacy while at the same time asserting that the claim was false because the Apartheid State was wholly illegitimate. In contrast, one might suppose that the work of such lawyers made the Apartheid State at least somewhat legitimate.

This distinction alerts us to an ambiguity in my claim above that human rights lawyers can find resources in any operative system of law to contest the oppression visited by law on their clients. I suggested, further, that this feature of legal order legitimates not only in that the powerful will have a claim to legitimacy bolstered by the participation of human rights lawyers, but also actually legitimates the legal order because its sheer existence—its facticity—provides the resources for legitimation in the normative sense. However, legitimation in the normative sense can mean ‘legitimation work’ rather than ‘legitimacy work’, with the former concept more at home in sociology than in political philosophy, where it is associated with Max Weber’s pioneering inquiry into the legitimacy of the modern legal state.⁶²

⁶¹ Hart, *Essays on Bentham*, 157.

⁶² I owe this important distinction to Kieran McEvoy, Louise Mallinder and Anna Bryson, *Lawyers in Conflict and Transition* (Cambridge: Cambridge University Press, 2022), who take it from Rodney Barker, *Legitimizing Identities: The Self-Presentations of Rulers and Subjects* (Cambridge: Cambridge University Press, 2009), who owes it to Max Weber. I suggest in a review of McEvoy, *et al.*, that the distinction is clear albeit implicit in their sociological tradition, but also

Here we should recall Hart's suggestion in the Preface to *The Concept of Law* that the book 'may also be regarded as an essay in descriptive sociology'.⁶³ This suggestion has occasioned much head scratching; Ronald Dworkin deemed it 'famously baffling'.⁶⁴ And it is often thought to be a reference not to sociology at all, just an indication of Hart's reliance on J.L. Austin's 'ordinary language' philosophical methodology.

The claim is not so baffling when connected to Hart's remark in the previous paragraph that a 'central theme of the book' is that law cannot be understood without an appreciation of the 'crucial distinctions between two different kinds of statements', that is, those from the internal and those from the external points of view.⁶⁵ As Hart's biographer Nicola Lacey has pointed out, Hart's copy of Weber's *On Law in Economy and Society* is heavily annotated at just the point where Weber set out his view of legitimation work and the necessity to understand it from his equivalent of the internal point of view.⁶⁶ Hart, that is, wanted a theory of legal order in which the orientation of the actors or its participants towards the rightness of the order is fully accounted for observationally. As one might say, the observer accounts for the actors' orientation without making any judgment about rightness. Such observation is not from the external point of view since orientation or acceptance of rightness is irrelevant to a point of view that focuses exclusively on facts about conduct. Nor is it the 'fully committed' or 'full blooded' 'internal point' of view of the participant, which is why the 'detached point of view' seemed appropriate to Hart, following Raz's refinement of his distinction.⁶⁷

not one they can maintain, as demonstrated by their book in which talk of legitimation inevitably shades into legitimacy. See David Dyzenhaus, 'Cause Lawyering: Optimism About the Rule of Law?' *Journal of Law and Society* (2023) forthcoming.

⁶³ Hart, *The Concept of Law*, v.

⁶⁴ Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: Belknap Press, 2006), 165.

⁶⁵ Hart, *The Concept of Law*, v.

⁶⁶ Nicola Lacey, 'Analytical Jurisprudence Versus Descriptive Sociology Revisited' (2006) 84 *Texas Law Review* 945, at 951. She quotes from Hart's copy of Weber as follows: '[c]onduct ... can be orientated on the part of actors towards their *idea* of the existence of a *legitimate order*' and that 'then only will an order be called "valid" if the orientation towards [its] maxims occurs, among other reasons also because it is ... regarded by the actor as in some sense *obligatory* or *exemplary* for him'. See Max Weber, *On Law in Economy and Society* (Cambridge, Mass.: Harvard University Press, 1954, Max Rheinstein, ed., Edward Shils, trans.), 3. Weber's emphasis. Lacey also points out that Hart heavily marked passages in the book that underpin his own analysis of points of view. (See, in addition, Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004), 230-31.)

⁶⁷ See Hart, *Essays on Bentham*, 154-61, and Raz, *The Authority of Law*, 153-9, for this array of terms.

However, they differed in that Hart has a sociological theory of the authority of law and Raz a moral theory. Hart argued that law *has* authority, not merely that it *claims* authority, whereas a moral theory argues that law has the authority it claims when and only when its content lives up to the demands of a set of moral criteria independent of law, the demands of what I called earlier moral justice. For Raz, law will have the authority it claims when and only when it vindicates his ‘Normal Justification Thesis’, which requires that the reasons the law transmits to subjects in fact serve their interests better than if they were to judge for themselves. If a legal order lacks legitimate authority it will, Raz says, have *de facto* authority in that, while it does not have the authority it claims, it is ‘capable of possessing the requisite moral properties of authority’.⁶⁸

Hart rejected what he called the ‘moral component’ in Raz’s theory of law’s claim to legitimate authority, but he did confess to a large problem that rejection raised for his own account. The virtue of Raz’s account, he suggested, is that it responds to the idea that when a subject is stated to have a duty to act contrary to his own sense of his interests, it is assumed that there exist reasons that are objective in that they ‘exist independently of his subjective motivation’.⁶⁹ On this assumption, ‘it would be difficult to deny that legal duty is a form of moral duty’ because that denial would seem to entail that there were ‘two independent “worlds” or sets of objective reasons, one legal and the other moral’. Hart thus conceded that his own ‘non-cognitive’ account of legal reasons seems committed to the ‘paradoxical’ and even ‘confused’ conclusion that ‘judicial statements of a subject’s legal duties need have nothing directly to do with the subject’s reasons for action’.⁷⁰

Hart therefore detected a problem for his positivist tradition. If one of the features of law that requires explanation is law’s authority, the philosopher of law needs to explain how law

⁶⁸ Joseph Raz, ‘Authority, Law, and Morality’ in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) 194, at 199.

⁶⁹ Hart, *Essays on Bentham*, 266–8.

⁷⁰ *Ibid.*

provides reasons of a special kind to subjects--‘authoritative legal reasons’.⁷¹ But since Hart was not willing to countenance that such reasons have a moral quality to them, he confessed that he was at something of a loss. However, Raz may have a different version of the same problem since his distinction between legitimate and *de facto* authority invites questions which his theory of authority does not help to answer. First, does an illegitimate legal order have *de facto* authority? Second, if it is merely capable of having authority, is it a legal order at all, capable of producing valid laws? Third, if an illegitimate legal order has only *de facto* authority, what kinds of reasons do its laws supply to officials and subjects?

Because Hart’s task is to explain the authority law has, not that which it merely claims, he can answer ‘yes’ to the first question. He may thus ignore the second question. But he is stuck with the answer to the third he found confused and paradoxical, one which, to borrow from philosophers who work in his tradition, understands the reasons that law supplies as ‘normatively inert’⁷² or as possessing only ‘weightless normativity’,⁷³ in other words, as unauthoritative, authoritative legal reasons. Raz, in contrast, wavers between answering ‘yes’ and ‘no’ to the first question. ‘Yes’ permits him to ignore the second question. But ‘no’ squarely confronts his moral theory of authority, which then also commits him to the paradoxical idea of unauthoritative, authoritative legal reasons.

The exchange between Hart and Raz does, however, help to illuminate the path forward. When Hart talked of ‘official acceptance’, he tended to think of the relationship of acceptance as one between the officials, on the one hand, and the fundamental rules of the legal order, on the other. Acceptance refers to the voluntary cooperation of each official with every other in upholding the fundamental rules of their operative system of law. But since their acceptance

⁷¹ Ibid, chapter X.

⁷² John Gardner’s useful and telling phrase: Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012), 23.

⁷³ Developed by Jeffrey Kaplan in his 2018 PhD thesis, ‘Weightless Normativity: A Theory of Law, Language, and More’ <https://escholarship.org/uc/item/8gb35173>. See also his unpublished paper, ‘The Internal Point of View’, on file.

suffices for a legal order to exist, the acceptance of subjects is not an existence condition of legal order. The path forward has to do with the issue of the scope of the authority relationship, with acknowledging, adapting Hart's response to Raz, that 'judicial statements of a subject's legal duties need have [something] ... directly to do with the subject's reasons for action'.⁷⁴

This path brings legal subjects into the picture so that we can understand why legal officials are able to make decisions responsive to the subjects. Their activity is understood as part of the dynamic patterns of voluntary cooperation 'creating *authority*' without which 'the coercive power of law and government cannot be established'.⁷⁵ But that path opens only when one sees how, in light of the argument so far, sociological legitimation shades into normative legitimation because of the participation of different actors in it, participation which is only possible if there is a basis inherent in legal order that makes human rights lawyering possible. And with this shift, legitimation work becomes unambiguously, though complicatedly, legitimacy work, which makes it time to return to the metaphor of law as a chain.

III The Political Sociology of Obedience

The metaphor of the law as chain is pervasive in political and legal philosophy. When Rousseau opens *The Social Contract* with 'Man is born free; and everywhere he is in chains', it is the civil law he has in mind and the whole of the book can be understood as an argument about how to make such enchainment 'legitimate'.⁷⁶ In his 1934 *The Pure Theory of Law*, Hans Kelsen describes the legal system as a 'chain of creation'.⁷⁷ And in *The Morality of Law*, Fuller claims that the fact that there is an 'inner morality' to legal order establishes a 'bond of reciprocity' between lawgiver and citizen, which, if 'finally and completely ruptured by government', leaves 'nothing ... on which to ground the citizen's duty to observe the rules'.⁷⁸

⁷⁴ Hart, *Essays on Bentham*, 266–8.

⁷⁵ Hart, *The Concept of Law*, 201, his emphasis.

⁷⁶ Jean-Jacques Rousseau, *The Social Contract* in *The Social Contract and Other Later Political Writings* (Cambridge: Cambridge University Press, 2004, Victor Gourevitch, trans. and ed.), 41.

⁷⁷ Translated as Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992, Bonnie Litschewski Paulson and Stanley L. Paulson, trans.), 56.

⁷⁸ Fuller, *The Morality of Law*, 40.

Fuller's 'inner morality' and 'bond of reciprocity' may seem a far cry from the authoritarian top-down image of chains maintained by the force of the sovereign's sword associated with Hobbes. But recall that, on Hobbes's account, it is the subjects themselves who fasten the chains. Moreover, at the end of *Leviathan*, he says that the point of the book is to set 'before men's eyes' the 'mutuall relationship between protection and obedience'.⁷⁹ He also therefore claims a reciprocal relationship. Of course, that claim may seem like an attempt to make palatable the truth in the chain metaphor: that the threat of the sword of the sovereign—the 'danger' of punishment by overwhelming force—is what makes the law into chains, just as in Rousseau the idea of a general will that binds citizens because they have themselves willed it, whatever its content, has at times earned him a place in the pantheon of authoritarian thinkers.⁸⁰

Precisely this aspect troubled Hart who acknowledged the metaphor as capturing the way in which the 'pressure' to obey 'appears as a chain binding those who have obligations so they are not free to do as they want' and commented that '[t]he other end of the chain is sometimes held by the group or their official representatives, who insist on performance or exact the penalty ...'⁸¹ But he complained that the metaphor 'haunts much legal thought': 'Natural and perhaps illuminating though these figures or metaphors are, we must not allow them to trap us into a misleading conception of obligation as essentially consisting in some feeling of pressure or compulsion experienced by those who have obligations.'⁸² As he explained, 'if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily' since '[w]ithout their voluntary co-operation, thus creating *authority*, the coercive power of law and government cannot be established'.⁸³

In addition, Hart was in agreement with Shklar's assertion that Fuller's inner morality is 'perfectly compatible with governments of a most repressive and irrational sort'. In fact, the

⁷⁹ Hobbes, *Leviathan*, 491.

⁸⁰ See J.L. Talmon, *The Origins of Totalitarian Democracy* (Great Britain: Secker & Warburg, 1952).

⁸¹ Hart, *The Concept of Law*, 87.

⁸² *Ibid*, 88.

⁸³ Hart, *The Concept of Law*, 201. His emphasis.

agreement goes even deeper. Shklar's view of law is for the most part as an instrument of politics, a view which lends itself to absorbing, as Raz following Hart attempted to do, Fuller's principles of legality into legal theory by making them principles which, if followed, shape law into a more effective instrument of extra-legal politics.⁸⁴ The image of law that animates this view was well described by Fuller as a 'one-way projection of authority originating with government and imposing itself on the citizen.'⁸⁵

As I have explained elsewhere, such legal theories are 'static' in that they suppose that the content of the law is fully formulated outside of law so that the job of law is to transmit that content to subjects.⁸⁶ 'Dynamic' theories, by contrast, try to capture a crucial feature of the modern legal state: it is the state that engages in the fully law-governed production of legal norms.⁸⁷ They thus differ from static theories in that they include the dynamic process of legal change—the 'operative' dimension of a legal system--within the scope of philosophy of law. In contrast, a static theory consigns change to some extra-legal space, in Hart's case by claiming that judges exercise a legally unconstrained discretion in penumbral or hard cases.

Hart was not all that consistent in this regard since he assented to the following propositions: that law works in the register of authority; that the making of law is conditioned by fundamental legal rules; that law must conform to some degree to principles of legality;⁸⁸ that officials must abide by principles of procedural justice; that judges must try to decide their cases

⁸⁴ Raz, 'The Rule of Law and its Virtue'; H.L.A. Hart, 'Lon L. Fuller, *The Morality of Law*', in Hart, *Essays in Jurisprudence and Philosophy* 342. Fuller has a list of 'Defects of book' at the end of his copy of *Legalism*; among them is that she 'ignores problem of interpretation', his emphasis. And he remarked that she seemed to view law as the mere outcome of politics and politics itself as power struggle, referring to *Legalism* 143 and 149.

⁸⁵ Fuller, *The Morality of Law*, 207.

⁸⁶ See Dyzenhaus, *The Long Arc of Legality*. I argue there that the distinction between static and dynamic theories does not map onto the distinction between legal positivist theories and the theories of their critics such as Fuller and Dworkin, since Kelsen, who coined the static/dynamic distinction, argued for a dynamic theory. Kelsen himself thought that the biggest mistake in Hart's tradition, what he called the 'analytical jurisprudence' of John Austin, is that it 'regards law as a system of rules complete and ready for application, without regard to the process of their creation': Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 *Harvard Law Review* 44. And see Ronald Dworkin's little-known defence of Kelsen against Hart: Ronald Dworkin, 'Comments on the Unity of Law Doctrine (A Response)', in Howard E Kiefer and Milton K Munitz, eds., *Ethics and Social Justice* (Albany: State University of New York Press, 1968) 200.

⁸⁸ Hart, 'Positivism and the Separation of Law and Morals', 81.

according to law in accordance with criteria that bring his account of interpretation quite close to Dworkin's;⁸⁹ and that substantively the law of any legal order must offer protections to at least some proportion of subjects lest it become 'meaningless taboos'.⁹⁰

In addition, while Hart retained from Austin the idea that for the existence of legal order when it comes to subjects the only necessary condition is that they have a habit of obedience, however induced, he did also say that an 'extreme case' arises if 'the internal point of view with its characteristic use of normative legal language (This is a valid rule) ... [is] confined to the official world'. Such a society would be 'deplorably sheeplike; the sheep might end in the slaughter-house'. But, he added, 'there is little reason for thinking that it could not exist or for denying it the title of legal system'.⁹¹

Moreover, Hart was deeply troubled by the possibility of a 'breakdown in the complex congruent practice' of both officials and subjects that sustains a legal order.⁹² Such a breakdown will occur when the 'solid gains' brought by the invention of the form of rule of the modern legal state are outweighed because its 'centrally organized power' is used for 'the oppression of numbers with whose support it can dispense'.⁹³ He remarked that if a system 'is fair and caters genuinely for the vital interests of all those from whom it demands obedience, it may gain and retain the allegiance of most for most of the time, and will accordingly be stable'. Most will 'look upon its rules from the internal point of view as accepted standards of behaviour' and thus not

⁸⁹ See Hart, *The Concept of Law*, 205, on the 'characteristic judicial virtues': 'impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable principle as a reasoned basis for decision'.

⁹⁰ Hart, 'Positivism and the Separation of Law and Morals', 82. At 81-2, he conceded that in any legal order there will 'justice in the administration of law', the 'natural procedural justice' which 'prevents us from treating [law]... as if morally it is utterly neutral, without any contact with moral principles'. This kind of justice he distinguished from 'justice of the law' to point out that law clearly unjust in the second sense could be applied in perfect conformity with justice in the first sense:

a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between the persons affected, laws which were hideously oppressive, and might deny to a vast rightless slave population the minimum benefits of protection from violence and theft.

What he failed to see is the implications of the connection between procedural justice and the substantive protections and of what happens when a state deprives subjects of either resource.

⁹¹ Hart, *The Concept of Law*, 117.

⁹² *Ibid*, 118.

⁹³ *Ibid*, 202.

from the external point of view of ‘malefactors or mere helpless victims’ upon whom ‘these legal standards have to be imposed by force or threat of force’. In contrast, the system ‘may be narrow and exclusive’, ‘run in the interests of the dominant group, and it may be made more repressive and unstable with the latent threat of upheaval’.⁹⁴

This picture presents a stark distinction between who is within the jural community and who without, between an in-group and an out-group. But Hart usefully blurred this distinction when he continued: ‘Between these two extremes various combinations of these attitudes are to be found, often in the same individual’.⁹⁵ The combination is not, however, as Hart seemed to indicate, of attitudes alone, because one must factor in the reasons for attitudes.

My account of what we can think of as the politics of legal space shows that this kind of pathology arises when a significant part of the jural community is relegated to the status of second-class citizenship. Challenges to this status will usually be made on behalf of an individual subject. But when the stakes raised by the challenge pertain to the contours of legal space, its basis will be the status of equality before the law of the group to which the individual belongs. The trigger for a change in the configuration of legal space is a legal norm that negatively affects the equality before the law of a group of subjects.⁹⁶

In any Rule-of-Law State--any state on what I call the ‘continuum of legality’--subjects will be able to challenge such a law on the basis that it conflicts with norms that protect their status as members of one jural community in which all are equal before the law. To make such a challenge is to participate voluntarily in the process of creating authority. But the challenge merely makes explicit the tensions in the passive habit of obedience, itself a kind of voluntary

⁹⁴ Ibid, 201-2.

⁹⁵ Ibid, 202. He did not mention that Austin grappled with the same problem: Austin, *Lectures on Jurisprudence*, 243-5.

⁹⁶ So much is common ground between Gustav Radbruch and Julius Ebbinghaus in their postwar reflections on the Nazi experience. See Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ (2006) 26 *Oxford Journal of Legal Studies* 1 and Julius Ebbinghaus, ‘The Law of Humanity and the Limits of State Power’ (1953) 10 *The Philosophical Quarterly* 14. See also GWF Hegel, *The Philosophy of Right*, trans. T.M. Knox, *Hegel’s Philosophy of Right* (Oxford: Oxford University Press, 1976), paragraph 209, ‘The Administration of Justice’, and note to paragraph 270, where he deals with the legal and constitutional status of German Jews.

participation. The challenge requires the officials respond to answer the question which I have summarized elsewhere as ‘But, how can that be law for me?’⁹⁷

In this regard, Sford notes that his clients ‘start out as nobodies, weightless entities in space’.

The authorities ignore them, sometimes not even responding to their communications, batting them away like bothersome flies. Until they file a petition. As soon as the clients hire legal representation and enter the legal process, they gain heft and volume and visibility.⁹⁸

And in a recent comparative study of ‘cause lawyering’, the term of art used by sociologists who study what I call human rights lawyering, the authors conclude a section on ‘Courts as Sites of Instrumental Resistance: “Sand in the Cogs”’ as follows:

[U]sing law in this way gives resistance a ‘face’—it individualises and humanises those on the receiving end of state power as well as offering some (however fleeting) dignity and self-respect to those who are willing to challenge that power. Across all of the sites we studied, cause lawyers repeatedly told us of their sense of moral responsibility to provide precisely that for their clients – what one South African cause lawyer described as ‘giving a person dignity ... speaking to the accused person as a human being’. Jeremy Waldron has described dignity in legal processes in terms of ‘standing’ – ‘the formal legal standing or perhaps, more informally the ‘moral presence’, reassuring an individual of their value and that they have a story to be heard. Affording dignity is itself an act of resistance. Courts in such contexts are more than places of instrumental resistance against repression and support for clients. They are also sites of political and symbolic resistance

⁹⁷ Dyzenhaus, *The Long Arc of Legality*.

⁹⁸ Sford, *The Wall and the Gate*, 439.

wherein both the power of the state can be subverted and the resistant capacity of those opposed to a regime can be demonstrated to audiences beyond the client and the court.⁹⁹

I want to go even further. It may seem startling, even offensive, to suggest that Palestinians who have been subject to more than 50 years of belligerent occupation are legal subjects, part of a jural community in which they participate in fastening the legal chains that bind them to the lips of their effective sovereign, the Israeli military. But, at least when they litigate on the basis of their legal rights, they are asserting their subjecthood; and such an assertion is not merely about their subjection to law. It is also an assertion of a kind of legal citizenship, which is at the same time political. It is one might say, ‘citizenship though participation’ in a ‘negotiated practice’

I take this idea from James Tully’s contrast between ‘citizenship as a universalisable legal status’ and ‘diverse citizenship’. Of the latter, he says that it

focuses on the singular civic activities and improvisations of the governed in any practice of government and the diverse ways these are more or less institutionalised or blocked in different contexts (a civic activity/contextual orientation). Citizenship is not a status given by the institutions of the modern constitutional state and international law, but negotiated practices in which one becomes a citizen through participation.¹⁰⁰

On my account, Palestinian citizenship in the OTLO is indeed not given by the legal order since the tensions sketched in the text are exploited by lawyers such as Sfar as part of a political struggle in which the lawyers make starkly visible the question what kind of citizenship

⁹⁹ McEvoy, Mallinder and Bryson, *Lawyers in Conflict and Transition*, 78-9, quoting from Waldron, ‘How Law Protects Dignity’, 201.

¹⁰⁰ James Tully, *Public Philosophy in a New Key*, vol. 2, *Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008), 248.

their clients have and could have.¹⁰¹ They do so through making wholly explicit the peculiarly legal experience of injustice.¹⁰²

In this respect, Austin's own account of his habit of obedience is quite helpful. Austin emphasized that the idea is deployed to explain the role of legal order in an 'independent political society' in establishing the 'mutual relation that subsists between that superior and ... [subjects]', such that it '*may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection.*'¹⁰³ Such a relationship does not exist, Austin argued, merely because a superior power is able to get the population of a country to fall in line by issuing commands backed by enforceable threats. He relied on an example from just a few years before he delivered the lectures which are his main work in jurisprudence.

In 1815 the British army and its allies occupied France, and their commands of the allies were obeyed by the French government and its subjects. 'But', Austin comments, since the commands and the obedience were comparatively rare and transient, they were not sufficient to constitute the relation of sovereignty and subjection between the allied sovereigns and the members of the invaded nation. The French government and the French subjects were an independent political society.¹⁰⁴

As I sketched above, the situation of the Parallel State is different. An occupation of more than 50 years can't be described with a straight face as 'temporary', especially when it is accompanied by an ever more entrenched 'settler colonialism',¹⁰⁵ albeit that one side of the

¹⁰¹ See further Karen Knop, 'Citizenship, Public and Private' (2008) 71 *Law and Contemporary Problems* 309, at 313, relying on J.G.A. Pocock, 'The Ideal of Citizenship Since Classical Times' (1992) 99 *Queen's Quarterly* 33. I also find helpful here an exploration in a different context of the idea of 'intentional citizenship' in Avia Pasternak, *Responsible Citizens, Irresponsible States: Should Citizens Pay for Their State's Wrongdoings?* (Oxford: Oxford University Press, 2021), in particular, her exploration in chapter 2 of earlier work on complicity, mainly, Chiara Lepora and Robert E. Goodin, *On Complicity and Compromise* (Oxford: Oxford University Press, 2015) and Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000).

¹⁰² See Eyal Weizman, *Forensic Architecture: Violence At The Threshold of Detectability* (Cambridge, Mass.: Zone Books, 2017) for an exploration of other ways of making injustice visible, often in the service of human rights lawyers, prominently Sfarid.

¹⁰³ Austin, *Lectures on Jurisprudence*, 169-72, at 171, his emphasis.

¹⁰⁴ *Ibid*, 172.

¹⁰⁵ See Kretzmer and Ronen, *The Occupation of Justice*, 513.

ideological divide does not view the situation as occupation at all since it considers the Territories to be part of 'greater' Israel. The 'commands and the obedience' are not, then, 'rare and transient'. But are they 'sufficient to constitute the relation of sovereignty and subjection' between the Israeli state and the Palestinian occupants of the Territories? The answer based on my account seems to be 'yes' and 'no'. But that ambiguity is productive. The question is raised, and gets that answer, because the commander is not uncommanded.

While the facts on the ground suggest something permanent, the Israeli state for the most part and the Court maintain the legal fiction of temporary belligerent occupation, governed by the relevant norms of public international law. Not only the judges, but also both the lawyers like Sfar and the clients they represent participate in sustaining that fiction. That presents a continual challenge to the Israeli state in regard to its fundamental legal commitments, to what kind of jural community it governs; and so the challenge is to its fundamental constitutional and political commitments as well. Because the Palestinians are subject to law, the question is to which law: to public international law or Israeli public law, or both? The Court's workaround, as I suggested, is to filter the norms of both through administrative law, which makes the legal contest uneven, but still one that allows for human rights lawyering.

It is a pathological situation but one on the continuum of legality. For that reason, what makes the system of law operative provides resources—both procedural and substantive--that human rights lawyers can exploit, as did the system of the Apartheid State though the way legal space was configured there made a rather different kind of lawyering possible. Indeed, I suggested that, while an Apartheid State relegates whole groups of subjects to second-class status, because they remain subject to the constitutional norms of their legal order, the implementation of their second-class status is vulnerable to legal challenges on the basis of these norms. A kind of Dworkinian interpretivism is possible, and not the perverse kind which Wacks suggests. Rather, judges can make a stand on legal principle in a way that tempers unjust policy.

Moreover, the last point is not undermined by noting that, in an unjust regime, the activity of Dworkinian judges and of human rights lawyers may do more harm than good because their victories not only can't get at the fundamental injustice of the regime, but also may serve overall to legitimize it. We still need an explanation of why the law still offers, as Dworkin argued, reasons that are 'weak' yet strong enough to morally complicate the situation of those who confront unjust laws. He denied that such reasons arise from the potential for judges to adopt his interpretive model. Rather, they come from the existence of a 'general political situation', such that 'the central power of the community has been administered through an articulate constitutional structure the citizens have been encouraged to obey and treat as a source of rights and duties, and that the citizens have in fact done so.'¹⁰⁶ But he did not go further to explain why this is so.

Fraenkel's 'classic study' offers, in my view, the key to the explanation. His analysis of the Dual State supports at least a negative hypothesis that the kind of arbitrary rule that we associate with tyranny is not possible within a Rule-of-Law State, even a perverse one. Recall a distinction central to Dworkin's legal theory from start to finish between 'legislative rights', which are 'rights that the community's lawmaking powers be exercised in a certain way', and 'legal rights', which are 'political rights, but a special branch because they are properly enforceable on demand through adjudicative and coercive institutions without need for further legislation or lawmaking activity'.¹⁰⁷

If, as all agree, such enforceability requires officials to interpret the law, then the only way to preclude something like Dworkin's interpretive model of law is to make the space of law subject to the decisions of officials in a prerogative state. On my argument, human rights lawyers can use the procedural rights required to ensure congruence to contest those parts of the law that treat groups as inferior based on those parts of the law that give the groups equal status. If

¹⁰⁶ Ronald Dworkin, 'A Reply', in Marshall Cohen, ed., *Ronald Dworkin & Contemporary Jurisprudence* (London: Duckworth, 1984) 247, at 257.

¹⁰⁷ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap, 2011), 407.

the procedural rights are abolished or rendered vacuous, the order will become a Dual State in whether subjects have legal rights at all will increasingly come into question. If the groups are deprived largely verging on altogether of access to the protections afforded in the space of first-class citizenship, the legal order will begin to change into a Parallel State in which the tensions sketched above come to the fore

The ‘general political situation’ of the Rule-of-Law State thus excludes the prerogative state. That shows that Fuller is right insofar as the general political situation is much as he describes legal order—authority, plus formal principles of legality, plus the procedural principles that are required for subjects to have the assurance that official decisions are ‘congruent’ with the law. The state and its officials may act only within the limits of the authority they have from law.

That does not by itself support the positive hypothesis for which Fuller argued: that in a Rule-of-Law State, the discipline of legality to which the ruler is subject will produce reciprocity for all in the jural community such that subjects are treated with ‘dignity as a responsible agent’.¹⁰⁸ It does show, though, that to the extent that subjects are treated in a way that does not respect their dignity, they will be able to contest the law that negatively affects their subject status by appeal to legal resources which lawyers minded to do so can help them to exploit. And that is the activity that we have come to call human rights lawyering.

Such lawyering builds legitimacy from within, a highly problematic exercise within an unjust legal order since that exercise legitimates the illegitimate. Here we should recall Shklar’s insights with which I started: that ‘the real realm of injustice ... does not stand outside of the gates of even the best of known states [since] .. [m]ost injustices occur continuously within the framework of an established polity with an operative system of law in normal times’ and the Hobbesian insight that ‘[w]ithout juridical institutions and the beliefs that support them, there

¹⁰⁸ Ibid, 162. See Kristen Rundle, ‘Form and Agency in Raz’s Legal Positivism’ (2013) 32 *Law and Philosophy* 767.

can be no decent, just, or stable social relations, but only anxiety, mutual mistrust, and insecurity’.

On my account in this paper, the insights are both correct and important. They tell us that even in states that we consider to be the best candidates for decency in our ever-troubled world, the practice of human rights lawyering will be morally fraught. Such lawyers will be legitimating the illegitimate in the full knowledge that they cannot through court work alone change the regime against which they struggle. But as Sford so eloquently tells, the lawyers can open cracks in the regime which force the society to confront the question of its most fundamental legal and political commitments.¹⁰⁹ As long as those legal commitments are maintained, the space of law affords a kind of politics in which even the ‘nobodies, weightless entities’ may ‘gain heft and volume and visibility’. And that may bring us close enough to the positive hypothesis.

For it entails that, first, as long as there is a legal order in place, as long as government is by law, Sford’s ‘moral foundation’ of ‘a culture of good government’ will be present, however shaky. Second, while that foundation does not suffice to change the regime, it does provide a basis for human rights lawyers to contest aspects of it; and that contest does open the cracks in the regime that can be contested by political movements with which the lawyers may be allied. In putting the challenge to the state on behalf of their clients, the lawyers are asking the state to articulate the nature of the bond between it and those subject to the law, the individuals in the jural community--all those over whom the state claims authority.

¹⁰⁹ Consider the legal battles over abortion right that are now being fought out in the US. If some states make it a criminal offence to travel across state lines to get an abortion, a situation much like that of the Fugitive Slaves will be produced. For an interesting analogy, see Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (2006) and for an account of the problems that may ensue, see the draft paper: David S. Cohen, Greer Donley and Rachel Rebouché, ‘The New Abortion Battleground’ (2023) 123 *Columbia Law Review*, forthcoming. For a troubling political analysis of the problems a fracturing political and legal order will bring, see Steven Simon and Jonathan Steven, ‘These Disunited States’, *New York Review of Books*, 22 September, 2022, 51-4.