Legal Theory and the Politics of Legal Space

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In *The Dual State*, Ernst Fraenkel argued that the Nazi state was a Dual State which consisted of two states that existed side by side. On the one side was the Normative State, which contained whatever remained of the law and institutions of the Weimar legal order. On the other side was the Prerogative State, which consisted of the apparatus of the Nazi Party wherein the leader's will was the ultimate source of authority. Fraenkel observed that the law of the Normative State governed relationships between individuals and between individuals and state institutions only as long as officials in the Prerogative State did not find such government inconvenient. He concluded that the rule of law did not obtain in Nazi Germany. I contrast the Dual State with three other juridical state forms or ideal types: the Rule-of-Law State 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 protective of individual rights; the Parallel State in which two legal orders are united at the top but otherwise sealed off from each other; and the Apartheid State in which vast exceptions to the general law are made in order to discriminate against one or more groups. All three are on what I call the 'continuum of legality', which means that those who are subject to its law will be part of a 'jural community'--the community of legal subjects bound together by law. To be subject to the law is to be able to get an answer to the question 'But, how can that be law for me?' The kind of answer one can get is deeply affected by where one's state is on the continuum, which reveals the politics of legal space. I also suggest that all actual states are Hybrid States in that they will combine elements of all the ideal types, but that the particular combination is what permits one to place a state on the continuum.

In *The Dual State*, Ernst Fraenkel argued that the Nazi state was a "Dual State" which consisted of two states that existed side by side. On the one side was 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. On the other side was the "prerogative state", which consisted of the apparatus of the Nazi Party

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wherein the leader's will (his actual will or his will as interpreted by subordinate officials) was the ultimate source of authority.[2] Fraenkel observed that the law of the normative state governed its subjects only as long as officials in the prerogative state did not find such government inconvenient. Put positively, a Nazi official could override the law or the institutions of the normative state whenever this was thought to be in the interests of the Nazi Party.

Fraenkel contrasted the Dual State with what I will refer to as the "Rule-of-Law State", which following Albert Dicey, he took to be a state 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 protective of individual rights.[3] 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.[4]

The Rule-of-Law State is, on my argument to come, at one end of what I call the "continuum of legality". As long as a state is on that continuum, those who are subject to its law will be part of a "jural community"--the community of legal subjects bound together by law. These bonds are in the first place constituted by the enacted or positive law made by the state. However, they are also constituted by the fundamental legal principles found in any state on the

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[2] Ernest Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* [1941], Second edition (Oxford: Oxford University Press, 2017). 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.

[3] Fraenkel, *The Dual State*, p. 156. See A.V. Dicey, *The Law of the Constitution* (Oxford: Oxford University Press, 2013), p. 119.

[4] Fraenkel, *The Dual State*, pp. 70-1.

continuum. To the extent these bonds are lacking in a state, the closer it will move to the other end of the continuum, until the point where it falls right off, as Fraenkel argued the Dual State did.

In order to explore that continuum, I will introduce two more types of state—the "Apartheid State" and the "Parallel State". Together with the Dual and the Rule-of-Law States, these make up four ideal types of the modern state. As ideal types, they do not reflect all the complexity of the states which are their exemplars. Still, it important that they are rooted in the experience of actual states, for the type abstracts from and simplifies experience only in order to illuminate it.[5] Indeed, I will later suggest that all actual states are "Hybrid States" in that they will combine elements of the four ideal types, but the particular combination they manifest is what permits one to place a state in the right place on the continuum.

TYPES OF STATE

(i) The Dual State v. the Rule-of-Law State

[5] See Max Weber, *Economy and Society* (Cambridge, Mass.: Harvard University Press, 2019), p. 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 p. 473 of Weber, *Economy and Society*, and Jellinek, *Allgemeine Staatslehre*, pp. 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 p. 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), pp. 13-14.

Fraenkel's book 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 because of his frontline service in the First World War.[6] On his account, the lawlessness of the prerogative state was complemented by the lawfulness of the normative state. As he put the point,

> The [n]ormative [s]tate … is by no means identical with a state in which the "Rule of Law' prevails, i.e., with the *Rechtsstaat* of the liberal period. The [n]ormative [s]tate is a necessary complement to the [p]rerogative [s]tate and can be understood only in that light. Since the [p]rerogative and [n]ormative [s]tates constitute an interdependent whole, consideration of the [n]ormative [s]tate alone is not permissible.[7]

Frankel's observation about complementarity is important if we wish to understand how the Rule-of-Law State can be hollowed out from within. Consider that in his Preface to the 1974 German edition of *The Dual State*, 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".

> 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…[8]

It was, in other words, still possible to enforce the law and the rule of law in Nazi Germany in the late 1930s, though that enforcement was a precarious business because it was contingent on decisions in the prerogative state.

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[6] See Douglas G. Morris, *Legal Sabotage: Ernst Fraenkel in Hitler's Germany* (Cambridge: Cambridge University Press, 2020).

[7] Fraenkel*, The Dual State,* p. 71.

[8] Fraenkel, *The Dual State*, p. xix.

Moreover, from what is known about the detail of Fraenkel's legal victories, Douglas Morris has suggested that they did not depend on the residual legal rights available within the normative state. Rather, they depended entirely on the effective use of legal procedures to Fraenkel's clients' advantage in cases in which judges were not subject to direct pressure from officials in the prerogative state or were prepared to try to resist such pressure and do their jobs.[9] This was all that was possible because the "always cramped space" of the normative state contracted as the Nazi grip on power increased until the point when "the normative state meant not the rule of law but the technical administration of the law".[10]

Indeed, Fraenkel pointed out that the existence of the prerogative state did more than make the protections afforded by the normative state precarious. It also made the protections less robust. The "mere existence of arbitrariness, as embodied in the [p]rerogative [s]tate", he remarked, "has dulled the sense of justice to such a degree that the existence of an agency with limited jurisdiction is considered as a legal institution even though the government exercises enormous discretionary power".[11] In a footnote to this claim, he quoted Dicey to this effect: "the predominance of regular law, as opposed to the influence of arbitrary power, excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority";[12] and he complained that this idea "was never accepted in Germany".[13]

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[9] Douglas G Morris, "The Dual State Reframed: Ernst Fraenkel's Political Clients and his Theory of the Nazi Legal System," *Leo Baeck Institute Year Book,* Vol. 58, No. 1 (2013), pp. 5-21.

[10] Morris, "The Dual State Reframed," pp. 5 and 19.

[11] Fraenkel, *The Dual State*, p. 70.

[12] Dicey, *The Law of the Constitution*, p. 119. I have corrected small errors in Fraenkel's quotation in *The Dual State*, p. 223, note 218.

[13] Dicey, *The Law of the Constitution*, p. 119.

Now Dicey equated the administrative state, as he observed it in France, with the absence of the rule of law because that state is composed of agencies and officials to whom the legislature has delegated discretion, not only as to how to implement the program of the statute, but also often to decide on the content of the program by making rules to concretize an abstractly stated legislative mandate. Because this activity was supervised by specialized administrative tribunals, not the ordinary courts exercising the controls of ordinary law, Dicey claimed that "[a]mong modern Englishmen the political doctrines which have in France created the system of *droit administratif* are all but unknown".[14]

The idea of unknowability echoes in another of Dicey's claims--that martial law "in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England".[15] One interpretation of these claims is that Dicey naïvely believed that there were in fact no administrative law regimes in England in existence in the late nineteenth century and that officials had never established regimes of martial law--regimes of legally unlimited military force within an area on the basis that an official response to civil unrest would be inadequate if it were confined to action in terms of the ordinary law as policed by the ordinary courts.

But this interpretation cannot be correct, since Dicey's legal practice was in administrative law,[16] and since he dealt at some length in a Note to the sixth edition of *The Law of*

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[14] Dicey, *The Law of the Constitution*, p. 111.

[15] Dicey, *The Law of the Constitution*, p. 161.

[16] See Mark Walters, *AV Dicey and the Common Law Constitutional Tradition: 'A Legal Turn of Mind'* (Cambridge: Cambridge University Press, 2020), Chapter 11, "Dicey's Administrative Law Blindspot".

the Constitution with the historical record of martial law.[17] In the latter, his concern was to show that the claim about the necessity of martial law, in effect a claim about the necessity of manifestations of the prerogative state in times of stress, is false because legality not only should but also can govern official action in times of stress, even though this might require more reliance on the legislature than on courts and perhaps, in addition, some institutional innovation.[18] He had thus to be committed to the same conclusion about administrative law regimes; and his view of administrative law regimes in England and of the French system of *droit administratif* moderated along the same lines.[19]

Fraenkel had a similar view of, on the one hand, both martial law and its equivalent in the emergency powers provision of the Weimar Constitution—Article 48—and, on the other, of administrative law. In regard to the former, he traced the origins of the prerogative state in Nazi Germany to the abuse of Article 48 by the conservative politicians who governed Germany in the early 1930s as well as to the Weimar judges who had not accepted what he took to be a principle of English law that martial law is unconstitutional.[20] In regard to the latter, he observed that "a clear distinction exists between administrative agencies and the organs of the

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[17] Dicey, *The Law of the Constitution*, pp. 352-66. See Walters, *AV Dicey and the Common Law Constitutional Tradition*, pp. 277-85.

[18] For an extended analysis, see my "The Puzzle of Martial Law," *University of Toronto Law Journal*, Vol. 59, No. 1 (2009), pp. 1-64.

[19] See Walters, *AV Dicey and the Common Law Constitutional Tradition*, pp. 275-98 and Chapter 11; Dicey, *The Law of the Constitution*, Appendix II, "The Development of Administrative Law in England".

[20] Fraenkel, *The Dual State*, pp. 3-6.

[p]rerogative [s]tate": "[h]owever extensive the discretion of an administrative agency … its discretion can be exercised only within the limits of its clearly defined jurisdiction".[21]

As I understand Dicey's and Fraenkel's view, martial law and unconstrained administrative discretion are constitutionally unknowable, but that does not amount to a denial of the existence of actual examples of the use of law to create spaces of legally unlimited power. Take the principle that no one should be a judge in their own cause. It has no application in the prerogative state as well as no application in an administrative state if there is no independent review of whether officials have transgressed the limits on their authority. As Lon L. Fuller argued, if such a principle is generally unobserved, we should not think only that our legal order has changed in some important way, but also that we are on the path to no longer living in a legal order.[22] We need, however, to see that such a conclusion applies only if an order is journeying to the extreme end of the continuum of legality. In between that end and the rule-of-law end, the relationship between the spaces of legality and the spaces of illegality is complex.

Fraenkel's legal practice was precarious because of the place of the Dual State off the legality continuum. He could not count on his client's case being dealt with by a judge who operated in the normative state. Further, if Morris is right, even within that space a lawyer could count only on properly applied legal procedures not residual legal rights, because the relationship between the prerogative state and the normative state negatively affected the space of legality within the normative state. Finally, one has to take into account that even those procedures

[21] Fraenkel, *The Dual State*, p. 70.

[22] Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review*, Vol. 71, No. 4 (1958), pp. 630-672, p. 660.

could turn out sometimes to be an utter sham, in which case there was a pocket of lawlessness within the normative state.[23]

Still, had the legal procedures been properly applied, victories would have been possible. This marks the difference between the normative state and the prerogative state. The latter was not bounded by even thin legality, unless one were to count Hitler's Enabling Act of 1933—the statute which made his will into the fundamental 'legal' norm--as prospectively validating anything done within the prerogative state, which would be to evacuate the idea of legality of all content. Fraenkel said of the Act that "it would be futile to deny the significance of this legislation in the transformation of the German legal order".[24] His argument about that significance was twofold.

First, the Act was in itself lawless—the product of an "illegal *coup d'état*".[25] Now illegality can be the foundation of legality. But Fraenkel was clear that this was not the case in Nazi Germany. Rather, the second point, the Act brought about the "abolition of the rule of law".[26] Relying on Charles McIlwain's work on medieval and early modern conceptions of absolutism, Fraenkel emphasized the distinction between the arbitrary power of a dictator who makes law in "accordance with his will" and the absolute sovereign whose will is valid only if "expressed in a way prescribed by law and tradition" and "restricted to certain purposes". Here he found telling the "formula: 'The king is bound by the Law of God and the Law of Nature'".[27] As he explained,

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[23] See HO Pappe, "On the Validity of Judicial Decisions in the Nazi Era," *Modern Law Review*, Vol. 23, No. 3 (1960), pp. 260-274.

[24] Fraenkel, *The Dual State*, p. 4.

[25] Fraenkel, *The Dual State*, p. 4.

[26] Fraenkel, *The Dual State*, pp. 8-9.

[27] Fraenkel, *The Dual State*, p. 113.

the distinction was between the conception of antiquity that law is a "matter of politics" and the modern conception which "attaches politics to law".[28]

That the prerogative state was not so bound meant that what held the two states together was not legality but something else, some complex mix of prudential factors which made it expedient for the Nazis to maintain the normative state: for example, the importance of a somewhat stable life for 'Aryan', heterosexual, not mentally disabled Germans who had not been involved in anti-Nazi political activities; perhaps some sense that the existence of the normative state could be the basis for legitimacy claims both within and without Germany; and the fact that some of the Nazi goals were better achieved using properly applied law as their instrument rather than arbitrary official action. Because the two states 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.

(ii) The Apartheid State

The Apartheid State was 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

[28] Fraenkel, *The Dual State*, p. 114.

part run by specialized agencies and officials, and they relegated black South Africans 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 dignity—was maintained as an abstract ideal of the legal order throughout the apartheid-era, even as particular apartheid laws made it ever clearer that the animating political ideology of the ruling party was one of white supremacy.

To be both within the community for some purposes and without for others is to occupy a highly problematic legal status, that of second-class subject or citizen.[29] Second-class status is much more *legally* problematic than the status of slavery, provided that the slaves are relentlessly consigned to the status of objects or things. For if one is legally recognized as having status as a responsible agent for some purposes but not for others, the parts of the law that seem to relegate one to inferior status are thrown into doubt 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.[30] In that case, the order would change into one in which there are two separate spaces of legality though held together by law. It would become what I call a 'Parallel State', the topic of the next subsection.

(iii) The Parallel State

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[29] See Julius Ebbinghaus, "The Law of Humanity and the Limits of State Power," *The Philosophical Quarterly*, Vol. 3, No. 10 (1953), pp. 14-22.

[30] See David Dyzenhaus, 2nd Edition, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2010).

A prominent example of a Parallel State is the one which governs both Palestinians in the Occupied Territories and the inhabitants of Israel.[31] Before I begin my analysis of this kind of state, two clarifications are in order.

First, while I claim that it is a distinct ideal type of state, and thus deny that it is an Apartheid State, my denial does not pertain to the issue whether the actual Israeli state is guilty of the crime of apartheid, as that crime is stated in public international law.[32] On my argument the fact that a state has committed the crime of apartheid does not suffice to make it an Apartheid State because such a state is characterized by the fact that all legal subjects are regarded as equal before the law even though its statutory regimes go a long way to undermine the equality of the oppressed parts of the population.[33] In other words, a state which commits

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[31] For relevant use of this term, see Mark LeVine and Mathias Mossberg, eds., *One Land, Two States: Israel and Palestine as Parallel States* (Berkeley: University of California Press, 2014).

[32] The *International Convention on the Suppression and Punishment of the Crime of Apartheid* declares apartheid to be a crime against humanity (Article I) and defines it as "inhumane acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them", with relevant acts listed (Article II). For arguments to the effect that the Israeli state is guilty of this crime, see Michael Sfard, "The Occupation of the West Bank and the Crime of Apartheid: Legal Opinion," June 2020, https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/Apartheid+2020/Apartheid+ENG.pdf and B'Tselem, "A Regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is Apartheid," https://www.btselem.org/sites/default/files/publications/202101_this_is_apartheid_eng.pdf.

[33] If my argument is correct, the situation in Israel/Palestine is in one respect worse than that in apartheid-era South Africa. The legal resources available to lawyers to contest the legality of the

the crime of apartheid but does not regard its oppressed subjects as formally equal before the law is not, in my terms, an Apartheid State.[34]

Second, there is the issue of occupation. Palestine is officially supposed one day to become a fully independent state. But *de facto* it is subject to Israeli control and *de jure* it is (with the possible exception of Gaza) subject to the international law of belligerent occupation, notably to Article 43 of the Hague Regulations: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'. Such occupation is supposed to be subject to three principles: the inalienability of sovereignty vested in the occupied territory (that is, no legal taking of land by conquest); management of the occupation as a form of trust; and, implicit, in the first two, the temporary nature of the occupation.

Now that occupation has lasted for over 50 years and politically speaking there is no end to it in sight. Moreover, the 'facts on the ground' established by Israeli settlers within the Occupied Territories, the infrastructure of roads and security put in place by Israel to secure these settlements including the Wall or 'Separation Barrier', as well as the extension of the protection of Israeli law to these settlements and the enactment of statutes to facilitate further settlement activity, indicate an ongoing *de facto* annexation which the current government seems to regard as the prelude to a formal act of annexation, an act of conquest illegal under public

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actions of officials who implement the occupation do not include the fundamental norms of the Israeli legal order.

[34] It is, however, the case that any Apartheid State will be guilty of the crime of apartheid as it by definition uses law to maintain a system of racial or ethnic supremacy.

international law. I do not deal with this issue except to note that, were there to be such an act of formal annexation, one would still not have in place an Apartheid State unless the government were, first, to establish equality before the law for all subjects and, second, to enact statutes which in significant respects made Palestinian subjects into second-class citizens.

The fiat which brought the Palestinian and Israeli orders together, thus creating the Parallel State, was effected by Meir Shamgar, who had held the office of Attorney General during the initial period of occupation and had in that role designed the system of military law which governed the occupation.[35] It unified the two legal orders by making the Israeli Supreme Court the apex court for both legal orders. But within this unified legal order a fairly clear distinction is maintained between the two sub-orders, except in so far as the court applies principles of Israeli administrative law in light of its perception of appropriate application in the context of military occupation, which is in line with Shamgar's official reason for this fiat--that it was important that there was some form of external control over the military so as to prevent arbitrariness and maintain the rule of law.[36]

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[35] In an early legal analysis (1990), Eyal Benvenisti suggested this was a Dual State—Benvenisti, *Legal Dualism: The Absorption of the Occupied Territories into Israel* (New York: Routledge, 2018). This label was not, however, based on Fraenkel, but on a paper by Shamgar. Ibid, unnumbered Preface. For a different view, though one based on considerable lapse of time, see Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge: Cambridge University Press, 2017). Gross argues that the Supreme Court navigates the parts of public international law most suitable for shoring up the legality of the occupation while avoiding those which do not.

[36] I say fairly clear because it appears that recently the Supreme Court has started to rely more on constitutional law than on public international law in its rulings on Palestinians in the OTLO.

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 under the leadership of powerful chief justices. 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 facts and to the controls which are considered appropriate to apply. Hence, in this Parallel State, the law which governs the lives of Palestinians in the OTLO is not an exception to the general law of the ILO, but the system of law developed by the military under the supervision of the Supreme Court.[37]

This Parallel State is thus unlike the Apartheid State because it is not held together by fundamental legal principles. But within it, the OTLO is not a prerogative state in which individuals are subject to the totally 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. Further, there is even less arbitrariness because of the Israeli Supreme Court's jurisdiction. More procedural protections have been put in place than the military authorities thought appropriate.

See Tamar Hostovsky Brandes, "International Law in the Decisions of the Israeli Supreme Court concerning the Occupied Territories," *International Journal of Constitutional Law*, Vol. 18, No. 3 (2020), pp. 767-787. She argues that this shift is consistent with a deliberate eradication of the distinction between Israel and the Occupied Territories by the parliament and the government.

[37] The military is of course also subject to parliamentary legislation which in some cases orders the military commander to legislate in particular ways. Note that appeals can be made from the OTLO to the Israeli administrative courts.

Occasionally, the court finds that public international law is relevant to its deliberations. Further, there have been some decisions, especially those brokered between lawyers in the shadow of the court, which have made a substantive difference.[38]

The tensions in issue here 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 has to be a group of first-class citizens in whose status the second-class citizens to some extent partake and the 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 within the OTLO because while all the subjects of the OTLO are equally subject to the law, the law they are subject to is the commands of those who occupy their land by force, who in that respect are more like the "uncommanded commander" of John Austin's 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 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, does provide for some measure of freedom and dignity, and indeed without which there can be neither freedom nor dignity.[40]

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[38] David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002), pp. 187-98.

[39] HLA Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, Vol. 71, No. 4, pp. 593-629, p. 603.

[40] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1983), pp. 213-14, 219-23.

That there is some measure of freedom and dignity is, of course, important. It shows that even as law oppresses, it has to enable something of moral worth. This point applies also to the pockets of inequality established by apartheid law and it is worth noting that two of the major victories won by human rights lawyers against the actual South African Apartheid State arose out of exercises in statutory interpretation which stabilized apartheid law so that those subject to it could know with some certainty what their rights were under that law. In *Komani NO v. Bantu Affairs Administration Board, Peninsula Area*,[41] the Appellate Division—South Africa's apex court of the time--held that a black man qualified to live in an urban area was entitled to have his wife live with him, while in *Oos-Randse Administrasieraad v. Rikhoto*,[42] the same court held that workers who were sent back annually from the cities to the rural areas and then had to enter into a fresh contract with their employers were, nevertheless, continuously employed and thus had a right to live in the urban area in which they worked.

In both cases, the urban areas were the townships, ghettoes for black South Africans established on the outskirts of cities set aside for whites so that the whites, who lived in vastly superior areas, would have the benefit of cheap labour. Still, the difference these decisions made in the lives of those black South Africans they affected was immense and served to undermine the myth of apartheid—the ideology of 'apartness' in which black South Africans in white urban areas were sojourners, 'guest workers' who came alone from their own states—the infamous Bantustans or 'homelands'--on temporary contracts to work in officially 'white' South Africa.

As I indicated, these decisions were presented by the Appellate Division as standard exercises in statutory interpretation. That is, no fundamental principles of law were explicitly invoked. Nevertheless, the fact that South Africa remained an Apartheid State made it possible for the court to conceptualize black South Africans as full legal rights holders, albeit under a

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[41] 1980 (4) SA 448 (A).

[42] 1983 (3) SA 595 (A).

regime of substantively discriminatory law. In other words, their first-class status in some respects affected positively the legal space in which their inferior status was entrenched, unlike in the Dual State, in which the space of the prerogative state negatively affected the space of the normative state, and unlike in the Parallel State, in which the legal orders are joined together in a way which seeks to ensure that the fundamental principles of the ILO do not underpin the legal bond between the orders.

That second-class citizenship is constructed both by the enacted law which creates the status and by the fundamental legal principles which undermine it is instructive, as we can see by returning to the example of slavery. As I pointed out, second-class status is much more *legally* problematic than the status of slavery, provided that the enslaved persons are relentlessly consigned to the status of objects or things. Slavery is of course morally a very problematic status. But the proviso is important because it is very difficult to create the status of utter slavery by law.

The development of the Roman law of slavery is an example here, as when enslaved persons assumed tasks on behalf of their masters, for example, entering into contracts, it became difficult to maintain them in the class of things without any subjective rights. In addition, the possibility of manumission—the emergence of an enslaved person by dint of an act of the owner from no-status to full status—made it more difficult to hold intact the category of no-status.[43] A slave-owning society is like a Dual State in that enslaved persons live in a space where prerogative rules, but private individuals wield the prerogative, not state officials. Moreover, it is a prerogative granted by law and so subject to legal regulation or abolition. The relationship between the space of legality and the space of private prerogative is thus bounded by law in a way which over time may constrict the prerogative space, the opposite of what we find in the Dual State, and more akin to the situation just described of the Apartheid State.

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[43] See Alan Watson, *Roman Slave Law* (Baltimore: Johns Hopkins University Press, 1987).

An example much closer in time illustrates this point vividly, though, as I will show, in it the distinctions between my ideal types of state blur to the point where we have in place not only a 'Hybrid State', but also the suggestion that all modern legal states are hybrids. Nevertheless, the ideal types remain helpful for understanding where a state should be placed on the continuum of legality.

THE HYBRID STATE?

In the antebellum US, 'Fugitive Slaves' fled from slavery in southern states to what they hoped would be freedom in northern states. But they were required to be returned to their owners by the constitutional compact which established Union through a set of compromises which permitted and secured slavery. The requirement was given concrete expression in a succession of federal Fugitive Slave Acts, designed in part to overcome the resistance by abolitionists in northern states to the return of fugitives, a resistance often fought out by legal means in the courts.[44]

The abolitionists and those judges who listened sympathetically to their arguments were often inspired by the ruling of the Court of King's Bench in the 1772 case of *Somerset v. Stewart* which held that an enslaved person brought to England could not be compelled to leave and was entitled to a writ of habeas corpus. Lord Mansfield stated in his judgment a wide-reaching

[44] 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.

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".[45]

The politics of legal space in the US during this period were immensely complex as can be shown, even if one simplifies matters greatly by imagining the Union as divided into just two blocks, the North in which slavery was abolished, and the South in which slavery was an institution. One can try to conceive of the antebellum US, that is, as a kind of Parallel State. This Parallel State would differ from a Dual State in that the North was on the rule-of-law end of the legality continuum and the same was true of the South, as long as one was not an enslaved person. Within the South, enslaved persons did not live in law-created spaces in which they had an inferior status which made them second-class citizens, with one foot in the first-class space, the other in the inferior space. Rather, they were in a law-created space of no-status. Moreover, if they exited from that space, whether by emancipation, or by order of law, or by successful escape, they emerged in both the South and the North into inferior status, a kind of Apartheid State, unlike in Rome where slavery was not race-based.[46]

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[45] 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), p. 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).

[46] On the contrast between Roman and American slavery, see A. Leon Higginbotham, "Forward", in Watson, *Roman Slave Law*, p. ix. That free blacks lived in an Apartheid State was confirmed by the Supreme Court in 1859 in *Dred Scot v. Sandford* 60 US 393*,* a decision which in 1986 it failed to overturn in *Plessy v. Ferguson* 163 US 53. The court finally dealt with the issue in 1954, at least at the level of formal constitutional interpretation, in *Brown v. Board of Education* 347

This Parallel State also differs from the one which unites the ILO and the OTLO. Enslaved persons could cross legally from the South to the North if they travelled with their owners, in the same way that the owners' baggage could. But once in the North questions arose, testable in court, whether, as in *Somerset's Case*, the enslaved person became free under local law. The issues here, again as in *Somerset's Case*, arose in private international law. That is, the legal question is 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.[47]

In the US the problem was that the Constitution, although it infamously dared not call the institution of slavery by its name, made a compromise with the institution through Articles about the protection of property which both permitted slavery in the South as well as the forcible rendition of enslaved persons back to their owners if either they had escaped to the North, or been taken by their owners to the North and tried to seek their freedom with the help of abolitionists and the courts. The ability to litigate on the basis of Lord Mansfield's dictum operated in the shadow cast by the constitutional compromise which permitted the odious institution. At the same time, it operated in the light cast by the Preamble of the Constitution: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this

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US 487. On *Dred Scott*, see Paul Finkelman, *Supreme Injustice: Slavery in the Nation's Highest Court* (Cambridge, Mass.: Harvard University Press, 2018) and on the journey from slavery through *Dred Scott* to *Plessy*, Steve Luxenberg, *Separate: The Story of Plessy v. Ferguson and America's Journey from Slavery to Segregation* (New York: WW Norton and Company, 2019).

[47] See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981).

Constitution for the United States of America". In addition, the situation of enslaved persons brought into the North was susceptible to being regulated by local statute, for example a statute that required that if owners stayed for longer than a prescribed period of time in the North enslaved persons in their possession would become free by force of law.

Perhaps, then, the North and the South made up not so much a Parallel State as a Hybrid State, one held uneasily together by fundamental legal principles as well as by positive law, including the positive law of the Constitution, in ways which made the space of no-status sanctioned by the Constitution and established by enacted law highly problematic, as it did the law-created spaces of inferiority in which free blacks lived. Indeed, it may be the case that all states on the continuum of legality turn out to be hybrid in that they are as least to some extent Rule-of-Law States, otherwise they would have no place on the continuum of legality. But to some extent some subjects will be second-class citizens and to that extent the state will be an Apartheid State. In addition, it is likely that to some extent a state will try to prevent general principles reaching from one legal space to another; hence, will be to that extent a Parallel State; or will, whether deliberately or unwittingly, attempt to create spaces in which prerogative rules and to that extent be a Dual State.

If this conclusion is warranted it indicates not the defects but the advantages of my ideal types. Modern legal states may, that is, differ more in the extent to which they contain elements of the ideal types than in conforming altogether to one or other. However, the types, are in my view, most helpful in that they point to the problems of legality which arise in particular states and which will both indicate both their place on the continuum of legality and the kind of jural community they create.

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 legal 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 one between, on the one hand, the norms of the Constitution other than the slavery-permitting Articles which transcended the enacted law of 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 were given all the procedural rights of a free person when they litigated, which significantly improved their chances of a favourable verdict.

It was precisely to address these tensions that the South caused to be enacted the federal Fugitive Slave Law in 1850 which, as Andrew Delbanco says, "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."[48] Delbanco describes it as an "act without mercy". It forbade defendants to testify in their own defence, ruled out trial by jury, and disallowed all forms of exonerating evidence including rape, beatings, and other kinds of abuse, put the power of extradition in the hand of federal officers, criminalized the act of sheltering a fugitive, and required local authorities to assist the claimant in recovering his property. Once ownership was

[48] 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), p. 5.

proved according to the property laws of South, the person was rendered back to captivity, which is why only proof of freedom that the person was not owned in the eyes of that law, for example, emancipation papers signed by the owner, could save the enslaved persons from this fate.[49]

The 1850 law had, in light of the analysis so far, 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 by stripping litigants' procedural rights to the bone. We can note here Karen Knop's suggestion that private international law is about a private side of citizenship captured in the figure of the "legal citizen"—the person who is entitled to sue and be sued in certain courts.[50] Knop shows how what she calls private international law's "cosmopolitan form"—its "techniques" for dealing with the applicability of foreign law—allows it to bring a very concrete focus to contentious moral questions about "inclusion and exclusion".[51]

The 1850 law sought, that is, to deal with the problem of public citizenship which the Constitution fudged in its 'property' provisions by diminishing private citizenship through stripping litigants of the procedural rights that make it possible to present their case. It thus sought to deal with the internal legal tensions of the US constitutional order by making it almost impossible to raise these in a judicial forum. But that attempt served only to intensify political tensions in the North, often leading to violent resistance to the enforcement of the law, given

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[49] I follow Delbanco, *The War Before the War*, p. 5, closely here save for my emphasis on the dimension of private international law.

[50] Karen Knop, "Citizenship, Public and Private," *Law and Contemporary Problems*, Vol. 71, No. 3 (2008), pp. 309-341, p. 310.

[51] Knop, "Citizenship, Public and Private," p. 313.

that the legal avenues of resistance had been so narrowed.[52] In addition, new liberty laws were enacted in the North which sought to ensure jury trials for Fugitive Slaves in the face of the 1850 law, which as one Southern senator complained, amounted to a "practical denial of the whole right of the slaveholder over his slave, if he gets beyond the Jurisdiction of his own State".[53]

It was thus of immense political significance that Abraham Lincoln made part of his campaign for the presidency the problem which would attend a free black who would be deprived of the opportunity of proving his status. In his inaugural address, Lincoln claimed that anyone who had sworn an oath to uphold the Constitution was committed to upholding the Fugitive Slave clause which had been taken to permit the enactment of the rendition legislation. But he objected to the 1850 law in these terms:

> In any law upon the subject ought not all the safeguards of liberty known in civilized and humane jurisprudence be introduced, so that a free man be not, in any case, be surrendered as a slave? And might it not be well, at the same time, to provide by law for the enforcement of that clause of the Constitution which guarantees that 'the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several states?'[54]

As James Oakes has commented, "[d]ue process was widely regarded as one of the 'privileges and immunities' of citizenship, so the demand that accused fugitives be guaranteed a jury trial

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[52] RJM Blackett, *The Captive's Quest for Freedom: Fugitive Slaves, the 1850 Fugitive Slave Law, and the Politics of Slavery* (New York: Cambridge University Press, 2018). See also James Oakes's very perceptive review, "The Power of Running Away," (2018) *New York Review of Books*, December 6 issue. My account in the following two paragraphs follows Oakes.

[53] Oakes, "The Power of Running Away".

[54] Oakes, "The Power of Running Away".

was an implicit recognition of black citizenship".[55] Moreover, in a trial with a jury of Northerners opposed to slavery, it was not only the case that free blacks would be better guarded against rendition under a false claim that they were owned, but also possible that individuals would be freed despite the fact that they were owned under the property rules of the South.

These legal issues brought the Union to the brink of the war which began the same year in which Lincoln delivered his address. That local enactments like personal liberty laws and litigation could have these results had of course everything to do with the fact that the legal issues implicated the existential moral problem of the Union—the tension between its constitutional commitments to 'blessings of liberty' and to the idea that there could be property in man. But that the moral issues were implicated as *legal* issues was politically significant, as can be illustrated by recalling Ronald Dworkin's distinction 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".[56]

The idea of enforceability on demand is important because it specifies what is distinctive about the politics of legal space. Within that space, as long as legal officials exhibit what Fuller called an attitude of "fidelity to law", those subject to law are entitled to be shown a legal warrant for the interpretation of the law on which an official acted.[57] As I will now suggest, the subject

[55] Oakes, "The Power of Running Away".

[56] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap Press, 2011), p. 407.,

[57] Fuller, "Positivism and Fidelity to Law".

can ask the question 'But, how can that be law for me?' and is entitled to get an answer from an official independent of the one who acted.[58]

BUT, HOW CAN THAT BE LAW FOR ME?

The analysis above shows that the range of possible answers is restricted by the construction of the particular legal space in which the question is asked. In a state on the rule-of-law end of the legality continuum, the subjects can in principle get an answer which, while it may not always be what they want, and may even be one of which they morally disapprove, does not undermine their status as first-class citizens in the jural community. Such a state exists when its enacted law which draws distinctions between groups of peoples does so in ways which can be justified to individuals in those groups on the basis of the fundamental legal principles of the order.

In a Parallel State such as the combination of Israel with the Occupied Territories, because it is bound together by a *fiat* and not by fundamental principles, subjects in the OTLO are denied access to the fundamental legal principles in the ILO and so are governed by a system of enacted law enforced in accordance with principles of administrative law, though adapted to the context of military rule so as to make its subjects' interests subordinate to the military's sense of the demands of security. The jural community in this context is one which, as Thomas Hobbes said in *Leviathan*, preserves a "bare Preservation" but not all the "other Contentments of life" which, he argued, the "safety of the people" required if they were to trade their obedience for their sovereign's protection.[59] Its members know that they do not own, to continue with

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[58] For the full argument, see David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge: Cambridge University Press, forthcoming). Chapter 5 is a longer treatment of the issues canvassed here.

[59] Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1997), p. 231.

Hobbes, the acts of their sovereign as if these were their acts. They have not fastened the "artificial chains" of the law from the sovereign's "lips" to their "ears".[60] Those chains are imposed on them by a regime which looks increasingly like military conquest rather than temporary legal occupation, a phenomenon which the actions of the Supreme Court serve both to obscure and legitimize. Moreover, the spectre of the prerogative state hovers over the community since in almost any case in which the state invokes security considerations, the Supreme Court will defer. If, as Carl Schmitt said, "[t]he sovereign is he who decides on the exception",[61] this practice of the court maintains in an uneasy alliance a legal idea of sovereignty under the rule of law and a Schmittean idea of legally unlimited sovereignty, with the court providing a veneer of legality over the latter since it will decide when to defer to the military, even if its test is that it will usually defer whenever the military claims this is necessary.[62]

Finally, there is a way in which Palestinian subjects in this Parallel State are virtual second-class citizens in the legal sense sketched above, and which complicates my argument. The Israeli Supreme Court presides over a state--the ILO—in which there are first-class citizens,

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[60] Hobbes, *Leviathan*, p. 147.

[61] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: MIT Press, 1988), p. 5.

[62] See Hassan Jabareen, "Can the Court Normalize the Exception in Non-Emergency Cases? Palestinian Cases Before the Israeli Supreme Court," *International Journal of Constitutional Law*, Vol. 18, No. 3 (2020), pp. 788-803. For examination of the problem of exception in the occupation, see 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).

although the Palestinian citizens of Israel are in significant respects second-class citizens.[63] Within the Occupied Territories, while Palestinians are all subject to the same law, it is also the case that they live side by side with the Israeli settlers in the fortified enclaves which are illegal extensions of the Israeli state and subject to the protection of that state. Dramatic examples here are the separate systems of roads established by the Israeli Defence Force for settlers and Palestinians, the wall built to cut Palestinians off from contact with Israel and settler enclaves, as well in many cases from their means of livelihood.[64]

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 Supreme Court's jurisdiction over them gives them a toehold if not a foothold in the first-class space. But even that toehold is at best precarious since the court both offers and withdraws the 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. Indeed, it narrows them so dramatically that, as indicated, I would resist the argument that there now exists an Apartheid State since there is hardly even lip service to the ideal that all subjects are equal before the law.

This is in a way the converse of the situation under the Fugitive Slave Law of 1850 in which procedural rights were drastically reduced in order to block access to the substantive

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[63] 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), pp. 189-218.

[64] See John Dugard and John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory," *European Journal of International Law*, Vol. 24, No. 3 (2013), pp. 867-913; Hassan Jabareen, "How the Law of Return Creates One Legal Order in Palestine," *Theoretical Inquiries in Law*, Vol. 21, No. 2 (2020), pp. 459-490.

resources, albeit that these were deeply compromised. During the apartheid era, both strategies were used in particular laws—a reduction in procedural rights or a narrowing of substantive resources, or a combination of both. With the last, the situation of legal subjects became perilously close to pockets of lawlessness within that example of a perverse Rule-of-Law State, perhaps akin to the situation of those individuals in whose matters Fraenkel achieved his victories between 1933 and 1938.

But 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 Schmitt's "state of exception" writ large, 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.[65]

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[65] The space of the Nazi prerogative state may have been legally more complex than is assumed in the text. See Herlinde Pauer-Studer and J David Velleman, *Konrad Morgen: The Conscience of a Nazi Judge* (London: Palgrave MacMillan, 2015), which describes the career of a legal official in the SS who, on discovering the existence of the extermination camps, began prosecuting with some success the officials who staffed the camps when they commit infractions of the SS military code. Morgen's view was that the mass killing was itself lawful, since it was being carried out by secret order of Hitler and the Enabling Act made lawful such an order, but the order did not affect 'ordinary' crimes committed by the SS in the camps.

In sum, legal contiguity matters to those who wish to use resources within the law to challenge particular laws or the actions of officials implementing those laws and they find themselves at points on the continuum of legality between the rule-of-law and the extreme ends. That they can make the challenge as of right—on demand--depends not only on the resources of principle available within their own space, but also on the contiguity of the law-created space within which they find themselves and which creates the problematic status they wish to contest with another law-created space which makes the first space legally as well as morally problematic.

Of course, moral contiguity also matters. Suppose that in the antebellum US the North and the South fractured into independent states, which was in fact the threat the Union faced on the brink of the war as individual southern states either threatened secession or seceded. There would be extreme moral and political tensions about slavery which would arise from the fact that the North and the South shared a physical border, in just the way that such tensions were most intense between the actual northern and southern states that bordered each other in the antebellum period.[66]

The difference between this situation and that in the Union of both states is that in the latter the moral and political tensions manifest themselves legally in that judges have to answer conflicting claims of legal right which arise from within the domestic law of their own legal order, while in the former the tensions would arise from sheer physical contiguity. Moreover, in the former situation it matters more that the two states are firmly on the continuum of legality than that they share a physical border. For if they are both firmly on the continuum, as we can see from *Somerset's Case*, the moral tensions can become legal if an enslaved person either escapes to or is brought to a state which does not permit slavery. In such a case, as long as one adopts Mansfield's premise in his dictum in *Somerset's Case,* the application of the property rule of the

[66] For discussion of the particular tensions which arose in states on the borders between the north and the south, see Oakes, *Freedom National.*

slave-owning state is defeated by the legal norm of the other state which does not allow the law of slavery to reach into its space.

The more abstract point at stake here is that these two states, because they are *legal* states, are legally contiguous, whether or not they are physically contiguous, because of the international dimension of private international law. The difference physical contiguity makes is only that it is more likely that these moral problems will arise as legal problems. Similarly, the norms of public international law apply to states because that body of law binds them together as states subject to the same rule of law without regard to their physical location.

Both public and private international law thus make vivid for all legal states a phenomenon which was perhaps uniquely vivid in the antebellum US. Dworkin's distinction between legal and legislative rights is of the utmost importance because it focuses attention on the way in which legal rights exist as a matter of demand within the institutional structure within which they are asserted. In contrast, legislative rights are rights which get contested in the domain of debate over what legislation ought to be enacted in order to make a society better off. They only become legal rights once the legislature has enacted them into its positive law. But if legislative rights in state A are legal rights in state B, and A and B are legally contiguous, the ties of legality between A and B--what unites them as *legal* states--will raise the question whether the legal rights of A must be interpreted in light of the relevant legal rights of B. Similarly, because all states exist within the international legal order, there is a perennial question about how to interpret any state's legal norms in light of relevant public international law.

Of course, judges and other adjudicative officials must be minded to interpret the legal rights of their jurisdiction in this spirit before one will see legislative rights shading into legal rights. As Dworkin argued, this will require judges to understand their jural community as bound

together by fundamental legal principles as well as by enacted law.[67] As the experience of the actual apartheid state showed, that mindset can prove a resource for resisting authoritarian rulers.

Such rulers wish to rule by legally unlimited diktat. They want their personal say-so to rule and their officials are supposed to work towards their sense of its content. If they wish for whatever prudential reasons to rule by law they will find, as Fuller famously argued in his parable of King Rex, their rule constrained in ways that make it harder for their say-so to prevail.[68] They will thus be forced to restrict both the procedural rights and the substantive rights available to their subjects, as well as to reduce the reach into the space in which they rule of fundamental legal principles from other legal spaces, whether other jurisdictions or the space of international law. They will, that is, have to abuse legality while seeking to garner the legitimacy that accrues to rule in accordance with the rule of law. In combination with Fuller, the lesson of Fraenkel's great book is that the more rulers wish to assert their authoritarian tendencies, the closer their states will approach that end.

Rulers who wish to oppress a particular group have three options. First, they can create an Apartheid State, one in which law is used to create a class of inferior but still second-class legal subjects because they have one foot in first-class status, the other in the inferior status. Second, they can use law to create a Parallel State, one in which the oppressed group is in a legal space sealed off to the extent possible from the space of first-class status. Third, they can create pockets of prerogative within the space of the Rule-of-Law State, in which a group of individuals is rendered into the status of things. All three options will, however, create tensions generated from the fact that these states, or some combination of them, are located on the continuum of legality.

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[67] Ronald Dworkin, *Law's Empire* (London: Fontana, 1986).

[68] Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), pp. 33-41.

Notice that these tensions arise because the problem raised by the individual who cannot get an adequate answer to the question 'But, how can that be law for me?' becomes most acute when it arises because the individual is a member of group that has second class status. While the kind of Dworkinian theory on which I partly rely is often accused of excessive individualism, the situations in which doubts arise about whether a state is on the continuum of legality are produced because of the way the state treats the group of which the individual is a member. Put differently, the tensions arise because only those in an in-group are treated as equal before the law while the individual who cannot get an adequate answer is part of an out-group whose inferior status is imposed by law. In this way, the singular question provides a lens on the structural problems that affect whole groups and which create the tensions that move a state along the continuum.To rid a state of these tensions, rulers must move it off the continuum of legality. That is why the idea of authoritarianism in the sense of dictatorial rule is in deep tension with the idea of the rule of law. It is also why a legal theory that wishes to explain the authority of the modern legal state must rely on the idea of the fundamental legal principles that together with enacted law bind a jural community, so that legal subjects are able to get an answer to the question 'But, how can that be law for me?'