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Struggle and Legitimation

Stephen Ellmann

A specter is haunting lawyers working against injustice—the specter of legitimation.¹ Those who seek to challenge unjust states by using the law of those states against them are very likely to feel tarnished by the need to speak in terms of laws they despise. This sense of personal taint is bad enough, and sometimes may simply be intolerable. But perhaps it is even worse to wonder whether one's desperate efforts to maneuver within an unjust system in the end add luster to that system and so help preserve the evil one opposes. And this fear of “involuntary legitimation” is an easy one for which to find some foundation. After all, many nations—some more just than others—pride themselves on their adherence to the rule of law. Their leaders evidently believe, or at any rate hope, that fidelity to law is legitimizing. If they are right in their understanding of the sources of their own power, then it is only a short step to the conclusion that when law is being used to legitimate great injustice, no opponent of that injustice should lend credibility to law.

This is an important worry, and one that deserves careful exploration. It deserves such exploration in part because serious strategic judgments may turn on it. When legal strategies do reinforce unjust power, pursuing these strategies may be unwise and wrong. Moreover, this examination may reveal that some legal strategies are more compromising than others and that discovery may guide lawyers as they choose which cases to handle, and where.

The truth is, however, that while resolving this question might affect some strategic assessments, lawyers are already making such assessments daily, and in scores of countries around the world they have chosen to pursue many of the legal avenues available to them for resisting state injustice.

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1. Apologies to Marx & Engels.

Clients are making the same decisions—or, as George Bisharat suggests, they are simply ignoring the abstractions of legitimation in favor of the concrete hope, however slim, of legal relief. Perhaps these lawyers and clients are misguided, but it is more likely, I think, that we as scholars have much to learn from the “on-the-ground” judgments of practice. Thus the importance of this exploration lies not only in its potential impact on practical decisions but also—perhaps more—in its potential impact on an accurate scholarly understanding of the nature of lawyers’ work and law’s role in society.

Studying the issue of legitimation may also help us to understand better what might be called the “discourse” of legitimation. Why, we might ask, does the question of legitimation occupy our attention? Surely the answer is not only that this question is, “objectively,” a good question. For practicing lawyers, part of the force of this question may be that it gives form to the sense of futility and of taint that comes from working extremely hard in unfriendly forums to win minimal victories. For outside observers, part of this question’s appeal may be that it embodies the skepticism that many have come to feel about the value of lawyers and of law in general, and the related sense of the pervasiveness and ingeniousness of power in resisting challenge. There is much for practicing lawyers to be frustrated by and much for observers to be skeptical about. But if the danger of legitimation proves to be less severe than it sometimes seems—if we find that in conditions of great injustice lawyers’ resistance can and sometimes does make a difference—then we have reason to temper both frustration and skepticism.

The purpose of this Symposium is to take the danger of legitimation seriously. In doing so, we build on the work of other scholars, many of whose thoughts are discussed in these articles. The reason for revisiting this question is not to exorcise the ghost of legitimation, for these studies do not acquit lawyering against injustice of the charge that it has some legitimating effects. But the conjunction of these four studies, we hope, allows readers to assess the issue of legitimation in a particularly wide-ranging fashion. The four articles approach the issue in a diverse array of nations and legal systems and from a number of different perspectives; they have no single message and this Introduction can only touch on, rather than summarize, all their insights.² What the Introduction seeks to do, however, is to place the articles in relation to each other and to suggest some of the lessons, and the questions, that they highlight.

2. The articles are George E. Bisharat, “Courting Justice? Legitimation in Lawyering under Israeli Occupation”; Stephen Ellmann, “Law and Legitimacy in South Africa”; Mark J. Osiel, “Dialogue with Dictators: Judicial Resistance in Argentina and Brazil”; Jane Kaufman Winn & Tang-chi Yeh, “Advocating Democracy: The Role of Lawyers in Taiwan’s Political Transformation.” The bulk of this Introduction consists of a discussion of these articles; I cite particular pages from them only for direct quotations.

The articles do collectively demonstrate that the task of identifying and assessing legitimation effects is complex and delicate. They also give reason to believe that the legitimation that lawyering may confer on unjust states is less inevitable and often less substantial than might have been feared. Moreover, the articles remind us that not every legitimation effect is necessarily to be regretted. An appeal phrased in the terms favored by the powerful may save more lives than a more outspoken critique, as Mark Osiel emphasizes. To the extent that lawyering against injustice legitimizes the idea that in a just society the rule of law might be an important bulwark against oppression, as George Bisharat and I suggest, again the legitimating impact of this work may well be a benefit rather than a cost. Finally, the Symposium suggests that a comprehensive appraisal of lawyers' work in unjust states—an appraisal weighing the full range of tangible impacts and symbolic legitimation effects that may result from lawyers' efforts—will often find that on balance lawyers' contribution to the struggle against injustice is of real value.

What can lawyers accomplish? The first step in any such appraisal is to understand what it is that lawyers can actually do in unjust states. Why are they allowed to operate? Can they make arguments of any substance within the terms of an unjust legal system? Can they ever win? We would not need to discuss legitimation if there were nothing lawyers could do anyway—but there is. Not in every country, to be sure. Indeed, Jane Kaufman Winn and Tang-chi Yeh's contribution illuminates how much the legal system in Taiwan had to change before it could be seen as at all hospitable to the idea of reformist lawyering. The state's restriction of the number of lawyers, its close control of the process of admission to the bar, its scrutiny of candidates for the magistracy and for prosecutorial positions, and its control over the bar associations—to say nothing of the host of other elements of authoritarian rule—all restricted the growth of lawyering against injustice. Nevertheless, it is noteworthy that even before the end of martial law in 1987, some lawyers evidently were engaged in such work, on behalf of consumers, women, and political defendants.

The truth is that it is not easy for a state to operate a legal system while altogether barring the use of that system by those who oppose the state's unjust acts. States that set some store by their reputation for adherence to law—and many do, among them Argentina, Brazil, Israel, South Africa, and Taiwan, the countries examined here³—cannot easily close their courts

3. That most of these countries were guilty of profound injustice during the periods these articles examine will not seem controversial. To call Israel's occupation of the West Bank and the Gaza Strip unjust, however, certainly is controversial. I note, as Bisharat does (p. 354), that it is not necessary to believe that Israel's occupation is unjustifiable to believe "that the . . . Israeli military governments' repressive powers have been great, and their exercise frequent," and so to include a study of law in Israel's Occupied Territories in this Symposium on lawyering in repressive states.

or jail their lawyers. Nor can they painlessly spell out in "law" each of the injustices they propose to commit. Nor is it at all simple, as the many scholars who have argued the plasticity of legal doctrine have shown, to shape legal provisions that absolutely foreclose argument on behalf of the state's victims. Moreover, it is becoming increasingly difficult for any one state to write rights out of its law, as human rights consciousness and insistence on the human rights promises of international law grow more deeply embedded in international politics.

Mark Osiel focuses on the utility of various theories of jurisprudence for expressing opposition to injustice. Osiel's concern here is with judges, but his insights bear on the rhetorical resources available to lawyers as well. Revisiting the famous debate between H. L. A. Hart and Lon Fuller over the impact of positivism and natural law thinking in Nazi Germany, and incorporating attention to the effects of legal realism as well, Osiel concludes that none of these theories intrinsically disposes its practitioners either to accept or to repudiate state conduct and that each of them can be put to the service of resistance to injustice. As he shows in examining the case of Argentina under the juntas, courts may find it possible to speak quite a measure of truth to power even, or especially, when they deliberately adopt the preferred legal framework of the regime they address. The Argentinian Supreme Court chose to speak largely in the language of legal realism—an imported American perspective which had been turned into a rationale for the manipulation of law in the service of power—and Osiel contends that what the Court said was to a significant degree heard (though he feels the Court should have gone further than it did). Osiel also comments that judicial formalism (which can be a species of positivism) "has surely saved more lives and preserved more liberties than naturalism" (p. 546), since this framework allows courts to resist rulers' wishes by invoking the mysteries of legal technicality. Moreover, Osiel finds in Brazil evidence of the utility of natural law jurisprudence, which he sees the Brazilian Supreme Court as having adopted in an effort to speak cogently not to Brazil's dictators but to its people. Osiel does not contend, however, that each of these approaches is equally available and useful in every unjust state; instead, he urges us to pursue further the question of which theories in actual practice provide the best resources for resistance to injustice.

So long as lawyers are free to operate, and so long as they have legal propositions available to invoke, it turns out that they can accomplish quite a lot. Some of what they can accomplish they will achieve through litigation, but lawyers' work can take many forms, and a full assessment of lawyers' impact requires us to avoid too narrow an understanding of what lawyers actually do. Thus they may carve out discrete areas of law in which progress can be made; Winn and Yeh, for example, mention Taiwanese lawyers' efforts in the fields of labor relations, consumer law, and women's

rights. They may preserve contact with the victims of state power, even if doing so makes the lawyers feel more like social workers than lawyers (as George Bisharat reports of lawyers in Israel's Occupied Territories). They may win shorter periods of imprisonment for their clients or reduce the risk of lethal torture, as Bisharat also reports. Similarly, Osiel suggests that the Argentinian Supreme Court shaped legal responses to injustice that could have protected some of the juntas' victims (though the court failed to carry through on this promise). Lawyers may also pursue challenges to injustice outside the courts. One method of doing so is to address the international and domestic court of public opinion (as in the Palestinian case once more). Another is to lobby, as in the context of West Bank and the Gaza Strip or South Africa. Yet another is to campaign for office, as a considerable number of antigovernment lawyers in Taiwan have chosen to. Or lawyers may protest—for example, by announcing a fast in support of hunger strikers, as some lawyers did in South Africa.

What leads lawyers to attempt this work? We also would not need to discuss the impact of lawyers' work if lawyers did not choose to use their professional skills and status in work against injustice. It is worth pausing for a moment, therefore, to consider what we can say about lawyers' motivations for undertaking this work, work that even if sometimes fruitful will often be frustrating and may be dangerous. Certainly much of what motivates lawyers must not be law. Bisharat, for example, sees the primary motivation of Palestinian lawyers as political—they, like other Palestinians in all walks of life, oppose Israel's occupation of the West Bank and the Gaza Strip. Moreover, politics may be of many stripes; Osiel believes that the judges of the Argentine Supreme Court offered criticism of some of the juntas' actions not because they believed the juntas were illegitimate but because they supported the juntas and wanted them to live up to their aspirations. For lawyers motivated primarily by politics, the decision to use legal methods for political objectives could simply be an instrumental, tactical choice, presumably based on the sort of analysis of what can be accomplished that this Introduction is describing.

But law may also play a motivating role. Osiel suggests that the principal way jurisprudential theories can encourage resistance to injustice is to provide judges (and, again, the same would be true for lawyers) with arguments that are relatively less offensive to the regime responsible for the injustice. Less offensive arguments are *safer* arguments, and people will be more likely to act if doing so seems less perilous.

It may be, in addition, that the impact of legal training and legal ideals is sometimes more positive than this. Winn and Yeh have found that in Taiwan people with legal backgrounds are more likely to enter politics in opposition to the government than in association with it; perhaps legal training led to opposition politics—although, as Winn and Yeh observe, it

may instead have been opposition sentiments that led to legal training. Winn and Yeh also describe the striking experiences of some Taiwanese lawyers, who were themselves radicalized by their bitter experience as defense counsel in a political trial early in the 1980s. If ideals matter to men and women, and if lawyers tend to embrace the ideals law asserts, then we are entitled to suggest that law inspires as well as facilitates lawyers' efforts against injustice.

Can law that is linked to injustice enjoy any legitimacy? It is only because lawyers do undertake this work, and because it has some impact, that there is real reason to be concerned about its legitimating effects. Even where lawyers can accomplish something, however, we would not need to examine the danger of legitimation if it turned out that law simply enjoyed no legitimacy whatsoever. But it is clear that this is not the case. Rulers may need to legitimize their conduct in their own eyes, and the sense of fidelity to law may be very helpful in this enterprise, as George Bisharat suggests. They also need to win and maintain the approval of those groups in the population to whom they look for support. Law may well have helped legitimize apartheid in the eyes of whites; occupation of the West Bank and the Gaza Strip in the eyes of Israelis; and campaigns against the left in the eyes of some portions of Brazilian and Argentinian society.

Moreover, law appears to have considerably more legitimacy among oppressed people themselves than might have been imagined. Bisharat notes the "nearly naive trust in the bona fides of Israeli legal institutions" that Palestinian lawyers initially had, and also points to these lawyers' continued feeling (at least before the *intifada*) that the judges of the military courts were good judges though they applied bad law (p. 382). Similarly, Winn and Yeh report that Taiwanese with only primary school education are much less likely than the most educated (and presumably most powerful) of their fellow citizens to believe that bribes or personal connections are sometimes required to win a lawsuit.

My contribution to the Symposium focuses on this issue⁴ and argues that black South Africans did accord the legal system of apartheid a considerable measure of legitimacy—much more than might have been expected in light of the tremendous and pervasive rejection of apartheid itself. Opposition to apartheid, I contend, did not translate into absolute rejection of every institution associated with it. Instead, I suggest, many Africans who deeply abhorred apartheid were decidedly conservative on many other issues, and might well have accorded some legitimacy to the country's legal system because it provided them—poorly, but better than any other institution—with a measure of security against crime and also offered a measure of

4. I discuss the evidence from South Africa on many of the other questions outlined in this introduction in Stephen Ellmann, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

redress of injustice. It is even possible that some Africans, infected by apartheid with a sense of their own racial inferiority, might have considered the state legal system legitimate partly because it was run by whites. Other Africans who proudly rejected apartheid and who were not conservative in any sense may nonetheless have had a measure of faith in the courts, perhaps because they felt so strongly the power of the stories they had to tell and welcomed the opportunity to be heard that courts could provide. Still others, more skeptical activists who were adamantly determined to bring down apartheid and judged institutions and people by their contribution to that goal, may have found some significance in the fact that these courts did not relentlessly rule in favor of the state, and may have been struck by the courage and commitment displayed by anti-apartheid lawyers—both those who worked in courts and those, like Nelson Mandela, who led from elsewhere. While I doubt that African activists would have endorsed the legitimacy of the legal system under apartheid, it is quite possible that they drew from their experiences with that system a measure of legitimation for the ideals of the rule of law.

Does the risk of legitimation outweigh the benefits of lawyering against injustice? If law does enjoy some measure of legitimacy among rulers and ruled, observers and observed, and if lawyers' work within the legal system is sometimes meaningful, then it becomes plausible to think that lawyers might in fact contribute to the legitimacy of the legal system and through it to the legitimacy of the state as a whole. Put differently, each lawyer must confront the moral question of whether it is "reasonably foreseeable" that lawyering against injustice will "further . . . the policies" that the lawyer meant to defeat.⁵ I argue in my article that in light of the ways that Africans apparently appraised their legal system, the activities of anti-apartheid lawyers likely *did* contribute to the measure of legitimacy Africans accorded to that system. But the leap from legitimizing the legal system, however partially, to legitimizing the system as a whole is a huge one. It deserves emphasis that legal challenges to injustice, at least at first blush, by no means enhance a regime's reputation. What such cases do, after all, is to assert the existence of injustice. Often they do so in passionate language, reported in the press, observed by human rights monitors, and backed up with evidence. The first effect such cases should have should be to disgrace the state rather than to buttress it.

Still we cannot ignore the possibility of a second, and ultimately greater, effect: to enhance the legitimacy of an unjust system by bolstering the illusion that it operates fairly and according to rules. At one level, to be sure, this suggestion turns out to be quite implausible: people who consider a government outrageously oppressive are not likely to change their minds

5. The quoted language is drawn from Mark Osiel's statement (p. 550) of the "criterion of moral self-scrutiny" that public officials should adopt.

because the courts remain open. South African blacks did not revise their view of apartheid, nor have Palestinians revised their assessment of the Israeli occupation of the West Bank and the Gaza Strip. We have already seen that the claim of adherence to law may be used as a basis for seeking legitimacy with other audiences as well, however, and for these other audiences the efforts of lawyers opposing injustice may offer more potent reassurance about the fundamental legitimacy of the system. Weighing such potential costs against the possible benefits that lawyers might simultaneously win is difficult indeed. Doing so is the central concern of George Bisharat's article and an important theme of the work of Jane Winn and Tang-chi Yeh.

Bisharat studies the landscape of lawyering in the Occupied Territories and concludes that although the victories of lawyers representing Palestinians have been decidedly modest, and their work has had some legitimation effects, nonetheless the benefits of their work have likely outweighed the costs. He also emphasizes that even after close analysis it is difficult to be certain of this very conclusion—and observes that one reason for endorsing lawyers' efforts in the context of this uncertainty is that “there is . . . logical appeal in the aphorism ‘a bird in the hand is worth two in the bush’ ” (pp. 398–99). I will not try to recapitulate here his detailed analysis of the various factors weighing in this balance.

Instead, I want to highlight one aspect of his discussion—his argument that even though Palestinians certainly never were induced to support the occupation as a result of any legitimizing impact of lawyers' work, the intensity of their opposition to it might have been weakened. Bisharat notes the troubling possibility that “*more repression is better than less*, at least insofar as mobilizing a political oppositional movement is concerned” (p. 352). He also suggests that lawyers, precisely because they were able to help their clients negotiate their encounters with the legal system somewhat less painfully, may have encouraged clients to go along with the system rather than challenge it—as they might have if they had unanimously refused to accept plea bargains and so tied up the courts. Perhaps, in addition, the opportunity to be heard in the courts offered Palestinians “symbolic compensation” for what they had suffered and so contributed to making their fury less intense (p. 389). Though Bisharat ultimately finds the benefits of lawyers' work greater than its costs, these observations remind us, as he says, that when a state cannot win legitimacy in the eyes of those it governs, it may still be able to use law to encourage acquiescence.

Even after these complexities have been mastered, our analysis of the costs and benefits of lawyering against injustice is not complete. Here as elsewhere, we must go on to ask the question “compared to what?” If judges disposed to protect human rights abandon the field of conventional adjudication to avoid lending legitimacy to injustice, then, as Mark Osiel com-

ments, “we deny ourselves—as advocates for its victims—the chance to chasten executive abuse in these standard lawyerly ways” (p. 554). The Palestinian case is a particularly illuminating one on this score, as Bisharat demonstrates, because there it is possible to compare the results of lawyers’ work with the results of lawyers’ *not* working—that is, with the results of the prolonged strike initiated by Palestinian lawyers of the West Bank. As Bisharat notes, Israeli courts would likely have successfully claimed a considerable measure of legitimacy even in the absence of any participation by lawyers opposed to the occupation; even more important, in actual practice the strike disabled its participants from playing the various supportive roles in challenging the injustices of the occupation that those actually in the trenches were in a position to perform.

As challenging as the legitimation question is in assessing lawyering in the Occupied Territories, answering this question in the context of Taiwan may be even more difficult. As Jane Winn and Tang-chi Yeh remind us, Taiwan’s legal system has borrowed extensively from Western models, but the role of law in Taiwan, including the role of law in Taiwanese opposition to injustice, may differ significantly from what we would find in Western settings. Winn and Yeh observe that “the public perception that law was administered impartially has not been central to the legitimization of the [Kuomintang] regime on Taiwan,” in part because although “respect for the exercise of state power through legal institutions has always been an aspect of Chinese popular culture, the legitimacy of regulatory institutions has not generally rested on their claim to protect individual rights as it has in some Western nations” (p. 563). These observations might suggest that neither law itself nor legal challenges to government injustice would have important effects on the legitimacy of the government of Taiwan.

Another possibility, however, is that there are important effects, but these effects are not the result of law’s seeming, or not seeming, to honor ideals of liberal democracy. Winn and Yeh write: “One key to political legitimacy under the imperial order was the figure of the remonstrating official, who acted from deep moral conviction and great courage, and at great personal peril, to draw problems to the attention of the emperor” (pp. 597–98). Perhaps lawyers’ efforts in Taiwan, though couched in terms of liberal values, ultimately reinforce the legitimacy of a vision of government as an interaction between elites. Whether the current Taiwanese government benefits or suffers from being judged in this light would depend on whether it properly honored the courage and conviction of its elite opponents; but not on whether it moved toward greater fidelity to legal models for protection of individual “rights.” Winn and Yeh thus highlight the importance, and the difficulty, of determining exactly what is legitimizing or delegitimizing in a given society and what lawyers’ work actually means within the cultural context in which it is carried out.

So far we have evaluated lawyers' work against injustice primarily in light of its impact on the regimes whose conduct the lawyers challenge. But this analysis, as multilayered as it is, leaves out one factor we must now add to the balance: the implications of this work for the next regime. As too many dreary historical examples show, the next regime may turn out to be worse than the unjust government it replaced. Moreover, the path by which a country arrives at that next regime may dramatically influence the nature of the new government. On this score, two of the articles in the Symposium argue that the impact of lawyers' work now may reinforce the power of the rule of law in the future. Bisharat sees such an effect in evidence in the Occupied Territories, where human rights lawyers who have long spoken out against Israeli conduct now are criticizing the acts of the Palestinian Authority. Similarly, I find evidence of this effect in the tremendous reliance on law and legal institutions in the new South African constitution.

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We deal here in great uncertainties. The sheer existence of legitimation has been contested; the legitimation effects of lawyering against injustice are very complex; the concrete benefits of this work are not always easy to measure either; and the impact on the next regime is necessarily unknowable until that regime arrives. The studies in this Symposium, by taking the possibility of "involuntary legitimation" seriously, demonstrate how difficult it is to firmly demonstrate or refute the significance of this risk. Yet these studies also illustrate the ability and willingness of lawyers to deploy the tools of their trade on terrain that might have seemed impossibly hostile. We need to learn much more about this work, but I believe we already have reason to conclude that often it is well worth undertaking. Certainly we know enough to greatly admire many courageous men and women who have tried to realize the value of law by using it against injustice.