### Case

#### No circumvention and the courts are effective—the executive will consent

Prakash and Ramsay 12, Professors of Law

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The Courts.—The courts constrain the Executive, both because courts are necessary to the Executive imposing punishments and because courts can enforce the Constitution and laws against the Executive. It is true, as Posner and Vermeule say, that courts often operate ex post and that they may defer to executive determinations, especially in sensitive areas such as national security. But these qualifications do not render the courts meaningless as a Madisonian constraint. First, to impose punishment, the Executive must bring a criminal case before a court. If the court, either via jury or by judge, finds for the defendant, the Executive does not suppose that it can nonetheless impose punishment (or even, except in the most extraordinary cases, continue detention). This is so even if the Executive is certain that the court is mistaken and that failure to punish will lead to bad results. As a result, the Executive’s ability to impose its policies upon unwilling actors is sharply limited by the need to secure the cooperation of a constitutionally independent branch, one that many suppose has a built-in dedication to the rule of law.84 And one can hardly say, in the ordinary course, that trials and convictions in court are a mere rubber stamp of Executive Branch conclusions. Second, courts issue injunctions that bar executive action. Although it is not clear whether the President can be enjoined,85 the rest of his branch surely can and thus can be forced to cease actions that judges conclude violate federal law or the Constitution.86 As a practical matter, while courts issue such injunctions infrequently, injunctions would be issued more often if an administration repeatedly ignored the law. Third, courts’ judgments sometimes force the Executive to take action, such as adhering to a court’s reading of a statute in areas related to benefits, administrative process, and even commission delivery. Though the claim in Marbury v. Madison87 that courts could issue writs of mandamus to executive officers was dicta,88 it was subsequently confirmed in Kendall v. United States ex rel. Stokes, 89 a case where a court ordered one executive officer to pay another.90 Finally, there is the extraordinary practice of the Executive enforcing essentially all judgments. The occasions in which the Executive has refused to enforce judgments are so few and far between that they are the stuff of legend. To this day, we do not know whether Andrew Jackson said, “John Marshall has made his decision, now let him enforce it.”91 Lincoln’s disobedience of Chief Justice Taney’s writ of habeas corpus is so familiar because it was so singular. Yet to focus on actual court cases and judgments is to miss the broader influence of the courts. Judicial review of executive action matters because the knowledge of such review affects what the Executive will do. Executives typically do not wish to be sued, meaning that they often will take measures designed to stave off such suits and avoid actions that raise the risk of litigation. The ever-present threat that someone will take a case to court and defeat the Executive acts as a powerful check on executive decision making. The Executive must take account of law, including law defined as what a court will likely order.

### XO CP

#### Judicial action is key to judicial globalization

Flaherty—executive

Key to Modeling—Suto, CJA, and Kersch

Perm do both—solves the NB because Obama will be seen as taking the lead

#### Executive control reduces courts to political tools and prevents litigation of human rights issues

Free 3 (Brian C., Washington State Supreme Court, edit-in-chief Pacific Rim Law and Policy Journal, "Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in

Alien Tort Claims Act Litigation," Pacific Rim Law & Policy Journal, 2003, <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/731/12PacRimLPolyJ467.pdf?sequence=1>, accessed 2013)

Although executive opinions are necessary for judicial consideration in certain cases, the separation of powers doctrine mandates that courts make judicial determinations free from political control, even during times of national crisis. The Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer 114 refused to accept President Truman's claims that the Korean War necessitated the seizure of American steel mills. 115 Instead, the Court insisted that the propriety of the President's actions be determined by established constitutional principles." 6 In Washington Post Co. v. United States Department of State,"17 the District of Columbia Court of Appeals assessed the State Department's claim that an individual would be significantly harmed if certain Department records were publicly released," 1 8 ultimately determining that the Department's contention was unfounded."19 The court concluded that "whatever weight the opinion of the Department, as a presumed expert in the foreign relations field, is able to garner, deference cannot extend to blatant disregard of countervailing evidence."' 120 If courts were to practice unquestioning adherence to executive communication, they would enable politicization of the judiciary. As the divergent views of the Carter and Reagan Administration demonstrate, 121 political support for § 1350 has differed dramatically among various presidential administrations. If courts do not make justiciability determinations independent from executive control, § 1350 may become little more than a political tool. Instead of objective determinations made according to established principles of law, courts would determine litigants' claims based upon prevailing political views. Presidents would be free to defeat human rights claims or, alternatively, force courts to adjudicate issues inappropriate for judicial resolution.

#### Internal executive actions don’t solve—still perceived as not credible independent of the action taken

Goldsmith 13, Professor at Harvard Law

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These are unhappy developments for the president who in his first inaugural address pledged with supercilious confidence that, unlike his predecessor, he would not expend the "rule of law" for "expedience's sake." Obama reportedly bristles at the legal and political questions about his secret war, and the lack of presidential trust that they imply. "This is not Dick Cheney we're talking about here," he recently pleaded to Democratic senators who complained about his administration's excessive secrecy on drones, according to Politico. And yet the president has ended up in this position because he committed the same sins that led Cheney and the administration in which he served to a similar place. The first sin is an extraordinary institutional secrecy that Obama has long promised to reduce but has failed to. In part this results from any White House's inevitable tendency to seek maximum protection for its institutional privileges and prerogatives. The administration's disappointing resistance to sharing secret legal opinions about the secret war with even a small subset of Congress falls into this category. MUCH OF WHAT THE ADMINISTRAT-ION SAYS ABOUT ITS SECRET WAR SEEMS INCOMPLETE, SELF-SERVING, AND ULTIMATELY NON-CREDIBLE. But the point goes deeper, for secrecy is the essence of the type of war that Obama has chosen to fight. The intelligence-gathering in foreign countries needed for successful drone strikes there cannot be conducted openly. Nor can lethal operations in foreign countries easily be acknowledged. Foreign leaders usually insist on non-acknowledgment as a condition of allowing American operations in their territories. And in any event, an official American confirmation of the operations might spark controversies in those countries that would render the operations infeasible. The impossible-to-deny bin Laden raid was a necessary exception to these principles, and the United States is still living with the fallout in Pakistan. For official secrecy abroad to work, the secrets must be kept at home as well. In speeches, interviews, and leaks, Obama's team has tried to explain why its operations abroad are lawful and prudent. But to comply with rules of classified information and covert action, the explanations are conveyed in limited, abstract, and often awkward terms. They usually raise more questions than they answer—and secrecy rules often preclude the administration from responding to follow-up questions, criticisms, and charges. As a result, much of what the administration says about its secret war—about civilian casualties, or the validity of its legal analysis, or the quality of its internal deliberations—seems incomplete, self-serving, and ultimately non-credible. These trust-destroying tendencies are exacerbated by its persistent resistance to transparency demands from Congress, from the press, and from organizations such as the aclu that have sought to know more about the way of the knife through Freedom of Information Act requests. A related sin is the Obama administration's surprising failure to secure formal congressional support. Nearly every element of Obama's secret war rests on laws—especially the congressional authorization of force (2001) and the covert action statute (1991)—designed for different tasks. The administration could have worked with Congress to update these laws, thereby forcing members of Congress to accept responsibility and take a stand, and putting the secret war on a firmer political and legal foundation. But doing so would have required extended political efforts, public argument, and the possibility that Congress might not give the president precisely what he wants. The administration that embraced the way of the knife in order to lower the political costs of counterterrorism abroad found it easier to avoid political costs at home as well. But this choice deprived it of the many benefits of public argumentation and congressional support. What Donald Rumsfeld said self-critically of Bush-era unilateralism applies to Obama's unilateralism as well: it fails to "take fully into account the broader picture—the complete set of strategic considerations of a president fighting a protracted, unprecedented and unfamiliar war for which he would need sustained domestic and international support." Instead of seeking contemporary congressional support, the administration has relied mostly on government lawyers' secret interpretive extensions of the old laws to authorize new operations against new enemies in more and more countries. The administration has great self-confidence in the quality of its stealth legal judgments. But as the Bush administration learned, secret legal interpretations are invariably more persuasive within the dark circle of executive branch secrecy than when exposed to public sunlight. On issues ranging from proper targeting standards, to the legality of killing American citizens, to what counts as an "imminent" attack warranting self-defensive measures, these secret legal interpretations—so reminiscent of the Bushian sin of unilateral legalism—have been less convincing in public, further contributing to presidential mistrust. Feeling the heat from these developments, President Obama promised in his recent State of the Union address "to engage with Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world." So far, this promise, like similar previous ones, remains unfulfilled. The administration has floated the idea of "[shifting] the CIA's lethal targeting program to the Defense Department," as The Daily Beast reported last month. Among other potential virtues, this move might allow greater public transparency about the way of the knife to the extent that it would eliminate the covert action bar to public discussion. But JSOC's non-covert targeted killing program is no less secretive than the CIA's, and its congressional oversight is, if anything, less robust. A bigger problem with this proposed fix is that it contemplates executive branch reorganization followed, in a best-case scenario, by more executive branch speeches and testimony about what it is doing in its stealth war. The proposal fails to grapple altogether with the growing mistrust of the administration's oblique representations about secret war. The president cannot establish trust in the way of the knife through internal moves and more words. Rather, he must take advantage of the separation of powers. Military detention, military commissions, and warrantless surveillance became more legitimate and less controversial during the Bush era because adversarial branches of government assessed the president's policies before altering and then approving them. President Obama should ask Congress to do the same with the way of the knife, even if it means that secret war abroad is harder to conduct. Administration officials resist this route because they worry about the outcome of the public debate, and because the president is, as The Washington Post recently reported, "seen as reluctant to have the legislative expansion of another [war] added to his legacy." But the administration can influence the outcome of the debate only by engaging it. And as Mazzetti makes plain, the president's legacy already includes the dramatic and unprecedented unilateral expansion of secret war. What the president should be worried about for legacy purposes is that this form of warfare, for which he alone is today responsible, is increasingly viewed as illegitimate.

### Court Capital

#### Judges don’t consider capital when deciding.

Landau, JD Harvard and clerk to US CoA judge, 2005

(David Landau, JD Harvard Law, clerk to Honorable Sandra L. Lynch, U.S. Court of Appeals for the First Circuit, 2005, “THE TWO DISCOURSES IN COLOMBIAN CONSTITUTIONAL JURISPRUDENCE: A NEW APPROACH TO MODELING JUDICIAL BEHAVIOR IN LATIN AMERICA” 37 Geo. Wash. Int'l L. Rev. 687)

Theoretically, attitudinalists could argue that judges rule in accordance with their own ideological preferences honestly, rather than strategically, because for some reason judges simply are not capable of, or prefer not to, act strategically. In practice, however, this is not what they say. Attitudinalists instead say that the factual environment renders strategic action unnecessary, at least for U.S. Supreme Court justices, because, for example, federal judges have life tenure, U.S. Supreme Court justices have no real ambition for higher office, and congressional overrides are rarely a realistic danger. [n25](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n25) "The Supreme Court's rules and structures, along with those of the American political system in general, give life-tenured justices  [\*696]  enormous latitude to reach decisions based on their personal policy preferences." [n26](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n26) In other words, both strategic and attitudinal models, in practice, assume that judges are willing and able to act strategically. Where the two theories differ is in their factual assumptions: Strategic models support the belief that judges face various types of constraints that force them to support decisions that differ from their preferred policy points, while attitudinalists believe that the institutional environment leaves at least those judges that they study - generally U.S. Supreme Court justices - free to make decisions that are exactly in accord with their preferred policies. Similarly, followers of strategic theory could theoretically believe that judges act strategically to maximize achievement of some set of goals other than their ideological policy preferences. For example, perhaps judges could prefer "legalistic" goals like adherence to precedent, but would have to defect strategically from absolute adherence to those goals given the presence of other institutions with some clout, like the U.S. Congress. In practice, however, this is not what happens. Instead, strategic theorists virtually always model judges as strategically furthering sets of ideological policy goals, which are the exact same goals modeled by the attitudinal theorists. [n27](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n27) What we have, then, are two theories that in practice tend to collapse into one. In both theories, actors are assumed: (1) to have preferences; and (2) to act strategically for the maximization of those preferences. [n28](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n28) In addition, attitudinalists and strategic theorists both believe in a particular kind of rational choice theory: Specifically, the actors' preferences are assumed to be solely ideological, policy-based goals derived from the political realm. It is important to emphasize that both theories also believe that the  [\*697]  proper way to test judicial behavior is to look at what judges actually do, not at what they say: Thus, what matters is the outcome, not the reasoning of the case.

#### Winners Win

Lawrence G. Sager Prof Law ’81 (Professor of Law, New York University) April, 1981 Constitutional Triage Columbia Law Review, Vol. 81, No. 3. pp. 707-719.

A second objection, to which Professor Choper has made himself more directly vulnerable, concerns the validity of those premises. The assertion that deciding controversial cases dissipates the moral or political authority of the federal judiciary is far from self-evident, and Professor Choper's arguments, balanced and reflective though they be (pp. 129-70), do not persuade me. Even quite harrowing episodes like the Supreme Court's confrontation with Georgia over the status of the Cherokee Nation' may in the long run have accrued to the benefit of the Court's national prestige. 5 [Footnote] 5. "Long run" may misstate the case. In the fall of 1832, with Georgia openly defying the decision of the Court in Worcester v. Georgia, and President Jackson unwilling—possibly unable—to do anything about it, John Marshall wrote to Justice Story, "1 yield slowly and reluctantly to the conviction that our Constitution cannot last." But within six months, Jackson had moved to denounce South Carolina's Nullification Ordinance and to request legislation giving the federal government power to act against states that defied Supreme Court authority, Congress had enacted such legislation (the Force Bill) amidst a clamor of support for the Court, and the Governor of Georgia had pardoned Samuel Worcester and Elizur Butler, who had in turn withdrawn their suit. Charles Warren is thus moved to speak of the period, only months after the decision in Worcester, as one of "renewed confidence in the Court," with the Court finding itself in "a stronger position than it had been for the past fifteen years." 1 C. Warren, The Supreme Court in United States History 778 (1926). See generally id., at 729-79. Speculation about such questions is difficult, and there is a tendency to ignore an important variable in the factual equation. Much of the Court's ability to weather the storms of its unpopular decisions may well depend upon a popular sense that federal judges are obliged to decide constitutional controversies, and to decide them according to their best understanding of the dictates of the Constitution. Displays of political discretion, while a short-term means of avoiding controversy, may serve over time to erode public tolerance of the Court's controversial decisions.

#### Kennedy won’t be on top—he came out against the plan

Vaughn and Wiliams, Professors of Law, 13 [2013, Katherine L. Vaughns B.A. (Political Science), J.D., University of California at Berkeley. Professor of Law, University of Maryland Francis King Carey School of Law, and Heather L. Williams, B.A. (French), B.A. (Political Science), University of Rochester, J.D., cum laude, University of Maryland Francis King Carey School of Law, “OF CIVIL WRONGS AND RIGHTS: 1 KIYEMBA V. OBAMA AND THE MEANING OF FREEDOM, SEPARATION OF POWERS, AND THE RULE OF LAW TEN YEARS AFTER 9/11”, Asian American Law Journal, Vol. 20, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2148404]

On remand, in what came to be called Kiyemba III, 57 the D.C. Court of Appeals reinstated its judgment and opinion in Kiyemba I, modified to account for the recent developments in relocating the Uighurs.58 Shortly thereafter, the Supreme Court denied the Uighurs’ renewed petition for certiorari.59 Justices Breyer, Kennedy, Ginsburg, and Sotomayor issued a brief statement addressing the denial. In their view, the government’s resettlement offers, “the lack of any meaningful challenge [by the Uighurs] as to their appropriateness, and the Government’s uncontested commitment to continue to work to resettle [the Uighurs] transform [the habeas] claim.”60 Put differently, there is, the justices stated, “no Government imposed obstacle to petitioners’ timely release and appropriate resettlement.”61 If circumstances were to materially change, the justices stated that the Uighurs should “raise their original issue (or related issues) again in the lower courts and this Court.” Thus, for now, and for at least some of the Uighur detainees, their story did indeed finally end, as it began, in relocation—albeit in relocation to a foreign country. For others, relocation remains little more than a hope. Regardless, at the time that the Supreme Court was presented with the petitions in Kiyemba I and Kiyemba III, the Uighurs were still being—and had been, for over six years—unlawfully detained by the U.S. government. New factual issues related to continuing diplomatic negotiations for transfer to another country should not have altered the legal requirement to release them, at the very least pending successful completion of the negotiations for their release. While the majority of the Uighurs originally brought to Guantanamo Bay in 2002 have since been relocated, several remain, effectively indefinitely detained, by virtue of their simple desire to select, or at least have a say in, the place where they will live—a right that rule of law principles suggests they are entitled, having had their detention determined unlawful.

### Prisons K

#### This is just a link of omission – we believe that a separation of power of war authority is key.

#### Legal norms are good—prevents liberal democracies from sliding into totalitarianism by eliminating instances of exclusion

Heins, Professor PolSci Concordia, ‘5 (Volker, “Giorgio Agamben and the Current State of Affairs in Humanitarian Law and Human Rights Policy” German Law Journal, Vol 6 No 5)

According to this basic Principle of Distinction, modern humanitarian action is directed towards those who are caught up in violent conflicts without possessing any strategic value for the respective warring parties. Does this imply that classic humanitarianism and its legal expressions reduce the lives of noncombatants to the "bare life" of nameless individuals beyond the protection of any legal order? I would rather argue that humanitarianism is itself an order-making activity. Its goal is not the preservation of life reduced to a bare natural fact, but conversely the protection of civilians and thereby the protection of elementary standards of civilization which prevent the exclusion of individuals from any legal and moral order. The same holds true for human rights, of course. Agamben fails to appreciate the fact that human rights laws are not about some cadaveric "bare life", but about the protection of moral agency.33 His sweeping critique also lacks any sense for essential distinctions. It may be legitimate to see "bare life" as a juridical fiction nurtured by the modern state, which claims the right to derogate from otherwise binding norms in times of war and emergency, and to kill individuals, if necessary, outside the law in a mode of "effective factuality."34 Agamben asserts that sovereignty understood in this manner continues to function in the same way since the seventeenth century and regardless of the democratic or dictatorial structure of the state in question. This claim remains unilluminated by the wealth of evidence that shows how the humanitarian motive not only shapes the mandate of a host state and nonstate agencies, but also serves to restrict the operational freedom of military commanders in democracies, who can- not act with impunity and who do not wage war in a lawless state of nature.35 Furthermore, Agamben ignores the crisis of humanitarianism that emerged as a result of the totalitarian degeneration of modern states in the twentieth century. States cannot always be assumed to follow a rational self-interest which informs them that there is no point in killing others indiscriminately. The Nazi episode in European history has shown that sometimes leaders do not spare the weak and the sick, but take extra care not to let them escape, even if they are handicapped, very old or very young. Classic humanitarianism depends on the existence of an international society whose members feel bound by a basic set of rules regarding the use of violence—rules which the ICRC itself helped to institutionalize. Conversely, classic humanitarianism becomes dysfunctional when states place no value at all on their international reputation and see harming the lives of defenseless individuals not as useless and cruel, but as part of their very mission.36 The founders of the ICRC defined war as an anthropological constant that produced a continuous stream of new victims with the predictable regularity and unavoidability of floods or volcanic eruptions. Newer organizations, by contrast, have framed conditions of massive social suffering as a consequence of largely avoidable political mistakes. The humanitarian movement becomes political, to paraphrase Carl Schmitt,37 in so far as it orients itself to humanitarian states of emergency, the causes of which are located no longer in nature, but in society and politics. Consequently, the founding generation of the new humanitarian organizations have freed themselves from the ideals of apolitical philanthropy and chosen as their new models historical figures like the Swedish diplomat Raoul Wallenberg, who saved thou- sands of Jews during the Second World War.38 In a different fashion than Agamben imagines, the primary concern in the field of humanitarian intervention and human rights politics today is not the protection of bare life, but rather the rehabilitation of the lived life of citizens who suffer, for in- stance, from conditions such as post-traumatic stress disorder. At the same time, there is a field of activity emerging beneath the threshold of the bare life. In the United States, in particular, pathologists working in conjunction with human rights organizations have discovered the importance of corpses and corporal remains now that it is possible to identify reliable evidence for war crimes from exhumed bod- ies.39

#### The abandonment of western intervention is worse—imperialist structures exists internationally—US foreign policy promotes democratic movements and challenges oppression

Shaw 2, Professor of IR and Politics

[March 2002, Martin Shaw is a Professor of International Relations and Politics at the University of Sussex, “Post-Imperial and Quasi-Imperial: State and Empire in the Global Era”, Millennium - Journal of International Studies, vol. 31 no. 2 327-336, http://mil.sagepub.com/content/31/2/327]

Despite many echoes of classic imperialism in the West’s relationships to the non-West, which I will discuss below, the West’s strength remains the extent of its transcendence of classic imperial relations and forms. As Karl Kautsky suggested, in the only early Marxist assessment of imperialism to half-anticipate current developments, [i]n the event that an accord of nations, disarmament, and lasting peace [between the major capitalist states] is achieved, then the worst of the causes which were increasingly leading to the moral bankruptcy of capitalism would recede. . . . ultra-imperialism would initially usher in an era of new hopes and expectations within capitalism.16 Western power is much more radically post-imperial, more internationalised and more thoroughly democratised (at least at the national level) than any of the competing centres. In this sense its moral claims, though internally contradictory in many senses (not least in the clash, currently accentuated, between American nationalism and European internationalism), are much stronger than those of major non-Western powers like Russia, China and India.17 The transformation of the West should not, however, be the sole or even main focus of imperial (or post-imperial) theory in contemporary IR. The political and military reach of Western-US world dominance is limited by the strength of other major independent centres. The prevalence of more or less imperial relations and forms within these other centres is as important today as it was during the Cold War. Formally, the Soviet system was not an empire but (like the West) an internationalised state bloc—an alliance, a defensive pact indeed of like- minded ‘progressive’ nations. In reality, of course, the quasi-imperial character of the Soviet state was its Achilles’ heel. Not only was Stalin’s USSR a reconstitution, in modern form, of the old Russian ‘prison of peoples’—the Soviet bloc laid a thin veneer of internationalism over imperial domination. With deep irony, given Communism’s claims to internationalism, elites in the national state apparatuses of Eastern Europe sought mainly to restrict their international organisation by the USSR and to expand their economic relations with the West, as means of both political independence and economic development. The end result was that it was the quasi-imperial Soviet bloc that collapsed, while the post-imperial West has (more or less) held together into the global era. Lest it be thought that this is of purely historic significance, consider the determinants of post-Soviet politics. As the wider bloc fell apart, the tensions of the old Russian empire re-surfaced, leading to the disintegration of the Soviet Union itself—and a pattern of conflicts that have continued ever since. Resistance to quasi-imperial relations of dominance, and their reassertion by central powers not only in Russia but in other republics, are at the heart not only of the Chechnya conflict but of other wars across the former Union since 1991. Political empire, even if not formally constituted, remains central to the contradictions of global-era international relations in this region. Nor is this a local phenomenon. Communist China, like Russia, was based on the reconstitution of historic empire. There were many echoes of imperial rule in the dictatorship of Mao Zedong, however much a modern totalitarian party and ideology gave them distinct characters. The godlike character of the emperor and the suppression of border regions (above all Tibet) were fairly traditional features. However, imperial power was indulged in terrible new ways, as earlier in Stalin’s Russia, such as the state-made famine of the ‘Great Leap Forward’ and the assault on the educated in the ‘Cultural Revolution’. In the hands of a totalitarian party, the modern multinational state could reconstitute an old empire in an extreme form of imperial power. Quasi-imperial relations and forms of power are not restricted, however, to the fading totalitarianisms of the 20th century. They remain general features of the non-Western state in the global era. Those who have tried to classify modern states, like Robert Cooper and Georg Sørenson, have termed the major non-Western states simply ‘modern’ or ‘Westphalian’.18 Western states have become ‘postmodern’ or ‘post- Westphalian’ and others, described by Cooper as ‘pre-modern’ and by Sørenson as ‘post-colonial’, do not reach the modern/Westphalian standard. However, none of these classifications has addressed the implications of the imperial character of ‘modern’ or ‘Westphalian’ states for analysing their trajectories. What passes for the modern state in the non-Western world today is best described as a quasi-imperial formation. Many large and medium-sized states are reconstitutions of historic pre-European or European empires. India today is a vast state ruling more people than belonged to the entire British empire in the mid-20th century. The gap between rich and powerful and the village poor is huge, and the centre disposes its armies to hold on to rebellious Kashmir, even to the point of risking nuclear war with Pakistan, in a way that reminds us of how European empires blundered to war in 1914. It is of more than polemical significance to suggest that the British Raj was not abolished but Indianised and Pakistanised by the new national elites.19 Similar phenomena can be found across the non-Western world, and their sharper forms are the key foci of many armed conflicts. Modern Turkey, which still cannot bring itself to acknowledge the Ottoman genocide of the Armenians in 1915, has pursued a residual imperial campaign against the Kurds. Indonesia, inheritor of the Dutch empire, has abandoned its murderous annexation of East Timor, but its army puts down rebellions in Aceh, Ambon and elsewhere. Quasi-imperial, revolutionary Ethiopia, under the Soviet ally Menghistu, fought a long war to keep Eritrea. Neither is ‘new empire’ the prerogative of such reconstituted old empires: in post-colonial creations—Iraq, for example— new elites have also forged quasi-imperial systems of domination of central states (and their ethnic-social constituencies) over other elements in the society. It is clear from these and many other examples that quasi-imperial relations of rule are central to world, regional as well as national politics in the global era. The new upsurge of democratic protest and the advance of human rights politics have actually heightened the importance of imperial cleavages. Democratic movements affect both the central and subordinate regions of quasi-imperial states, but it is among nationally oppressed populations that democratic tensions with central power are sharpest. 1989-91 in Eastern and Central Europe was not just a moment of democratic upheaval but of national resistance to the quasi-imperial Soviet bloc. In focusing as many have on the ‘velvet revolutions’ we have tended to neglect the violent repression and armed conflict that Central Europe narrowly escaped, and which have been the norm elsewhere. Where the democratisation of authoritarian states leads to conflicts with secessionist movements they are most likely to result in violence. Such crises may even accentuate the imperial character of the state, as in Yugoslavia, where the challenge of democratisation led the Milosevic regime to try to reconstitute an imperial Serbianised Yugoslavia, suppressing the rights of groups like the Kosovo Albanians. In this way, (re)imperialisation is a strategy for elites threatened by secession. The extent of the crisis in quasi-imperial relations has been deepened by the changing relationship of the West, especially the US, to local quasi- empires. Historically, the Cold War-West sustained many authoritarian and oppressive regimes, even seeming to license some of these as subimperialisms (as Fred Halliday referred to the Shah’s Iran).20 In the ending of the Cold War, the West has been more willing to countenance both democratic and secessionist movements, thus increasing the prospects of successful transformation. It remains to be seen how far the ‘war on terrorism’ has reversed this trend.21 Seen in this context of a much more widespread pattern of changing quasi-imperial relations, the reassertion of post-imperial Western power appears in a different light. Considered by some as a ‘new imperialism’, Western interventionism has been in turn a response to crises in the quasiimperial states of the non-West. Indeed, interventions have often responded to the appeals of oppressed groups, such as Bosnians, East Timorese and Kosovo Albanians. Western reluctance to intervene, even in clear cases of genocide like Rwanda, has been more widespread than interventionism. It is this context, and not only the humanitarian element in actual interventions, that renders suspect some of the simpler narratives of new imperialism.22

Perm: do both. We don’t defend the legal system as it is – we believe it should be criticized.

#### The permutation is best—legal reforms can utilized to protect vulnerable populations if we remain conscious of its dangers—the alternative leaves groups stranded

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[February, 2007; Orly Lobel is an Assistant Professor of Law, University of San Diego. LL.M. 2000 (waived), Harvard Law School; LL.B. 1998, Tel-Aviv University, “THE PARADOX OF EXTRALEGAL ACTIVISM: CRITICAL LEGAL CONSCIOUSNESS AND TRANSFORMATIVE POLITICS”, 120 Harv. L. Rev. 937]

B. Conceptual Boundaries: When the Dichotomies of Exit Are Unchecked At first glance, the idea of opting out of the legal sphere and moving to an extralegal space using alternative modes of social activism may seem attractive to new social movements. We are used to thinking in binary categories, constantly carving out different aspects of life as belonging to different spatial and temporal spheres. Moreover, we are attracted to declarations about newness - new paradigms, new spheres of action, and new strategies that are seemingly untainted by prior failures. n186 However, the critical insights about law's reach must not be abandoned in the process of critical analysis. Just as advocates of a laissez-faire market are incorrect in imagining a purely private space free of regulation, and just as the "state" is not a single organism but a multiplicity of legislative, administrative, and judicial organs, "nonstate arenas" are dispersed, multiple, and constructed. The focus on action in a separate sphere broadly defined as civil society can be self-defeating precisely because it conceals the many ways in which law continues to play a crucial role in all spheres of life. Today, the lines between private and public functions are increasingly blurred, forming what Professor Gunther Teubner terms "polycorporatist regimes," a symbiosis between private and public sectors. n187 Similarly, new economic partnerships and structures blur the lines between for-profit and nonprofit entities. n188 Yet much of the current literature on the limits of legal reform and the crisis of government action is built upon a privatization/regulation binary, particularly with regard [\*979] to social commitments, paying little attention to how the background conditions of a privatized market can sustain or curtail new conceptions of the public good. n189 In the same way, legal scholars often emphasize sharp shifts between regulation and deregulation, overlooking the continuing presence of legal norms that shape and inform these shifts. n190 These false dichotomies should resonate well with classic cooptation analysis, which shows how social reformers overestimate the possibilities of one channel for reform while crowding out other paths and more complex alternatives. Indeed, in the contemporary extralegal climate, and contrary to the conservative portrayal of federal social policies as harmful to the nonprofit sector, voluntary associations have flourished in mutually beneficial relationships with federal regulations. n191 A dichotomized notion of a shift between spheres - between law and informalization, and between regulatory and nonregulatory schemes - therefore neglects the ongoing possibilities within the legal system to develop and sustain desired outcomes and to eliminate others. The challenge for social reform groups and for policymakers today is to identify the diverse ways in which some legal regulations and formal structures contribute to socially responsible practices while others produce new forms of exclusion and inequality. Community empowerment requires ongoing government commitment. n192 In fact, the most successful community-based projects have been those which were not only supported by public funds, but in which public administration also continued to play some coordination role. n193 At both the global and local levels, with the growing enthusiasm around the proliferation of new norm-generating actors, many envision a nonprofit, nongovernmental organization-led democratization of new informal processes. n194 Yet this Article has begun to explore the problems with some of the assumptions underlying the potential of these new actors. Recalling the unbundled taxonomy of the cooptation critique, it becomes easier to identify the ways extralegal activism is prone to problems of fragmentation, institutional limitation, and professionalization. [\*980] Private associations, even when structured as nonprofit entities, are frequently undemocratic institutions whose legitimacy is often questionable. n195 There are problematic structural differences among NGOs, for example between Northern and Southern NGOs in international fora, stemming from asymmetrical resources and funding, n196 and between large foundations and struggling organizations at the national level. Moreover, direct regulation of private associations is becoming particularly important as the roles of nonprofits increase in the new political economy. Scholars have pointed to the fact that nonprofit organizations operate in many of the same areas as for-profit corporations and government bureaucracies. n197 This phenomenon raises a wide variety of difficulties, which range from ordinary financial corruption to the misrepresentation of certain partnerships as "nonprofit" or "private." n198 Incidents of corruption within nongovernmental organizations, as well as reports that these organizations serve merely as covers for either for-profit or governmental institutions, have increasingly come to the attention of the government and the public. n199 Recently, for example, the IRS revoked the tax-exempt nonprofit status of countless "credit counseling services" because these firms were in fact motivated primarily by profit and not by the not-for-profit cause of helping consumers get out of debt. n200 Courts have long recognized that the mere fact that an entity is a nonprofit does not preclude it from being concerned about raising cash revenues and maximizing profits or affecting competition in the market. n201 In the [\*981] application of antitrust laws, for example, almost every court has rejected the "pure motives" argument when it has been put forth in defense of nonprofits. n202 Moreover, akin to other sectors and arenas, nongovernmental organizations - even when they do not operate within the formal legal system - frequently report both the need to fit their arguments into the contemporary dominant rhetoric and strong pressures to subjugate themselves in the service of other negotiating interests. This is often the case when they appear before international fora, such as the World Bank and the World Trade Organization, and each of the parties in a given debate attempts to look as though it has formed a well-rounded team by enlisting the support of local voluntary associations. n203 One NGO member observes that "when so many different actors are drawn into the process, there is a danger that our demands may be blunted ... . Consequently, we may end up with a "lowest common denominator' which is no better than the kind of compromises the officials and diplomats engage in." n204 Finally, local NGOs that begin to receive funding for their projects from private investors report the limitations of binding themselves to other interests. Funding is rarely unaccompanied by requirements as to the nature and types of uses to which it is put. n205 These concessions to those who have the authority and resources to recognize some social demands but not others are indicative of the sorts of institutional and structural limitations that have been part of the traditional critique of cooptation. In this situation, local NGOs become dependent on players with greater repeat access and are induced to compromise their initial vision in return for limited victories. The concerns about the nature of both civil society and nongovernmental actors illuminate the need to reject the notion of avoiding the legal system and opting into a nonregulated sphere of alternative social activism. When we understand these different realities and processes as also being formed and sustained by law, we can explore new ways in which legality relates to social reform. Some of these ways include efforts to design mechanisms of accountability that address the concerns of the new political economy. Such efforts include [\*982] treating private entities as state actors by revising the tests of joint participation and public function that are employed in the state action doctrine; extending public requirements such as nondiscrimination, due process, and transparency to private actors; and developing procedural rules for such activities as standard-setting and certification by private groups. n206 They may also include using the nondelegation doctrine to prevent certain processes of privatization and rethinking the tax exemption criteria for nonprofits. n207 All of these avenues understand the law as performing significant roles in the quest for reform and accountability while recognizing that new realities require creative rethinking of existing courses of action. Rather than opting out of the legal arena, it is possible to accept the need to diversify modes of activism and legal categories while using legal reform in ways that are responsive to new realities. Focusing on function and architecture, rather than on labels or distinct sectors, requires legal scholars to consider the desirability of new legal models of governmental and nongovernmental partnerships and of the direct regulation of nonstate actors. In recent years, scholars and policymakers have produced a body of literature, rooted primarily in administrative law, describing ways in which the government can harness the potential of private individuals to contribute to the project of governance. n208 These new insights develop the idea that administrative agencies must be cognizant of, and actively involve, the private actors that they are charged with regulating. These studies, in fields ranging from occupational risk prevention to environmental policy to financial regulation, draw on the idea that groups and individuals will [\*983] better comply with state norms once they internalize them. n209 For example, in the context of occupational safety, there is a growing body of evidence that focusing on the implementation of a culture of safety, rather than on the promulgation of rules, can enhance compliance and induce effective self-monitoring by private firms. n210 Consequently, social activists interested in improving the conditions of safety and health for workers should advocate for the involvement of employees in cooperative compliance regimes that involve both top-down agency regulation and firm-and industry-wide risk-management techniques. Importantly, in all of these new models of governance, the government agency and the courts must preserve their authority to discipline those who lack the willingness or the capacity to participate actively and dynamically in collaborative governance. Thus, unlike the contemporary message regarding extralegal activism that privileges private actors and nonlegal techniques to promote social goals, the new governance scholarship is engaged in developing a broad menu of legal reform strategies that involve private industry and nongovernmental actors in a variety of ways while maintaining the necessary role of the state to aid weaker groups in order to promote overall welfare and equity. A responsive legal architecture has the potential to generate new forms of accountability and social responsibility and to link hard law with "softer" practices and normativities. Reformers can potentially use law to increase the power and access of vulnerable individuals and groups and to develop tools to increase fair practices and knowledge building within the new market.

#### Alternatives to legal reform fail—legal strategies prevent cooptation, the law is necessary for all progressive agendas, and alternatives maintain the status quo

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In the following sections, I argue that the extralegal model has suffered from the same drawbacks associated with legal cooptation. I show that as an effort to avoid the risk of legal cooptation, the current wave of suggested alternatives has effects that ironically mirror those of cooptation itself. Three central types of difficulties exist with contemporary extralegal scholarship. First, in the contexts of the labor and civil rights movements, arguments about legal cooptation often developed in response to a perceived gap between the conceptual ideal toward which a social reform group struggled and its actual accomplishments. But, ironically, the contemporary message of opting out of traditional legal reform avenues may only accentuate this problem. As the rise of informalization (moving to nonlegal strategies), civil society (moving to extralegal spheres), and pluralism (the proliferation of norm-generating actors) has been effected and appropriated by supporters from a wide range of political commitments, these concepts have had unintended implications that conflict with the very social reform ideals from which they stem. Second, the idea of opting out of the legal arena becomes self-defeating as it discounts the ongoing importance of law and the possibilities of legal reform in seemingly unregulated spheres. A model encompassing exit and rigid sphere distinctions further fails to recognize a reality of increasing interpenetration and the blurring of boundaries between private and public spheres, profit and nonprofit sectors, and formal and informal institutions. It therefore loses the critical insight that law operates in the background of seemingly unregulated relationships. Again paradoxically, the extralegal view of decentralized activism and the division of society into different spheres in fact have worked to subvert rather than support the progressive agenda. Finally, since extralegal actors view their actions with romantic idealism, they fail to develop tools for [\*971] evaluating their success. If the critique of legal cooptation has involved the argument that legal reform, even when viewed as a victory, is never radically transformative, we must ask: what are the criteria for assessing the achievements of the suggested alternatives? As I illustrate in the following sections, much of the current scholarship obscures the lines between the descriptive and the prescriptive in its formulation of social activism. If current suggestions present themselves as alternatives to formal legal struggles, we must question whether the new extralegal politics that are proposed and celebrated are capable of producing a constructive theory and meaningful channels for reform, rather than passive status quo politics.

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