
THE PARADOX OF EXTRALEGAL ACTIVISM:
CRITICAL LEGAL CONSCIOUSNESS AND
TRANSFORMATIVE POLITICS

Orly Lobel

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THE PARADOX OF EXTRALEGAL ACTIVISM: CRITICAL LEGAL CONSCIOUSNESS AND TRANSFORMATIVE POLITICS

Orly Lobel*

The limits of law in bringing about social change have long preoccupied legal thinkers. Recent schools of thought have built upon the critical understanding of these limits to produce a body of literature that privileges extralegal activism. These writings present alternatives to the path of legal reform, purporting to avoid the problems of cooptation and deradicalization that hindered earlier legal activism. Three extralegal focal points emerge in this literature: first, a move from professionalism to “lay lawyering”; second, a move from the legal arena to an autonomous sphere of action; and third, a departure from formal legal norms to softer, informal normativities. This Article demonstrates how these recent developments have drawn erroneous conclusions from critical understandings about the cooptive risks of legal strategies. In particular, proposed alternatives to legal reform strategies fail to recognize ways in which they are frequently subject to the same shortcomings they seek to avoid by opting out of the legal arena. Linking historical examples from the labor movement and the civil rights movement to contemporary social movement and public interest literature, the Article charts a nuanced map of legal cooptation critiques, which include distinct claims about resources and energy, framing and fragmentation, lawyering and professionalism, crowding-out effects, institutional limitations, and legitimation. The Article argues that the contemporary manifestation of a critical legal consciousness has eclipsed the origins of critical theory, which situates various forms of social action on more equal grounds. The new extralegal truism, which rejects legal reform as a transformative path for social change, consequently risks reinforcing the very account that it sets out to resist — namely, that the state is no longer able to ensure socially responsible practices in the twenty-first-century economy.

I. INTRODUCTION

The limits of the law as a means of effecting social change have been a key focus of legal thinkers over the past several decades. The aggregate impact of emerging schools of thought challenging the value of legal reform in producing social change has been the development of a contemporary critical legal consciousness — a conventional wisdom

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about the relative inefficacy of law.¹ Critical claims go further than simply expressing disappointment in the capacity of the legal system to achieve the desired goals of a social movement. An argument that has become increasingly prevalent in legal scholarship states that the law often brings more harm than good to social movements that rely on legal strategies to advance their goals. The law entices groups to choose legal strategies to advance their social goals but ultimately proves to be a detrimental path. The negative effect is generally understood as “legal cooptation” — a process by which the focus on legal reform narrows the causes, deradicalizes the agenda, legitimizes ongoing injustices, and diverts energies away from more effective and *transformative* alternatives. Consequently, the argument proceeds, the turn to the law actually reinforces existing institutions and ideologies. As they engage with the law, social reform groups become absorbed by the system even as they struggle against it.

When examining closely the dominant set of assumptions underlying recent critical scholarship, one must face the question: what is uniquely *legal* about cooptation? This Article considers the claims of

¹ The term “legal consciousness” has been developed in two parallel streams. In legal theory, the term refers to the body of “ideas about the nature, function, and operation of law held by anyone in society at a given time.” David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 592 (1984); see also Duncan Kennedy, *Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, in 3 CURRENT RESEARCH IN THE SOCIOLOGY OF LAW (J. Spitzer ed., 1980); Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 478 (1981); Elizabeth Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635, 636, 660 (1982). In a second parallel stream, sociolegal researchers have drawn on empirical data to explore the evaluation of legality made by ordinary citizens in everyday life. See PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW (1998); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN 62 (1990); Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 LAW & SOC’Y REV. 1055, 1058–59 (2000). Legal consciousness research in this second stream is described as the examination of:

the role of law (broadly conceived) and its role in constructing understandings, affecting actions, and shaping various aspects of social life. It centers on the study of individuals’ experiences with law and legal norms, decisions about legal compliance, and a detailed exploration of the subtle ways in which law affects the everyday lives of individuals to articulate the various understandings of law/legality that people have and use to construct their understanding of their world.

Id. at 1059. This Article adopts the first stream’s definition of legal consciousness, tracing the genealogies of paradigm construction made by legal scholars. However, the analysis of these genealogies draws partly on the complexities of law developed by the second stream of scholarship. One aim of the Article is, therefore, to bring the two streams of research closer by demonstrating how critical legal consciousness extends beyond the conventional scope of the critical legal studies scholarship of the 1970s. In effect, emerging extralegal schools of thought have embraced the ideas of cooptation as conventional wisdom, elevating the mantra “we are all crits now” to a truism, much as scholars in the 1960s belabored the mantra “we are all realists now.” See LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960, at 229 (1986) (characterizing the statement “we are all realists now” as so frequently made that it has become a truism to refer to it as a truism).

legal cooptation as they have been developed vis-à-vis former periods of social activism — primarily the New Deal labor movement and the 1960s civil rights movement — in relation to recent scholarship that purports to provide alternatives to cooptive legal processes. It traces the impact of critical understandings of the law to three strands of contemporary “extralegal” schools of thought that operate under a critical legal consciousness. The Article argues that the limits of social change are not confined to legal reform, but in fact are as likely (if not more so) to occur in the realm of extralegal activism. Moreover, the very idea of opting out of the legal arena creates a false binary between social spheres that in reality permeate one another. Under the contemporary axiomatic skepticism about the law, analysts often bundle and collapse legal cooptation claims rather than differentiate among myriad, distinct sets of concerns. When claims about the failures of legal reform are unbundled, they provide a window into our assumptions about the possibilities and rhythms of change in general, not merely change via the path of the law. Accordingly, this Article asserts that contemporary critical legal consciousness has eclipsed the origins of critical theory, which situated various forms of social action — all of which potentially have cooptive as well as transformative effects — on more equal grounds.

The inquiry begins by delineating three periods of social reform activism, their relationship to legal reform, and their successes and failures as perceived by legal scholars. Part II describes the first two periods, which have served contemporary thinkers as paradigmatic moments for analyzing the failures of legal reform and the negative consequences that followed the decline of social activism. The first period is the New Deal labor movement, which achieved statutory reordering of labor relations yet was ultimately criticized for creating a hostile environment for collective bargaining and for leading to the sharp decline of unionism. The second period is the civil rights movement of the 1950s and 1960s, which achieved widespread recognition for its legislative and judicial victories yet has been widely critiqued for its limited success in eliminating racial injustice. In both cases, cooptation analysis focuses not simply on the limits of the legal victories but also, and often primarily, on the pacification of the social movement and the decline of a reform vision, which resulted from the perceived successes of legislative and judicial victories. Pointing to these two “failed successes,” contemporary legal scholars express a now-axiomatic skepticism about law’s ability to produce social transformation. Drawing on the critical scholarship that has developed in relation to these two periods, Part II unpacks the arguments about legal cooptation, demonstrating that they are not monolithic but rather constitute distinct sets of claims, including concerns about resources and energy, framing and fragmentation, lawyering and professional-

ism, crowding-out effects, institutional limitations, and the unsubstantiated legitimation of existing social arrangements.

As a result of an emerging truism about the limitations of legal reform — captured by the reference to legalism as the “hollow hope”² — contemporary critics warn against a reliance on law, courts, legal language, and lawyers in the struggles of social movements. Part III describes a third period, this one involving extralegal activism, as it is represented and celebrated in legal scholarship. In mapping the landscape of this “alternative scholarship,” three distinct types of extralegal strategies emerge: first, the redefinition of the purpose of the legal system as promoting secondary goals rather than primary ones; second, the move away from the legal arena to an extralegal sphere of action, often evoking the notion of civil society; and third, the expansion of the meanings of law and legality, building on earlier understandings of the legal pluralism school of thought.

After exploring the underlying assumptions of each of these proposals with regard to the limits of law and the limits of change, this Article revisits the concept of cooptation within the broader range of possibilities for social struggle. Rather than dismissing concerns about legal cooptation, Part IV asserts that the emerging umbrella school of thought draws erroneous conclusions from critical understandings and presents false alternatives in the gamut of law and social change. A more accurate inquiry into the limits of change should cast doubt on the privileged role of extralegal activism that is trumpeted in contemporary writings. This Article demonstrates how extralegal activism proponents misrepresent alternative avenues of activism as solutions to cooptation concerns by overlooking the risks of cooptation present in extralegal activism. Consequently, a counter “myth of engagement” is reified by the rejection of the “myth of law.” Not only is the idea of avoiding legal strategies as a means of social change misdirected, but such a construction also conceals the ways in which the law continues to exist in the background of the envisioned alternatives. Thus, earlier critical insights about the ongoing importance of law in seemingly unregulated spheres are lost in the contemporary message. Further, the idea of opting out of the legal arena fails to recognize a reality of growing interpenetration and blurring of boundaries between private and public spheres, for-profit and nonprofit actors, and formal and informal institutions. Most importantly, a theory of avoidance contributes to a conservative rhetoric about the decline of the state, the necessities of deregulation, and the inevitability of mounting inequalities. The Article reveals a contemporary false equation of formal legal reform

² GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

avenues with a conservative status quo and of informal — that is, extralegal — avenues with transformative progress. The movement to extralegal activism has unwittingly aligned itself with concepts such as civil society revivalism, informality, and nongovernmental norm generation. All of these concepts are associated with decreasing commitments of the state, privatization, deregulation, and devolution of governmental authority in the social arena. All three brands of extralegal strategies reflect not only disillusionment with and disappointment in the legal system as a potential engine for social reform, but also imply path dependency with current economic realities and shifting commitments of the state in an era of globalization.

Since the critique of legal cooptation asserts that legal reform, even when viewed as successful, is never radically transformative, it is equally crucial to ask what criteria are available for assessing the success of the suggested alternatives. As this Article argues, the risks of extralegal cooptation are similar to the risks of legal cooptation. However, the allure of an alternative model of progressive politics that would avoid the critical risks of cooptation has prevented its advocates from scrutinizing it in the same way that legal strategies are routinely questioned. Therefore, the new wave of extralegal politics risks entailing no more than a loser's *ex post* self-mystification. Posing these challenges, Part V concludes that much of the contemporary alternative scholarship obscures the lines between description and prescription in the exploration and formulation of transformative politics.

II. "INSIDE" THE LAW AND THE CRITIQUE OF LEGAL COOPTATION: TWO PHASES AND A PRACTICAL MAP OF CRITICAL CATEGORIES

Two seminal moments of social movement legal struggles, the New Deal labor movement and the 1960s civil rights movement, are key to understanding the ways in which contemporary thinkers evaluate the promise and perils of legal reform. In both periods, critics have understood victories as limited and symbolic, deradicalizing and coopting a more comprehensive vision. Building on the debates from these two paradigmatic moments, this Part unbundles claims of cooptation into distinct ideas about the limitations and risks of reform.

A. The Deradicalization of the NLRA and the Labor Movement

The struggles of the labor movement during the Great Depression and New Deal reconstruction prompted federal statutory reordering of labor relations through the National Labor Relations Act (NLRA).³

³ 29 U.S.C. §§ 150–169 (2000).

Before the passage of the Act, organized labor was limited, and at times completely outlawed. In the late nineteenth century and early twentieth century, the Supreme Court struck down laws that criminalized the firing of employees because of their union membership.⁴ Courts regularly issued injunctions against strikes and upheld “yellow-dog” contracts, in which employees would promise not to join unions.⁵

When the NLRA was enacted, it was hailed as a great victory for labor interests. Labor lawyers predicted that the NLRA would serve as a powerful tool to increase unionization and to strengthen collective bargaining.⁶ However, the victorious attitude was short-lived. Since the enactment of the NLRA, labor lawyers have argued that the Act has been deradicalized by the courts, the National Labor Relations Board (NLRB), and other administrative bodies.⁷ Meanwhile, labor law scholars have become increasingly skeptical about the potential of the NLRA statutory regime to improve labor conditions.⁸ In particular, critics have decried courts’ assumption that, due to the NLRA, “management and labor have equal power in the workplace.”⁹ Indeed, the Act has been interpreted and implemented in ways that have naturalized a limited framework for collective bargaining — one that is “systematically hostile to labor militancy.”¹⁰ For example, courts issued decisions defining the scope of the bargaining unit to exclude “managerial employees.”¹¹ Similarly, courts interpreted the duty to bargain in “good faith” narrowly, allowing management to leave the bargaining table before an agreement was reached.¹² They further limited the subjects of compulsory bargaining,¹³ limited the possibilities of worker participation by creating a rigid separation between rep-

⁴ See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 26 (1915); *Adair v. United States*, 208 U.S. 161, 179–80 (1908).

⁵ See, e.g., *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 250–51 (upholding yellow-dog contracts) (1917); *id.* at 259–60 (issuing an injunction against unionization and strikes); see also Michael H. LeRoy & John H. Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the Taft-Hartley Act and the Moribund Right To Strike*, 43 ARIZ. L. REV. 63, 93 (2001) (noting that 389 labor injunctions were issued from 1922 to 1932, enjoining strikes and enforcing yellow-dog contracts).

⁶ See Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 125 (2003).

⁷ See *id.* at 126; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 292–93 (1977).

⁸ See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002) (arguing that the statutory scheme has to this point failed to achieve its purpose but offering proposals for using ossification to the advantage of labor).

⁹ Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981).

¹⁰ DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 251 (1997).

¹¹ See, e.g., *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686–90 (1980).

¹² See, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 104, 109 (1970).

¹³ See, e.g., *Texaco Inc. v. NLRB*, 408 F.2d 142, 145 (5th Cir. 1969).

representatives and the rank-and-file and by not protecting “concerted activities” in non-unionized workplaces;¹⁴ limited the modes of protected labor activity, excluding “secondary boycotts” such as picketing against subcontractors;¹⁵ limited the protected forms of labor speech, excluding “political speech”;¹⁶ and expanded the possibilities of anti-union campaigns, no-strike clauses, and compulsory arbitration.¹⁷

The NLRA, despite its perceived broad scope, thus provided an institutional framework for limiting activism and gains by the labor movement. Professor Karl Klare, for example, argues that the NLRA’s collective bargaining system has “an ‘institutionalizing’ aspect that limits and channels workplace conflict. . . . [The system places] limitations on worker participation in workplace (and union) governance, regulates and formalizes employee concerted activity, and legitimates hierarchy and management control regarding both day-to-day and long-term decisionmaking.”¹⁸ Professor Klare offers the example of *NLRB v. Sands Manufacturing Co.*,¹⁹ which held that labor engaged in unprotected, and thereby illegal, activities during the term of the collective bargaining contract. In that case, the Supreme Court reversed the NLRB’s finding that the workers had legally engaged in work stoppage and a sit-down strike.²⁰ Similarly classic examples of the use of the NLRA to limit labor activism include *NLRB v. Mackay Radio & Telegraph Co.*,²¹ in which the Court allowed the replacement of

¹⁴ On worker participation generally, see Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1133–36 (2005). On concerted activity, see, for example, Norton Healthcare, Inc., 341 N.L.R.B. 143 (2004); Nat’l Wax Co., 251 N.L.R.B. 1064 (1980); Alleluia Cushion Co., 221 N.L.R.B. 999 (1975).

¹⁵ See 29 U.S.C. § 158(b)(4)(i) (2000) (stating that secondary boycotts are unfair labor practices); *NLRB v. Servette, Inc.*, 377 U.S. 46, 51 (1964) (interpreting the NLRA to permit secondary pressures on managers to make managerial decisions as distinct from pressures to “induce or encourage them to cease performing their managerial duties in order to force their employers to cease doing business with [the strikers’ employer]”); see also CHARLES CRAVER, *CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* 145–46 (1993) (detailing restrictions on secondary boycotts and advocating a limited repeal of the restrictions); PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 272–73 (1990) (same).

¹⁶ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912–13 (1992).

¹⁷ See generally Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 121 (2001). See also, e.g., *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104–06 (1962) (holding that when a contract provides that a dispute shall be settled exclusively by arbitration, striking to settle the dispute is a violation of the collective bargaining agreement, even in the absence of a no-strike clause).

¹⁸ Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 743 (1985).

¹⁹ 306 U.S. 332 (1939); see also Klare, *supra* note 18, at 798–804.

²⁰ *Sands Mfg.*, 306 U.S. at 339.

²¹ 304 U.S. 333 (1938).

strikers by the employer,²² and *NLRB v. Fansteel Metallurgical Corp.*,²³ in which the Court reversed an order to reinstate sit-down strikers even though the employer had engaged in unfair labor practices.²⁴ Similarly, as Professor Paul Weiler argues, the limitations on remedies provided for by the NLRA have made litigation ineffective for labor activists and have failed to deter unfair labor practices by employers.²⁵ Indeed, Professor Weiler concludes that, in part as a result of the limited scope of remedies, “[p]erhaps the most remarkable phenomenon in the representation process in the past quarter-century has been an astronomical increase in unfair labor practices by employers.”²⁶

Analyzing these developments, critical labor law scholars concluded that the New Deal legal reform eventually “fostered the co-optation of the workers’ movement and . . . a diminution of labor’s combative-ness”²⁷: “What came to be regarded by both labor and management intelligentsias as the beneficent logic of the collective-bargaining ‘system’ created by the statute functioned in fact to demobilize workers and then ‘administer’ them.”²⁸

The most strident critics claimed that codified collective bargaining had become “an institutional structure not for expressing workers’ needs and aspirations but for controlling and disciplining the labor force and rationalizing the labor market.”²⁹ Those critics concluded that, paradoxically, the apparent legal success of the New Deal social reform struggles enabled the deradicalization and pacification of labor movement activism.

²² *Id.* at 345–46.

²³ 306 U.S. 240 (1939).

²⁴ *Id.* at 257–59; see also Matthew W. Finkin, *Concern for the Dignity of the Worker: Revisionism in Labor Law*, 43 MD. L. REV. 23, 25–26 (1984).

²⁵ Paul Weiler, *Promises To Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1770, 1787–1804 (1983) (arguing that the legal system “must bear a major share of the blame for providing employers with the opportunity and the incentives to use [unfair labor] tactics”); see also, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197–200 (1941) (holding that backpay damages under the NLRA should be reduced because workers failed to mitigate); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940) (explaining that the NLRA is remedial in nature and is not intended to provide further punitive damages); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 235–36 (1938) (stating that the “power to command affirmative action [under the NLRA] is remedial, not punitive”).

²⁶ Weiler, *supra* note 25, at 1778.

²⁷ Klare, *supra* note 7, at 267; see also Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 760–61 (1994) [hereinafter Barenberg, *Democracy and Domination*]; Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1412–30 (1993).

²⁸ KENNEDY, *supra* note 10, at 251.

²⁹ Klare, *supra* note 7, at 267–69.

B. The Civil Rights Movement and the Myth of Legal Rights

A second phase of social reform struggles has been framed by the model of the civil rights movement. In the wake of the 1950s and 1960s, the energy of civil rights groups, particularly the National Association for the Advancement of Colored People (NAACP) and the NAACP Legal Defense and Education Fund (LDF), increasingly encouraged other movements — including the women's rights movement, the gay rights movement, and the disability rights movement — to adopt a legal reform strategy and to organize around similar patterns of identity rights and antidiscrimination claims.³⁰ Indeed, from the late 1950s onward, litigation — in the form of individual test cases and class actions — became a primary instrument of social movement activism.³¹

But despite the enthusiasm around legal reform, race theorists gradually began to challenge the apparent success of judicial victories, above all the seminal case of *Brown v. Board of Education*,³² as well as legislative victories, particularly the adoption of the Civil Rights Act of 1964.³³ Legal scholarship started to explore the negative consequences antidiscrimination litigation had on its intended beneficiaries.³⁴ Civil rights organizations were criticized for concentrating on is-

³⁰ See generally JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978) (describing how various social movements relied on litigation to effect social change); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976) (providing a historical account of the events leading up to the Warren Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* (1984) (analyzing the civil rights movement as a social movement with a collective identity); CLEMENT E. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* (1959) (describing the legal strategies of NAACP lawyers).

³¹ See generally William A. Gamson & David S. Meyer, *Framing Political Opportunity*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS* 275, 275–85 (Doug McAdam et al. eds., 1996) (discussing interactions between political opportunities, mobilizing structures, and framing processes as factors influencing social movements); Enrique Laraña, *Continuity and Unity in New Forms of Collective Action: A Comparative Analysis of Student Movements*, in *NEW SOCIAL MOVEMENTS* 209, 209–10 (Enrique Laraña et al. eds., 1994).

³² 347 U.S. 483 (1954). As *Brown* celebrated its fiftieth anniversary in 2004, such critical understandings of the civil rights movement became prominent in the consciousness of legal scholars. Indeed, in the 2003 Law and Society Association Annual Meeting, the plenary lecture delivered by Derrick Bell was entitled "*Brown v. Board of Education* as Miraculous Mirage."

³³ Pub. L. No. 88-352, 78 Stat. 241 (1964).

³⁴ See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 56–74 (1987) [hereinafter BELL, *AND WE ARE NOT SAVED*]; Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–25 (1980); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 515–16 (1976); Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4,

sues that were more susceptible to remedy by litigation, such as school segregation and workplace discrimination, rather than attacking redistributive problems that were of greater importance to the people they were supposedly serving.³⁵ Critics also expressed disappointment with the narrow scope of the hailed judicial and legislative victories, which neglected the economic aspects of racial inequality and seemed to accept merely symbolic changes.³⁶ For example, in 1989, prominent NAACP leader Tyrone Tiller strongly described his views about the limited focus of legal reform:

One of the glaring failures of the civil rights movement was to provide a mechanism for economic equality The civil rights movement, historically, has always failed in that area because it was always the most difficult. Whites didn't mind giving up public accommodations or seats on the bus, but when it comes to money and jobs, they would not do it.³⁷

Moreover, legal victories required a long-term commitment to implementation and ongoing resources to be sustained.³⁸ As time passed, it became evident that there was little commitment on the part of the legal system to monitor decisions regarding implementation. Courts were reluctant to assume administrative roles, and administrative agencies were often slow, bureaucratic, and unwilling to diverge from the status quo.³⁹ The monetary resources needed for the enforcement and implementation of judicial decisions were scarce and did not flow from the litigation phase of the struggle.

These difficulties in attaining substantial and lasting changes through legal reform led many to conclude that alternative avenues to reform were needed. Furthermore, commentators argued that the focus on legal reform diluted the struggle for equality. With the turn to law, social causes were abandoned by legally focused reformers, and the goals of the social movement were coopted by legal interpretation.

5-6 (1982); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1352-56 (1988).

³⁵ See NANCY FRASER, JUSTICE INTERRUPTUS 13-15 (1997); STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY 110 (1995).

³⁶ Derrick Bell has been a leading voice in developing this critique. See, e.g., BELL, AND WE ARE NOT SAVED, *supra* note 34; DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); DERRICK BELL, RACE, RACISM AND AMERICAN LAW (3d ed. 1992). For an insightful account of the debate about whether the civil rights movement led to significant or merely symbolic change, see Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

³⁷ Harold Norris, *A Perspective on the History of Civil Rights Law in Michigan*, 1996 DET. C.L. REV. 567, 599 (omission in original) (quoting Denise Chrittendon & Linda Jones, *NAACP: 80 Years of Challenge*, DETROIT NEWS, July 7, 1989, at E1).

³⁸ See Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 45-46 (1979); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1265-69, 1304.

³⁹ See HANDLER, *supra* note 30, at 18-22; ROSENBERG, *supra* note 2, at 15-21.

Accordingly, although initially the success of the civil rights movement was understood in terms of the passage of key legislation and judicial declarations, contemporary legal thinkers interested in social causes became increasingly occupied with the extralegal history of the civil rights model — namely, the role of community organizing and grassroots campaigns embodied by such groups as the Congress of Racial Equality, the Student Nonviolent Coordinating Committee, the Southern Christian Leadership Conference, Students for a Democratic Society, and the Black Panthers.⁴⁰

Most importantly, the critique of the civil rights model went beyond resources and effectiveness to emphasize the thinness and passivity of this mode of activism. The critique described how the legal language of rights in which civil rights activism became invested made it possible to explain vast ongoing racial inequalities in terms that seemed natural and neutral.⁴¹ Once rights are legally codified and symbolically declared as granted by the legislature and the courts, existing distributions are then assumed to be part of the inevitable consequences of the market.⁴² Consequently, critics of the civil rights model concluded that the “law must be subordinated to other modes of activism and other disciplines; indeed, legal means of resolving problems should be avoided whenever possible, for they tend to reinforce the client’s experience of powerlessness.”⁴³ Accordingly, “a new orthodoxy that is deeply skeptical of the usefulness of legal strategies to promote social change” has replaced an earlier optimism about progressive legal reform.⁴⁴ In its most critical version, warning civil rights activists against “the leaky boat” of litigation,⁴⁵ the claim since the mid-1980s has been that “real progress can come only through tactics other than litigation.”⁴⁶

C. *Unbundling Cooptation*

The foregoing analysis of the labor movement, the civil rights movement, and their respective discontents should make it evident

⁴⁰ See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection of Law and Organizing*, 48 UCLA L. REV. 443 (2001).

⁴¹ See generally Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (offering a critique of rights and describing rights as historically contingent and subject to manipulation by those who have more power to determine their content).

⁴² See, e.g., Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (David Kairys ed., 1982).

⁴³ Richard L. Abel, *Lawyers and the Power To Change*, 7 LAW & POL’Y 5, 9 (1985).

⁴⁴ Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1255 (2006).

⁴⁵ BELL, AND WE ARE NOT SAVED, *supra* note 34, at 70.

⁴⁶ Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 24 (1985).

that arguments about legal cooptation are not panoptic but rather constitute distinct sets of claims. Unbundling the broad-brush idea of law as a coercive force in social movement agendas is particularly important today as we witness emerging truisms about transformative extralegal reform strategies. When we recognize that cooptation analysis concerns not one problem but several threads of problems that may arise when choosing a particular reform strategy, it becomes salient that many of these problems are not unique to the use of the law and indeed continue to exist outside of traditional legal reform. The risk of moving toward an unchallenged assumption about the ineffectiveness of legal reform strategies is magnified by the possibility of losing sight of the distinctiveness of various claims about cooptation when they are grouped into a single category. Unbundling the threads of the cooptation critique reveals that alternative extralegal strategies are in fact vulnerable to the same types of limitations. As the two periods described above suggest, the cooptation critique has included claims about resources and energy, framing and fragmentation, lawyering and professionalism, crowding-out effects, institutional limitations, and legitimation.

1. *Resources and Zero-Sum Energies.* — The first type of argument involves questions about the costs and investments that legal reform avenues demand from a movement. Litigation entails high monetary costs and requires heavy investment of time and energy, all of which inevitably decrease the ability of a movement to engage in alternative courses of action. Financial costs include both direct expenses — such as attorney’s fees, trial fees, and expert witness fees — and the indirect expenses associated with preparing for cases and interacting with lawyers and courts.⁴⁷ Thus, the focus on law tends to overwhelm individuals and groups with its vast resource demands and to divert energy from alternative avenues.⁴⁸ In particular, within a movement, subgroups with greater resources tend to hold more sway in making tactical decisions than do grassroots subgroups with fewer resources, causing legal strategies to neglect the more pertinent goals of the movement at large.⁴⁹ For example, in the context of the civil rights movement, the Civil Rights Act’s focus on nondiscrimination at work may have reflected the interests of the movement’s elites rather

⁴⁷ See, e.g., David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91–92 (1983).

⁴⁸ Cf. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2646 (1995) (arguing that the financial costs of litigation have led to the “monetization” of legal disputes, which are increasingly settled through payments of money rather than structural transformations).

⁴⁹ See Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 145, 146, 157–58 (Austin Sarat & Stuart A. Scheingold eds., 2006).

than the immediate interests of poorer constituents who needed more direct investment of resources in their communities.

Moreover, from an ex post perspective, even when a case is won in court, the momentary victory does not necessarily translate into increased resources because of collection evasion tactics and procedural impediments.⁵⁰ For instance, following a collective declaration of wrongdoing, plaintiffs are often required to endure a second stage of individual litigation to enforce payment.⁵¹ The problem of monetary victories not translating into cash in hand has occurred in the context of the labor movement, in which judicial findings of violations of workers' rights have proven inconsequential to the plaintiffs due to companies' abilities to resist remedial payments.⁵²

In light of the intense resource investments required by litigation, which are often followed by low returns, Professor Michael McCann warns that the use of law "absorb[s] scarce resources that could be used for popular mobilization."⁵³ In more illustrative terms, Professor David Luban describes the "conventional wisdom" that "[l]awsuits are expensive, terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming."⁵⁴ To magnify the vivid connection between litigation and physical malady, Professor Luban cites Judge Learned Hand, who claimed that "as a litigant I should dread a lawsuit beyond almost anything short of sickness and death."⁵⁵

2. *Framing and Fragmentation.* — A second concern has to do with the ways in which law requires a social movement to reformulate its claims and normative standing to fit into the legal world. The focus on legal reform compels groups to frame their claims as contained disputes between two sides, hence narrowing the platform, as well as the strategies, of the movement. Moreover, law offers a limited and generalizing account of what ought to be considered a "problem" and

⁵⁰ See, e.g., JENNIFER GORDON, *SUBURBAN SWEATSHOPS* 78 (2005) (describing how, in the context of the Workplace Project for immigrant workers' rights, "over time — and not very much time — the question of what counted as 'victory' became harder to answer" and a "win in court . . . did not necessarily translate to wages in hand").

⁵¹ See, e.g., Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 617–33 (2006); Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 54 (1996).

⁵² One striking example is the recent case of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), in which, after more than ten years of litigation and indisputable findings of unfair labor practices by the employer, the Supreme Court held that the NLRB was not allowed to award backpay to fired workers because of their status as undocumented workers. *Id.* at 140.

⁵³ MICHAEL W. MCCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 200 (1986).

⁵⁴ Luban, *supra* note 48, at 2621.

⁵⁵ *Id.* (quoting Learned Hand, *The Deficiencies of Trials To Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 89, 105 (1926)).

what can be envisioned as a “solution.”⁵⁶ To the extent that an issue cannot be framed in legal terms, projects and goals will go unaddressed. The need to fit into the legal world fragments the interconnected struggles of a social movement into discrete issues, each time channeling the movement into a single direction. The inherent links between projects, as well as between various social reform groups, are conceptually obscured because the issues are to be framed as distinct legal claims. Even within regulatory frameworks, policy domains are kept separate and fragmented, with different statutes and bureaucracies drawing substantive boundaries between social domains.⁵⁷

At the same time, a legal avenue requires social movements to present a united front, which flattens internal debates, fragments and marginalizes segments of the broader vision, and obscures the complexity of interests, needs, and stakes that exist within the social field.⁵⁸ Groups are faced with the dilemma of defining mutual goals and assuming a “coherentist” viewpoint in a reality of multiple experiences and voices, which inevitably leads to intragroup exclusion.⁵⁹

This strand of critique is particularly salient in the context of civil rights litigation. Commentators have been concerned about the ways in which a narrow focus on identity-based equality rights sacrifices the aggregate power of broad-based social groups, making it difficult to develop multi-issue grassroots alliances.⁶⁰ The fragmentation effect is intensified in identity-based antidiscrimination and equal opportunity claims, which more often than not are structured as zero-sum competitions. When these distributional claims are framed in terms of legal rights, much of the struggle of social movements becomes directed against other similarly situated groups rather than against more powerful groups: “Particularly where hard resources are involved, it is

⁵⁶ See, e.g., William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 138 (2004) (noting the law’s focus on “the rectification of past wrongs at the expense of those deemed responsible for them”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 475–78 (2001) (arguing that the law’s “rule-enforcement approach” is inadequate to address modern structural workplace discrimination).

⁵⁷ See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 385–88 (2004).

⁵⁸ See, e.g., ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 3 (1988) (arguing that the feminist movement has “conflate[d] the condition of one group of women with the condition of all”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing that the feminist movement silences the voices of black women).

⁵⁹ See, e.g., William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

⁶⁰ See MCCANN, *supra* note 53, at 200.

alarming easy to see that winner-take-all civil rights contests can take shape.⁶¹

For example, in the context of workplace equality, the claims of various identity groups for inclusion often come at the price of a more comprehensive agenda about workplace justice and the fair and decent treatment of all workers. A particularly interesting example is the way in which sexual harassment litigation has diverted attention from other forms of employee abuse and mistreatment in the workplace.⁶² Indeed, connecting the labor and civil rights movements through the lens of framing and fragmentation, many today believe that the focus of the labor movement's New Deal reordering sacrificed the interests of women and minorities in the name of a united front supporting the enactment of the NLRA, while others believe that the turn toward narrow, identity-based rights-claiming since the 1960s has been detrimental to the cause of broader workplace justice.⁶³

3. *Professionalization.* — A third type of concern involves the professionalized nature of the legal arena. A wide body of critical scholarship has explored how the role the legal profession itself plays within social reform activities can have a cooptive effect.⁶⁴ Some commentators are concerned with lawyers who have personal goals that motivate them to push for outcomes that are not in their client's best interests.⁶⁵ But more structurally, critical scholars worry that even when lawyers' motives are "clean," the legal profession, essentially comprising a closed network of elites, creates dependency so significant that lawyers

⁶¹ Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW* 115, 131 (David Kairys ed., 3d ed. 1998).

⁶² See Orly Lobel, *Reflections on Equality, Adjudication, and the Regulation of Sexuality at Work: A Response to Kim Yuracko*, 44 *SAN DIEGO L. REV.* (forthcoming 2007).

⁶³ See generally Orly Lobel, *Between Solidarity and Individualism: Collective Efforts for Social Reform in the Heterogeneous Workplace*, in *DIVERSITY IN THE WORKFORCE* 131 (Research in the Sociology of Work 14, Nancy Ditomasi & Corinne Post eds., 2004) (describing the rise of identity-based activism in the employment context and its relation to the fragmentation and decline of the labor movement).

⁶⁴ See, e.g., Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 *CORNELL L. REV.* 1298 (1992); Robert D. Dinerstein, *A Meditation on the Theoretic of Practice*, 43 *HASTINGS L.J.* 971 (1992); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 *N.Y.U. REV. L. & SOC. CHANGE* 369 (1983); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 40 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

⁶⁵ See, e.g., Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 *LAW & SOC'Y REV.* 15, 23–24 (1967) (arguing that criminal defense lawyers, insulated from outside pressures by the criminal justice system's structure and organization, are often more concerned with maximizing the number of plea bargains than with defending their clients to the full extent of the law). Thus, lawyers might push a movement into a one-track effort on a single high-profile case.

risk dominating the movement in which they operate.⁶⁶ Lawyers tend to be removed from the collective grassroots struggle but assume the role of speaking for the group, translating their constituents' words into a professional, distinct language.⁶⁷ Thus, Professors Gary Bellow and Jeanne Kettleon warn that public interest lawyers risk "encouraging dependency and blunting both individual and organized client initiatives" and thus "substantially undermin[ing] the possibility of the sorts of political activity essential to any long term resolution of the inequities that burden their clients."⁶⁸ Writing about *Brown*, Professor Risa Goluboff describes how the equal protection-based strategy of antidiscrimination litigation was deliberately divorced from economic and class-based claims: "The NAACP lawyers marginalized, cabined, and outright repudiated class issues through the complaints they pursued and those they ignored. By the 1950s, when the antisegregation strategy that eventually led to *Brown* coalesced, they had succeeded in writing class out of their story."⁶⁹

Another argument related to the dominance of lawyers is that the legal arena tends to be experienced by marginalized groups as a "hostile cultural setting,"⁷⁰ effectively silencing lay voices by repackaging grievances into legal format and jargon. As Professor Lucie White describes, "[t]he talk and ritual of litigation constitute a discourse and a culture that are foreign to most poor people. Poor people obviously do not speak in the same dialect that lawyers, judges, and elite business-people use."⁷¹ According to Professor White, the experience of marginalization is further exacerbated by the rules of the courtroom, where "speech is routinely interrupted" and "stories are interpreted by black-robed authorities on the basis of rules that are rarely explained and norms that [poor people] seldom share."⁷² Professor White concludes that the very ideas of court and law can evoke "feelings of ter-

⁶⁶ See, e.g., GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 166-68 (1993) (asserting that litigation has "systematically disadvantaged racial minorities" by encouraging them to become "Supreme Court dependents" rather than to pursue their goals through political struggles); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2119 (1991) (arguing that, in poverty law practice, the client's "voice" is often displaced by her lawyer's); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (arguing that the legalistic structure and culture of rent court prevent poor tenants from understanding or asserting their rights).

⁶⁷ See GORDON, *supra* note 50, at 148-49.

⁶⁸ Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 384 n.182 (1978).

⁶⁹ Risa L. Goluboff, "We Live's in a Free House Such as It Is": Class and the Creation of Modern Civil Rights, 151 U. PA. L. REV. 1977, 1979 (2003).

⁷⁰ Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients To Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 542 (1987-1988).

⁷¹ *Id.* at 542-43.

⁷² *Id.* at 543.

ror” in vulnerable communities.⁷³ As a result of both the dominance of expertise and the alienation of other modes of speech, professionalization and legalization of social action may pacify and even disempower activists.⁷⁴

4. *Institutional Limitation.* — A fourth type of claim of legal cooperation faults the institutional limitations of the legal system for failing to bring about the needed reforms for which a social movement strives.⁷⁵ Isolated victories are not readily translated into sustained efforts for structural change; institutional change tends to be incremental and often illusive. First and foremost, court judgments and congressional acts are not self-executing. The courts lack the capacity, power, and information to oversee the implementation of their decisions. Judgments are handed down, but they frequently are not in fact enforced.⁷⁶ Litigation thus will not produce lasting social consequences for those who choose the legal path.⁷⁷ Lawyers have the tendency to mythologize court decisions, like *Brown*, and legislative victories, like the enactment of the NLRA or the Civil Rights Act, but social movements that mobilize around legal cases quickly learn that even victories such as these do not translate into significant material change. Thus, legal enforcement is often understood as backward-looking or corrective, focusing on past wrongs while failing to deter future wrongdoing or sustain long-term organizing.⁷⁸

Moreover, more powerful groups are typically better positioned to interact with the legal system. Namely, Professor Marc Galanter’s “haves” — the “repeat players” who are familiar with the legal system — will be able to shape and control the development of the law to secure legal interpretations that favor their interests.⁷⁹ Powerful players influence the development of law by settling cases that they are likely

⁷³ *Id.*

⁷⁴ See, e.g., GORDON, *supra* note 50, at 196 (“[A] successful experience with legal services taught the worker nothing more than reliance on legal services.”).

⁷⁵ See generally ARYEH NEIER, *ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* (1982) (considering the relative usefulness of litigation in social reform activism); ROSENBERG, *supra* note 2 (raising doubts about the efficacy of the use of litigation for social reform in such major cases as *Brown* and *Roe v. Wade*, 410 U.S. 113 (1973)).

⁷⁶ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976) (describing the intense resources and commitment required to effectuate civil rights judgments).

⁷⁷ ROSENBERG, *supra* note 2, at 338.

⁷⁸ See, e.g., GORDON, *supra* note 50, at 79 (discussing failure of monetary judgments to prevent future misconduct by employers); Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 405–06 (arguing that employment discrimination law “is mainly enforced through quasi-tort lawsuits against alleged discriminators” rather than by developing a forward-looking “substantive vision of equality”).

⁷⁹ Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97 (1974).

to lose and litigating those that they are likely to win.⁸⁰ Similarly, powerful business interests lobby for and force compromises beneficial to themselves on seemingly progressive legislative bills, such as the NLRA.⁸¹ And, in particular in areas such as workplace justice that were pursued by both the labor movement and the civil rights movement, the business community repeatedly had the relative advantage of being able to predict and direct future disputes and find new ways to arrange production so as to avoid the burden of new regulations.⁸² It is therefore not surprising “that law-reform activity by social-reform groups will not result in any great transformation of American society. Instead, it is, at its most successful level, incremental, gradualist, and moderate. It will not disturb the basic political and economic organization of modern American society.”⁸³

5. *Crowding Out.* — A fifth category of cooptation effects caused by resorting to legal strategies suggests that the turn to the law frequently results in crowding out alternative paths, not simply because of resource demands, but also because of psychological effects. Law presents itself both as the exclusive source of authority in a society and as the engine of transformative politics. Law occupies the field of reform possibilities and reduces a movement’s vision to a limited scope of remedies. Accordingly, social movements often overestimate what the law will deliver. As a result, social reformers succumb to the “lure of litigation” rather than provide channels for real political reform.⁸⁴ The resort to the law therefore substitutes, physically and emotionally, for other, stronger forms of social engagement. For example, prior to the enactment of the NLRA, the labor movement had been rather militant.⁸⁵ After the major reordering of industrial relations designed to protect collective bargaining and to allow legal strikes,⁸⁶ there was in fact a sharp decline in active participation at the shop floor level.⁸⁷ The need to comply with the structure and framework of the law ar-

⁸⁰ See Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC’Y REV. 869, 870 (1999).

⁸¹ See, e.g., Klare, *supra* note 7, at 266 (“[A] small number of the most sophisticated representatives of business favored passage of the Act on the theory that [it] was essential to preserve the social order and to forestall . . . even more radical change.”).

⁸² See generally Lobel, *supra* note 14 (describing systematic industry resistance to workplace regulation and to agency enforcement of existing rules).

⁸³ HANDLER, *supra* note 30, at 233.

⁸⁴ See ROSENBERG, *supra* note 2, at 341.

⁸⁵ See Stephen L. Ukeiley, Commentary, *Graduate Assistants at the Bargaining Table, but for How Long?*, 21 HOFSTRA LAB. & EMP. L.J. 643, 645 (2004); Michael J. Heilman, Comment, *The National Labor Relations Act at Fifty: Roots Revisited, Heart Rediscovered*, 23 DUQ. L. REV. 1059, 1073–75 (1985).

⁸⁶ See Klare, *supra* note 7, at 324–25.

⁸⁷ See Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW & HIST. REV. 45, 110–12 (2006).

guably “bolstered the forces of union bureaucracy in their efforts to quell the spontaneity of the rank and file.”⁸⁸

The idea that legal action crowds out other reform paths and visions is expressed by the argument that the turn to the law cuts off the “possibility of radical change in society” by presenting its “moderately reformist” and “status-quo-ist” paths as the only alternatives.⁸⁹ Most disturbingly, after a social movement becomes focused on legal strategies, other avenues and strategies for social struggle such as protests, illicit strikes, and pickets are habitually condemned as deviant and are therefore barred from the movement’s agenda.⁹⁰

6. *Legitimation.* — The final set of arguments within the array of legal cooptation analyses is perhaps the most significant, and also the most complex. In the case of both the labor movement and the civil rights movement, arguments concerning legal cooptation have been closely linked to the notion of consciousness. In addition to producing material gains and losses, the legal regime shapes the consciousness, motivations, and desires of individuals and groups. Law affects the construction of subjectivity in nonlegal actors, particularly when they invest their time and passions in promoting social change through legal reform.⁹¹ For example, in the context of the labor movement, when the NLRA adopted classifications distinguishing “professional employees” from blue collar workers, these definitions in turn shaped the self-identity of workers, limiting the ability of members with different classifications to identify clearly their mutual interest in improved work conditions.⁹² Similarly, once the Civil Rights Act shaped the right to

⁸⁸ *Id.* at 325; see also JEREMY BRECHER, *STRIKE!* 235 (2d ed. 1997); JAMES R. ZETKA, JR., *MILITANCY, MARKET DYNAMICS, AND WORKPLACE AUTHORITY: THE STRUGGLE OVER LABOR PROCESS OUTCOMES IN THE U.S. AUTOMOBILE INDUSTRY, 1946 TO 1973*, at 34–36 (1995); Klare, *supra* note 7, at 281–85.

⁸⁹ KENNEDY, *supra* note 10, at 236.

⁹⁰ See Michael McCann & Helena Silverstein, *Rethinking Law’s “Allurements”: A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 261, 263 (Austin Sarat & Stuart Scheingold eds., 1998).

⁹¹ On the construction of subjectivity through law, see generally KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 *YALE L.J.* 105 (1993); Barenberg, *Democracy and Domination*, *supra* note 27; James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 *U. COLO. L. REV.* 489 (1991); Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 *HARV. L. REV.* 959 (1992); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 *TEX. L. REV.* 1563 (1984); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 *STAN. L. REV.* 1 (1984); and Pierre Schlag, *The Problem of the Subject*, 69 *TEX. L. REV.* 1627 (1991).

⁹² See, e.g., 29 U.S.C. § 152(11) (2000); *NLRB v. Health Care and Ret. Corp. of Am.*, 511 U.S. 571, 573–76 (1994); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 *TEX. L. REV.* 1563, 1578–80 (1996).

equal opportunity through a framework of rules prohibiting discrimination against individuals, identity groups came to view themselves as distinct and divided groups of victims that needed to rely on the courts to overcome hardships.⁹³

Generally, the consciousness effect involves the production of a particular “sense” about the world that makes a particular set of social arrangements appear “more natural, more necessary, and more just than [it] ‘really’ [is].”⁹⁴ Psychological cooptation is produced by the law precisely because law promises more than it can and will deliver. At the same time, law is unlike other sets of rules or systems in which we feel as though we have more choice about whether to participate. As described earlier, law presents itself simultaneously as the exclusive source of authority in a society and as the only engine for social change. It further presents itself as objective, situated outside and above politics. Thus, social actors who enter into formal channels of the state risk transformation into a particular hegemonic consciousness.

Relying upon the language of law and legal rights to bring change legitimates an ideological system that masks inequality.⁹⁵ When social demands are fused into legal action and the outcomes are only moderate adjustments of existing social arrangements, the process in effect naturalizes systemic injustice. The legal process reinforces, rather than resists, the dominant ideologies, institutions, and social hierarchies of the time. For example, when a court decision declares the end of racial segregation but de facto segregation persists, individuals become blind to the root causes of injustice and begin to view continued inequalities as inevitable and irresolvable. Similarly, rights-based discourse has a legitimation effect, since rights mythically present themselves as outside and above politics.⁹⁶ Meanwhile, the legal framework allows the courts to implement a color blindness ideology and grant only symbolic victories rather than promote meaningful progress.⁹⁷ As such, the role of law is one that in fact ensures the

⁹³ See Wendy Brown, *Injury, Identity, Politics*, in MAPPING MULTICULTURALISM 152–60 (Avery F. Gordon & Christopher Newfield eds., 1996).

⁹⁴ KENNEDY, *supra* note 10, at 236.

⁹⁵ See, e.g., Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 42, at 117.

⁹⁶ See RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION, at xv–xvii (1994); Gabel, *supra* note 91, at 1572–77; see also Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 75, 85–86 (1984) (describing ways in which the ruling class maintains power through legal forms and strategies).

⁹⁷ See STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 6–7 (1974); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1111 (1991).

“continued subordination of racial and other minority interests,” while pacifying the disadvantaged who rely on it.⁹⁸ Social movements seduced by the “myth of rights” assume a false sequence, namely “that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change.”⁹⁹

To broaden the critique to the terms of democratic theory and liberal constitutionalism, the legitimation effect can be defined as the process through which systematic losers come to understand themselves as part of the system, as self-governing, and as having willed their losses and their subordinate status. Social movements like the labor movement give up many of their claims against the structures of capitalism, such as claims for employee ownership, because they are no longer part of the legal map with which they engage.¹⁰⁰ Their causes are reduced to less ambitious, or less “radical” (hence, the term deradicalization, which, as described above, has been central to describing the fall of the labor movement), goals because the group begins to view conceptions of justice from the viewpoint of those against whom they were making claims.

* * * *

Taken together, and most often bundled into a single claim about the negative effect of law on social action, the six categories of cooptation risks have contributed to a critical legal consciousness that perceives social demands as no longer threatening to the status quo once they have been adopted by a legal regime, since they then take a moderate, or even symbolic, form.¹⁰¹ Professors Richard Cloward and Frances Fox Piven articulate a radical expression of the outside-of-the-law conclusion, describing legal reform strategies as inherently and profoundly cooptive because they take away the most powerful tool of underprivileged groups — the power to (illegally) disrupt.¹⁰² The contemporary truism about the limits of legal change is thus that law defangs radical demands and should not be the chosen path to transformative politics.

⁹⁸ SPANN, *supra* note 66, at 5.

⁹⁹ SCHEINGOLD, *supra* note 97, at 5.

¹⁰⁰ See generally Lobel, *supra* note 17 (describing the range of possibilities of institutions of employee voice and demonstrating how the spectrum of actual institutions is narrow in the United States).

¹⁰¹ See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 86 (2d ed. 1994).

¹⁰² FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (1979); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (2d ed. 1993).

III. AN ALTERNATIVE? "OUTSIDE" THE LAW TODAY

Reflecting the aspiration to avoid the process of legal cooptation, three interrelated alternatives to the traditional focus on the legal system emerge in the literature. The first is the redefinition of the purpose of the legal system as facilitating secondary outcomes rather than primary ones, pointing to the ultimate insignificance of particular legal results. The second is the move away from the legal arena to an "extralegal" sphere of action, often portrayed as the realm of civil society. The third focal point is the reconceptualization of the meaning of "law" and "legality," building on earlier notions of legal pluralism. As is argued in the following sections, all three proposals reflect not only disillusionment and disappointment with the legal system as a potential engine for social reform, but also the convergence of progressive legal scholarship with current economic realities and shifting commitments of the state in an era of globalization.

A. Law in Service of Indirect Effects: Lay Lawyering and the "Law and Organizing" Movement

The first move that has been suggested in recent scholarship is a transition to the notion that law serves not simply the purpose of direct outcomes but also, and indeed primarily, other goals of organizing, consciousness raising, and community building. Starting from the recognition that law impacts social consciousness, scholars propose to use this effect to serve social reform groups. They advocate the use of the legal system to "increase people's sense of personal and political power" rather than to promote specific court decisions.¹⁰³ A paradigmatic expression of these developments comes from the public interest lawyering literature. Since the early 1990s, the "Law and Organizing" approach, which rejects the law as a vehicle for direct social transformation and encourages lawyers to work with other community members to seek local, nonlegal solutions to social injustice, has become a central model.¹⁰⁴ The model links, or rather subordinates, the use of

¹⁰³ See Gabel & Harris, *supra* note 64, at 376. See generally Idit Kostiner, *Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change*, 37 LAW & SOC'Y REV. 323 (2003) (surveying social justice activists to understand their views on the relationship between law and movement activism).

¹⁰⁴ See, e.g., Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984-85); Cummings & Eagly, *supra* note 40; Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395; Symposium, *Political Lawyering: Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285 (1996). On February 25, 2000, the UCLA School of Law sponsored "A Conference on Law and Organizing." See Cummings & Eagly, *supra* note 40, at 448 n.20; Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2001). The idea that public interest lawyering involves not only litigation but also community or group organizing appeared well before the 1990s. See, e.g.,

the law to nontraditional gains, which include building membership, increasing community involvement, fundraising, gaining political leverage, ensuring publicity and media coverage, dramatizing the cause, and producing counter-hegemonic narratives.

For example, as a lawyer and founding administrator of a migrant workers' rights NGO, Jennifer Gordon asserts that traditional lawyering "seemed to be working *against* the possibility of collective action."¹⁰⁵ According to Gordon:

[Our NGO] found itself in the perverse position of trying to persuade workers who had been successfully represented by the [center's legal] clinic that what they had just observed about the efficacy of lawyers was untrue, or at least not as true as the efficacy of collective action — with all evidence being to the contrary.¹⁰⁶

Gordon subsequently offers several possibilities for how the use of the law can contribute to social reform activism.¹⁰⁷ First, the promise of legal assistance on a discrete case can be used "as a draw" to bring new members into an organization that has larger organizing and reformist goals. Second, law can function as a measure of injustice, as part of educational efforts, and as a narrative in analyzing personal experiences. Finally, law may be utilized as part of a larger organizing campaign, in which the ultimate goal is not to win a particular lawsuit, but to advance organizing efforts or to put pressure on an industry.

Within a framework such as the one Gordon describes, lawyers are urged to deemphasize conventional legal practices and to focus on facilitating group mobilization;¹⁰⁸ for example, lawyers can write training materials, train lay lobbyists and organizers, and prepare groups for political confrontation.¹⁰⁹ Termed by one scholar as "lay lawyering

Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Neil K. Komisar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 92 (Burton A. Weisbrod ed., 1978). Rather, it is the move toward prioritizing these alternative strategies over traditional legal ones that is most recent.

¹⁰⁵ GORDON, *supra* note 50, at 191.

¹⁰⁶ *Id.* at 196.

¹⁰⁷ *See id.* at 234; *see also* Peter Pitegoff, *Organizing Worker Cooperatives*, 7 LAW & POL'Y 45 (1985) (discussing the intrinsic link between legal work and local organizing in the case of worker cooperatives).

¹⁰⁸ *See generally* Sophie Bryan, *Personally Professional: A Law Student in Search of an Advocacy Model*, 35 HARV. C.R.-C.L. L. REV. 277 (2000) (comparing different models of attorney-group interaction, including the "Service-Is-Subservient" model, the "Plaintiff-as-Proxy" model, and the "Lawyer-as-Justice-Seeker" model).

¹⁰⁹ *See* Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1056–58 (1970); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

work,”¹¹⁰ the model at times effectively equates the role of lawyer with that of organizer, while minimizing or eliminating the need for reliance on the lawyer’s specialized legal knowledge and largely rejecting the provision of practical, direct, or individualized legal services.¹¹¹

Importantly, although an expansion of our understanding of how law and legality matter beyond direct regulatory effects is no doubt a valuable contribution, the distinctive feature of these recent accounts of public interest law is the dismissal of the direct significance of law in an attempt to prioritize indirect effects. Even though the contemporary critical legal consciousness views law as having limited effects on real change, it might still see law as having symbolic importance and helping to organize and mobilize movements.¹¹² However, public interest commentators since the 1990s have criticized lawyers who pursue litigation rather than other strategies that would better serve their causes, such as grassroots mobilization and self-help.¹¹³ They further urge law schools to prepare students for nonlitigation work with communities instead of focusing on legal disputes.¹¹⁴ When these commentators *do* consider law as a viable strategy, the general wisdom is that it should take a secondary, supportive role to these alternative paths. Accordingly, some authors insist that success for an activist lawyer should not be measured by “technical winning or losing” but by “the impact of the legal activities on the morale and understanding of the people involved in the struggle.”¹¹⁵ The law is thus used in order to empower individuals and groups in their everyday lives rather than for direct material gains.¹¹⁶ Various advocacy groups, legal scholars, and legal clinics that operate within law schools increasingly embrace this

¹¹⁰ Gerald P. López, *Lay Laweering*, 32 UCLA L. REV. 1 (1984).

¹¹¹ See Bryan, *supra* note 108, at 279–80; Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1044 (1994); Daniel S. Shah, *Laweering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217, 250–51 (1999).

¹¹² See, e.g., MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); MCCANN, *supra* note 53; PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Michael McCann, Book Review, 105 AM. J. SOC. 238 (1999). This understanding of the importance of the symbolic effects of the law stems from HANDLER, *supra* note 30. The emphasis, however, on shifting the focus of legal reform in service of symbolic effects is more recent.

¹¹³ See, e.g., GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE 24, 60–61 (1992).

¹¹⁴ See, e.g., Gerald Korngold, *Legal Education for Non-Litigators: The Role of the Law Schools and the Practicing Bar*, 30 N.Y.L. SCH. L. REV. 621 (1985).

¹¹⁵ ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER 57 (1983); see also Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004) (describing a model for protest with a “reduced emphasis on winning or losing”).

¹¹⁶ See Gabel & Harris, *supra* note 64, at 376.

new “extralegal” approach to lawyering.¹¹⁷ The model envisions “a particular type of legal advocacy[,] one that is intimately joined with, and ultimately subordinate to, grassroots organizing campaigns.”¹¹⁸ In the pursuit of intellectual knowledge, this alternative focus is translated into a call for scholarship that avoids the doctrinal questions concerning “what should the law be?” and instead studies the law as constitutive of the self-understanding of individuals and groups.¹¹⁹

*B. Purifying an Extralegal Sphere:
Glocalization and Civil Society Revivalism*

Within the context of disillusionment with formal law, a growing body of literature theorizes that it is possible to avoid legal cooptation by opting out of the regulated system altogether. Many scholars advocate a return to activism in a “third sphere,” often described in residual terms as neither the political nor the economic spheres but rather “an independent domain of free social life where neither governments nor private markets are sovereign.”¹²⁰ Indeed, this sphere is conceptualized as separate from and prior to the state.¹²¹ For example, Professor Alan Wolfe argues that there is a need to protect and to shield civil society from the overbearing forces of both the market and government.¹²² Professor Kathleen Sullivan describes the realm of private voluntary association as competing with the state for loyalty, offering “an alternative to government as a vehicle for collective self-formation.”¹²³ Accordingly, this third sphere to which our attention

¹¹⁷ Both Michael Wishnie and Sameer Ashar run law school clinics that emphasize organizing and community mobilization as well as advocacy. See Daphne Eviatar, *Clinical Anxiety: Rebellious Lawyers Are Shaking Up Law School Clinics*, LEGAL AFFAIRS, Nov.-Dec. 2002, at 37, available at http://www.legalaffairs.org/issues/November-December-2002/review_eviatar_novdec2002.msp; Sameer M. Ashar, *Law Clinics as a Locus of Radical Democratic Resistance* 11-12, 15-16 (Oct. 26, 2005) (unpublished manuscript, on file with the Harvard Law School Library); see also Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417 (2005-2006).

¹¹⁸ Cummings & Eagly, *supra* note 40, at 447.

¹¹⁹ See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 1-3 (1999).

¹²⁰ BENJAMIN R. BARBER, *A PLACE FOR US: HOW TO MAKE SOCIETY CIVIL AND DEMOCRACY STRONG* 4 (1998).

¹²¹ See Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1311-12 (2002).

¹²² See ALAN WOLFE, *WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION* 241-46 (1989).

¹²³ Kathleen M. Sullivan, Symposium, *The Republican Civic Tradition: Rainbow Republicanism*, 97 YALE L.J. 1713, 1719 (1988). Professor Sullivan further describes civil society as a place removed from the state, where social groups can self-define and deviate from institutionalized conventions:

Contracting constitutional protection for voluntary groups would impair their most crucial functions. Intermediate organizations not only facilitate individual self-definition and expression, but also keep the state from replicating itself by nurturing deviance, diversity,

must shift consists of community, lifeworld, and civil society, or more tangibly, the nonprofit sector, NGOs, and voluntary associations. The “civil society movement,” having gained new prominence in the 1990s, has been embraced by scholars and activists from all sides of the political spectrum.¹²⁴ In turn, the role of public interest lawyering is to support the flourishing of this third sphere of life, imagined “outside the market and the state.”¹²⁵

When contemporary extralegal advocates reject legal strategies as transformative paths for social change and suggest activism in the realm of civil society as an alternative path, they are echoing this purist conception of separate spheres of life. It is useful to distinguish here between two traditions of civil society. The first tradition, that of Montesquieu (what Professor Charles Taylor has termed the “M-stream”), understands civil society as political society, which develops within the political process.¹²⁶ By contrast, in the tradition of Locke (the “L-stream”), civil society is pre-political, extra-political, and self-organizing.¹²⁷ Although civil society has always been a meaningful aspect of social engagement, the distinct characteristic of the extralegal model is its renewed embrace of the Lockean tradition, uncritically heralding a simplistic notion of pre/extra-political “grassroots” local action. Building on this grassroots romanticism, scholars distinguish between prior moments of “social movement” struggles, such as the labor movement of the 1930s and the civil rights movement of the 1960s, and the new forms of civil society social engagement. According to such scholars, the type of engagement of social groups today should be

and dissent. These functions depend on subgroups’ private status — on their detachment and distance from the all-inclusive state.

. . . [T]o recast private associations as participants in a common public life — however broadly “public” is defined — is to mute their potential deviance from and opposition to dominant norms.

Id. at 1721.

¹²⁴ See, e.g., AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY* 96 (1996); DAVID G. GREEN, *REINVENTING CIVIL SOCIETY: THE REDISCOVERY OF WELFARE WITHOUT POLITICS* 147–53 (1993); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 383–93 (2000); MICHAEL TANNER, *THE END OF WELFARE: FIGHTING POVERTY IN THE CIVIL SOCIETY* 134–39 (1996); Kathryn Abrams, *Law’s Republicanism*, 97 *YALE L.J.* 1591, 1604–06 (1988); Stephen Davies, *Two Conceptions of Welfare: Voluntarism and Incorporationism*, 14 *SOC. PHIL. & POL’Y* 39 (1997); William A. Schambra, *All Community Is Local: The Key to America’s Civic Renewal*, in *COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA* 44 (E.J. Dionne Jr. ed., 1998) [hereinafter *COMMUNITY WORKS*]; Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 461, 499–504 (Theda Skocpol & Morris P. Fiorina eds., 1999).

¹²⁵ Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 27 (2004).

¹²⁶ CHARLES TAYLOR, *Invoking Civil Society*, in *PHILOSOPHICAL ARGUMENTS* 204 (1995).

¹²⁷ See *id.*; Gunther Teubner, *The “State” of Private Networks: The Emerging Legal Regime of Polycorporatism in Germany*, 1993 *BYU L. REV.* 553, 554–55.

understood differently from former models. Scholars distinguish between “movement politics,” such as the labor movement and the civil rights movement, which were transient, grand, energetic moments demanding legal reform, and the newer form of “civil society,” which manifests itself more modestly but has longer staying power precisely because it is self-contained and separate from demands on the state. Indeed, “[m]uch of 1960s politics was about ‘Thinking Big’ It was about what were called ‘movements.’ . . . Politics was happening, it appeared, only when tens of thousands of people took to the streets, sometimes in the name of nonnegotiable demands.”¹²⁸ By contrast, civil society is described as sturdy and resilient, building “ties of trust, reciprocity, accountability, and mutual self-help over time.”¹²⁹ Visualized within a separate sphere, social activism is recast in new terms, and the focus shifts to extralegal strategies and to the diversification of forms of action and struggle. Indeed, because of the wide range of strategies that are assumed to support civil society’s expansion, Professor Michael Walzer describes civil society as “a project of projects,” requiring a “new sensitivity for what is local, specific, [and] contingent.”¹³⁰ These diverse strategies are similar to those described in the previous “law in service of” or “lay lawyering” model and include grassroots mobilization, community organizing, community action initiatives, alliance building, shaming, public campaigning, and active protest.

At the international level, globalization literature similarly describes a proliferation of activism that cannot be explained by traditional theories of social struggle. Like at the local level, the extralegal globalization approach celebrates multiple forms of action, describing the proliferation of micro-initiatives and reinscribing local efforts as part of the global.¹³¹ And yet again, the image of a civil society is evoked: “Global civil society, as such, is that slice of associational life which exists above the individual and below the state, but also across national boundaries.”¹³²

¹²⁸ Jean Bethke Elshtain, *Not a Cure-All: Civic Society Creates Citizens, It Does Not Solve Problems*, in COMMUNITY WORKS, *supra* note 124, at 24, 27–28.

¹²⁹ *Id.* at 28.

¹³⁰ Michael Walzer, *The Idea of Civil Society: A Path to Social Reconstruction*, in COMMUNITY WORKS, *supra* note 124, at 123, 143.

¹³¹ Hence the emerging concept of “glocalization,” in which efforts at the local level reflect changes in the global market and in turn influence the way the global economy is developing. *See, e.g.*, N.A. Phelps & N. Parsons, *Edge Urban Geographies: Notes from the Margins of Europe’s Capital Cities*, 40 URB. STUD. 1725, 1726 (2003); Roland Robertson, *Glocalization: Time-Space and Homogeneity-Heterogeneity*, in GLOBAL MODERNITIES 25, 28–31 (Mike Featherstone et al. eds., 1995).

¹³² PAUL WAPNER, ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS 4 (1996). For further discussions of global civil society, see generally RONNIE D. LIPSCHUTZ WITH JUDITH MAYER, GLOBAL CIVIL SOCIETY AND GLOBAL ENVIRONMENTAL GOVERNANCE

In their book *Global Dreams*, Richard Barnet and John Cavanagh describe how marginalized groups “spin[] their own transnational webs to embrace and connect people across the world.”¹³³ Groups that are bypassed by the new world order manage to “craft[] their own strategies for survival and development,” forming “a global civil society, . . . tak[ing] shape . . . mostly off camera” and outside of the regular channels of the state and the market economy.¹³⁴ This recent “glocalization” literature suggests that we focus on a new vision of transnational politics, rooted in the everyday interaction of marginalized groups, such as immigrants of color, within families, churches, schools, and informal community networks.¹³⁵ The analysis moves away from the idea of social struggle that aims for institutional power and legal reform to a concept of “visibility” and “presence.”¹³⁶

Developing an understanding that a counterhegemonic ideal in one context can become hegemonic and embedded in dominant politics in another, the literature further advocates the need to diversify our ideas of resistance.¹³⁷ Scholars describe the creation of broad fronts with no shared platform and an environment that creates a sense that all can participate, no matter how particular or how small the social group.¹³⁸ Indeed, unlike the New Deal labor movement and the mid-century civil rights movement, current social struggles, such as the oxymoronic global “Anti-Globalization Movements,”¹³⁹ with platforms ranging from economic justice to religious recognition, do not exemplify united

(1996); André C. Drainville, *Left Internationalism and the Politics of Resistance in the New World Order*, in *A NEW WORLD ORDER?: GLOBAL TRANSFORMATIONS IN THE LATE TWENTIETH CENTURY* 217 (David A. Smith & József Böröcz eds., 1995); Cecelia Lynch, *Social Movements and the Problem of Globalization*, 23 *ALTERNATIVES* 149 (1998); Paul Wapner, *Defending Accountability in NGOs*, 3 *CHI. J. INT'L L.* 197 (2002); and Michael Walzer, *Between Nation and World*, *ECONOMIST*, Sept. 11, 1993, at 49, 51.

¹³³ RICHARD J. BARNET & JOHN CAVANAGH, *GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER* 429 (1994).

¹³⁴ *Id.* at 429–30; see also LIPSCHUTZ WITH MAYER, *supra* note 132, at 59–60.

¹³⁵ See generally SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* 6–26 (1998) (describing the effects of globalization on local communities in terms of their politics, culture, and economies).

¹³⁶ See *id.* at xxi (“[Marginalized social groups] lack power, but now have ‘presence.’”).

¹³⁷ See generally BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* (2002) (analyzing the contemporary impact of legal pluralism on the legal experiences, perceptions, and consciousnesses of individuals and social groups).

¹³⁸ On the conflicting claims of social movements in the context of globalization, human rights, and economic development, see generally BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* 237–58 (2003), and Boaventura de Sousa Santos, *The Heterogeneous State and Legal Pluralism in Mozambique*, 40 *LAW & SOC'Y REV.* 39 (2006).

¹³⁹ See, e.g., Jason McQuinn, *From Seattle to Prague and Beyond!*, *ANARCHY: A J. OF DESIRE ARMED*, Fall-Winter 2000–2001, at 2 (describing how anti-globalization sentiments are being increasingly voiced throughout the world).

movements, but rather frequently serve as umbrellas of diverse, and even contradictory, issues and actions.

The underlying narrative of this spatial shift is the decline in the significance, as well as capabilities, of the state. Since formalized power and old hierarchies have been destabilized, there exists no single adversary — the state or the legal system — which is in charge and should be the object of the struggle. Rather, the state, itself lacking control vis-à-vis grander, more obscure, and more dispersed forces, is merely one of many actors and vehicles for action. The state is, in Professor Boaventura de Sousa Santos's terms, "the newest social movement."¹⁴⁰

C. Reconceptualizing "Law": The New Legal Pluralism

The resistance to the legal system as the primary vehicle for social reform has also brought a renewed academic interest in the earlier legal pluralism school of thought.¹⁴¹ Legal pluralism, as opposed to legal centralism, suggests that more than one body of laws or set of norms exist within a single legal jurisdiction.¹⁴² Private ordering and the idea of self-regulation are clearly central to the study of legal pluralism. Legal pluralism thus goes further than the notion of organizing. Its focus is on relatively formal forms of nongovernmental norms, such as corporate codes of conduct or private grievance procedures. According to strong versions of legal pluralism, "the state has no more empirical claim to being the center of the universe of legal phenomena than any other element of that whole system does."¹⁴³ Therefore, "[f]or the pluralists, the modern assumption that all legal and political theories can be reduced to the relationships between Sovereign and Subject

¹⁴⁰ Boaventura de Sousa Santos, Lecture at the International Law and Society Conference (July 2001).

¹⁴¹ For examples of the renewed interest in legal pluralism, see generally SANTOS, *supra* note 137, at 89–98; Jean-Guy Belley, *Law as Terra Incognita: Constructing Legal Pluralism*, 12 CAN. J.L. & SOC. 17 (1997); Martha-Marie Kleinhaus & Roderick A. Macdonald, *What Is a Critical Legal Pluralism?*, 12 CAN. J.L. & SOC. 25 (1997); and Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 ARIZ. J. INT'L & COMP. L. 69 (1998). See also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 56, 234–36, 274–75 (1991) (describing the importance of informal norms of reciprocity in maintaining order and social control).

¹⁴² See LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 196–99 (1975) (describing legal pluralism as circumstances in which more than one set of laws coexist in a single jurisdiction); see also John Griffiths, *What Is Legal Pluralism?*, 24 J. LEG. PLURALISM & UNOFFICIAL L. 1, 2 (1986) (defining legal pluralism broadly as a "state of affairs . . . in which behavior pursuant to more than one legal order occurs"); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988) (providing an overview of legal pluralism scholarship).

¹⁴³ Mark Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEG. PLURALISM 1, 1 n.1 (1981) (quoting John Griffiths, *The Legal Integration of Minority Groups Set in the Context of Legal Pluralism* 48 (1979) (unpublished manuscript)).

or State and Individual . . . is false.”¹⁴⁴ Indeed, a state’s law should recognize the existence of subsystems, “each . . . capable of regulating itself, according to its own norms and its own code, and ha[ving] no need to support its normative claims on any external principle.”¹⁴⁵ Private groups should be entitled to “exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.”¹⁴⁶

Recent accounts, drawing on these strong versions of the legal pluralism school — and linking them to questions of alternative social reform avenues — accordingly point to the emergence of new forms of law that are private and chaotic, yet claim validity as parallel to that of traditional formal law. The task of maintaining order becomes “decentralized and dispersed throughout society among different groups” and multiple sources of authority, all competing on the same normative plane with state-generated law.¹⁴⁷ For example, in the context of labor and employment protections, there is a growing interest among advocates in nonstate expressions of norms. These expressions include individual company codes of corporate conduct, which are documents issued by corporate headquarters describing various workplace standards and conditions that will be respected by the corporation.¹⁴⁸ These nonstate regulatory expressions also include more coordinated efforts by “coalitions of civil society and business groups — with or without some governmental input.”¹⁴⁹ A model example is Social Accountability International’s (SAI) SA8000 code, a late 1990s initiative

¹⁴⁴ Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1636 (1999) (citing HAROLD J. LASKI, *AUTHORITY IN THE MODERN STATE* 26–27 (1919)).

¹⁴⁵ Jacques Lenoble, *Law and Undecidability: A New Vision of the Proceduralization of Law*, 17 CARDOZO L. REV. 935, 997–98 (1996).

¹⁴⁶ Mark Dewolfe Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953) (“[G]overnment must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives . . .”).

¹⁴⁷ Austin Sarat & Roger Berkowitz, *Disorderly Differences: Recognition, Accommodation, and American Law*, 6 YALE J.L. & HUMAN. 285, 313 (1994); see also Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165 (1989); Carol J. Greenhouse, *Legal Pluralism and Cultural Difference: What Is the Difference? A Response to Professor Woodman*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 61 (1998).

¹⁴⁸ See generally Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEG. STUD. 401 (2001) (describing the rise of corporate codes of conduct and evaluating their effectiveness). Codes of conduct, of course, are not always effective. For example, Enron had a comprehensive code of ethics and good governance for many years before its collapse. See Paul Fiorelli, *Will U.S. Sentencing Commission Amendments Encourage a New Ethical Culture Within Organizations?*, 39 WAKE FOREST L. REV. 565, 567 (2004).

¹⁴⁹ Blackett, *supra* note 148, at 413.

modeled after industry certification standards of quality control.¹⁵⁰ The SA8000 code includes long lists of labor and employment standards and includes a management auditing system, whereby SAI certifies and accredits firms to become external auditors, who will in turn certify manufacturing facilities for conformance to SA8000.¹⁵¹ Other examples of recent private codification and standardization efforts include the Sustainability Reporting Guidelines of the Global Reporting Initiative,¹⁵² the Clean Clothes Campaign Code of Labour Practices for the Apparel Industry,¹⁵³ the Eco-label project,¹⁵⁴ and the Fairtrade Mark.¹⁵⁵ The focus on new instruments such as social labeling, private standard setting, monitoring, accreditation, and compliance certification by both nonprofit and for-profit organizations is illustrative of the proliferation of interest in self-regulation in recent years.¹⁵⁶ The logic beneath these emerging initiatives is that central state regulation is merely one, and often not the most effective, way to promote good governance and social responsibility in the private market. The breadth of topics addressed through these initiatives — environmental practices; fair, safe, and just working conditions; sound financial planning; community investment; and market interactions — demonstrate the growing emphasis on nonstate regulation.

Focusing on these occurrences, recent studies emphasize the importance of alternative models of accountability, including “soft law” regimes that guide private behavior in the absence of a “hard” binding regulatory regime.¹⁵⁷ The focus on these softer modes of regulation

¹⁵⁰ See Soc. Accountability Int'l, Overview of SA8000, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473> (last visited Jan. 14, 2007) [hereinafter SA8000].

¹⁵¹ See Blackett, *supra* note 148, at 415–17.

¹⁵² See Global Reporting Initiative, G3 Sustainability Reporting Guidelines Draft (Jan. 2, 2006), <http://www.grig3.org/guidelines.html>.

¹⁵³ See Clean Clothes Campaign, Code of Labour Practices for the Apparel Industry Including Sportswear (Feb. 1998), <http://www.cleanclothes.org/codes/ccccode.htm>.

¹⁵⁴ See European Comm'n, Eco-label, http://ec.europa.eu/environment/ecolabel/index_en.htm (last visited Jan. 14, 2007).

¹⁵⁵ Fairtrade Found., Introducing Fairtrade (Aug. 2005), available at http://www.fairtrade.org.uk/downloads/pdf/introducing_fairtrade.pdf.

¹⁵⁶ See LESTER M. SALAMON ET AL., JOHNS HOPKINS CTR. FOR CIVIL SOC'Y STUDIES, GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR (1999); Lobel, *supra* note 57, at 389; Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 350–55 (2001); *Sweatshop Wars*, ECONOMIST, Feb. 27, 1999, at 62; SA8000, *supra* note 150.

¹⁵⁷ On the term “soft law” in international law, see Steven R. Ratner, *International Law: The Trials of Global Norms*, 110 FOREIGN POL'Y 65, 67 (1998); see also David M. Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 LAW & SOC. INQUIRY 1187, 1194–97 (2000). On “soft law” labor regimes, see Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 121–23 (1999); see also Lobel, *supra* note 57, at 388–90. Professor Jerry Mashaw has defined “soft law” as consisting of “social accountability regimes” and being “infinitely negotiable, continuously revisable, often unspoken; oscillating be-

challenges the traditional assumptions about legal reform, requiring the redefinition of conventional notions of law and providing alternative avenues for action. The new legal pluralist rejects an equation between norm generation and formal regulation and also rejects the idea that social reform should be equated with legal reform. The generation of legalities in multiple arenas of action is studied in multiple legal fields, ranging from social policy areas such as labor and employment law, environmental law, education law, and consumer law to financial regulation and corporate law policy, and international law.¹⁵⁸ The call for greater recognition of legal pluralism is most salient in the context of globalization studies, in which international and transnational legal regimes are often described as the disorganization, decentralization, and destabilization of former structures, spaces, hierarchies, and forms of normativity.¹⁵⁹ In turn, legal scholars have become increasingly occupied with exploring situations in which a separate legal order exists within a legal regime, for example, when immigrant groups bring their own legal principles to create a parallel legal system in a community.¹⁶⁰

The study of new legal pluralism is thus closely connected to the idea of civil society revivalism, as its prescription is the production of more norms in a third sphere, outside of the law and the market. In the context of labor market policy in particular, “[v]oluntary corporate codes of conduct are in vogue. . . . [M]ajor transnational corporations . . . refer to their ‘guiding principles,’ ‘code[s] of worldwide business conduct,’ and ‘code[s] of ethics and business conduct.’ Codes now exist in almost every industry: apparel, oil, electronics, and general manufacturing.”¹⁶¹ Again, the emphasis of the new legal pluralists is not simply on the existence of such voluntary codes in conjunction

tween deep respect for individual choices and relentless social pressure to conform to group norms.” Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY 115, 125 (Michael W. Dowdle ed., 2006).

¹⁵⁸ See, e.g., Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757 (2005). See generally Lobel, *supra* note 57 (describing developments in the work of administrative agencies, legislatures, and courts to provide opportunities for private parties to participate more actively in managing their regulatory environment in such diverse areas as eco-management, discrimination policies, and information technology).

¹⁵⁹ On legal pluralism in international law, see, for example, SURYA PRAKASH SINHA, LEGAL POLYCENTRICITY AND INTERNATIONAL LAW 6–17 (1996), and Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT’L L. 65, 67–68 (1996). See also LAW AND GLOBALIZATION FROM BELOW (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

¹⁶⁰ See Kleinhans & Macdonald, *supra* note 141, at 39–40; Snyder, *supra* note 144, at 1635 n.59.

¹⁶¹ Owen E. Herrnsstadt, *Voluntary Corporate Codes of Conduct: What’s Missing?*, 16 LAB. LAW. 349, 349 (2001).

with traditional regulatory tools, but rather on the possibility that these new “laws” are preferred alternatives to legal reform struggles.¹⁶²

IV. PROBLEMATIZING THE CONCEPT OF EXIT — COOPTATION REVISITED

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

¹⁶² Trade associations, major corporations, government officials, and nongovernmental organizations have embraced the corporate code of conduct as the cutting edge mechanism for steering corporate behavior in relation to workers' lives. While in office, President Clinton supported the Apparel Industries Partnership Program in its creation of the Fair Labor Association, declaring: “The announcement we make today will improve the lives of millions of garment workers around the world.” *Id.* at 349–50 (quoting Press Release, Office of the Press Sec’y, Remarks by the President at the Apparel Industry Event (Apr. 14, 1997)). President Clinton also initiated broad “Model Business Principles,” guidelines that encourage “all businesses to adopt and implement voluntary codes of conduct for doing business around the world.” *Id.* at 350 (quoting U.S. DEP’T OF COMMERCE, MODEL BUSINESS PRINCIPLES (1996)).

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.

*A. Practical Failures: When Extralegal Alternatives
Are Vehicles for Conservative Agendas*

We don't want the 1950s back. What we want is to edit them. We want to keep the safe streets, the friendly grocers, and the milk and cookies, while blotting out the political bosses, the tyrannical headmasters, the inflexible rules, and the lectures on 100 percent Americanism and the sinfulness of dissent.¹⁶³

A basic structure of cooptation arguments as developed in relation to the labor and civil rights movements has been to show how, in the move from theory to practice, the ideal that was promoted by a social group takes on unintended content, and the group thus fails to realize the original vision. This risk is particularly high when ideals are framed in broad terms that are open to multiple interpretations. Moreover, the pitfalls of the potential risks presented under the umbrella of cooptation are in fact accentuated in current proposals. Paradoxically, as the extralegal movement is framed by way of opposition to formal legal reform paths, without sufficiently defining its goals, it runs the very risks it sought to avoid by working outside the legal system.

Extralegal paths are depicted mostly in negative terms and as resorting to new alternative forms of action rather than established models. Accordingly, because the ideas of social organizing, civil society, and legal pluralism are framed in open-ended contrarian terms, they do not translate into specific visions of social justice reform. The idea of civil society, which has been embraced by people from a broad array of often conflicting ideological commitments, is particularly demonstrative. Critics argue that “[s]ome ideas fail because they never make the light of day. The idea of civil society . . . failed because it

¹⁶³ Alan Ehrenhalt, *Where Have All the Followers Gone?*, in *COMMUNITY WORKS*, *supra* note 124, at 93–96.

became too popular.”¹⁶⁴ Such a broadly conceived ideal as civil society sows the seeds of its own destruction.

In former eras, the claims about the legal cooptation of the transformative visions of workplace justice and racial equality suggested that through legal strategies the visions became stripped of their initial depth and fragmented and framed in ways that were narrow and often merely symbolic. This observation seems accurate in the contemporary political arena; the idea of civil society revivalism evoked by progressive activists has been reduced to symbolic acts with very little substance. On the left, progressive advocates envision decentralized activism in a third, nongovernmental sphere as a way of reviving democratic participation and rebuilding the state from the bottom up. By contrast, the idea of civil society has been embraced by conservative politicians as a means for replacing government-funded programs and steering away from state intervention. As a result, recent political uses of civil society have subverted the ideals of progressive social reform and replaced them with conservative agendas that reject egalitarian views of social provision.

In particular, recent calls to strengthen civil society have been advanced by politicians interested in dismantling the modern welfare system. Conservative civil society revivalism often equates the idea of self-help through extralegal means with traditional family structures, and blames the breakdown of those structures (for example, the rise of the single parent family) for the increase in reliance and dependency on government aid.¹⁶⁵ This recent depiction of the third sphere of civic life works against legal reform precisely because state intervention may support newer, nontraditional social structures. For conservative thinkers, legal reform also risks increasing dependency on social services by groups who have traditionally been marginalized, including disproportionate reliance on public funds by people of color and single mothers. Indeed, the end of welfare as we knew it,¹⁶⁶ as well as the

¹⁶⁴ Alan Wolfe, *Is Civil Society Obsolete? Revisiting Predictions of the Decline of Civil Society in Whose Keeper?*, in *COMMUNITY WORKS*, *supra* note 124, at 18.

¹⁶⁵ See Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1621 (2001). Examples of such claims about the causal connection between the breakdown of traditional civil society/family structures and reliance on government aid are found in documents such as *COUNCIL ON CIVIL SOCIETY, A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS* (1998), and *NAT'L COMM'N ON CIVIC RENEWAL, A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT* (1998). For a critique from the perspective of racial justice, see Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 *YALE L.J.* 1609 (1988).

¹⁶⁶ See, e.g., Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 *DUKE L.J.* 493 (1999).

transformation of work as we knew it,¹⁶⁷ is closely related to the quest of thinkers from all sides of the political spectrum for a third space that could replace the traditional functions of work and welfare. Strikingly, a range of liberal and conservative visions have thus converged into the same agenda, such as the recent welfare-to-work reforms, which rely on myriad non-governmental institutions and activities to support them.¹⁶⁸

When analyzed from the perspective of the unbundled cooptation critique, it becomes evident that there are multiple limits to the contemporary extralegal current. First, there have been significant problems with resources and zero-sum energies in the recent campaigns promoting community development and welfare. For example, the initial vision of welfare-to-work supported by liberal reformers was a multifaceted, dynamic system that would reshape the roles and responsibilities of the welfare bureaucracy. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹⁶⁹ (PRWORA), supported by President Clinton, was designed to convert various welfare programs, including Aid to Families with Dependent Children, into a single block grant program. The aim was to transform passive cash assistance into a more active welfare system, in which individuals would be better assisted, by both the government and the community, to return to the labor force and find opportunities to support themselves. Yet from the broad vision to actual implementation, the program quickly became limited in focus and in resources. Indeed, PRWORA placed new limits on welfare provision by eliminating eligibility categories and by placing rigid time limits on the provision of benefits.¹⁷⁰

Moreover, the need to frame questions relating to work, welfare, and poverty in institutional arrangements and professional jargon and to comply with various funding block grants has made some issues, such as the statistical reduction of welfare recipients, more salient, whereas other issues, such as the quality of jobs offered, have been largely eliminated from policymakers' consideration. Despite aspects of the reform that were hailed as empowering for those groups they were designed to help, such as individual private training vouchers, serious questions have been raised about the adequacy of the particu-

¹⁶⁷ See generally Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539 (2006) (describing changes in work relations and modes of production in the past several decades and analyzing the way these developments should affect policy).

¹⁶⁸ See Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 49, at 302, 307-08; Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739 (2002).

¹⁶⁹ Pub. L. No. 104-193, 110 Stat. 2105 (1996).

¹⁷⁰ See *id.*

lar policy design because resources and institutional support have been found lacking.¹⁷¹ The reforms require individual choices and rely on the ability of private recipients to mine through a vast range of information. As in the areas of child care, health care, and educational vouchers, critics worry that the most disadvantaged workers in the new market will not be able to take advantage of the reforms.¹⁷² Under such conditions, the goal of eliminating poverty may be eroded and replaced by other goals, such as reducing public expenses. Thus, recalling the earlier cooptation critique, once reforms are envisioned, even when they need not be framed in legalistic terms, they in some ways become reduced to a handful of issues, while fragmenting, neglecting, and ultimately neutralizing other possibilities.

At this point, the paradox of extralegal activism unfolds. While public interest thinkers increasingly embrace an axiomatic rejection of law as the primary form of progress, their preferred form of activism presents the very risks they seek to avoid. The rejected “myth of the law” is replaced by a “myth of activism” or a “myth of exit,” romanticizing a distinct sphere that can better solve social conflict. Yet these myths, like other myths, come complete with their own perpetual perils. The myth of exit exemplifies the myriad concerns of cooptation. For feminist agendas, for example, the separation of the world into distinct spheres of action has been a continuous impediment to meaningful reform. Efforts to create better possibilities for women to balance work and family responsibilities, including relaxing home work rules and supporting stay-at-home parents through federal child care legislation, have been couched in terms of support for individual choice and private decisionmaking.¹⁷³ Indeed, recent initiatives in federal child care legislation to support stay-at-home parents have been clouded by preconceptions of the separation of spheres and the need to make one-or-the-other life choices. Most importantly, the emergence of a sphere-oriented discourse abandons a critical perspective that distinguishes between valuing traditional gender-based characteristics and celebrating feminine difference in a universalist and essentialist manner.¹⁷⁴

¹⁷¹ See Diller, *supra* note 168, at 1748–49; John Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 604–22 (2004); Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43, 49–50.

¹⁷² See, e.g., JOEL F. HANDLER & YEHESEKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* 55–63, 133–35, 343–45 (2006).

¹⁷³ See generally Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 431 (1990) (“Conflict between work and family responsibilities is a critical workplace issue. . . . [There exists] an ideology of individual choice and individual burdens which masks the nature of the structure and the basis of the conflict.”).

¹⁷⁴ See JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* (1996); Frances E. Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497 (1983).

Not surprisingly then, some feminist writers have responded to civil society revivalism with great skepticism, arguing that efforts to align feminine values and agendas with classic republican theory of civil society activism should be understood, at least in part, as a way of legitimizing historical social structures that subordinated women.¹⁷⁵

The feminist lesson on the law/exit pendulum reveals a broader pattern. In a classic example of cooptation, activists should be concerned about the infusion (or indeed confusion) of nonlegal strategies with conservative privatization agendas. Indeed, in significant social policy contexts, legal scholarship oriented toward the exploration of extralegal paths reinforces the exact narrative that it originally resisted — that the state cannot and should not be accountable for sustaining and improving the lifeworld of individuals in the twenty-first-century economy and that we must seek alternative ways to bring about social reform. Whether using the terminology of a path-dependent process, an inevitable downward spiral, a transnational prisoner's dilemma, or a global race to the bottom, current analyses often suggest a lack of control over the forces of new economic realities. Rather than countering the story of lack of control, pointing to the ongoing role of government and showing the contradictions between that which is being kept regulated and that which is privatized, alternative extralegal scholarship accepts these developments as natural and inevitable. Similar to the arguments developed in relation to the labor movement — in which focusing on a limited right to collective bargaining demobilized workers and stripped them of their voice, participation, and decisionmaking power — contemporary extralegal agendas are limited to very narrow and patterned sets of reforms.

A striking example has been the focus on welfare reform as the single frontier of economic redistribution without a connection being made between these reforms and social services in which the middle class has a strong interest, such as Social Security and Medicare. Similarly, on the legal pluralism frontier, when activists call for more corporate social responsibility, the initial expressions are those of broad demands for sustainable development and overall industry obligations for the social and environmental consequences of their activities.¹⁷⁶ The discourse, however, quickly becomes coopted by a shift to a narrow focus on charitable donations and corporate philanthropy or

¹⁷⁵ See, e.g., Dowd, *supra* note 173, at 486; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

¹⁷⁶ See World Business Council for Sustainable Development, *Corporate Social Responsibility: Meeting Changing Expectations* (1999), available at <http://www.wbcsd.org> (follow "Publications & Reports" hyperlink; then follow "Corporate Social Responsibility: Meeting changing expectations" hyperlink).

private reporting absent an institutionalized compliance structure.¹⁷⁷ Moreover, because of institutional limitations and crowding out effects possible in any type of reform agenda, the focus shifts to the benefits of corporate social responsibility to businesses, as marketing, recruitment, public relations, and “greenwashing” strategies.¹⁷⁸ Critics therefore become deeply cynical about the industry’s real commitments to ethical conduct.

A similar process can be described with regard to the literature on globalization. Globalization scholarship often attempts to produce a unifying narrative and an image of unitary struggle when in fact such unity does not exist. Embodied in the aforementioned irony of a “global anti-globalization” movement, social reform activism that resides under the umbrella of global movements is greatly diverse, some of it highly conservative. An “anti-globalization” movement can be a defensive nationalist movement infused with xenophobia and protective ideologies.¹⁷⁹ In fact, during central instances of collective action, such as those in Seattle, Quebec, Puerto Alegre, and Genoa, competing and conflicting claims were frequently encompassed in the same protest.¹⁸⁰ Nevertheless, there is a tendency to celebrate and idealize these protests as united and world-altering.

Similarly, at the local level, grassroots politics often lack a clear agenda and are particularly ripe for cooptation resulting in far lesser achievements than what may have been expected by the groups involved. In a critical introduction to the law and organizing model, Professor Scott Cummings and Ingrid Eagly describe the ways in which new community-based approaches to progressive lawyering privilege grassroots activism over legal reform efforts and the facilitation of community mobilization over conventional lawyering.¹⁸¹ After carefully unpacking the ways in which community lawyers embrace

¹⁷⁷ See, e.g., Symposium, *Corporate Social Responsibility: Paradigm or Paradox?*, 84 CORNELL L. REV. 1282, 1311 (1999).

¹⁷⁸ See CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* 135–67 (2002); John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 13–18 (2005). On greenwashing, see William A. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253 (2003) (describing greenwashing as a “form[] of disinformation from organizations seeking to repair public reputations and further public images”).

¹⁷⁹ See Lynch, *supra* note 132.

¹⁸⁰ See, e.g., Richard Bondreaux & Marjorie Miller, *Genoa on Minds of Protestors*, L.A. TIMES, July 18, 2001, at A1 (noting that the “summit-hopping movement for global justice” that began in Seattle “embraces Greenpeace environmentalists, Greek trade unions, Basque separatists, German punks, faith-based groups such as Christian Aid and more”); The WTO History Project, *Organizations Opposed to the WTO*, <http://depts.washington.edu/wtohist/orgs.htm> (last visited Jan. 14, 2007) (listing the over 1400 organizations, representing all sorts of interests, that signed a petition opposing the WTO in connection with the Seattle protest).

¹⁸¹ See Cummings & Eagly, *supra* note 40.

law and organizing, Professor Cummings and Eagly rightfully warn against “exaggerating the ineffectiveness of traditional legal interventions” and “closing off potential avenues for redress.”¹⁸² Significantly, the strategies embraced by new public interest lawyers have not been shown to produce effective change in communities, and certainly there has been no assurance that these strategies fare comparatively better than legal reform. Moreover, what are meant to be progressive projects of community action and community economic development frequently can have a hidden effect of excluding worse-off groups, such as migrant workers, because of the geographical scope and zoning restrictions of the project.¹⁸³ In the same way that the labor and corporate social responsibility movements have failed because of their embrace of a legal framework, the community economic development movement — so diverse in its ideological appeal yet so prominent since the early 1990s as a major approach to poverty relief — may bring about its own destruction by fracture and diffusion.¹⁸⁴

In all of these cases, it is the act of *engagement*, not *law*, that holds the risks of cooptation and the politics of compromise. It is not the particularities of lawyers as a professional group that create dependency. Rather, it is the dynamics between skilled, networked, and resourced components and those who need them that may submerge goals and create reliance. It is not the particularities of the structural limitations of the judiciary that threaten to limit the progressive vision of social movements. Rather, it is the essential difficulties of implementing theory into practice. Life is simply messier than abstract ideals. Cooptation analysis exposes the broad, general risk of assuming ownership over a rhetorical and conceptual framework of a movement for change. Subsequently, when, in practice, other factions in the political debate embrace the language and frame their projects in similar terms, groups experience a sense of loss of control or possession of “their” vision. In sum, in the contemporary context, in the absence of a more programmatic and concrete vision of what alternative models of social reform activism need to achieve, the conclusions and rhetoric of the contemporary critical legal consciousness are appropriated by advocates representing a wide range of political commitments. Under-

¹⁸² *Id.* at 491.

¹⁸³ See, e.g., Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 318 (1999).

¹⁸⁴ See WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT* (2001); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001); Louise A. Howells, *The Dimensions of Microenterprise: A Critical Look at Microenterprise as a Tool To Alleviate Poverty*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 161 (2000); Shah, *supra* note 111, at 218; Patricia A. Wilson, *Empowerment: Community Economic Development from the Inside Out*, 33 URB. STUD. 617 (1996).

stood from this perspective, cooptation is not the result of the turn to a particular reform strategy. Rather, cooptation occurs when imagined ideals are left unchecked and seemingly progressive rhetoric is reproduced by a conservative agenda. Dominant interpretations such as privatization and market competitiveness come out ahead, whereas other values, such as group empowerment and redistributive justice, receive only symbolic recognition, and in turn serve to facilitate and stabilize the process.¹⁸⁵

*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.¹⁸⁶ 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.¹⁸⁷ Similarly, new economic partnerships and structures blur the lines between for-profit and nonprofit entities.¹⁸⁸ 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

¹⁸⁵ See JOEL F. HANDLER, *DOWN FROM BUREAUCRACY* 133–43 (1996) (calling this commitment "empowerment by invitation" as opposed to "empowerment by conflict"). Some have even argued for the need to create formally a fair system of interest group representation, publicly subsidizing self-organization by those with legitimate interests but few resources. See Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance?*, in *ASSOCIATIONS AND DEMOCRACY* 7 (Erik Olin Wright ed., 1995).

¹⁸⁶ See Lobel, *supra* note 57, at 350, 367–71.

¹⁸⁷ Teubner, *supra* note 127, at 554.

¹⁸⁸ See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1082–85 (2000).

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.¹⁸⁹ 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.¹⁹⁰ 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 non-profit sector, voluntary associations have flourished in mutually beneficial relationships with federal regulations.¹⁹¹ 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.¹⁹² 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.¹⁹³

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.¹⁹⁴ 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 pro-

¹⁸⁹ See, e.g., Mark Moore, Introduction to Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003).

¹⁹⁰ See, e.g., *id.*

¹⁹¹ See Peter Dobkin Hall & Colin B. Burke, *Historical Statistics of the United States Chapter on Voluntary, Nonprofit, and Religious Entities and Activities: Underlying Concepts, Concerns, and Opportunities* (Hauser Ctr. for Nonprofit Orgs., Working Paper No. 14, 2002), available at <http://ssrn.com/abstract=352460>; see also Mark Tushnet, *The Constitution of Civil Society*, 75 CHI.-KENT L. REV. 379, 385 (2000) (describing the regulatory framework in which civil society institutions operate).

¹⁹² See SIMON, *supra* note 184, at 113–41.

¹⁹³ See HANDLER, *supra* note 185, at 133–68.

¹⁹⁴ See SIMON, *supra* note 184, at 227.

fessionalization. Private associations, even when structured as non-profit entities, are frequently undemocratic institutions whose legitimacy is often questionable.¹⁹⁵ There are problematic structural differences among NGOs, for example between Northern and Southern NGOs in international fora, stemming from asymmetrical resources and funding,¹⁹⁶ 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.¹⁹⁷ This phenomenon raises a wide variety of difficulties, which range from ordinary financial corruption to the misrepresentation of certain partnerships as “nonprofit” or “private.”¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹ In the

¹⁹⁵ See Robert O. Keohane, *Commentary on the Democratic Accountability of Non-Governmental Organizations*, 3 CHI. J. INT'L L. 477 (2002).

¹⁹⁶ See generally PRATAP CHATTERJEE & MATTHIAS FINGER, *THE EARTH BROKERS: POWER, POLITICS AND WORLD DEVELOPMENT* (1994) (finding notable differences between Northern and Southern NGOs in their causes, claims, resources, and strategies); Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 16 (2001) (noting that “representatives of northern NGOs, with greater resources and organizational capacities, are more likely to advocate adoption of a ‘stakeholder model,’” in the hope that “their northern environmental views would more likely prevail”).

¹⁹⁷ See Avner Ben-Ner & Theresa Van Hoomissen, *Nonprofit Organizations in a Mixed Economy: A Demand and Supply Analysis*, in *THE NONPROFIT SECTOR IN THE MIXED ECONOMY* 27 (Avner Ben-Ner & Benedetto Gui eds., 1993); Jerald Schiff & Burton Weisbrod, *Competition Between For-Profit and Nonprofit Organizations in Commercial Markets*, in *THE NONPROFIT SECTOR IN THE MIXED ECONOMY*, *supra*, at 127.

¹⁹⁸ See generally Moore, *supra* note 189 (highlighting ways in which the contemporary “era of privatization” obscures the boundaries between private and public and for-profit and nonprofit).

¹⁹⁹ See Marion R. Fremont-Smith & Andras Kosaras, *Wrongdoing by Officers and Directors of Charities: A Survey of Press Reports 1995–2002* (Hauser Ctr. for Nonprofit Orgs., Working Paper No. 20, 2003), available at <http://ssrn.com/abstract=451240>.

²⁰⁰ See Associated Press, *I.R.S. Ends Exempt Status for Some Credit Counselors*, N.Y. TIMES, May 16, 2006, at C6.

²⁰¹ See Matthew Reiffer, Note, *Antitrust Implications in Nonprofit Hospital Mergers*, 27 J. LEGIS. 187, 206–07 (2001).

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.²⁰²

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.²⁰³ 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.”²⁰⁴

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.²⁰⁵ 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

²⁰² See, e.g., *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986) (Posner, J.) (“The adoption of the nonprofit form does not change human nature”); *United States v. Mercy Health Servs.*, 902 F. Supp. 968, 989 (N.D. Iowa 1995).

²⁰³ Sheila Patel, Speech at the International Sociology Association’s Conference on Social Movements and Globalization (April 2001).

²⁰⁴ Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 564 (1997) (quoting Gunnar Bolstad, *Organisasjonene ma Vurderé Sin Strateji*, 19 NATUR OG MILJO BULL. 6 (1992)) (omission in original).

²⁰⁵ See SIMON, *supra* note 184, at 207–11; Cummings, *supra* note 168, at 302; Cummings, *supra* note 184, at 453–54.

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.²⁰⁶ They may also include using the nondelegation doctrine to prevent certain processes of privatization and rethinking the tax exemption criteria for nonprofits.²⁰⁷ 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.²⁰⁸ 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

²⁰⁶ On using the state action doctrine in the privatization context, see Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1188–91 (1995); Sheila S. Kennedy, *When is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203, 221–23 (2001); and Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1456–1501 (2003). It is also increasingly clear that voluntary self-regulation and initiatives of private accreditation and certification will work better in certain situations, especially when a particular set of incentives exists. The culture of the industry is significant — multiple factors determine the relative success of these efforts. Such factors include the level of professionalism in the industry, the prestige and reputation at stake, the multiplicity of actors involved, the existence of strong network links in the industry, and the presence of a strong union. More detailed research is required in order to understand these differences and accordingly adopt adequate policies.

²⁰⁷ See Metzger, *supra* note 206. On the function of the nonprofit sector and its growth, see NORMAN I. SILBER, *A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE MODERN NONPROFIT SECTOR* (2001); Evelyn Brody, *The Twilight of Organizational Form for Charity: Musings on Norman Silber, A Corporate Form of Freedom: The Emergence of the Modern Nonprofit Sector*, 30 HOFSTRA L. REV. 1261 (2002) (book review); and Mark Sidel, *The Nonprofit Sector and the New State Activism*, 100 MICH. L. REV. 1312 (2002) (book review).

²⁰⁸ See Lobel, *supra* note 57, at 345–48, 357–66, 451–53; Orly Lobel, Surreply, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 499–501 (2004).

better comply with state norms once they internalize them.²⁰⁹ 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.²¹⁰ 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.

C. *Conceptual Leaps: When a Transformative Vision Is Abandoned*

Both the practical failures and the fallacy of rigid boundaries generated by extralegal activism rhetoric permit us to broaden our inquiry to the underlying assumptions of current proposals regarding transformative politics — that is, attempts to produce meaningful changes in the political and socioeconomic landscapes. The suggested alternatives produce a new image of social and political action. This vision rejects a shared theory of social reform, rejects formal programmatic agendas, and embraces a multiplicity of forms and practices. Thus, it is described in such terms as a plan of no plan,²¹¹ “a project of pro-

²⁰⁹ See Ford, *supra* note 158, at 821–22; Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 883–88 (2005); Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2155 (2005); Lobel, *supra* note 14, at 1128–40.

²¹⁰ See, e.g., JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 64–65 (2002); Lobel, *supra* note 14, at 1104–15; Lobel, *supra* note 57, at 415–19.

²¹¹ See Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 719–20 (1992) (discussing “post-ideological” social movements, which are stridently rejectionist yet have “no grandiose plan for a better society”).

jects,”²¹² “anti-theory theory,”²¹³ politics rather than goals,²¹⁴ presence rather than power,²¹⁵ “practice over theory,”²¹⁶ and chaos and openness over order and formality. As a result, the contemporary message rarely includes a comprehensive vision of common social claims, but rather engages in the description of fragmented efforts. As Professor Joel Handler argues, the commonality of struggle and social vision that existed during the civil rights movement has disappeared.²¹⁷ There is no unifying discourse or set of values, but rather an aversion to any metanarrative and a resignation from theory. Professor Handler warns that this move away from grand narratives is self-defeating precisely because only certain parts of the political spectrum have accepted this new stance: “[T]he opposition is not playing that game . . . [E]veryone else is operating *as if* there were Grand Narratives . . .”²¹⁸ Intertwined with the resignation from law and policy, the new bromide of “neither left nor right” has become axiomatic only for some.²¹⁹ The contemporary critical legal consciousness informs the scholarship of those who are interested in progressive social activism, but less so that of those who are interested, for example, in a more competitive securities market. Indeed, an interesting recent development has been the rise of “conservative public interest lawyer[ing].”²²⁰ Although “public interest law” was originally associated exclusively with liberal projects, in the past three decades conservative advocacy groups have rapidly grown both in number and in their vigorous use of traditional legal strategies to promote their causes.²²¹ This growth in conservative ad-

²¹² Michael Walzer, *The Concept of Civil Society*, in TOWARD A GLOBAL CIVIL SOCIETY 7, 27 (Michael Walzer ed., 1995).

²¹³ ALAN SCOTT, IDEOLOGY AND THE NEW SOCIAL MOVEMENTS 103 (Controversies in Sociology Series No. 24, 1990); see also William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994) (describing poverty lawyers’ efforts to empower clients by refusing to impose the lawyers’ own judgments).

²¹⁴ See Walzer, *supra* note 212, at 9 (describing “the standard leftist interpretation of Rousseau’s argument,” which holds that being politically active is an end in itself).

²¹⁵ See Heather K. Gerken, *Dissenting by Dividing*, 57 STAN. L. REV. 1745, 1746 (2005).

²¹⁶ Frances Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1171 (1989) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)).

²¹⁷ See Handler, *supra* note 211, at 719.

²¹⁸ *Id.* at 726; see also Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 STAN. L. REV. 213 (1993) (reviewing GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992)) (supporting the argument that strategies from the civil rights era have been replaced).

²¹⁹ Handler, *supra* note 211, at 722 (citing CARL BOGGS, *SOCIAL MOVEMENTS AND POLITICAL POWER* (1986)).

²²⁰ Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1224 (2005).

²²¹ Compare JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 71–76 (Inst. for Research on Poverty, Poverty Policy Analysis Series, 1978) (describing public interest lawyers’ focus on liberal causes), with John P. Heinz et al., *Lawyers for Conservative*

vocacy is particularly salient in juxtaposition to the decline of traditional progressive advocacy. Most recently, some thinkers have even suggested that there may be “something inherent in the left’s conception of social change — focused as it is on participation and empowerment — that produces a unique distrust of legal expertise.”²²²

Once again, this conclusion reveals flaws parallel to the original disenchantment with legal reform. Although the new extralegal frames present themselves as apt alternatives to legal reform models and as capable of producing significant changes to the social map, in practice they generate very limited improvement in existing social arrangements. Most strikingly, the cooptation effect here can be explained in terms of the most profound risk of the typology — that of legitimation. The common pattern of extralegal scholarship is to describe an inherent instability in dominant structures by pointing, for example, to grassroots strategies,²²³ and then to assume that specific instances of counterhegemonic activities translate into a more complete transformation. This celebration of multiple micro-resistances seems to rely on an aggregate approach — an idea that the multiplication of practices will evolve into something substantial. In fact, the myth of engagement obscures the actual lack of change being produced, while the broader pattern of equating extralegal activism with social reform produces a false belief in the potential of change. There are few instances of meaningful reordering of social and economic arrangements and macro-redistribution. Scholars write about decoding what is really happening, as though the scholarly narrative has the power to unpack more than the actual conventional experience will admit.²²⁴ Unrelated efforts become related and part of a whole through mere re-framing. At the same time, the elephant in the room — the rising level of economic inequality — is left unaddressed and comes to be understood as natural and inevitable.²²⁵ This is precisely the problematic process that critical theorists decry as losers’ self-mystification, through which marginalized groups come to see systemic losses as the

Causes: Clients, Ideology, and Social Distance, 37 LAW & SOC’Y REV. 5 (2003) (discussing the growth of conservative public interest law).

²²² Cummings & Eagly, *supra* note 44, at 1277–78.

²²³ See, e.g., Panel, *Continuing To Build a Movement: Legal and Grassroots Strategies*, 43 HOW. L.J. 87 (1999).

²²⁴ See, e.g., SASKIA SASSEN, *THE GLOBAL CITY* (2d ed. 2001).

²²⁵ In September 2006, British graffiti artist Banksy displayed an art exhibit in Los Angeles called “Barely Legal,” featuring a painted elephant. Cards were handed out explaining to those visiting the show: “There’s an elephant in the room. There’s a problem we never talk about. The fact is that life isn’t getting any fairer . . . 20 billion people live below the poverty line.” Carla Hall & Amanda Covarrubias, *Painted Pachyderm Draws Outcry*, L.A. TIMES, Sept. 16, 2006, at B1 (omission in original) (quoting card provided to exhibition visitors). Thanks to Miriam Cherry for pointing me to this.

product of their own actions and thereby begin to focus on minor achievements as representing the boundaries of their willed reality.

The explorations of micro-instances of activism are often fundamentally performative, obscuring the distance between the descriptive and the prescriptive. The manifestations of extralegal activism — the law and organizing model; the proliferation of informal, soft norms and norm-generating actors; and the celebrated, separate nongovernmental sphere of action — all produce a fantasy that change can be brought about through small-scale, decentralized transformation. The emphasis is local, but the locality is described as a microcosm of the whole and the audience is national and global. In the context of the humanities, Professor Carol Greenhouse poses a comparable challenge to ethnographic studies from the 1990s, which utilized the genres of narrative and community studies, the latter including works on American cities and neighborhoods in trouble.²²⁶ The aspiration of these genres was that each individual story could translate into a “time of the nation” body of knowledge and motivation.²²⁷ In contemporary legal thought, a corresponding gap opens between the local scale and the larger, translocal one. In reality, although there has been a recent proliferation of associations and grassroots groups, few new local-state-national federations have emerged in the United States since the 1960s and 1970s, and many of the existing voluntary federations that flourished in the mid-twentieth century are in decline.²²⁸ There is, therefore, an absence of links between the local and the national, an absent intermediate public sphere, which has been termed “the missing middle” by Professor Theda Skocpol.²²⁹ New social movements have for the most part failed in sustaining coalitions or producing significant institutional change through grassroots activism. Professor Handler concludes that this failure is due in part to the ideas of contingency, pluralism, and localism that are so embedded in current activism.²³⁰ Is the focus on small-scale dynamics simply an evasion of the need to engage in broader substantive debate?

It is important for next-generation progressive legal scholars, while maintaining a critical legal consciousness, to recognize that not all extralegal associational life is transformative. We must differentiate, for example, between inward-looking groups, which tend to be self-

²²⁶ See Carol J. Greenhouse, *Ethnography and Democracy: Texts and Contexts in the United States in the 1990s*, 13 *YALE J.L. & HUMAN.* 175, 180–86 (2001).

²²⁷ *Id.* at 184.

²²⁸ See Theda Skocpol, *Don't Blame Big Government: America's Voluntary Groups Thrive in a National Network*, in *COMMUNITY WORKS*, *supra* note 124, at 37, 42.

²²⁹ THEDA SKOCPOL, *THE MISSING MIDDLE: WORKING FAMILIES AND THE FUTURE OF AMERICAN SOCIAL POLICY* 8–9 (2000).

²³⁰ See Handler, *supra* note 211, at 719–28.

regarding and depoliticized, and social movements that participate in political activities, engage the public debate, and aim to challenge and reform existing realities.²³¹ We must differentiate between professional associations and more inclusive forms of institutions that act as trustees for larger segments of the community.²³² As described above, extralegal activism tends to operate on a more divided and hence a smaller scale than earlier social movements, which had national reform agendas. Consequently, within critical discourse there is a need to recognize the limited capacity of small-scale action. We should question the narrative that imagines consciousness-raising as directly translating into action and action as directly translating into change. Certainly not every cultural description is political. Indeed, it is questionable whether forms of activism that are opposed to programmatic reconstruction of a social agenda should even be understood as social movements. In fact, when groups are situated in opposition to any form of institutionalized power, they may be simply mirroring what they are fighting against and merely producing moot activism that settles for what seems possible within the narrow space that is left in a rising convergence of ideologies. The original vision is consequently coopted, and contemporary discontent is legitimated through a process of self-mystification.

V. RESTORING CRITICAL OPTIMISM IN THE LEGAL FIELD

“La critique est aisée; l’art difficile.”

A critique of cooptation often takes an uneasy path. Critique has always been and remains not simply an intellectual exercise but a political and moral act. The question we must constantly pose is how critical accounts of social reform models contribute to our ability to produce scholarship and action that will be constructive. To critique the ability of law to produce social change is inevitably to raise the question of alternatives. In and of itself, the exploration of the limits of law and the search for new possibilities is an insightful field of inquiry. However, the contemporary message that emerges from critical legal consciousness analysis has often resulted in the distortion of the critical arguments themselves. This distortion denies the potential of legal change in order to illuminate what has yet to be achieved or even imagined. Most importantly, cooptation analysis is not unique to legal reform but can be extended to any process of social action and engagement. When claims of legal cooptation are compared to possible alternative forms of activism, the false necessity embedded in the con-

²³¹ See Skocpol, *supra* note 228, at 40–42.

²³² See *id.* at 42–43.

temporary story emerges — a story that privileges informal extralegal forms as transformative while assuming that a conservative tilt exists in formal legal paths.

In the triangular conundrum of “law and social change,” law is regularly the first to be questioned, deconstructed, and then critically dismissed. The other two components of the equation — social and change — are often presumed to be immutable and unambiguous. Understanding the limits of legal change reveals the dangers of absolute reliance on one system and the need, in any effort for social reform, to contextualize the discourse, to avoid evasive, open-ended slogans, and to develop greater sensitivity to indirect effects and multiple courses of action. Despite its weaknesses, however, law is an optimistic discipline. It operates both in the present and in the future. Order without law is often the privilege of the strong. Marginalized groups have used legal reform precisely because they lacked power. Despite limitations, these groups have often successfully secured their interests through legislative and judicial victories. Rather than experiencing a disabling disenchantment with the legal system, we can learn from both the successes and failures of past models, with the aim of constantly redefining the boundaries of legal reform and making visible law’s broad reach.