Bad Reliance in Public Law

MICHAL SALITERNIK*

When and how should courts protect individual reliance upon unlawful governmental acts? This question arises in various situations in all fields of public law. However, despite its pervasiveness, the problem of "bad reliance" has hardly drawn any scholarly attention. This Article sets out to fill this gap. The Article adopts a cross-public law perspective and makes two main normative claims. First, the Article argues that given their duty to promote the rule of law, courts should usually invalidate unlawful governmental acts even if they have induced extensive reliance. However, in cases where reliance upon an unlawful governmental act was essential for the exercise of personal autonomy—understood as the ability of people to control their destiny by pursuing their own life plans—courts should nevertheless consider giving effect to unlawful acts.

Second, the Article argues that when a court decides to protect reliance upon an unlawful governmental act, it should attempt to mitigate the adverse effects that such protection may have on the ex ante incentives of governmental authorities to comply with the law. The Article presents a two-tier strategy that courts can use to achieve this goal. Under this strategy, courts should explicitly acknowledge and condemn unlawful governmental behavior. Thereafter, they should exercise broad discretion with respect to the remedial measures that should be taken to protect reliance upon it. This strategy ensures that governmental authorities will know what the law requires of them and that they will pay a reputational price for violating it. At the same time, it renders the benefits that governmental authorities can gain from such violations uncertain.

Following the normative analysis, the Article turns to examining several doctrines and devices that courts have used to protect bad reliance. This examination shows that some of the rationales and considerations discussed in the Article already find expression in judicial practice, while others offer critical insights into this practice. At the same time, the case law analysis illustrates the problems and risks associated with the protection of bad reliance along the lines prescribed by this Article. The Article argues that while these difficulties should not dissuade courts from protecting bad reliance, they should affect their choice among alternative remedial solutions.

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* Postdoctoral Fellow, GlobalTrust Research Project, Tel Aviv University Faculty of Law. I am grateful to Eyal Benvenisti, Hanoch Dagan, Doreen Lustig, and Ariel Porat for their helpful comments and advice.

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INTRODUCTION

When a court reviews a governmental act and finds it to be unlawful, it is usually expected to strike down that act and attempt to undo its consequences.[1] Such a judicial response is understood to be mandated by the principle of the rule of law: it reinforces the duty of the government to abide by the law and vindicates the corresponding right of those subjected to the government's authority to be governed by law.[2] In some cases, however, the rule-of-law-based requirement to abrogate unlawful governmental acts may be in tension with the moral requirement to protect the legitimate expectations of people who have relied in good faith upon these acts. In order to protect such expectations, courts may have to give effect to unlawful governmental acts.

The tension between the need to respect the rule of law and the need to protect legitimate reliance upon unlawful governmental

1. The term "governmental acts" is used in this Article to denote various types of norm-generating measures adopted by governmental authorities, including: statutes, regulations, orders, decrees, and formal statements and decisions. A lawful governmental act is an act committed by a governmental authority within its mandate and in conformity with all applicable domestic and international norms. An unlawful governmental act is an act that transcends the mandate of the relevant governmental authority, or which otherwise conflicts with applicable domestic or international norms.

2. The abrogation of unlawful governmental acts also serves another fundamental goal, namely, the redress of individual wrongs, which is distinct from the goal of promoting the rule of law. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787–91 (1991) (noting that public law remedies serve two basic functions, namely, the redress of individual violations, and the reinforcement of structural values, including those underlying the separation of powers and the rule of law). For a definition of the principle of the rule of law, see *infra* Part I.A.

acts—referred to here as the problem of "bad reliance"[3]—may arise in all areas of public law.[4] For example, in administrative law, it may arise in the context of bid protest litigation, whereby a public contract has been awarded in violation of applicable procurement legislation. Despite this illegality, courts have occasionally refused to cancel the contract on the grounds that the successful bidder had already relied upon it.[5] The problem of bad reliance may also arise when an administrative agency adopts regulations allocating government subsidies without having pursued appropriate procedures, but a judicial decision to vacate those regulations might cause serious hardship to eligible parties who have relied upon them.[6]

In constitutional law, the tension between rule of law and legitimate reliance considerations may be witnessed, *inter alia*, in cases concerning under-inclusive statutes, which confer benefits or entitlements to one group but not to another in a manner that violates its members' right to equal protection. In such cases, abrogation of the discriminatory statute might frustrate the legitimate expectations of members of the included group.[7] Another example is when a person acts under the color of official title even though it is later discovered that his or her appointment or election to office was constitutionally flawed.[8] In some of these cases, courts have validated the acts of the "de facto officer" in order to protect legitimate reliance upon them.[9]

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3. By defining reliance upon unlawful governmental acts as "bad," I do not mean to say that it is morally condemnable, only that it is undesirable from a rule of law perspective.

4. The term "public law," as it is used in this Article, refers to those areas of law whose main purpose is to govern the behavior of governmental authorities, namely constitutional law, administrative law, and international law. For a different definition of public law which includes only constitutional and international law, see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1795 (2009) ("[b]y 'public law' we mean constitutional and international law—legal regimes that both constitute and govern the behavior of states and state actors."). According to Goldsmith and Levinson, administrative law should not be classified as public law, but rather as an "intermediate" case, "because [it] implicate[s] some of the features shared by international and constitutional law, but not others." *See id.* at 1795 n. 6. Goldsmith and Levinson note, however, that "much of what is commonly described as administrative law . . . is, in fact, straightforward constitutional law . . ." *Id.*

5. *See, e.g.*, Keco Indus., Inc. v. Laird, 318 F. Supp. 1361, 1364, 1366 (D.D.C. 1970) (denying an injunction while reasoning, *inter alia*, that the successful bidder, which is likely to suffer substantial loss, is not a party); Nat'l Cash Register Co. v. Richardson, 324 F. Supp. 920 (D.D.C. 1971) (denying an injunction while noting that the successful bidder has already incurred expenses in contemplation of performing the contract).

6. *See infra* Part IV.A.

7. *See infra* Part IV.B.

8. *See, e.g.*, Kathryn A. Clokey, Note, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV. 1121, 1121 (1985) (noting the pervasiveness of the problem of imperfect official authority).

9. *See, e.g.*, Andrade v. Lauer, 729 F. 2d 1475, 1496, 1499–1500 (D.C. Cir. 1984) (noting that the purpose of the de facto officer doctrine is to allow the government to take effective action and to protect third party reliance upon apparently valid government actions).

Finally, in international law, the problem of bad reliance arises forcefully when courts consider the validity of laws and regulations promulgated by occupying powers exercising effective control over foreign territories. International jurisprudence suggests that while occupants are generally prohibited from introducing new civil or criminal laws into an occupied territory, and although such laws should usually be considered invalid, this invalidity should not be extended to certain acts that have induced legitimate reliance by the local population.[10]

In each situation described above, courts face the same basic dilemma, namely, how to strike an appropriate balance between, on the one hand, the need to condemn and discourage unlawful behavior by governmental authorities (and sometimes also the need to provide adequate relief to those adversely affected by such behavior), and, on the other hand, the will to protect those who legitimately relied upon unlawful governmental acts.[11] However, despite this commonality, the problem of bad reliance has never been examined from a joint public law perspective. In fact, it has not even drawn adequate attention within any single public law field.[12] The purpose of this Article is to fill this gap by offering a cross-field normative analysis of the problem of bad reliance.

The promise of a joint public law analysis of bad reliance lies in several common features of administrative, constitutional, and international law. The most relevant features are, first, that all three legal regimes aim to constitute and govern the behavior of state actors.[13] Put differently, these regimes are designed to serve the rule of law requirement that the power of government institutions be constrained by law.[14] Questions concerning the implications of this rule of law

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10. *See infra* Part III.C.

11. It is noteworthy that judicial protection of bad reliance does not necessarily conflict with the need to provide adequate relief to those adversely affected by the unlawful governmental behavior. For example, protection of reliance does not conflict with the need to redress individual wrongs when an under-inclusive statue is extended rather than nullified, or when the registration of marriages by an unlawful territorial regime is given legal effect.

12. There are, however, some exceptions. *See, e.g.*, Eyal Benvenisti & Michal Saliternik, *The Treatment of Occupation Legislation by Courts in Liberated Territories*, *in* INTERNATIONAL LAW IN DOMESTIC COURTS: RULE OF LAW REFORM IN POST-CONFLICT STATES 269 (Edda Kristjánsdóttir, André Nollkaemper, & Cedric Ryngaert eds., 2012) (discussing the inclination of courts in post-occupation societies to validate unlawful occupation acts in order to protect legitimate reliance upon them); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291–92 (2003) (suggesting that the use of remand without vacation may be justified for the purpose of protecting legitimate reliance); Dale Gibson & Kristin Lercher, *Reliance on Unconstitutional Laws: The Saving Doctrines and Other Protections*, 15 MAN. L.J. 305, 305 (1986) (discussing various "saving doctrines" that can be used to protect rights deriving from good-faith reliance on invalid laws).

13. *See* Goldsmith & Levinson, *supra* note 4, at 1795 (asserting that public law both constitutes and governs the behavior of state institutions).

14. *See* Joseph RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 211–14 (1979).

requirement for various situations—including situations involving individual reliance upon unlawful governmental acts—should, therefore, be seen as central to all three regimes. Second, these regimes share a similar enforcement deficit, which stems from the absence of a super-state authority capable of enforcing public law norms against state actors in the same way that the state enforces criminal and private law norms against individuals.[15] This reality has generated various theoretical accounts of state compliance with the law.[16] The Article draws on these accounts to assess the possible impact of judicial protection of bad reliance on state behavior. Third, administrative law, constitutional law, and international law all tend to be flexible when it comes to remedies. In all three areas, courts frequently adopt creative remedial solutions to address complex situations.[17] The Article suggests that this flexible approach should inspire the development of adequate remedial solutions to the problem of bad reliance.

To be sure, alongside these similarities, there are also many differences between public law fields, which bear implications for the problem of bad reliance. For example, whereas constitutional and administrative law (domestic public law) are embedded in the political model of separation of powers between the executive, the legislature, and the judiciary, international law operates within a different institutional structure that entails more power to governments than to courts. Hence, separation of power concerns associated with judicial protection of bad reliance under domestic public law take a different form at the international level.[18] However, notwithstanding such differences, the commonalities seem sufficiently strong to justify the development of a unified conceptual framework for addressing the problem of bad reliance. Moreover, the differences themselves can offer new doctrinal and theoretical insights that enrich the analysis and allow for mutual learning.[19]

Informed by such cross-field comparisons, this Article makes two main normative claims. First, it argues that judicial protection of bad

15. *See, e.g.*, Goldsmith & Levinson, *supra* note 4, at 1823, 1840 (noting that public law cannot rely on the enforcement capacity of states for compliance).

16. *See* Christopher A. Whytock, *Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law*, 36 GEO. J. INT'L L. 155, 170–71 (2004) (noting that "scholars, from different sides of the domestic-international divide, and from both law and political science, ask essentially the same question: how can public law constrain government behavior in the absence of hierarchy and centralized enforcement?").

17. *See infra* notes 82–88 and accompanying text.

18. *See infra* notes 89–90 and accompanying text.

19. For instance, the formation of appropriate solutions to the problem of bad reliance in international law can be inspired by the more developed remedial doctrines of domestic public law, whereas domestic public law can be informed by the rich theories of state compliance that can be found in international law scholarship. *See infra* Part II.

reliance should not be a matter of course. As a general rule, courts should invalidate unlawful governmental acts and refrain from according them any legal effect. However, in exceptional cases in which reliance upon an unlawful governmental act was necessary for realizing one's personal autonomy (for example, due to the lack of alternative ways of pursuing one's basic life plans), courts should consider protecting the relying party by giving full or partial legal effect to the unlawful act.

The second normative claim that this Article makes is that if, after having contemplated all the relevant considerations, a court decides to give effect to an unlawful act in order to protect bad reliance, it should attempt to do so in a manner that provides the minimal possible incentives to governmental authorities to act unlawfully in the future. The Article suggests that courts can achieve this goal by adopting a two-tier strategy for the protection of bad reliance. Under this strategy, courts should explicitly acknowledge and condemn the illegality of the reviewed governmental act. Thereafter, they should exercise broad discretion with respect to the remedial measures that should be taken to protect reliance upon it. This strategy ensures that governmental authorities will know what the law requires of them and that they will pay a reputational price for violating it. At the same time, it renders the benefits that governmental authorities can gain from such violations less certain than in the case that legitimate expectations would always be fully protected.

Following the theoretical discussion of the appropriate scope and method of judicial protection of bad reliance, the Article turns to showing that the normative principles that it advocates already find some expression in legal practice. It examines three categories of cases involving bad reliance, each from a different area of public law, and explains how some of the choices that courts made in these cases reflect the rationales and considerations presented in the Article. In administrative law, the Article examines the device of remand without vacation, which courts have used, *inter alia*, to protect legitimate reliance upon legally-flawed agency actions. In constitutional law, it examines cases in which courts remedied the unconstitutionality of under-inclusive statutes by extending them to excluded groups, rather than nullifying them. In international law, the Article discusses the "Namibia Exception," which gives effect to some unlawful acts of occupying powers in order to uphold the legitimate expectations of the local population.

It is worth stressing that this doctrinal analysis does not purport to be exhaustive or conclusive. It does not cover all situations of bad reliance,[20] nor does it suggest that courts always or usually address such

20. For example, it does not discuss the abovementioned de facto officer doctrine or the upholding of government contract awards. *See supra* notes 5, 8–9 and accompanying text.

situations in accordance with the normative principles prescribed in this Article.[21] Rather, this analysis aims to illustrate and add clarity to the abstract ideas developed in the theoretical part of this Article. At the same time, it seeks to demonstrate the explanatory power of these ideas by applying them to judicial decisions that at first sight may seem unfounded.

Before proceeding, a methodological clarification is due. This Article focuses on the public law system of the United States. Its normative arguments are situated in American constitutional and administrative law and illustrated by American case law. It seems safe to assume, however, that the basic thesis of this Article is also applicable to the public law systems of other constitutional democracies committed to the rule of law. As far as international law is concerned, the Article does not limit itself to the application of this legal system to, or to its implementation by, any particular country. It assumes that international law as such is generally committed to the principle of the rule of law, and therefore, the problem of bad reliance may arise in international jurisprudence even in the context of states that do not adhere to the rule of law in the administration of their domestic affairs.

The Article consists of three Parts. Part II addresses the question of when courts should protect bad reliance. It argues that while the ideal of the rule of law requires that all unlawful governmental acts be invalidated, in reality, this ideal cannot and should not be fully realized. It then discusses the conditions under which the need to protect individual reliance may justify deviation from the rule of law, and explains why this should be the case when such reliance has been necessary for the exercise of personal autonomy. Part III addresses the question of how courts should protect bad reliance. It suggests that they should do so by combining explicit condemnation of unlawful governmental behavior with a flexible choice of remedies, and explains how this strategy can promote justice in particular cases while mitigating possible adverse effects on the rule of law as well as on the legitimate interests of third parties. Part III translates the theoretical discussion into practice. It examines three distinct remedial practices—remand without vacation, extension of under-inclusive statutes, and validation of unlawful occupation measures under the Namibia Exception—that have been used to protect bad reliance, and assesses the merits and limitations of each, given the principles and strategies discussed in the previous

21. A notable counter-example is the retroactive application of a newly adopted judicial interpretation of a statute notwithstanding individual reliance upon the older interpretation. *See, e.g.*, Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (applying retroactively a new constitutional interpretation that placed a stricter statute of limitations on a personal injury claim). For an analysis of the implications of such retroactivity for individual reliance see, e.g., Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515 (1998).

Parts. This Article concludes by summarizing the main arguments and findings, stressing the need for further examination and theorization of the problem of bad reliance and of the possible judicial responses to it.

I. When Should Courts Protect Bad Reliance

A. The Rule of Law and Its Limits

Like many other popular concepts, the principle of the rule of law means different things to different people in different contexts.[22] Friedrich Hayek has put forward one of its most widely accepted definitions. According to Hayek, the rule of law entails "that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[23] Following Hayek, Joseph Raz has observed that the ideal of the rule of law includes two interrelated aspects. First, it requires that the government be bound by law.[24] Second, it requires that the law be capable of guiding people's behavior.[25] This means, *inter alia*, that the law must be prospective, general, open, clear, and relatively stable.[26]

Even more intriguing and controversial than the question of what the rule of law means is the question of why it is good. There seem to be two basic approaches here: intrinsic and extrinsic. According to the former, the rule of law is good in and of itself, and regardless of the particular contents of the laws by which the government and people are bound.[27] According to the latter, the rule of law is good because, and only

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22. *See, e.g.*, Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & Phil. 137, 140 (2002) (asserting that the content and implications of the concept of the rule of law have always been uncertain and controversial); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 1 (1997) (noting that the rule of law is an essentially contested concept); Judith N. Shklar, *Political Theory and the Rule of Law*, *in* The Rule of Law: Ideal or Ideology 1–3 (Allan C. Hutcheson & Patrick Monahan eds., 1987) (noting that "the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use.").

23. F. A. Hayek, The Road to Serfdom: Texts and Documents: The Definitive Edition 112 (Bruce Caldwell ed., 2008).

24. Raz, *supra* note 14.

25. *Id.*

26. *Id.* at 214–19. Similar "laundry lists" of rule of law requirements have been offered by Lon Fuller, John Finnis, Neil MacCormick, and others. *See* Lon L. Fuller, The Morality of Law 39 (2d ed. 1969) (asserting that legal rules should be general, public, prospective, clear, consistent with one another, practicable, relatively stable, and congruent with their actual application); John Finnis, Natural Law and Natural Rights 270 (2d ed. 2011) (adopting Fuller's list with minor variations); Neil MacCormick, *Natural Law and the Separation of Law and Morals*, *in* Natural Law Theory: Contemporary Essays 105, 122 (Robert P. George ed., 1992) (adopting Fuller's list). For an overview, see Waldron, *supra* note 22, at 154–55.

27. *See, e.g.*, Fuller, *supra* note 26 (asserting that fulfillment of the rule of law requirements of generality, publicity, non-retroactivity, etc. ensures the "internal morality" of a legal system, which

to the extent that, it promotes other values such as human rights, social equality, or economic welfare.[28] Under the intrinsic approach, the rule of law may be considered virtuous even in totalitarian states whose legal corpuses are based on oppressive rules that mostly serve the narrow self-interest of the ruler. Under the extrinsic approach, the rule of law is considered virtuous only in states whose laws generally promote the interests of the people while also guaranteeing their basic freedoms.

For the purposes of the present study, however, it is not necessary to choose between these approaches. Both consider the rule of law virtuous in constitutional democracies like the United States. As far as international law is concerned, this Article similarly assumes that in view of the dominant contents and goals of contemporary international law—the promotion of economic cooperation and development, the protection of human rights, the prevention of war crimes, etc.—adherence to the rule of law at the international level is desirable both intrinsically and extrinsically. The remainder of the discussion, therefore, proceeds on the assumption that lawful governmental behavior is generally desirable, whereas unlawful governmental behavior is generally undesirable.[29]

Now, if governmental adherence to the rule of law is a good thing, then legal institutions, including courts, should aspire to strengthen it.[30] The most straightforward way for courts to do so is to repudiate all

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does not depend on the particular substance of its laws); RAZ, *The Rule of Law*, *supra* note 14, at 219–20 (mentioning various reasons for valuing the rule of law as such, including the fact that it reduces the use of arbitrary power by the government and that it contributes to people's autonomy by allowing them to fix long-term goals and effectively direct their lives towards them); MacCormick, *supra* note 26, at 123 (positing that a state that treats people in a rational and predictable way in fact treats them as "rational agents due some respect as such," and that this treatment has an independent value "even when the substance of what is done falls short of any relevant ideal of substantive justice.").

28. *See, e.g.*, Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PENN. L. REV. 943 (1958) (citing Owen Roberts, Lecture at Oxford University: The Rule of Law in the International Community (Nov. 1951)) (associating the rule of law with democracy and individual liberties). According to Andrei Marmor, Hayek also conflates the rule of law with the ideal of good law. *See* Andrei Marmor, *The Rule of Law and its Limits*, 23 L. & PHIL. 1, 1 (2004). It is noteworthy that Fuller, while emphasizing that respect to the rule of law is intrinsically moral, also argues that it is likely to produce substantially better rules. *See* FULLER, *supra* note 26, ch. 4.

29. There are, of course, some exceptions to this rule. *See, e.g.*, Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 646–56 (2013) (arguing that resistance to the law by public officials is sometimes desirable, *inter alia* because it can trigger public discourse, unblock political channels, facilitate policy change, and contribute to more just outcomes).

30. While rule of law theorists tend to focus on the process of the promulgation of laws, some of them also acknowledge the important role of courts in maintaining the rule of law. *See, e.g.*, RAZ, *supra* note 14, at 217 ("[I]t is futile to guide one's action on the basis of the law if when the matter comes to adjudication the courts will not apply the law and will act for some other reasons"); FULLER, *supra* note 26, at 39 (asserting that the rule of law entails "congruence between the laws as announced and their actual administration.").

violations of law by governmental authorities and to undo their consequences. This approach promotes both aspects of the rule of law articulated by Raz.[31] In denying the power of the government to act effectively outside the law, it reinforces the first aspect, which asserts that the government must obey the law. At the same time, complete judicial intolerance towards unlawful governmental behavior contributes to the ability of the law to guide people's behavior in their relationship with the government, and thus meets the second aspect of the rule of law. It conveys a message to the public that the law on the books is the same as the law that applies in practice, and thus encourages people to follow it and calculate their measures in accordance with it.

While judicial disapproval of any deviation from the law may represent an ideal of the rule of law, in reality, this ideal cannot, and perhaps should not, be fully achieved. Like all ideals, its realization is subject to various pragmatic constraints as well as to competition with conflicting values. According to Lon Fuller, the rule of law is by its very nature doomed to remain largely within the realm of aspirations.[32] This means that those involved in the creation, administration, and enforcement of the law should aspire to make the law as general, clear, prospective, consistent, practicable, stable, and congruent as possible. Even if they achieve a less than optimal level of these goods, they may still satisfy the minimal level of legality required of a properly so-called legal system.[33] Whereas Fuller regretfully concedes that it is practically impossible to fully realize the ideal of the rule of law, other commentators assert that it is normatively undesirable to do so. Andrei Marmor, for example, argues that too strict an adherence to certain rule of law requirements might deny lawmakers and law implementers the flexibility that they need in order to adjust the law to changing circumstances.[34] As far as the judiciary's role is concerned, Marmor contends that courts should not aspire to a perfect match between the law on the books and the law that they apply. Following Meir Dan-Cohen, Marmor notes that in some situations, justice considerations

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31. *See supra* notes 24–26 and accompanying text.

32. *See* FULLER, *supra* note 26, at 41–44. Fuller distinguishes between the "morality of duty," which sets a minimum threshold for acceptable human behavior, and the "morality of aspiration," which directs us to the fullest realization of human capacities. The demands of the rule of law, according to Fuller, represent a morality of aspirations.

33. According to Fuller, the only exception to this pragmatic approach to the rule of law is the requirement of publicity, which presents a higher standard of duty to lawmakers. *Id.* at 43–44.

34. *See* Marmor, *supra* note 28, at 26–32, 34. Elsewhere, Marmor draws a distinction between "guiding ideals" and "limit ideals." The former are ideals that do not require, on their own moral grounds, full implementation, whereas the latter would require full implementation if only that would be possible. *See* Andrei Marmor, *The Intrinsic Value of Economic Equality*, *in* RIGHTS, CULTURE AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ 127, 140 (Lukas Meyer et al. eds., 2003). In *The Rule of Law and Its Limits*, Marmor explains that the rule of law is a guiding ideal rather than a limit one. *See* Marmor, *supra* note 28, at 9.

should induce courts to apply to the case before them different rules than the ones that should have guided the conduct of the parties in the first place.[35] I return to this point and to Meir Dan-Cohen's famous distinction between conduct rules and decision rules in Part II. For now, suffice it to conclude that while the principle of the rule of law requires of courts to ensure that governmental authorities obey the law, in some cases they may or should nonetheless give effect to unlawful governmental behavior.

One of the considerations that can justify judicial validation of an unlawful governmental act or of some of its consequences is the need to protect legitimate reliance upon that act. The crucial question is, of course, what should be considered, for that matter, a "legitimate reliance" worthy of judicial protection at the expense of adherence to the rule of law, and sometimes also at the expense of the particular values or rights undermined by the unlawful act. In the next Part, I suggest that the key to answering this question lies in the notion of qualified autonomy and its relationship to political power.

B. Personal Autonomy and Its Limits

In order to explain when reliance upon an unlawful governmental act would deserve legal protection, it is useful to discuss first the main justifications for protecting individual reliance upon *lawful* governmental acts. The latter can be justified by both utilitarian and non-utilitarian considerations. The utilitarian argument points out that many governmental initiatives require some cooperation or investment on the part of their addressees in order to be successfully implemented. This means that people's reliance upon the government's acts may be crucial for the latter's impact and effectiveness.[36] Assuming that lawful governmental acts serve the public interest, the more relied-upon and effective they are, the greater the social value that they create. However, in order to ensure that people will be willing to rely upon the government, such reliance must be protected even in cases where, due to changes in the circumstances or in governmental preferences, a particular reliance-inducing act is no longer understood to serve the public interest. This is why courts should protect ex ante desirable reliance, even if it is ex post undesirable.

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35. Marmor, *supra* note 28, at 36–38.

36. *See, e.g.*, Daphne Barak-Erez, *The Doctrine of Legitimate Expectations and the Distinction Between the Reliance and Expectation Interests*, 11 Eur. Pub. L. 583, 590 (2005) (noting that the willingness of people to rely upon the government is crucial for the achievement of government goals). Lon Fuller and William Perdue make a similar claim with respect to reliance in private transactions, noting that reliance upon the contractual promises of others facilitates market activity. *See* Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 Yale L.J. 52, 61 (1936).

The main non-utilitarian justification for protecting reliance upon lawful governmental acts has to do with the fundamental value of personal autonomy. As Raz explains:

> The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.[37]

In order for people to control their destiny, to make plans and pursue them, they must be able to rely upon the law of their country. This is true both for private law, which regulates people's interactions with their business partners, family, and neighbors, and for public law, which controls people's relationship with their government and affects many important aspects of their lives. By protecting individual reliance upon lawful governmental acts, courts ensure that public law provides a "stable and safe basis for individual planning,"[38] and thus support personal autonomy.[39]

Of course, not all types of reliance upon lawful governmental acts should always be upheld.[40] As a general rule, however, courts should aspire to protect such reliance. By contrast, when it comes to unlawful governmental acts, protection of reliance should be the exception rather than the rule.

The utilitarian argument against judicial protection of individual reliance on an unlawful governmental act asserts that since such protection promotes the effectiveness of the unlawful act, it might intensify the damage caused by that act to the rights or values that the violated norm sought to secure. At the same time, such protection is likely to increase the incentives of governmental authorities to act unlawfully when it appears to promote their goals. Economic efficiency considerations thus suggest that courts should generally refuse to protect reliance upon unlawful governmental acts.

Does judicial refusal to protect individual reliance upon unlawful governmental acts clash with the value of personal autonomy? Usually not. While the institutional protection and promotion of personal

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37. JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986).

38. RAZ, *supra* note 14, at 220.

39. Moreover, respect for individual reliance upon the government is also bound up with the Kantian principle that all human beings are possessed of equal moral worth and should be treated with equal respect. Reasonable reliance upon a promise or statement of a governmental authority usually builds on past experience, whereby similar promises or statements were duly adhered to. An unexpected departure of the governmental authority from its previous course of action may thus frustrate the legitimate expectation for an equal treatment. *See* Barak-Erez, *supra* note 36, at 589.

40. For example, in order to prevent excessive, socially undesirable reliance, the protection of reliance should be limited to "reasonable" or "foreseen" reliance.

autonomy is crucial for individual wellbeing,[41] it must be subject to some restrictions. One of them is that personal autonomy should usually not be protected if it is exercised in an unlawful manner or if it gives effect to unlawful behavior (assuming, again, that unlawful behavior is socially undesirable). The need to place normative constraints on the exercise of personal autonomy has been acknowledged by some contemporary moral theorists.[42] Raz, for example, asserts that autonomy should not be abused for wrongdoing.[43] The idea that the exercise of personal autonomy should be limited by moral requirements can also be traced in the work of Immanuel Kant. Although Kant is concerned with moral rather than personal autonomy,[44] his work can be understood to entail that a person's choices of action are constrained by her moral choices, which essentially reflect "objective" morality.[45]

In addition to these normative limitations, the exercise of personal autonomy is also limited by, or depends upon, one's capacity to make rational autonomous choices.[46] This capacity consists of several elements, including, *inter alia*, the availability of a sufficient range of options to choose from, access to relevant information, and a certain level of independence (or freedom from coercive influence).[47] Obviously, the

41. *See, e.g.*, RAZ, *supra* note 37, at 203 (noting that the promotion and protection of personal autonomy is the core of the liberal concern for liberty).

42. Many others, however, have ignored the question of whether personal autonomy is limited by moral or legal requirements. As noted by Robert Taylor, "a problem that is endemic to the personal-autonomy literature [is that] autonomy as it is conceived in this literature is consistent with unethical, even criminal behavior . . . ." Robert S. Taylor, *Kantian Personal Autonomy*, 33 POLITICAL THEORY 602, 615 (2005).

43. RAZ, THE MORALITY OF FREEDOM, *supra* note 37, at 378–81. It is not entirely clear, however, whether RAZ objects the abusive exercise of personal autonomy because it undermines the internal value of personal autonomy, or because of its negative impact on others, or both.

44. The difference between Kant's conception of moral autonomy and contemporary conceptions of personal autonomy has been discussed by several writers. *See, e.g.*, *id.* at 370 n.2 (clarifying that "[p]ersonal autonomy, which is a particular ideal of individual well-being should not be confused with the only very indirectly related notion of moral autonomy."); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution*, 58 NOTRE DAME L. REV. 445, 448 (1983) (using different terms to describe the corollaries of moral and personal autonomy at the state level).

45. *See* Taylor, *supra* note 42 (arguing that although Kant does not explicitly discuss the notion of personal autonomy, it is present in his account of the imperfect duties of self-perfection and the practical love of others, and that according to this account, a virtuous person has significant freedom to fashion her own plan of life, while at the same time discharging her duty to advance the happiness of others); *see also* ALLEN WOOD, KANT'S ETHICAL THOUGHT 329 (1999) (noting that in Kant's moral theory, ethical duties place constraints on the pursuit of our life plans).

46. According to Rawls, rational choice is based on "the adoption of effective means to ends; the balancing of final ends by their significance in our plan of life as a whole . . . ; and finally, the assigning of a greater weight to the more likely consequences." *See* John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 529 (1980). It is quite clear that without these capacities, one cannot devise and carry out any meaningful life plans.

47. Different writers have articulated different conditions which they deem essential for the exercise of personal autonomy. For example, Joel Feinberg has suggested that the basic conditions for autonomy include authenticity, integrity, and distinct self-identity (individuality). *See* Joel Feinberg,

presence or absence of each of these conditions is a matter of degree, and so is people's capacity for autonomy.[48]

Having acknowledged that the realization of personal autonomy is subject to normative constraints entailed by moral and legal norms as well as to practical constraints derived, *inter alia*, from the availability of adequate options and from one's independence and access to information, I suggest that for the purpose of deciding whether or not to protect individual reliance upon unlawful governmental acts, the normative and practical constraints should be understood to stand in direct relation to each other. This means that the greater a person's capacity to make rational autonomous choices, the stricter the normative requirements that should apply to her, and the weaker the justification for protecting her reliance upon an unlawful act, and vice versa: the fewer the options and information available to her and the lesser her independence, the lower the normative standards that she should be expected to meet, and, other things being equal, the stronger the justification for protecting her reliance upon an unlawful act.

This formula seeks to ensure that everyone will enjoy at least a minimal level of personal autonomy. It assumes that the personal autonomy of a person who has many options to choose from would not be dramatically affected if some of these options, namely, those derived from unlawful acts, were removed from her menu of legitimate choices. However, for a person whose options are already limited, the availability of normatively dubious courses of action could make the difference between an adequate and a less-than-adequate level of personal autonomy.

To give a hypothetical example, imagine that a big food chain wishes to open a new branch in a small rural town. The company receives the required business license from the local authority and opens the new restaurant in accordance with the license terms. However, after a while, it turns out that the license grant violated applicable regulations because the restaurant is located too close to some hazardous facility. Now consider a slightly different scenario, in which the unlawful license is

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Autonomy, *in* THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 27 (John Christman ed., 1989). Reviewing the literature on this topic, John Christman has identified two families of conditions for autonomy: competency conditions (the capacity for rational thought), and authenticity conditions (the capacity for identification and reflective endorsement of one's own desires, values, and so on). *See* John Christman, *Autonomy in Moral and Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2015), http://plato.stanford.edu/archives/spr2015/entries/autonomy-moral/. The list presented in this paper resembles RAZ's 'conditions of autonomy,' which include "appropriate mental abilities, adequate range of options, and independence." *See* RAZ, *supra* note 37, at 372. However, whereas RAZ's first condition focuses on the mental ability to make rational choices, I prefer to emphasize the availability of relevant information, which, as far as the legal protection of reliance is concerned, seems to raise more complicated questions.

48. RAZ, *supra* note 37, at 373.

given to a local resident, who was fired from her work as a clerk at a local store and decided to open her own business for the first time in her life. According to the formula suggested above, in the second scenario there appears to be a stronger justification than in the first case for devising a judicial remedy that would allow the restaurant to continue to operate. Apparently, the food chain could choose many other locations for its new restaurant in many other towns, whereas the local clerk might be effectively limited to the area where she lives. Moreover, for the company, the establishment of yet another branch was probably merely a business plan, whereas for the clerk it might have been more of a life plan. It can also be assumed that the professional company was better able than the inexperienced clerk to find out that the license was unlawful before relying upon it. For all of these reasons, protecting the clerk's reliance appears to be crucial for her personal autonomy, which does not seem to be true for the food chain or its owners. This does not mean that the clerk's reliance should ultimately be protected. The decision whether or not to protect it may depend on various circumstances and considerations that are not accounted for in our hypothetical example, such as the possible impact of such protection on the rights and interests of third parties. However, the point that this example is intended to make is that the more limited one's capacity to make autonomous choices, the greater the justification for protecting her reliance despite conflicting rule of law considerations.

It is worth stressing again that protecting reliance upon an unlawful governmental act should be the exception. The general assumption should be, as it is in many other legal regimes, that most people usually have sufficient capacity to make choices that can count as autonomous. The exact point on the "capacity for autonomy" scale below which reliance upon an unlawful act should be protected cannot be determined *a priori*. In any event, the acknowledgment that the default principle should be the invalidation of unlawful governmental acts means that each time a court decides to deviate from this principle, it must specifically explain why personal autonomy considerations (or other valid considerations) justify such deviation.

Setting aside rule of law and efficient incentive considerations for a moment, the idea that people's reliance upon unlawful governmental acts should not be protected unless their personal autonomy capacities are significantly limited is susceptible to criticism from two opposite sides; the first represents a more restrictive conception of individual agency than the one suggested here, and the second a more expansive one. The criticism from the restrictive side asserts that all persons, not only those with limited access to information or limited opportunities to choose from, should be allowed to assume that the governmental authorities are acting lawfully and to rely upon their statutes, decisions, and orders as

long as they are not manifestly unlawful. According to this view, to demand of ordinary people to engage in complex inquiries about the lawful exercise of governmental authority is to place an excessively onerous burden upon them.

The main problem with this criticism is that it underestimates the ability of people to reflect critically on the acts of governmental authorities. It reduces the role of citizens in their relationship with the authorities to that of passive consumers who cannot distinguish between good and bad governmental products. In fact, however, most people seem to be capable of undertaking a more sophisticated and active role vis-à-vis the government.[49] Admittedly, most people are not experts in public law and are not fully familiar with the administrative, constitutional, and international law constraints that apply to governmental authorities. Nor, however, are they experts in private or criminal law, yet in their interactions with other individuals, people are subject to the presumption that *ignorantia juris non excusat.* Why should a similar presumption not apply to public law? Even if such a presumption is more burdensome in the context of public law, this burden is somewhat mitigated by the fact that ignoring public law constraints and relying upon unlawful governmental acts does not give rise to direct criminal or civil liability; it merely entails that one's reliance will not have a legal effect.

The criticism from the expansive side asserts that all persons, including those who have limited access to information or limited opportunities to choose from, should be held responsible for their choices (as long as they are not mentally incompetent or completely subjected to external coercion), and that even the apparent legality of governmental acts should not release them from this responsibility. According to this view, to demand less of some people is to betray the liberal perception of persons as free and equal rational beings.[50]

This criticism reflects an overly simplistic conception of individual agency, which does not give sufficient weight to the differences between people in terms of their ability to make rational autonomous choices. Moreover, it fails to appreciate that these differences are to a great extent the product of social and political conditions. Feminist legal scholars have problematized the unitary, context-insensitive liberal

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49. *See, e.g.*, JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (1989 [1962]) (contrasting pre-twentieth century models of active, participatory democracy with later models of democracy whereby citizens became passive consumers of political goods and services).

50. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 445 (rev. ed., 1999) (noting that from a Kantian view, "the desire to do what is right and just is the main way for persons to express their nature as free and equal rational beings," and that according to Aristotle, "this expression of their nature is a fundamental element of their good.").

understanding of personal autonomy, noting that in many areas of law women are treated unfairly because they are expected to meet a masculine standard of agency and independence.[51] At the same time, however, feminist scholars have warned that an opposite legal approach that portrays women as completely helpless victims is no less misleading or harmful.[52] They have therefore called for the adoption of a more nuanced approach which acknowledges the complex realities of women's lives and admits that there are many more forms and degrees of individual autonomy than the mainstream liberal account permits.[53] These insights are valid not only for women, but also more generally for people whose ability to make rational autonomous choices is constrained by sociopolitical conditions, and should affect the legal treatment of these people, including in the case that they rely upon an unlawful governmental act.

II. How Should Courts Protect Bad Reliance

Having established that in some cases courts should protect individual reliance upon unlawful governmental acts notwithstanding countervailing rule of law considerations, the Article now turns to the question of how exactly courts should discharge this task. The main challenge is to reduce the incentives that such protection might provide to governmental authorities to act unlawfully. In this Part, I present a two-tier strategy that can meet this challenge. Under this strategy, the first thing that courts should do is to explicitly acknowledge and condemn the illegality of the relevant governmental act. Second, they should exercise broad discretion with respect to the remedial measures that should be taken to address this illegality. This strategy ensures that

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51. *See, e.g.*, Diana T. Meyers, *Personal Autonomy and the Paradox of Feminine Socialization*, 84 J. Phil. 619, 621 (1987) (pointing to the need for a new account of personal autonomy which is sensitive to the unique life experiences of women); Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 Wm. & Mary L. Rev. 805, 807–08 (1999) (noting that although some liberal theorists acknowledge that people's choices are constrained by various historic and social factors, they ultimately assign these factors a peripheral rather than constitutive role in shaping a conception of individual autonomy).

52. *See, e.g.*, Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 Women's Rts. L. Rep. 213 (1992) (challenging the theme of complete victimization and helplessness that emerged in expert testimonies in homicide cases involving battered women who had killed their assailants); Elizabeth M. Schneider, *Feminism and The False Dichotomy of Victimization and Agency*, 38 N.Y.L. Sch. L. Rev. 387 (1993) (contending that feminist scholarship has too often been shaped by a false, static view of women as either victims or agents); Meyers, *supra* note 51, at 621 ("There is ample social-psychological evidence to the effect that women are less able to exert control over their lives than men, but the claim that feminine socialization altogether excludes most women from the class of autonomous agents is both morally repugnant and factually unsubstantiated.").

53. *See, e.g.*, Meyers, *supra* note 51 (arguing that it is time to adopt an alternative conception of autonomy which encompasses partial or qualified forms of autonomy).

governmental authorities will know what the law requires of them and pay a reputational price for violating it. At the same time, it renders the benefits that governmental authorities can gain from such violations less certain than in the case that legitimate expectations would always be fully enforced. All in all, this strategy allows courts to protect legitimate reliance upon unlawful governmental acts while creating the minimal possible incentives for the government to act unlawfully.

In a sense, this strategy strives to achieve a certain level of what Meir Dan-Cohen defines as "acoustic separation" between conduct and decision rules.[54] Focusing on criminal law, Dan-Cohen contends that criminal behavior is generally regulated by two different types of rules, namely, conduct rules that are addressed to the general public, and decision rules that are addressed to judges and other official decision-makers. When the two types of rules conflict, the legal system may use various "selective transmission" strategies to create an (inevitably partial) acoustic separation between them, so that the decision rules applied by courts will not affect the behavior of the general public, nor will the conduct rules that guide public behavior affect judicial decisionmaking.[55] Dan-Cohen demonstrates this idea, *inter alia*, in the criminal defenses of duress and necessity. He notes that these defenses, which can be classified as decision rules, are remarkably vague and are applied variably to different people in different situations, and argues that these features undermine the ability of people to rely upon these defenses when they decide whether to violate criminal conduct rules.[56]

While Dan-Cohen's study focuses on criminal law, the conceptual framework he develops is also applicable, with the necessary changes, to other areas of law, including public law. Specifically, in the context of individual reliance upon unlawful governmental acts, this framework explicates the potential tension between conduct rules that tell governmental authorities to respect human rights, to apply due process requirements, or to act impartially, and decision rules that tell courts to give legal effect to governmental acts that violate these norms in the case that they induce legitimate reliance. As noted, Dan-Cohen's analysis also suggests that some strategies of selective transmission can considerably mitigate this tension. Parts A and B respectively explain in greater detail how each of the components of the two-tier strategy presented above can work to that effect.

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54. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626–36 (1984).

55. *Id.* at 634–36 (asserting that legal systems use various strategies of "selective transmission" in order to increase the probability that a certain normative message will reach only the constituency for which it is intended).

56. *Id.* at 637–45.

A. Acknowledge and Condemn Illegality

Stating that a governmental act is unlawful and at the same time giving it legal effect is not an easy task for courts. This is true especially in legal systems, including that of the United States, where violations of the law by governmental authorities are commonly understood to automatically yield invalidity and require a remedy.[57] It is therefore not surprising that when courts find it appropriate to give effect to an apparently unlawful governmental act in order to protect legitimate reliance upon it, they sometimes prefer to evade the tension between illegality and validity by adopting a creative interpretation of the applicable law, under which the reviewed governmental act is ultimately deemed lawful.[58] While this choice is understandable, it is nonetheless regretful, because it distorts the meaning of a general legal norm only for the sake of doing justice in a particular case.

From a broad rule of law perspective, acknowledging and condemning the unlawfulness of the reviewed governmental act while asserting that it nevertheless has some valid legal consequences seems to represent a better judicial strategy for protecting legitimate reliance upon unlawful acts, for two reasons. First, it clarifies the requirements of relevant public law norms as the court genuinely understands them, and thus provides appropriate guidance to "good" governmental authorities that wish to observe the law. Second, it attaches reputational costs to violating the law, and thus deters "bad" governmental authorities from doing so.[59]

The claim that judicial assertion and denunciation of public law violations can promote lawful behavior on the part of both good and bad governmental authorities finds support in contemporary theories of compliance with public law. These theories attempt to answer the question why governments comply with public law in the absence of any power that can force them to do so,[60] and why judicial review affects

57. As Richard Fallon and Daniel Meltzer observe, "[f]ew principles of the American [legal] tradition resonate more strongly than one stated in *Marbury v. Madison*: for every violation of a right, there must be a remedy." Fallon & Meltzer, *supra* note 2, at 1778.

58. For an analysis of this phenomenon in the context of international law, see *infra* Part III.C.

59. The idea of "good" and "bad" governmental authorities that I have in mind follows the logic of Holmes' famous claim that the law should be examined from the perspective of the "bad man," who, unlike the "good man," cares nothing for ethics, and the only thing that can make him obey the law is the fear of civil or criminal sanctions. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 458–61 (1897). By way of analogy, a "bad governmental authority" would obey public law only when it serves its interests, whereas a "good governmental authority" would do so also because it believes this is the right thing to do.

60. There are some forms of coercive enforcement in public law, such as the use of economic or military sanctions against a violating state under the UN Charter. However, such coercive enforcement is rather uncommon in public law.

them if it is not backed by any coercive measures.[61] This question has figured most prominently in international law scholarship, but many of the ideas developed in this scholarship are also relevant, and have occasionally been applied, to constitutional and administrative law.[62] While a comprehensive analysis of all major theories of state compliance is beyond the scope of this study,[63] a brief discussion of some of the insights that they generate can help explain why it is important that courts explicitly recognize the illegality of governmental acts that violate public law norms even (or especially) when they uphold some of their consequences.

Theories of compliance with public law can generally be divided into two types: instrumentalist and non-instrumentalist.[64] Non-instrumentalist theories assert that governmental authorities usually obey the law because they believe it is the right or moral thing to do.[65] Thus, some prominent legal scholars have argued that states comply with public law norms when they consider them to be fair and legitimate, either in terms of their substance or in terms of the procedures through which they have been adopted.[66] Other commentators have argued that governmental authorities obey public law norms not because they

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61. As Matthew Stephenson puts it, the question is "[w]hy . . . would the government accept the limits imposed by a truly independent court? Why would people with money and guns ever submit to people armed only with gavels?" *See* Matthew C. Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 60 (2003).

62.

> [The] insight that constitutional law must be somehow self-enforcing if it is to constrain government behavior points to international law as a better analogy for constitutional enforcement and compliance than ordinary domestic law. Indeed, to the extent that subsequent constitutional theorists have thought about how constitutional law works to influence and constrain government, they have unwittingly followed in the footsteps of international law and international relations theorists.

Goldsmith & Levinson, *supra* note 4, at 1832–33.

63. For useful surveys of public law compliance theories, see Whytock, *supra* note 16, at 170–85; Goldsmith & Levinson, *supra* note 4, at 1822–42.

64. *See* Goldsmith & Levinson, *supra* note 4, at 1822–42.

65. It is noteworthy that similar non-instrumentalist explanations may also account for Holmes' "good" man's compliance with civil and criminal law. By contrast, instrumentalist explanations for individual compliance with the law, which focus on the "bad" man's fear of civil and criminal sanctions, do not apply to governmental authorities due to the absence of a super-state enforcement mechanism. On the Holmesian distinction between the motivations for compliance of "good" and "bad" men, see Holmes, *supra* note 59, at 459–61.

66. *See, e.g.*, Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988). The claim that the perceived procedural legitimacy of public law creates a pull toward compliance finds some support in the social psychology literature. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: the United States Supreme Court and Abortion Rights*, 43 DUKE L. J. 703 (1994).

perceive them as fair and legitimate (that is, following a process of critical reflection), but rather because they (partly unconsciously) *internalize* the values embodied in these norms.[67] Yet another influential non-instrumentalist theory asserts that states obey public law because it forms part of their identity as constitutional democracies or as members of the international community.[68] The common thread of all these theoretical approaches is that they assume that governmental authorities obey public law because of what the law is, and not because it helps them achieve some other goals or avoid some sanctions. These theories envision a good governmental authority that obeys the law because it believes it is the right thing to do. For such an authority, a judicial assertion that a certain behavior is inconsistent with public law norms would usually provide, in and of itself, sufficient reason to avoid such behavior.

But what if some governmental authorities do not care about the right thing to do? What if, like Holmes' "bad man," they adhere to the law only if they have some external incentive to do so? Instrumentalist theories of state compliance take it as a basic assumption that governmental authorities are rational, utility-maximizing actors who obey the law, if they do, only because it serves their self-interest. This does not necessarily mean that the particular norms by which they abide serve their immediate interests. Even if the requirements presented by a certain rule collide with the immediate self-interest of the governmental authority, it might find it worthwhile to trade off this short-term interest in exchange for some long-term benefits. These benefits may, for example, take the form of reciprocal cooperation: a government may comply with an inconvenient norm and expect that another government will act in the same way when it faces a similar choice,[69] or that a competing domestic political actor will act in the same way when it

67. *See, e.g.*, Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) & THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)); *see also* Cass R. Sunstein, *Endogenous Preferences, Environmental Law*, 22 J. LEGAL STUD. 217 (1993).

68. *See* Goldsmith & Levinson, *supra* note 4, at 1828–29, 1837–38 (noting that under the constructivist tradition in international relations, international norms are understood to constitute part of the state's sovereign identity, and that in a similar vein, constitutional law can be taken to create a state's domestic political identity).

69. *See* Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001) (exploring how various features of international institutions affect international cooperation); Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1 (1986) (explaining how international institutions can mitigate the prisoner's dilemma that states face in their relations with other states and thereby promote long-term cooperation among states).

comes to power.[70] Even more broadly, a government may be willing to comply with unfavorable public law norms in order to build or maintain its general reputation as law-abiding. At the international level, such a reputation can facilitate the conclusion of future agreements in which the government might be interested.[71] In domestic law, ongoing commitment to the rule of law can increase public trust in and support for the government.[72] These insights suggest that even when a court decides to protect reliance upon an unlawful governmental act, and in so doing advances the short-term goals that the government sought to achieve when it decided to violate the law, it can still deter self-interested governmental authorities from engaging in unlawful reliance-inducing activity in the future by making it clear that alongside the immediate gains, such activity also entails long-term reputational costs.

Contemporary theories of state compliance thus suggest that in order to mitigate the negative impact that the protection of individual reliance upon an unlawful governmental act might have on the ability and willingness of both good and bad governmental authorities to act lawfully in the future, courts should explicitly recognize and condemn the illegality of the relied-upon act. Of course, the idea that principled judicial statements can in and of themselves affect governmental behavior might be met with skepticism by ardent realists, who downplay the role of values and norms in political decision-making.[73] For them, however, even an operative judicial decision which requires the government to undo the consequences of an unlawful act can hardly have any effect in the absence of a super-state power that can enforce this

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70. *See* Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 260–62 (1997) (using game-theoretic tools to show that public authorities' respect for administrative and constitutional law stems from a self-enforcing equilibrium among competing political powers); Stephenson, *supra* note 61, at 61 (arguing that public authorities obey the rulings of independent courts because they "facilitate tacit bargains between political competitors to exercise mutual moderation.").

71. *See* Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379, 383 (2006) (arguing that states comply with their international obligations because they wish to build their reputation as credible partners to cooperation); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1849 (2002) (same).

72. *See* Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001).

73. The realist (and neo-realist) school in political science emphasizes the decisive role of power in international politics, and asserts that other factors, including legal norms and institutions, hardly have any independent influence on state behavior. *See* HANS J. MORGENTHAU & KENNETH W. THOMPSON, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (6th ed., 1985); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979). Although this school has developed mainly in the field of international relations, it has also had influence on national political thought. As noted by Morgenthau: "The essence of international politics is identical with its domestic counterpart. Both domestic and international politics are a struggle for power, modified only by the different conditions under which this struggle takes place in the domestic and in the international spheres." *See* MORGENTHAU, POLITICS AMONG NATIONS, *supra* at 39.

decision.[74] For hardcore realists, then, judicial review can be little more than a cipher for political power. The answer to the realist critique is that even if its deep skepticism is justified and it is doubtful that this is the case as long as judicial review is a central practice of democratic governance, it is worth trying to make the best of it and insisting, as a minimum, that courts do not approve of unlawful governmental behavior only for the sake of doing justice in a particular case.

B. Exercise Broad Remedial Discretion

While the fear of judicial condemnation can discourage "bad" governmental authorities from violating the law even when they expect that, due to the need to protect legitimate reliance, such violation will ultimately achieve its short-term goals, condemnation alone may not always be a sufficient deterrent to unlawful governmental behavior. This may be the case, for example, when the short-term goals achieved through the violation are so important to the government that it considers them to be worth the long-term costs of condemnation, or when these goals enjoy such popular support that judicial condemnation is more likely to inflict reputational costs upon the court itself than upon the government.[75] In such cases, the incentives of governmental authorities to act unlawfully may nevertheless be reduced if there exists some uncertainty as to whether or not, and to what extent, the court will actually protect reliance in a manner that gives effect to the unlawful act.[76]

As noted above, Dan-Cohen suggests that inconsistent judicial application of criminal defenses like duress and necessity can reduce the incentives of people to engage in criminal activity in circumstances that may give rise to these defenses.[77] In a similar vein, inconsistent judicial treatment of unlawful reliance-inducing governmental behavior can create weaker incentives for governmental authorities to engage in such behavior than the systematic protection of reliance interests.[78] This does

74. *See* Goldsmith & Levinson, *supra* note 4, at 1833–34 (discussing the realist approach to constitutional judicial review, according to which most judicial interventions reflect emerging majority preferences, and noting that whenever the Supreme Court decided against the preferences of powerful political actors its decisions were ignored or evaded).

75. This may be the case, for example, when the court protects the human rights of an unpopular minority group.

76. The proposition that uncertainty regarding the probability and nature of legal sanctions can create effective deterrence has been confirmed by empirical studies in other areas of law, in particular criminal law. *See, e.g.*, Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 Iowa L. Rev. 443, 468 (2004); Jeff T. Casey & John T. Scholz, *Beyond Deterrence: Behavioral Decision Theory and Tax Compliance*, 25 Law & Soc'y Rev. 821, 825 (1991).

77. *See supra* note 56 and accompanying text.

78. It is noteworthy that governmental authorities are usually more sophisticated actors than the average person, and are therefore likely to have better ability than the latter to predict the outcomes of judicial processes even when courts apply the law inconsistently. This does not mean, however, that

not mean, of course, that courts should apply different remedies to different cases of bad reliance in an arbitrary manner only for the sake of confusing governmental authorities. The distinction between the degree and type of protection accorded to legitimate reliance in different cases should derive from relevant considerations such as the seriousness of the violation committed by the government, the expected harm to the reliant parties in the case that the unlawful act is invalidated, and the expected harm to other parties if the act is not invalidated. However, the need to take into account these independently appropriate considerations also has the potential of mitigating governmental incentives to violate the law.

One could argue that while the exercise of broad judicial discretion with respect to the outcomes of unlawful reliance-inducing governmental behavior (compared to the alternative of consistently protecting such reliance) serves one aspect of the rule of law, namely, the requirement that the government comply with the law, it, however, undermines the second aspect of that principle, which requires that the law be capable of guiding human behavior.[79] According to this argument, when courts apply public law remedies inconsistently, they fail to provide appropriate legal guidance to governmental authorities as well as to individuals who might rely upon their measures. However, this argument is unconvincing, for several reasons. First, it is not at all clear that the requirement that the law be able to guide human behavior applies to governmental behavior, at least not in the same way that it applies to individual behavior. Second, even if this requirement does apply to governmental behavior, it should be understood to refer only to those public law rules that can be classified as conduct rules, which are addressed to governmental authorities and are intended to guide their behavior, and not to decision rules, which determine the consequences of violations of conduct rules and are addressed to those who enforce them. Third, even if a requirement that public law decision rules be capable of guiding governmental behavior exists, this requirement does not seem to be violated when decision rules are more lenient than their corresponding conduct rules,[80] as in the case that a certain governmental behavior is prohibited but is nevertheless given effect in some cases in order to protect reliance.

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the ability of governmental authorities to predict the outcomes of judicial processes in entirely unaffected by the degree of remedial discretion exercised by courts. On the connection between the legal sophistication of different actors and the desirable degree of acoustic separation, see Dan-Cohen, *supra* note 54, at 640–41.

79. *See supra* notes 25–26 and accompanying text.

80. *See* Dan-Cohen, *supra* note 54, at 671 (making a similar claim with respect to decision rules in criminal law).

The claim that courts should exercise broad remedial discretion in cases involving bad reliance should be assessed against the background of the more general tradition of remedial discretion in public law. While this tradition does not itself provide a justification for the exercise of broad discretion in the context of bad reliance, it at least confirms that such an approach is coherent with the general structures and practices of public law. The tradition of flexible remedial discretion in American administrative and constitutional law can be traced back to the early days of the republic when federal courts were granted broad equity powers under the Constitution along the model of the English courts of equity.[81] Although Congress has since that time granted federal courts a range of specific statutory remedial powers, this did not prevent the courts from continuing to assert their equitable remedial discretion.[82] While there are counterexamples in which courts refused to tailor remedies to particular circumstances or warned about the ramifications of a too flexible remedial approach,[83] the overall picture that emerges from administrative and constitutional case law is that national courts see themselves free to exercise broad though not unlimited remedial discretion.

When it comes to international law, remedial discretion appears to be even more open-ended than it is in national public law. This may have to do with the fact that international law has traditionally relied on self-help rather than on judicial settlement of conflicts.[84] As a result, international courts are a relatively new phenomenon,[85] and the remedial

81. The Constitution provides that the judicial power of federal courts "shall extend to all Cases, in Law and Equity" arising under the Constitution and the laws of United States. U.S. CONST. art. III, § 2. According to Laura Fitzgerald, the Constitution created the federal judicial system "with other preexisting judicial institutions in mind, including English courts of equity." Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1245 (2001); *see also* John T. Cross, *The* Erie *Doctrine in Equity*, 60 LA. L. REV. 173, 207 (1999) (maintaining that the judicial power vested in federal courts under Article III of the Constitution should be understood against the intention of its framers to borrow the basic features of the English judicial system).

82. *See* Levin, *supra* note 12, at 323–45 (discussing various cases and doctrines which show that courts have continued to adhere to the equitable tradition of flexible remedial discretion); Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 54 (1993) ("[T]he discretion once associated with equity now pervades the legal system.").

83. Missouri v. Jenkins, 515 U.S. 70, 98 (1995) (holding that the remedial authority of district courts in school segregation cases is subject to limitations, and mentioning previous cases that support this view); United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 497–98 (2001) (contending that a court of equity cannot refuse to enforce a statute and cannot contemplate factors that Congress did not want it to consider).

84. *See, e.g.*, CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 1 (1990) (noting that the question of judicial remedies has gained little attention in international law due to, *inter alia*, the lack of compulsory jurisdiction in the international legal system, the low incidence of modern judicial or arbitral settlement, and the predominant role of self-help).

85. *See, e.g.*, Christian Tomuschat, *International Courts and Tribunals* ¶ 7, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum & Frauke Lachenmann eds., 2011) (noting that until the 20th century, the notion of establishing international judicial bodies was "more or less, inconceivable").

aspects of international law have for a long time not been codified.[86] The flexible approach of international courts to remedial issues can be discerned, for example, in the case-by-case remedial practice of the International Court of Justice, which attaches little weight to its previous decisions or to previous arbitral awards,[87] and in the wide discretion exercised by international human rights tribunals when awarding damages to victims of human rights violations.[88] However, in contrast to domestic public law cases, international law cases include hardly any principled discussion about judicial remedial discretion in general, and about the authority of courts to give effect to internationally unlawful acts in particular.

Although pervasive, the exercise of broad remedial discretion by courts still raises concerns about the separation of powers.[89] Given that the structural underpinnings of international law are not entirely consistent with the principle of separation of powers, these concerns are more relevant for domestic public law than for international law. However, as far as the function and authority of the judiciary is concerned, the difference between international and domestic public law may not be so great,[90] suggesting that some version of the separation of powers concern might also be applicable to the exercise of remedial discretion by international or domestic courts applying international law.

Strictly construed, the principle of separation of powers asserts that the role of the judiciary is to interpret the law and apply it to particular cases.[91] In accordance with this view, when a court finds that the law has been violated, it must assert the invalidity of the violating act. Even if it believes that such invalidation will undermine important interests, the

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86. This situation has changed in 2001 with the adoption by the International Law Commission of the Draft Articles on State Responsibility. Int'l Law Comm'n, *Rep. on the Work of Its Fifty-Third Session*, at 43–58, U.N. Doc. A/56/10 (2001).

87. *See* GRAY, *supra* note 84, at 59–108 (showing that in contrast to its approach to substantive issues, with respect to remedies the ICJ has treated every case in isolation, and that its jurisprudence includes little discussion of relevant rules and principles).

88. *See, e.g.*, Robert Carnwath, *E.C.H.R. Remedies From a Common Law Perspective*, 49 INT'L & COMP. L.Q. 517 (2000); Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 115 (2005).

89. *See, e.g.*, William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637 (1982) (contending that courts generally make illegitimate, political decisions in public law remedies); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978) (advocating the application of separation of powers principles to limit the scope of public law remedies).

90. The main difference between domestic and international law in terms of separation of powers has to do with the fact that national executives, rather than legislatures, are the primary source of international norms. *See, e.g.*, Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 990 (2013) (asserting that international law is frequently used domestically to strengthen the powers of the President vis-à-vis Congress).

91. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285–88 (1976) (describing the traditional role of judges in federal courts).

court may not eschew this outcome by inventing creative remedial solutions that give full or partial effect to the unlawful act. Put simply, such solutions are beyond the institutional competence of courts.

It cannot be denied that when a court decides to apply a non-statutory remedy that gives effect to an unlawful act whether for the purpose of protecting legitimate reliance or for another purpose it somewhat stretches the boundaries of its authority. Such a decision, however, should not usually be considered a serious assault on the principle of separation of powers. Unlike classical judicial interventions in executive or legislative discretion, a remedy that gives effect to an unlawful act does not subvert but rather serves the interests of the governmental authority whose acts have been deemed unlawful.[92] Had it been consulted with, the relevant governmental authority would probably have preferred that remedy to the alternative option of complete invalidation of its acts. Hence, the separation of powers concern does not undermine the case for judicial protection of bad reliance. Yet, courts should be aware of this concern and take it into account when choosing among alternative remedial responses to bad reliance.

III. Protection of Bad Reliance in Practice

A. Administrative Law

Judicial administrative review was traditionally based on the standard practice of vacating unlawful acts and remanding them back to the relevant agency for further consideration.[93] This practice hardly left any remedial discretion for courts: once the administrative act was deemed unlawful, the next steps to be taken by the court were almost self-evident. With time, however, and especially since the 1990s, the D.C. Circuit and other federal courts began to remand without vacation, whereby the court remands the flawed administrative act but allows it to remain in place during the remand proceedings.[94] The difference between

92. Judicial extension of unconstitutional statutory provision may be different in this respect, since it often entails unexpected governmental expenses. *See infra* Part III.B.

93. *See, e.g.*, Levin, *supra* note 12, at 298 ("Until recently, reviewing courts routinely vacated agency actions that they found to have been rendered unlawfully. That practice was generally accepted and essentially taken for granted.").

94. For complementary surveys of cases involving remand without vacation, see, e.g., William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 Nw. U. L. Rev. 393, 412–16 (2000) (listing all nine cases of remand without vacation decided by the D.C. Circuit between July 1, 1985 and June 30, 1995); Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. Rev. 278, 293–300 (2005) (surveying all D.C. Circuit remand without vacation decisions issued between 1993 and 2003); Levin, *supra* note 12, at 296 n.12 (listing remand without vacation cases in circuits other than the D.C. Circuit).

the two remedial practices is substantial. When an administrative rule is vacated, it immediately ceases to have any legal effect. The agency may then change the rule, reenact it after pursuing proper procedures, or abandon the rulemaking effort altogether. In any event, even if the same rule is reenacted, the vacation period inevitably bears some impact.[95] By contrast, when a rule is remanded without vacation, the agency can continue to implement it while it works to correct the defects identified by the court. In some cases, years pass until the agency completes the remand proceedings, if at all.[96] Remand without vacation thus presents a clear example of a legal device through which courts condemn unlawful governmental acts while refraining from invalidating them. Although some judges and commentators have contested the legality of this device, arguing that when a court deems an agency rule unlawful it ought to vacate it,[97] these objections have not yet generated any principled majority decision, and remand without vacation continues to be applied and developed.[98]

The most common explanation provided by courts when they decline to vacate is that the overall social costs of disrupting the environmental, security, economic, or other regime established by the flawed act exceed the costs of leaving that act in place while it is remanded.[99] In a few cases, however, courts have explained their decision to remand without vacation by the need to protect legitimate reliance

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95. This is especially true after *Bowen v. Georgetown University Hospital*, in which the Supreme Court held that legislative regulations cannot apply retroactively to completed transactions unless such retroactive application has been explicitly authorized by Congress. 488 U.S. 204 (1988). This means that agencies cannot mitigate the effects of vacation through retroactive rulemaking. According to Richard Pierce, the *Georgetown* case was a major trigger for the growing judicial resort to remand without vacation. Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 76–77 (1995).

96. *See* Jordan, *supra* note 94, at 415 (mentioning cases in which remand proceedings had yet to be completed several years after the court declined to vacate them); Daugirdas, *supra* note 94, at 301–05 (explaining why agencies often fail to respond to remand without vacation). The fact that remand without vacation decisions do not usually mention a specific time at which the unlawful rule would be vacated marks the main difference between this device and the somewhat similar device of delaying the issuance of the court's mandate in order to allow the agency to repair the flawed rule before the court's order goes into effect. For a comparison between the two devices, see Levin, *supra* note 12, at 302–03 (arguing that postponement of the court's mandate is less suitable for complicated cases in which it is hard for the court to estimate how much time the agency would need to make the necessary changes); Jordan, *supra* note 94, at 413–17 (comparing the practical implications of the two methods).

97. *See, e.g.*, Checkosky v. Sec. & Exch. Comm'n, 23 F.3d 452, 493 (D.C. Cir. 1994) (Randolph, J., separate opinion) (arguing that remand without vacation is incompatible with section 706 of the Administrative Procedure Act, which requires a reviewing court to *set aside* unlawful agency actions).

98. It has been observed, however, that the doubts about both the legality (*supra* note 97 and accompanying text) and the desirability (*infra* note 116 and accompanying text) of remand without vacation have led to a certain decline in judicial resort to this device. *See* Levin, *supra* note 12, at 295 n.11.

99. *See, e.g.*, Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 619–20 (2004).

upon the unlawful act. In some of these cases, the relying parties were relatively disempowered and strongly depended on the continued application of the unlawful regulations for their economic subsistence.

Consider, for example, *Rodway v. United States Department of Agriculture*, one of the earliest reported cases involving remand without vacation.[100] In this case, nine low-income families challenged the new food-coupon allotment regulations promulgated by the Department of Agriculture pursuant to the 1964 Food Stamp Act.[101] The appellants argued, *inter alia*, that the new allotment system, because it was based on the average food costs of an average family, did not provide all food stamp recipients with the opportunity to obtain a nutritionally adequate diet.[102] The D.C. Circuit found that the new regulations were invalid and remanded them for further proceedings.[103] The court ordered that the regulations remained in effect until they could be replaced by valid regulations.[104] The court explained this decision by citing "the critical importance of the allotment regulations to the functioning of the entire food stamp system, on which over ten million American families are now dependent to supplement their food budgets."[105]

Similarly, in *Milk Train, Inc. v. Veneman*, the D.C. Circuit remanded without vacation regulations issued in 2000 by the Secretary of Agriculture, which were designed to implement a statutory program for the compensation of milk producers affected by declining milk prices.[106] The main beneficiaries of these regulations, which set limitations on the maximum amount of compensation available for each producer, were small and medium-size milk producers.[107] The appellants, a group of large milk-producing companies, challenged the compensation distribution method on various grounds.[108] The court accepted the appellants' claim concerning the timeframe of the program, but refused to vacate the regulations, reasoning that the Secretary "has already disbursed the [program] moneys to numerous dairy producers throughout the country, and those moneys may not be recoverable three years later."[109] In the same vein, in the case of *Sugar Cane Growers Coop. v. Veneman* decided shortly beforehand, the D.C. Circuit declined to vacate unlawful regulations that allocated subsidies to sugar producers.[110] In both cases,

100. Rodway v. U.S. Dep't of Agric., 514 F.2d 809, 824 (D.C. Cir. 1975).
101. *Id.* at 812.
102. *Id.*
103. *Id.* at 817.
104. *Id.*
105. *Id.*
106. Milk Train, Inc. v. Veneman, 310 F.3d 747, 748, 756 (D.C. Cir. 2002).
107. *Id.* at 749.
108. *Id.*
109. *Id.* at 755–56.
110. Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 91, 98 (D.C. Cir. 2002).

the court seems to have been convinced that the recipients of the subsidies "had significant reliance interests in the rules in the sense that they expended the distributed funds."[111]

In all of the above cases, the court accepted the appellants' claim that a certain subsidy regime was legally flawed, yet it decided to leave this regime in place in order to protect the interests of third parties who legitimately relied upon these subsidies. Although there is no explicit reference in these cases to the notion of personal autonomy, they do seem to follow the logic presented in this Article, according to which there is a special justification for protecting reliance upon an unlawful act when the reliant party has few or no alternatives to relying upon that act, so that its capacity to realize its personal autonomy is significantly limited.[112] To be sure, the decision whether to remand without vacation cannot turn only on the reliance interest of third parties, legitimate as it may be. According to the oft-cited test set forth by the D.C. Circuit in *Allied-Signal, Inc. v. United States Nuclear Regulatory Commission*, the decision whether to vacate turns on two main factors: first, the seriousness of the order's deficiencies, and second, the disruptive consequences of vacation.[113] Whereas the second factor, which is usually taken to denote the overall social costs of disrupting a regulatory regime, may also be understood to stand for the need to protect legitimate reliance, the first factor concerning the seriousness of the agency's violation of the law represents another independent consideration that must be balanced against the second.

Does remand without vacation represent an appropriate means for creating acoustic separation between conflicting conduct and decision rules in the context of administrative law? When a court finds that the need to protect legitimate reliance (or to avoid other disruptive effects of vacation) tips the balance in favor of remand without vacation and decides to leave the unlawful act in place, does it not ultimately encourage further violations on the part of administrative agencies? This question has not been directly addressed in the literature on remand without vacation. Instead, scholarly debates over the desirability of remand without vacation have focused on the related but distinct question regarding the implications of this device for the well-known problem of ossification. This problem refers to the chilling effect that strict judicial enforcement of time-consuming and resource-demanding legal constraints on administrative rulemaking may have upon the

111. *See* Daugirdas, *supra* note 94, at 299.

112. *See supra* Part I.B.

113. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (citing Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990)).

willingness of administrative agencies to engage in regulatory activity.[114] Proponents of remand without vacation argue that it can mitigate the problem of ossification since it significantly reduces the costs of failing to comply with rulemaking requirements.[115] By contrast, opponents of this device assert that precisely because it makes hard-look judicial review more palatable, it facilitates aggressive judicial intervention in the rulemaking process.[116]

With some variations, the debate over the impact of remand without vacation on the agency incentives to promulgate rules in the first place is also relevant to the question of its impact on the agency incentives to comply with the law once it has decided to engage in rulemaking. Along with the proponents of remand without vacation, this Article does not deny that this device might reduce the incentives of administrative agencies to attempt to comply with the law.[117] However, as its opponents imply, if this device did not exist, a court wishing to protect legitimate reliance (or to refrain from disrupting a regulatory regime) would have perhaps chosen to apply a lower standard of scrutiny and simply affirm the legality of the reviewed act. Remand without vacation offers a way out of this trap by allowing courts to apply a high standard of review which, as I argued in Part II.A, can in and of itself induce lawful behavior by both good and bad administrative agencies and at the same time to protect legitimate reliance as they deem just.

Finally, the somewhat sporadic manner in which courts make use of remand without vacation[118] is also conducive to reducing its negative impact on the incentives of governmental agencies to comply with the law. While this device has been considerably developed and refined since it was first used,[119] and various criteria have been put forward to guide its

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114. The problem of ossification has gained considerable attention in administrative law scholarship. *See, e.g.*, Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493 (2012); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

115. *See, e.g.*, Pierce, *supra* note 95, at 78 (asserting that the knowledge that "a rule can remain in effect in its entirety in most cases even if the agency is held to have violated the duty to engage in reasoned decisionmaking. . . . will encourage agencies to devote less time and fewer resources to their efforts to comply with that duty.").

116. *See* Rodriguez, *supra* note 99, at 602 (arguing that rather than ameliorating the problem of ossification, remand without vacation has "the paradoxical effect of encouraging more interventionist judicial review.").

117. *See* Pierce, *supra* note 95, at 78 ("Since agencies will take the duty to engage in reasoned decisionmaking less seriously in the absence of a significant risk of vacation, the cost of the doctrine will take the form of loss of some portion of the benefits of compelling agencies to comply with that duty.").

118. *See* Levin, *supra* note 12, at 295 n.11 (noting that in recent years the D.C. Circuit has used the device of remand without vacation "fairly selectively").

119. A notable step in this direction has been the articulation and implementation of the *Allied-Signal* test. *See supra* note 113 and accompanying text.

implementation,[120] remand without vacation has remained a discretionary tool whose application is hard to predict. Part II.B explains how this uncertainty undermines the ability of administrative agencies to rely upon this device ex ante and thus strengthens the separation between the ex ante requirement that agencies abide by the law and the ex post power of courts to refrain from vacating unlawful acts.

B. Constitutional Law

In the area of constitutional law, an interesting example of judicial protection of bad reliance can be found in the extension of under-inclusive statutes. When a court reviews a statutory provision that grants certain benefits or entitlements to one group but not to another and finds that it violates the equal protection requirement, it can essentially choose between two courses of action. The first is to abrogate the under-inclusive statute. The second is to order that the statute shall also apply to the hitherto excluded group, and thereby "repair" its unlawfulness.[121] Courts have often preferred the second option when they wished to protect the reliance interest of members of the group originally covered by the statute.

This was the situation in various cases involving the discriminatory distribution of social security benefits. In the 1975 case *Weinberger v. Wiesenfeld*, for example, the appellee challenged a provision of the Social Security Act that authorized "child in care" payments to the widows of wage-earning men, but not to the widowers of wage-earning women.[122] The Supreme Court held that this provision violated the right to equal protection secured by the Due Process Clause of the Fifth Amendment since it unjustifiably discriminated against female wage earners who were required to pay social security taxes by affording them less protection for their survivors than was provided for male wage earners.[123] The Court affirmed the New Jersey District Court's decision to enjoin the Secretary of Health, Education, and Welfare from denying benefits under the provision solely on the basis of sex and to order the payment of benefits to the appellee for all periods during which he would have qualified but

120. *See, e.g.*, *Report to the House of Delegates*, ABA Recommendation No. 107B 5–8 (1997) (offering guidelines for the use of remand without vacation).

121. *See* Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring opinion) ("Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.").

122. Weinberger v. Wiesenfeld, 420 U.S. 636, 637 (1975).

123. *Id.* at 642–53.

for the sex-based discrimination.[124] In so doing, the Court in effect "wrote into the statute the fathers Congress had left out."[125]

In *Wiesenfeld*, however, as well as in a number of other decisions that it delivered during the 1970s that effectively enlarged the coverage of discriminatory federal benefits statutes,[126] the Court did not explicitly address its authority to extend an under-inclusive statute, nor did it explicitly discuss the justifications for doing so.[127] It was only in the 1979 case of *Califano v. Westcott* that the Court explicitly recognized for the first time its authority to expand rather than abrogate an under-inclusive statute, and noted that this remedy could be justified, *inter alia*, by the need to protect legitimate reliance.[128] In that case, the Court unanimously held that Section 407 of the Social Security Act, which provided welfare benefits to families with dependent children when those children were deprived of parental support because of the unemployment of the father, but did not provide such benefits when the mother became unemployed, violated the constitutional right to equal protection.[129] All nine judges agreed that in such situations, the Court had the authority to choose between extension and invalidation of the unlawful act.[130] The majority held that in the circumstances of the particular case extension would be the appropriate remedy. According to the majority opinion, the main reason for choosing extension over nullification, in that case, was that "[a]pproximately 300,000 needy children currently receive [benefits under Section 407] . . . and an injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect."[131]

The minority in *Westcott* asserted that in that particular case, nullification of the discriminatory section was the appropriate remedy. It reasoned that it was unclear whether Congress would opt for extension

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124. *Id.* at 638–42.

125. Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 302 (1979).

126. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (equating the eligibility of husbands and widowers for certain social security benefits to that of wives and widows); Califano v. Silbowitz, 430 U.S. 924 (1977) (same); Jablon v. Califano, 430 U.S. 924 (1977) (same); Frontiero v. Richardson, 411 U.S. 677 (1973) (equating the eligibility of spouses of Air Force servicewomen for housing and healthcare benefits to that of spouses of Air Force servicemen); Richardson v. Griffin, 409 U.S. 1069 (1972) (equating the eligibility of children born out of wedlock for certain social security benefits to that of children of wed parents); Richardson v. Davis, 409 U.S. 1069 (1972) (same).

127. The only exception is the separate opinion of Justice Harlan in Welsh v. United States, which was not endorsed by the other judges in that case. *See supra* note 121. For a detailed analysis of pre-Westcott cases in which the Supreme Court tacitly expanded under-inclusive statutes, see Ginsburg, *supra* note 125, at 310–12.

128. Califano v. Westcott, 443 U.S. 76, 92–93 (1979).

129. *Id.* at 83–89.

130. *Id.* at 86–88, 94.

131. *Id.* at 90.

in that case.[132] Addressing the majority's concern about the hardships that may be caused to dependent children if Section 407 were to be nullified, the minority noted that if it wished, Congress could mitigate these hardships by "providing promptly for retroactive payments."[133] This proposition, however, does not sufficiently account for the situation of poor children and families who depend on social security benefits for their daily subsistence. Even if Congress did decide to provide them with retroactive payments, the time gap until these payments were made could be detrimental to them. Moreover, nullification by the court might turn out to be a starting point that affects subsequent legislative choices. As one commentator has observed, "legislative 'reversal' of a court's remedial disposition must overcome the many hurdles inherent in the legislative process that create inertia favoring maintenance of the status quo. Thus, a court's decision can strongly influence the ultimate resolution of the extension/nullification dilemma."[134] In the case of vulnerable groups whose life opportunities would be significantly constrained by the discontinuation of social security benefits, it seems appropriate for the Court to create a disposition in favor of the extension of these benefits.

Another interesting case involving individual reliance upon an under-inclusive provision of the Social Security Act is *Heckler v. Mathews*.[135] In this case, however, the Court did not directly protect reliance by extending an under-inclusive provision, but rather affirmed Congress's decision to protect such reliance. *Mathews* arose out of an earlier case, *Califano v. Goldfarb*, which concerned a statutory requirement of men which did not apply to similarly situated women to prove dependency upon their wage-earning retired or disabled spouse in order to be entitled to certain social security benefits.[136] The Court in *Goldfarb* held this male-only dependency test to be unconstitutional under the Fifth Amendment Equal Protection Clause and invalidated it, thereby extending the circle of individuals entitled to spousal benefits.[137] In order to accommodate the financial implications of this extension (estimated at $190 million in 1979), Congress added a "pension offset" to the Social Security Act, which ordered that spousal benefits be reduced by government pensions.[138] However, in an attempt to protect the reliance interest of those who had planned their retirements on the

132. *Id.* at 94–96 (Powell, J., dissenting opinion).

133. *Id.* at 96.

134. *See* Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1187 n.7 (1986).

135. Heckler v. Mathews, 465 U.S. 728 (1983).

136. Califano v. Goldfarb, 430 U.S. 199, 201–02 (1976).

137. *Id.* at 202.

138. *Mathews*, 465 U.S. at 732.

assumption that they would receive full, unreduced spousal benefits under the pre-*Goldfarb* legislation, Congress exempted this group from the pension offset arrangement for a five-year grace period.[139] Inevitably, this exemption meant that the dependency test, which had been found unconstitutional in *Goldfarb*, was temporarily reincorporated into the Social Security Act.[140] Anticipating the possibility that this might lead to judicial invalidation of the exemption, Congress added a severability clause that provided that in that case, the exemption, and only the exemption (rather than the entire offset arrangement), should be nullified (rather than extended to nondependent men retiring during the five-year period).[141]

As Congress anticipated, the offset exemption led to further litigation. In *Mathews*, the appellee argued that the application of the pension offset provision to nondependent men like himself, but not to similarly situated nondependent women (who were covered by the exemption), violated the equal protection requirement. Since he did not want the exemption to be abrogated, but rather that it be extended to nondependent men or that the entire offset provision be nullified, the appellee argued further that the severability clause was unconstitutional because it denied him an adequate remedy for an unconstitutionally inflicted injury. The Supreme Court unanimously rejected both arguments. It asserted that adequate remedy in the case of under-inclusive benefits was a mandate of equal treatment, which could be accomplished either by extension or by abrogation of the exclusionary benefit. Hence, by precluding the option of extension, the severability clause did not deny an adequate remedy for the injury of unequal treatment.[142] The Court also asserted, however, that in the case before it there was no need to invalidate the benefit granted by the exemption provision. The Court explained that the gender-based classification created by the exemption was substantially related to the achievement of an appropriate goal, namely, the protection of legitimate reliance, and therefore survived equal protection scrutiny.[143]

The *Mathews* case is illuminating for the study of judicial protection of bad reliance for three main reasons. First, it demonstrates the importance that both Congress and the Court attach to protecting legitimate reliance. The Court in *Mathews* endorsed the government's

139. *Id.* at 733.

140. *Id.*

141. *Id.* at 734. The Severability Clause read: "If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid." *Id.*

142. *Id.* at 737–40.

143. *Mathews*, 465 U.S. at 744–50.

position that "it is a significant and salutary goal to secure the retirement plans of our Nation's workers who, in good faith, had long and reasonably relied on the provisions of the Social Security Act."[144] The Court further emphasized that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification for the statute at issue here."[145] In only a few other cases did the Supreme Court so definitively acknowledge the importance of protecting reasonable reliance upon an unlawful act. While this acknowledgment did not form part of a judicial decision to uphold the consequences of an act that the court declared unlawful in the very same case, it is nevertheless instructive for other cases.

Second, *Mathews* provides an effective warning about the possible risk to the rule of law presented by the judicial practice of protecting reliance upon unconstitutionally under-inclusive statutes by extending rather than nullifying them. It shows how this practice might increase the legislator's incentives to adopt under-inclusive statutes that it knows or suspects to be unconstitutional but nonetheless deems desirable. Knowing that once a court asserts that an under-inclusive provision is unconstitutional, its decision whether to extend or nullify this act is influenced by what it assumes to have been the legislator's preference,[146] the legislator may decide to add to such provisions a specific severability clause which clearly expresses its preference for nullification. Especially after *Mathews*, such a clause can reduce the incentives of potential claimants to challenge the validity of under-inclusive provisions, for they know that in the face of such a specific pronouncement of the legislator's will, the court would probably defer to it and nullify the benefits. Hence, even if the legislator's second-best option is extension rather than nullification of the benefits, it may nevertheless strategically decide to express its desire that the benefits be nullified in the case they are held unlawful, in order to increase the chances that the option that it favors most will prevail.[147]

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144. *Id.* at 746–47.

145. *Id.* at 746 (internal quotation marks omitted).

146. *See id.* at 738 (asserting that the severability clause which clearly expresses the Congress' preference for nullification prevents the court from choosing extension); Califano v. Westcott, 443 U.S. 76, 90 (1978) (mentioning purported congressional intent as one of the justifications for ordering extension rather than nullification); *see also id.* at 94 (Powell J., dissenting opinion) (noting that the Court "should not use its remedial powers to circumvent the intent of the legislature"); Welsh v. U.S., 398 U.S. 333, 361–66 (1969) (Harlan, J., concurring opinion) (noting that extension of the under-inclusive statute examined in that case was in conformity with Congress intent); Caminker, *supra* note 134, at 1187–88 (critically noting that "[t]he current remedial model requires courts to defer to the legislative branch and choose the option that they believe the enacting legislature would have preferred had it known that its intended discrimination was unlawful.").

147. For a similar critique of the effects of *Mathews*, see Bruce K. Miller, *Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of* Heckler v. Mathews, 20 HARV. C.R.-C.L. L. REV.

That said, it should be stressed that courts do not always defer to the legislator's will when choosing between extension and nullification of an under-inclusive act. Instead, they sometimes consider the legislator's intent as only one among several considerations to be taken into account.[148] Therefore, it seems that even if the legislator explicitly expresses its will that an under-inclusive provision be nullified if held unlawful, the court may decide to extend it in order to protect legitimate reliance or to promote other appropriate goals. It can do so by stating that it has balanced the legislator's intent against other considerations and the latter prevailed, or, alternatively, it can adopt a creative interpretation of the legislator's intent, as courts have sometimes done, even when faced with explicit pronouncements of such intent.[149] Another option is to hold that the legislator acted unlawfully when it attempted to dictate the outcomes of the judicial process, and therefore its preferences should be ignored altogether, as the District Court did in *Mathews*.[150] Although this holding was unanimously rejected by the Supreme Court in *Mathews*,[151] it is still possible that in somewhat different circumstances a severability clause urging the nullification of unlawful benefits will be held unconstitutional. In sum, even when the legislator explicitly pronounces its preference for nullification, it cannot entirely bind judicial remedial discretion, nor can it guarantee that the legality of the under-inclusive provision will not be challenged in court. Hence, the legislator may nevertheless be hesitant to adopt an apparently unlawful under-inclusive statute, which exposes it not only to a certain risk that this statute will be extended or nullified against its will, but also to the risk of judicial condemnation, which, as noted above, is in and of itself disturbing.[152]

79, 83 (1985) ("A judicial posture of complete deference to legislative remedial choices carries a dangerous potential for immunizing unconstitutional classifications from judicial review, thereby undercutting the most important function of the federal courts in our constitutional scheme."); *see also* Bruce K. Miller & Neal Devins, *Constitutional Rights Without Remedies: Judicial Review of Underinclusive Legislation*, 70 JUDICATURE 151, 152 (1986) (criticizing the willingness of courts to entertain constitutional challenges to statutes without granting relief to the litigants who brought those challenges forward).

148. *See, e.g.*, *Westcott*, 443 U.S. at 90 (mentioning congressional intent as one of the relevant factors the court takes into account).

149. *See, e.g.*, Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 2 (1988) (contending that the Supreme Court often "use[s] legislative intent to contradict the language of the statute where a literal reading is not kind to the desired result.").

150. The District Court asserted that the severability clause was unconstitutional because it "'is not an expression of the true Congressional intent, but instead is an adroit attempt to discourage the bringing of an action by destroying standing.'" *Mathews*, 465 U.S. at 737.

151. *Id.*

152. *See supra* Part II.A.

In any event, it is noteworthy that in practice, Congress and state legislators do not usually incorporate into under-inclusive statutory provisions specific severability clauses of the kind examined in *Mathews*.[153] Instead, they often adopt general severability clauses, which apply to an entire statute and urge courts not to invalidate the entire benefits scheme that it establishes in the case that one of its provisions is held to be unconstitutional.[154] These general clauses offer no guidance to courts as to whether the legislator prefers extension or nullification of the unconstitutional provision.[155] In most cases, then, the court does not know what remedy the legislator would prefer, and the process of ascertaining the legislator's intent inevitably involves a great deal of speculation and replacement of legislative intent with judicial intent.[156] This brings us to the third lesson to be learned from *Mathews*, or more precisely, from the facts documented in that case. *Mathews* describes a series of complex legislative measures that Congress was bound to take after *Goldfarb* in order to prevent this decision from creating a major fiscal drain on the Social Security trust fund. These measures raise the question whether it is appropriate for a court to decide on the extension of governmental financial benefits. On its face, it is not implausible to argue that such decisions should remain the exclusive domain of Congress, in which the Constitution vests the power of the purse.[157]

Indeed, the separation of powers problem that is generally associated with judicial protection of bad reliance[158] seems to become particularly acute when this protection entails significant governmental spending. Yet this problem should not lead courts to automatically nullify under-inclusive governmental benefits, an outcome that might seriously undermine the personal autonomy of those who depend on these benefits for their daily subsistence. Instead, courts should be aware of the particularly interventionist nature of the remedy of extension, and

153. *See* Caminker, *supra* note 134, at 1188 (noting that "legislatures very rarely enact specific severability clauses; indeed, most probably never consider the possibility that courts will invalidate a particular provision and hence do not deliberate about a 'second choice' remedy.").

154. *Id.* at 1188–89.

155. *See* Nat'l Life Ins. Co. v. U.S., 277 U.S. 508, 535 (1927) (Brandeis, J., dissenting opinion) (noting that a general severability clause "gives no light as to which course Congress would prefer" to remedy under inclusion).

156. *See* Miller, *supra* note 147, at 90 ("[T]he legislative preference 'discovered' by a judge [when an underinclusive statute is held unconstitutional] is likely to be based on little more than her personal assessment of the relative worth of social welfare legislation compared to the demands for fiscal frugality—in other words, on the particular judge's political and social philosophy.").

157. *See, e.g.*, Fletcher, *supra* note 89, at 693 (noting that a court choosing among different remedial decrees, each adequate to vindicate doctrinal rights, is "taking over a political function"); Ginsburg, *supra* note 125, at 317 (asserting that a court "concludes its essentially judicial business" when it declares an under-inclusive statute unconstitutional, and that "the remaining task [of choosing between extension and nullification] is essentially legislative.").

158. *See supra* Part II.B.

make sure to use it carefully. They should take into account the expected costs of their decisions, and should especially beware of extending benefits currently enjoyed by a small group of people to a much larger group.[159]

Finally, courts should also consider the alternative remedial option of nullifying under-inclusive benefits but postponing the nullification for a certain period during which the legislator can decide how exactly it wishes to repair the unconstitutionality.[160] To be sure, this option has its own deficiencies. It bears the risk that legitimate reliance will be denied or that an important benefit regime will be disturbed because of the inertia effect mentioned above, which suggests that the legislator has a tendency to follow the remedial disposition established by the court,[161] or simply because the legislator does not have enough time to introduce a new benefits regime. In addition, postponed nullification might burden the court with deadline extension requests.[162] However, despite deficiencies, setting aside discriminatory benefits while staying the issuance of the court's mandate may, in some cases, represent an appropriate alternative to the dichotomous options of nullification and extension.[163]

C. International Law

In June 1971, the International Court of Justice ("ICJ") delivered an Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.[164] In this opinion, the ICJ asserted that South Africa's continued presence in Namibia after the termination of its Mandate over this territory in 1966 was illegal, and that therefore all measures taken by the Government of South Africa on behalf of or concerning Namibia were illegal and invalid. The court maintained further that this illegality created a duty for other states "to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to

159. *See* Ginsburg, *supra* note 125, at 318 (asserting that a prominent factor in the choice between extension and invalidation should be "the size of the class extension would encompass, in comparison to the size of the class the legislature included.").

160. For a discussion of this remedial option in the context of administrative law, see *supra* note 146.

161. *See supra* note 120 and accompanying text.

162. *See* Levin, *supra* note 12, at 302 (noting that postponing a nullification decision may place upon the court the burden of having to entertain a series of requests for extension of the stay).

163. This alternative seems to be well accepted in Canada. In the famous case of *Schachter*, the Canadian Supreme Court opined that in cases of under-inclusiveness, "the logical remedy is to strike down [the under-inclusive legislation] but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits." *See* Schachter v. Canada, [1992] 2 S. C. R. 679, 716 (Can.).

164. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21) [hereinafter Namibia Advisory Opinion].

[the occupation of Namibia by South Africa]."[165] The court also noted, however, in a passage that has come to be known as the "Namibia Exception," that

> In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[166]

At the heart of the ICJ's advisory opinion on Namibia stands the question of the legal status of formal acts of occupying powers exercising effective control over a territory to which they have no sovereign title.[167] In a sense, this question carries the rule of law dilemma discussed in this Article to its extreme, because it often concerns many or even all of the statutes and regulations governing the lives of people in occupied territories. In the specific case of Namibia, the occupation of this territory by South Africa was considered illegal *per se*, entailing that all formal acts adopted by the Government of South Africa with respect to Namibia were unlawful.[168] In other cases, the foreign occupation of a territory may not be unlawful *per se*, yet some of the acts promulgated by the occupying power may exceed its authority under the international law of occupation.[169] Either way, the principle of *ex injuria jus non oritar*, according to which a violation of international law cannot produce valid legal outcomes, entails

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165. *Id.* ¶ 133. The duty of states not to recognize an unlawful regime and not to give effect to its unlawful actions includes the obligations to abstain from entering into treaty relations with the unlawful regime; to abstain from entering into economic and other forms of relationship with that regime; and to abstain from establishing diplomatic relations with the unlawful regime. *See id.* ¶ 122–24.

166. *Id.* ¶ 125.

167. For a definition of the phenomenon of occupation, see EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 3 (2d ed. 2012) (defining occupation as "the effective control of a power . . . over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.").

168. An occupation regime may be considered unlawful *per se* when the occupying power claims to be the sovereign of that territory or administers it through a "puppet government" in lieu of a direct military administration. *See* BENVENISTI, *supra* note 167, at 4–6 (noting that the occupying power must establish a system of direct military administration in the occupied territory). According to Yaël Ronen, an occupation regime is considered illegal *per se* when its creation involves a violation of a peremptory norm of international law, principally the prohibition on the use of force or the obligation to respect the right of peoples to self-determination. *See* YAËL RONEN, TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW 1 (2011). The South African occupation of Namibia was considered illegal *per se* following the official termination of South Africa's Mandate for Namibia in 1966. *See* S.C. Res. 296 (Jan. 30, 1970).

169. The main constraints upon the authority of occupying powers are set forth in the 1907 Hague Regulations, the 1949 Fourth Geneva Convention, and in international human rights law. *See* BENVENISTI, *supra* note 167, at 11–18.

that the unlawful acts of occupants should be considered invalid. However, as noted by Judge Dillard in the Namibia Advisory Opinion, the application of such a strict legality standard may cause unjustified hardship to the people living under foreign occupation.[170] In the absence of an alternative domestic legal system that applies to them, the only way for these people to realize their personal autonomy—to make life plans and pursue them, *inter alia*, through commercial and personal transactions such as "the registration of births, marriages and divorces,"[171]—is to rely upon the rules that effectively govern these transactions.

The ICJ's articulation of the Namibia exception marked an important development in the international law of remedies. Until then, courts wishing to protect the legitimate expectations of local inhabitants who had relied upon the occupant's legislative measures had often done so by asserting the legality of these measures on the basis of a dubious interpretation of applicable international law norms.[172] For example, in several judicial decisions issued in the aftermath of World War II, courts asserted that occupying powers acted within the confines of their legislative authority under the international law of occupation when they introduced new civil and criminal laws into the occupied territories.[173] In fact, however, the 1907 Hague Regulations that applied to these situations generally forbade such changes in the legal systems of occupied territories.[174] A close examination of the cases in which courts adopted a different—and highly questionable—interpretation of the powers vested in occupants under the Hague Regulations suggests that these courts were motivated by the desire to protect the legitimate expectations of local inhabitants who engaged in private transactions in reliance upon the occupant's laws.[175] Although prompted by good intentions, the strategy adopted by these courts is problematic, because it fails to clarify the real constraints that international

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170. Namibia Advisory Opinion, *supra* note 164, at 167 (Dillard, J., separate opinion) (maintaining that "the maxim *ex injuria jus non oritur* is not so severe as to deny that any source of right whatever can accrue to third persons acting in good faith. Were it otherwise the general interest in the security of transactions would be too greatly invaded and the cause of minimizing needless hardship and friction would be hindered rather than helped.").

171. *See supra* note 164 and accompanying text.

172. *See, e.g.*, Benvenisti & Saliternik, *supra* note 12, at 269 (arguing that courts often ignored the international legality when they sought to protect legitimate reliance).

173. *See id.* at 270–76 (discussing cases in which national courts in liberated territories examined the validity of private transactions conducted in accordance with the occupant's legislation).

174. Article 43 of the Hague Regulations requires occupants to restore and ensure public order and civil life in the occupied territory "while respecting, unless absolutely prevented, the laws in force in the country." *See* Hague Convention (V) Regulations Respecting the Laws and Customs of War on Land, Annex to the Convention Respecting the Laws and Customs of War on Land, art. 43, Oct. 18, 1907.

175. *See* Benvenisti & Saliternik, *supra* note 12 (asserting that national courts in liberated territories primarily sought to uphold expectations of inhabitants who legitimately relied upon the occupant's prescriptions).

law places on the authority of occupying powers, and it also fails to condemn violations of these constraints. It thus runs the risk of inducing future occupants—both "good" and "bad" ones[176]—to exceed the limits of their lawful authority to the detriment of occupied populations.

The Namibia Exception presents a better strategy for protecting legitimate reliance because it recognizes the authority of courts to distinguish between the ex ante legality of governmental acts and the ex post validity of their outcomes. Compared to earlier judicial attempts to validate apparently unlawful occupants' measures that had created legitimate expectations by denying their illegality altogether, the Namibia Advisory Opinion provides weaker incentives for occupying powers to act unlawfully in at least two ways. First, it explicitly acknowledges and condemns violations of international law by the occupying power, and thereby attaches reputational costs to such violations.[177] The Namibia Advisory Opinion is unequivocal about the illegality of the acts promulgated by the South African Government in the course of its occupation of Namibia.[178] Although it maintains that some of these acts should be given legal effect, it emphasizes that this exception does not implicate the legality, but only the validity, of these acts.[179]

Second, the Namibia Advisory Opinion leaves some uncertainty as to which types of unlawful acts can yield valid outcomes and under what circumstances. The Opinion does not provide any general definition of unlawful acts that should be given legal effect. Instead, it mentions several examples of such acts ("such as, for instance, the registration of births, deaths and marriages"),[180] and adds to them a somewhat obscure qualification phrase ("the effects of which can be ignored only to the detriment of the inhabitants of the Territory.").[181] This formulation of the Namibia Exception as an open-ended "catalogue" allows considerable discretion to courts to adapt it to the particular circumstances of future cases.[182] In so doing, it also undermines the ability of occupants to rely upon the ex-post validation of unlawful acts.

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176. *See supra* note 59.

177. *See supra* Part II.A.

178. *See* Namibia Advisory Opinion, *supra* note 164, ¶¶ 118–19 (stressing that South Africa is responsible for having created and maintained an illegal situation, and that other states must recognize this illegality and refrain from lending any support to South Africa with reference to its occupation of Namibia).

179. *Id.* ¶ 125 (maintaining that certain acts should be validated notwithstanding their illegality).

180. *Id.*

181. *Id.*

182. *See* Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165, 184 (2015) (arguing that norms articulated in the form of catalog are dynamic and tend to "develop through a process of accretion.").

In recent years, the European Court of Human Rights ("ECtHR") has taken up the ICJ's (implicit) invitation to continue to develop the Namibia Exception in a series of cases concerning alleged human rights violations committed by the Turkish Republic of Northern Cyprus ("TRNC").[183] In these cases, the ECtHR asserted that the applicants had to comply with the requirement to exhaust domestic remedies before applying to the ECtHR.[184] The court rejected the applicants' claim that this requirement could not apply to them because it entailed recognition of the authority of the courts established and administered by the unlawful TRNC regime.[185] Relying on the Namibia Exception, the ECtHR explained that in order to "avoid in the territory of northern Cyprus the existence of a vacuum in the protection of . . . human rights," the *de facto* authority of TRNC courts and other formal institutions should be recognized "for the limited purpose of protecting the rights of the territory's inhabitants."[186] For similar reasons, the ECtHR also recognized the power of the TRNC government to enact and enforce criminal laws.[187]

The ECtHR's interpretation of the Namibia Exception calls for a broad ex ante recognition of the legislative and adjudicative authority of an illegal regime. This approach expands the scope of the Namibia Exception, which seems to have originally been limited to the ex post recognition of unlawful acts that had already been relied upon.[188] While the expansive approach to *de facto* authority has its pragmatic merits, from a rule of law perspective this approach is problematic: it provides strong assurances to *de facto* governments that their unlawful measures will be recognized as valid, and thereby encourages them to entrench their control over the territories they occupy. At the same time, it also encourages the local population to rely upon the occupant's laws and institutions rather than, for example, turn to alternative institutions such

183. The TRNC was proclaimed by the Turkish-Cypriot community of northern Cyprus in 1983, following the 1974 Turkish invasion into the island. No state except Turkey recognized the TRNC as a state, and the TRNC is widely considered an unlawful occupation regime. On the TRNC and its legal status, see Loizidou v. Turkey, App. No. 15318/89, Eur. Ct. H.R. 1, 5 ¶¶ 16–17, 19–23 (1996).

184. *See* Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R. 1, 25–27 ¶¶ 93–98 (2001); Demopoulos and Others v. Turkey, App Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 21819/04, 2010-I Eur. Ct. H.R. 1, 30–32 ¶¶ 92–96 (2010).

185. *See* Cyprus, Eur. Ct. H.R. (2001)1 at ¶ 83; Demopoulos, 2010-I Eur. Ct. H.R. at ¶ 92.

186. *See* Cyprus, Eur. Ct. H.R. (2001) 1 at ¶¶ 91–92; *see also id.* ¶ 96; Demopoulos, 2010-I Eur. Ct. H.R. 365 at ¶¶ 92–96.

187. *See* Foka v. Turkey, App. No. 28940/95, Eur. Ct. H.R. ¶ 83 (2008); *see also* Protopapa v. Turkey, App. No. 16084/90, Eur. Ct. H.R. 1, 20–21 ¶ 94 (2009) (recognizing the authority of TRNC courts to hold criminal trials).

188. *See* Ariel Zemach, *Frog in the Milk Vat: International Law and the Future of Israeli Settlements in the Occupied Palestinian Territories*, 30 AM. U. INT'L L. REV. 53, 85 (2015) (noting that the Namibia Exception originally referred only to ex post facto recognition of acts of routine administration).

as the ECtHR. In other words, this approach gives up the second element of the two-tier strategy (the exercise of broad remedial discretion that increases uncertainty), and retains only the first element (formally acknowledging and condemning illegality), which, as noted above, is not always sufficient for creating effective deterrence.[189]

In addition to using the Namibia Exception to accord ex ante validity to unlawful governmental acts, the jurisprudence of the ECtHR may also pave the way for another possible extension of the Namibia Exception. Under this extension, the Namibia Exception may be used not only to validate acts "the effects of which can be ignored only to the detriment of the inhabitants of the [occupied] [t]erritory,"[190] but also acts whose validation would have serious adverse effects on some of these inhabitants. The case that most strongly implies such extension is *Demopoulos v. Turkey*.[191] The applicants, in this case, were a group of Greek Cypriots who had fled from the northern part of Cyprus as a result of its occupation by Turkey and had left their immovable property behind. After asserting that the applicants were required to exhaust domestic remedies within the TRNC, the ECtHR turned to examining whether effective domestic remedies were actually available to them. The applicants argued that the mechanism established by the TRNC to address property claims of displaced Greek Cypriots did not provide the latter with effective redress *inter alia* because it generally denied the right of original owners to restitution, and instead offered them monetary compensation.[192] The court dismissed this claim, noting that restitution may not be the appropriate remedy given the fact that many years have passed since the applicants or their predecessors lost their possession over their property, and that during these years the property may have changed several hands.[193] In these circumstances, the court explained, restitution may result in the "forcible eviction and rehousing of potentially large numbers of men, women and children" and may, therefore, be "arbitrary and injudicious."[194]

In discussing the appropriate remedy for dispossessed Greek Cypriots, the ECtHR did not explicitly mention the Namibia Exception. However, the reasons that the court provides for allowing discretion to TRNC/Turkey to deny restitution seem to resonate with the logic of the Namibia Exception. They suggest that notwithstanding the illegality of the expulsion of Greek Cypriots from northern Cyprus and of the

189. *See supra* Part II.
190. *See supra* note 164 and accompanying text.
191. Demopoulos, 2010-I Eur. Ct. H.R. 365.
192. *Id.* ¶ 106.
193. *Id.* ¶ 111.
194. *Id.* ¶ 116.

transfer of their houses to Turk Cypriots and mainland Turks,[195] the latter should be allowed to stay in these houses in order to save them the hardship of forcible eviction and rehousing. The idea that the Namibia Exception may apply to situations of conflict-induced mass displacement followed by the transfer of abandoned property to the hands of "loyal" population deserves meticulous consideration. On the one hand, it can do justice with current dwellers who have settled in the empty houses of displaced persons in accordance with the laws of their country and have lived there for many years.[196] On the other hand, it is doubtful that the ICJ created the Namibia Exception with the intention of protecting the reliance interests of the dispossessors at the expense of the dispossessed. In fact, it seems that the Namibia Exception was intended to apply only to private acts such as the registration of marriages and divorces, as opposed to public acts such as the mass reallocation of property rights.[197] Extending the scope of the exception to such acts may provide to occupying powers particularly undesirable incentives to engage in serious violations of international law such as the deportation of the local population and the implantation of settlers in the occupied territory.[198] These conflicting considerations suggest that if a court considers the possibility of protecting the expectations of current possessors despite the unlawfulness of the original expropriation, it must carefully balance all relevant factors and risks, including the circumstances of the unlawful

195. The abandoned property of Greek Cypriots who fled from the northern part of Cyprus to the south was expropriated by the TRNC Government in accordance with Article 159(1)(b) of the 7 May 1985 Constitution of the TRNC. Thereafter, the TRNC Government granted rights in the expropriated property to Turkish Cypriots who fled from the south to the north as well as to mainland Turks who settled in northern Cyprus with the support of the Turkish government. *See* Yaël Ronen, *Status of Settlers Implanted by Illegal Regimes*, *in* 80 BRITISH YEARBOOK OF INTERNATIONAL LAW 194 (James Crawford & Vaughan Lowe eds., 2008).

196. In *Demopoulos* the ECtHR does not clarify whether current dwellers should meet some good faith standards in order to be protected from evacuation. However, according to some commentators, good faith is a necessary condition or at least an important consideration. *See, e.g.*, BENVENISTI, *supra* note 167, at 313 (asserting that "the good faith of the individual who benefited from the consequences of the breach is a necessary condition for upholding her claim."); Ronen, *supra* note 195 (noting that the Namibia Exception can plausibly be understood to apply only to persons acting in good faith, and that according to this interpretation, the expectations of settlers should be protected if they came into the occupied territory under compulsion or in ignorance of the legal situation).

197. This position was held by Judge de Castro in his separate opinion in the Namibia Advisory Opinion. Judge de Castro drew a distinction between private acts (such as marriages and registrations in the civil registries or in the Land Registry) and public acts ("relating to public property, concessions, etc."), and maintained that the Namibia Exception applied only to the former. *See* Namibia Advisory Opinion, *supra* note 164, at 218–19 (de Castro, J., separate opinion); *see also* Yaël Ronen, *Non-Recognition, Jurisdiction, and the TRNC Before the European Court of Human Rights*, 62 CAMBRIDGE L.J. 534, 537 (2003) ("[I]t is usually thought that the main thrust of the Namibia opinion is in the context of domestic, private law matters").

198. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 75 U.N.T.S 287 (prohibiting the transfer of local population and the implantation of settlers).

dispossession, the time that has elapsed since it occurred, the current situation of the dispossessed, the degree of responsibility of current possessors, and the possible impact of restitution on peace and stability in the territory at stake.

CONCLUSION

This Article has made two main normative claims. The first claim concerns the question of when courts should protect individual reliance upon unlawful governmental acts. The Article has argued that courts should generally refrain from protecting such reliance given the negative effects that this protection—which usually entails the validation of an unlawful act—may have upon the rule of law. However, the Article has also argued that in cases where reliance upon an unlawful act was the only or almost the only way for the reliant party to realize her personal autonomy—such reliance should nevertheless be protected.

The second claim concerns the question of how courts should protect bad reliance. The Article has argued that courts should attempt to mitigate the adverse effects that the validation of unlawful acts may have on the rule of law and in some cases also on the rights and interests of third parties. The Article has suggested that courts can do so by adopting a two-tier strategy that includes, first, explicit acknowledgment and condemnation of unlawful governmental behavior, and, second, the exercise of broad discretion regarding the appropriate means for protecting bad reliance in each case. The first tier improves the ability of good governmental authorities to comply with the law by clarifying the law's requirements, and it reduces the incentives of bad governmental authorities to violate the law by attaching reputational costs to such behavior. The second tier further reduces the incentives of governmental authorities to violate the law by creating uncertainty as to whether and how their unlawful acts will be given legal effect. At the same time, it allows courts to tailor remedies to the particular circumstances of each case and thereby do more justice at less cost.

The normative claims have then been assessed against the jurisprudence of domestic and international courts in public law cases involving bad reliance. This analysis suggests that, although they did not explicitly invoke it, the decisions of courts to protect bad reliance have been influenced by the personal autonomy rationale. Thus, in several cases, courts justified the validation of an unlawful act by mentioning the strong dependency of the reliant parties upon it. The case law analysis also shows that when protecting bad reliance, courts have often adhered to the logic of the two-tier strategy: they explicitly condemned the illegality of the relevant governmental act and at the same time asserted their authority to give it legal effect through the use of various remedial devices.

Finally, the analysis has also demonstrated the problems and risks associated with the protection of bad reliance, including the possible intrusion of courts into the domains of the executive and the legislature, the ability of sophisticated governmental authorities to act strategically to thwart judicial scrutiny of their measures, and the potential adverse effects on third parties. These difficulties emphasize the need for further examination and theorization of the problem of bad reliance and of the possible judicial responses to it. Such inquiry can contribute to the ability of courts to create justice ex post without undermining the authority of the law ex ante, or in other words, to settle hard cases without making bad law.

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