http://www.harvardlawreview.org/media/pdf/lobel.pdf
http://www.harvardlawreview.org/issues/120/february07/Article_3507.php

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

120 Harv. L. Rev. 937 (2007)

By Orly Lobel

Abstract

The limits of law in bringing about social change have long preoccupied legal thinkers. **Recent schools of thought have built upon the critical understanding of these limits to produce a body of literature that privileges extralegal activism. These writings present alternatives to the path of legal reform, purporting to avoid the problems of cooptation and deradicalization that hindered earlier legal activism. Three extralegal focal points emerge in this literature: *first*, a move from professionalism to "lay lawyering"; *second*, a move from the legal arena to an autonomous sphere of action; and third, a departure from formal legal norms to softer, informal normativities.** This Article demonstrates how these recent developments have drawn erroneous conclusions from critical understandings about the cooptive risks of legal strategies. In particular, **proposed alternatives to legal reform strategies fail to recognize ways in which they are frequently subject to the same shortcomings they seek to avoid by opting out of the legal arena**.
(p. 937)

…**This Article demonstrates how extralegal activism proponents misrepresent alternative avenues of activism as solutions to cooptation concerns by overlooking the risks of cooptation present in extralegal activism**. Consequently, a counter "myth of engagement" is reified by the rejection of the "myth of law." **Not only is the idea of avoiding legal strategies as a means of social change misdirected, but such a construction also conceals the ways in which the law continues to exist in the**

background of the envisioned alternatives. Thus, earlier critical insights about the ongoing importance of law in seemingly unregulated spheres are lost in the contemporary message. Further, **the idea of opting out of the legal arena fails to recognize a reality of growing interpenetration and blurring of boundaries between private and public spheres, for-profit and nonprofit actors, and formal and informal institutions. Most importantly, a theory of avoidance contributes to a conservative rhetoric about the decline of the state, the necessities of deregulation, and the inevitability of mounting inequalities**. ***The Article reveals a contemporary false equation of formal legal reform avenues with a conservative status quo and of informal — that is, extralegal — avenues with transformative progress***. **The movement to extralegal activism has unwittingly aligned itself with concepts such as civil society revivalism, informality, and nongovernmental norm generation. All of these concepts are associated with decreasing commitments of the state, privatization, deregulation, and devolution of governmental authority in the social arena**. All three brands of extralegal strategies reflect not only disillusionment with and disappointment in the legal system as a potential engine for social reform, **but also imply path dependency with current economic realities and shifting commitments of the state in an era of globalization**.
(pp. 941-942)

…**Linking historical examples from the labor movement and the civil rights movement to contemporary social movement and public interest literature**, the Article charts a nuanced map of legal cooptation critiques, which include distinct claims about resources and energy, framing and fragmentation, lawyering and professionalism, crowding-out effects, institutional limitations, and legitimation. **The Article argues that the contemporary manifestation of a critical legal consciousness has eclipsed the origins of critical theory, which situates various forms of social action on more equal grounds. The new extralegal truism, which rejects legal reform as a transformative path for social change, consequently risks reinforcing the very account that it sets out to resist — *namely, that the state is no longer able to ensure socially responsible practices in the twenty-first-century economy***.

…**It is important for next-generation progressive legal scholars, while maintaining a critical legal consciousness, to recognize that *not all extralegal associational life is transformative***. **We must differentiate, for example, between inward-looking groups, which tend to be self-regarding and depoliticized, and social movements that participate in political activities, engage the public debate, and aim to challenge and reform existing realities.231** We must differentiate between professional associations and more inclusive forms of institutions that act as trustees for larger segments of the community.232 As described above, **extralegal activism tends to operate on a more divided and hence a smaller scale than earlier social movements, which had national reform agendas**. Consequently, within critical discourse there is a need to recognize the limited capacity of small-scale action. We should question the narrative that imagines consciousness-raising as directly translating into action and action as directly translating into change.
(pp. 986-987)

…Indeed, **it is questionable whether forms of activism that are opposed to programmatic reconstruction of a social agenda should even be understood as social movements. In fact, when groups are situated in opposition to any form of institutionalized power, they may be simply mirroring what they are fighting against** and merely producing moot activism that settles for what seems possible within the narrow space that is left in a rising convergence of ideologies. The original vision is consequently coopted, and contemporary discontent is legitimated through a process of self-mystification.

V. RESTORING CRITICAL OPTIMISM IN THE LEGAL FIELD

"La critique est aisée; l'art difficile."

To critique the ability of law to produce social change is inevitably to raise the question of alternatives. In and of itself, the exploration of the limits of law and the search for new possibilities is an insightful field of inquiry. **However, the contemporary message that emerges from critical legal consciousness analysis has often resulted in the distortion of the critical arguments themselves**. This distortion denies the potential of legal change in order to illuminate what has yet to be achieved or even imagined. Most importantly, cooptation analysis is not unique to legal reform but can be extended to any process of social action and engagement. **When claims of legal cooptation are compared to possible alternative forms of activism, the false necessity embedded in the contemporary story emerges — a story that**

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

In the triangular conundrum of "law and social change," law is regularly the first to be questioned, deconstructed, and then critically dismissed. **The other two components of the equation — social and change — are often presumed to be immutable and unambiguous**. **Understanding the limits of legal change reveals the dangers of absolute reliance on one system and the need, in any effort for social reform, to contextualize the discourse, to avoid evasive, open-ended slogans, and to develop greater sensitivity to indirect effects and multiple courses of action**. Despite its weaknesses, however, law is an optimistic discipline. It operates both in the present and in the future. Order without law is often the privilege of the strong.
(pp. 987-988)