Conflicts Between American and European Views of Law:
The Dark Side of Legalism

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INTRODUCTION

What is the role of potential legal checks on the exercise of national power in exceptional contexts, such as those involving the use of force or response to serious security threats? In regularly recurring legal contexts, such as contract disputes, the law can work itself out over similar, repeating cases. The evolution of legal principle can occur through a trial and error process, in which learning from experience plays an important role. In the contexts with which this Symposium deals, however, each specific set of circumstances is relatively singular, and the stakes—security stakes, political stakes, international relations stakes—could not be higher. The issue we face, therefore, is the appropriate role of law and legal institutions in relatively unique settings

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where the costs of politico-legal systems getting the answer "wrong" are momentous and not easily reversible.

I approach these issues as an outsider, a specialist in Constitutional Law with limited exposure to the long history of discussion of these issues in the international context. The Symposium, therefore, provokes, for me, more general questions that transcend the specific issues raised in various individual papers. These questions focus on the characteristics of law itself—and of legal institutions—as potential tools for channeling and regulating the exercise of power in these exceptional contexts. These legal tools should not be seen as our only means of potentially regulating these contexts; indeed, a central task must be comparative assessment of law as against other potential means of engaging these problems. In the case of Michael Glennon's paper, these questions arise in the context of ex ante legal checks on the use of force as regulated through the United Nations Charter. In Lee Casey's and John Yoo's contributions, the issue is ex post legal checks on exercises of power, through nascent international legal institutions, such as the International Criminal Court (ICC), or perhaps through a more aggressive role for domestic courts in the institutional modes of investigating and responding to terrorism.

The question of how we understand law itself—its virtues and limitations—is a crucial but under-appreciated issue in an effort to understand the tension between the United States and European countries today. To understand that tension, it appears to me, it is not enough to recognize that the Europeans currently have a strong material interest in rules that require resort to multilateral institutions, while the United States might perceive itself to have material interests that point the other way. For beyond these material interests, it is also the case that Europeans and others have an ideological stance towards law and legal institutions that is quite different from the ideological stance many academics, government actors, and others in the United States bring to discussions about law in the context of international legal institutions.

We must keep in mind that in the last 20 years, the legalization of politics through constitutional law or public law has exploded within the domestic legal systems of Europe and much of the rest of the world—whether under the Canadian Charter of Rights and Freedoms (1982), the New Zealand Bill of Rights Act (1990), or the rise of constitutional democracy in many countries. These transformations have inspired dramatically activist courts in many countries and across national boundaries. Indeed, even England, long the bastion of parliamentary sovereignty, has now enacted the Human Rights Act of
1998, which domestically incorporates much of the European Convention on Human Rights. Thus, we are living at a moment when the turn to legalism and to judicial institutions—an expansive domain for law and legal institutions in regulating among the most political and foundational issues of domestic systems—has blossomed across the domestic legal systems of these countries. The demand for multilateral judicial institutions, then, such as the International Criminal Court, is not just the reflection of a demand for multilateral institutions per se. This demand reflects, I believe, a broader belief in the domain of legalization and judicialization itself.

It is quite intriguing—and enormously significant in this context—that the attachment to legalism and judicial institutions outside the United States is reaching this peak in the same period in which within the United States there has been general and increasing skepticism about judicial institutions, or at least an increased emphasis on the costs as well as benefits of using courts to address domestic issues analogous to those involving exceptional contexts in international relations. This skepticism or disaffection has become more pervasive within the domestic legal and political culture of the United States over the last twenty or so years; this skepticism is manifested in pressures for a reduced role for courts in the United States and more uncertainty about the extent to which law can effectively regulate various subjects. These domestic transformations are particularly noteworthy because the United States historically has been organized around a culture of legal rights, and a central role for legal institutions in enforcing such rights through institutions like judicial review and constitutionalism, more so than any other Western democracy. Yet as we reflect on our own experience with judicial institutions and with formal legal texts, we (to the extent one can generalize in this way) have sought to revise or modify or even reject the expansive judicialization and centralized, command-and-control legal regulation, that has characterized the United States.

What accounts for this more skeptical view of the domain of law and judicial institutions within the United States over the last generation? And how might that skepticism bear on current tensions between Europe and the United States over the role of law in international affairs? Though these are speculative matters, pursuing these questions can afford a deeper understanding of the current tensions over international law and legal institutions between the United States and the European countries.

Consider the question of what might be said against the view that law
and courts must be the mechanisms by which political power is channeled or overseen. To explore that question, we need a more functionally-oriented and precise analysis of how law has worked as an actual social practice. Such an analysis seeks to penetrate beyond abstract discussion of “the rule of law” and its virtues, or the problems of “the counter-majoritarian” nature of law in democracies, and similarly vague abstractions. Instead, we should focus on the specific consequences of turning to law and courts in various contexts—especially the exceptional, singular contexts we are dealing with here—and the comparative advantages and disadvantages of law and courts versus other means of addressing the problems at issue. If the American stance toward courts has become more self-conscious of the limitations of law, one reason is that we have become more excruciatingly aware of the potential costs of turning to courts to resolve certain types of problems. If that is so, then for Americans to engage more effectively with European critics on these issues—or for internal, domestic debate as well—we need to articulate a fuller account of the vices of judicial institutions or formal legal texts, particularly in the kind of contexts at issue here. These vices are often the flip-sides of the virtues of legalism in the more routine contexts. The danger, however, is that the very qualities that make law an appealing tool in these routine contexts will obscure the ways in which those same qualities can make law more problematic in exceptional and singular contexts.

I will identify four aspects of what I call the dark side of legalism. There are others, of course; these are not necessarily the most important ones. I have emphasized certain of these vices, in fact, because they are less obvious and more easily ignored. None of what I note here is meant to cast doubt on the role of international law in the many routine contexts in which it has undoubtedly made major contributions to human welfare. Indeed, none of what I say is meant to suggest that, even in exceptional contexts, law and courts cannot play productive roles. But based on American experience with our domestic judicial institutions, I want to stress certain risks of turning to law and courts that discussions of international law and institutions must, at the least, come to terms with if the gap between American and European understandings are to be diminished. As an outsider to these issues in the international context, I recognize that the deep tradition of scholarly discussion in the field might well have already struggled with these issues in detail. But my experience in current academic settings is that more attention to these issues would remain productive.
THE DARK SIDE OF LEGALISM

I. LAW AND THE PURPORTED VIRTUES OF TRANSPARENCY AND PROSPECTIVITY

Clarity and transparency are, of course, virtues of law in many, indeed perhaps most, contexts. They are general virtues of democratic political orders. But they are not virtues in all contexts. Like all values, the importance, interpretation, and priority of these values compared to other values depends upon the specific context at issue.

In exceptional contexts, such as those at issue here, it is not clear that "virtues" like ex ante clarity of legal rules are, in fact, always virtues. Indeed, the way in which certain conceptions of law insist on specifying generally applicable, knowable, clear rules of law in advance of their application might, in these contexts, undermine the very objectives "rule of law" proponents have in mind in touting these virtues.

Consider a concrete, recent, momentous example: the United States' decision, through Executive Order of the President (Bush Order), to potentially employ military tribunals for the trial of certain categories of "enemy combatants." The important question for present purposes is why the government might have issued the Bush Order before the United States had captured any specific person. Why not wait instead and see who had been captured before deciding in advance what kind of proceeding—criminal, military, or other—might be best justified for that specific figure and context. After all, surely there would be (or might be) a difference between how to try Osama bin Laden rather than a mid-level al Qaeda operative. The Bush Order was issued when it seemed an imminent possibility existed of the capture of the highest level al Qaeda figures, including bin Laden. But again, why the perceived need to issue such an order in advance of the actual capture of any specific person, given that the person at issue might affect the sense of what forum and what measures were appropriate? The answer, I believe, is a culture of legality that is now pervasive, yet unexamined. Its premises are taken for granted so much that they become the "ways things must be done" without much self-conscious reflection. The background fear that animated the rush to an Executive Order invoking military tribunals was that there would be a deep violation of "law" in not having rules specified in advance as to what would be done, institutionally and procedurally, with anyone the United States might capture. Thus, the government reacted to the perceived paramount virtues associated with the idea of the rule of law itself, virtues that required clear rules spelled out ex ante for dealing with this highly charged, complex context.

But there are costs to this vision of law as well: The very generality
of the Executive Order, for example, ungrounded in any concrete knowledge of how and when it might actually be applied, led to great outcry over its potential sweep. Contrast the contemporary approach with the Executive Order issued by President Roosevelt (FDR Order) invoking military tribunals during World War II: that order was drafted after specific individual German agents (some arguably U.S. citizens) had been caught. That is, at the moment the FDR Order was issued, it was clear to whom it would be applied. The FDR Order was, of course, not the subject of controversy at all.\(^1\) There are many reasons for the different response to the Bush Order. But I believe among those reasons was that the Bush Order, unlike its predecessor, was issued in the absence of any specific context to which it was going to be applied. That “law in a vacuum” approach generated the “parade of horrible” concerns, in which the Executive Order could, by its own terms, be imagined as something that would apply to a large array of potential scenarios. Ironically, of course, in the nearly one-and-half years since it was first announced,\(^2\) the Executive Order has not yet been applied in a single case.

The perceived need to issue this Order in advance of any immediate case to which it would be applied inevitably led to an Order whose generality and transparency produced an outcry, ironically, about that very generality. The source of the pressure to act in advance with clear rules was, I suggest, a reflection of the power of a culture of legality that leads government actors and others to believe that there is some fundamental violation of law if rules are not clearly specified in advance of the context to which they will apply. Again, the benefits of general, prospective, clearly-specified rules are undoubtedly overwhelming in many—perhaps most—contexts. Transparency, clarity, and generality are genuine legal virtues, but they are virtues in context. For the pressure always to act through such legalized conceptions can also generate enormous and unnecessary costs. That might well have been true with the Bush Order, especially since it has yet to be applied, while many of the domestic and international costs of issuing it have instead been realized. Perhaps it would have been wiser to wait for specific cases to arise that, in the government’s view, justified such an order. While that approach would certainly have been ad hoc, and would


\(^2\) The Order was issued on November 13, 2001. For discussion of key details, see Jack Goldsmith & Curtis Bradley, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249 (2002).
probably have triggered a different set of criticisms, it would also have led assessment of the Order to be made in the context of specific cases to which it was being applied. At the least, we can say there should have been serious consideration of whether the more conventional legalistic conception—which emphasizes transparent commitment of policy through *ex ante* general rules—or a more ad hoc approach tied to specific cases as they arose would have been preferable. My concern is that this deliberation about appropriate choices did not take place or was shortchanged, precisely because the culture of legality is so powerful that we just take for granted that the virtues of legality, such as clarity, generality, and *ex ante* rules, should always be dominant. But in the exceptional contexts we are dealing with here, those virtues might turn out to have unnecessary and substantial costs. At the least, sound policy analysis must not take for granted that what is normally desirable in crafting legal rules is always, in all contexts, equally desirable.

II. LAW AND THE PURPORTED VIRTUES OF CLEAR RULES AND WRITTEN TEXTS

What is the relationship between formal law, reflected in authoritative legal texts, on the one hand, and well-established principles or norms not codified in authoritative legal form, on the other? “Law” is thought to be binding, firm, and relatively clear. This binding nature of law tends to be directly associated with the “written-ness” of law: Law is codified and memorialized in a written text. All of this is often thought to make law “harder” than mere custom. A difference is widely perceived to exist, as a matter of practical action, between written legal texts and practices, customs, and shared understandings as a constraint; formal legal constraints are often perceived as harder, more visible, and hence more binding. International legal discourse has long engaged the debate about the efficacy of “soft law” versus “hard law,” in part because much of international law must, by necessity, depend on softer forms of law than those in the domestic context. Much of that debate, however, seeks to defend the claim that soft law can be a genuine form of constraint, even absent the sanction and enforcement institutions of domestic law. For many, soft law might be a second-best in a regime in which harder forms of law are not available, or an intermediate stage on the way toward an international legal system of harder legal rules. Even in these discussions, differences between hard law and soft law are often unreflectively thought to weigh heavily in favor of hard law over soft law as a constraint on power.
But like any other virtue of law, these virtues conventionally associated with written law should be understood as dependent on the context. In some contexts, unwritten norms can be more effective constraints, precisely because they enable a desirable flexibility for dealing with exceptional contexts involving political power. Let me suggest one, speculative example concerning the international use of force for humanitarian purposes, such as the cases of Haiti, Somalia, Bosnia, Kosovo, and the role of the UN Charter in legally regulating these decisions. Since adoption of the UN Charter, we have a codified, textually embodied, clear legal rule that proscribes state use of force except in case of self-defense against "armed attack." In addition, the UN Charter permits the collective use of force upon decision of the Security Council, though the Charter by its express terms prohibits UN intervention on matters that are "essentially...domestic." These provisions are designed to establish binding legal obligations on all members of the United Nations.

The critical question, for my purposes, is what are the hidden costs that can arise from embodying these principles in legal form in the UN Charter rather than leaving issues of state or collective use of force to be addressed through a system of international relations. That system would not center on a legal text of codified, law-like rules of international order, but would reflect the practices and political understandings of nation-states. The absence of formal, codified law is not the same thing as the absence of all regularity or principle or settled practice. The alternative is not necessarily an anarchic world in which national force is deployed at will. Indeed, advocates of formal legal codification as a solution to problems of political power sometimes trade too easily on an implicit or explicit claim that the only alternative to law is force and chaos. Instead, the alternative to a legal text such as the UN Charter is a world in which limitations on state use of force are left to debate, determination, and enforcement through the system of international relations itself. That is, there is a genuine choice here—one between the forms of hard law and those of softer principles and norms—for a prohibition against the aggressive use of force. The choice is between the greater rigidity (and loss of flexibility) that tends to come with formal codification and the greater flexibility (and opportunity for unprincipled exercise of power) that comes from a less text-bound system of general principles of international relations. Long before the

3. For a wonderful analysis of these provisions and their elaboration in practice, see THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002).
twentieth century, international relations had developed principles of permissible and impermissible wars and means of fighting legitimate wars. Of course, the perceived failure of that system is what led to the creation of the UN Charter in the first place.

It is still too early to judge what the long-term experience under the Charter will amount to. But even if the Charter turns out on balance to be as great an advance in international relations as its framers hoped, we should be aware that there might be costs associated with the legal codification reflected in the Charter. We should ask, for example, whether the multilateral military intervention in Kosovo that eventually took place (or the international intervention that never did take place in Bosnia) would have been easier to bring about—and many more lives have been saved—had the general norm against state use of force or the mechanisms by which collective force was mobilized been left to political debate and practice, rather than being codified into the form of a strong legal rule embodied in the UN Charter. Would a more flexible interpretation of this principle have been easier to achieve if the general "rule" had been left expressed as a norm instead of being turned into a textually embodied, formal rule of international law?

To be sure, counterfactuals of this sort are difficult to assess, especially given the mix of politics and principle in international legal institutional relations. The Kosovo problem tested two aspects of the law embodied in the Charter. First, the Security Council had to decide whether the conditions that justified collective deployment of force were present in the Kosovo context. Second, once the Security Council failed to come to that conclusion, the further decision had to be made whether the collective use of force by NATO, not endorsed by the Security Council, nonetheless complied with the Charter. Resistance to UN intervention and NATO action came primarily from Russia, China, India, and Namibia. These countries argued, based on the express text of the Charter, that the Charter did not authorize collective intervention to prevent human rights violations or to interfere in internal civil wars. These arguments, based on the written principles codified in the Charter, caused lengthy delays in collective intervention to stop the slaughter in Kosovo. After NATO's intervention had succeeded in doing so, legal authorities had to struggle to explain how the unauthorized collective use of force for humanitarian reasons could be squared with the text of the Charter. Thus, some concluded that NATO had indeed "violated strict Charter legality," though this violation was
The Independent International Commission Report on Kosovo, chaired by Judge Richard Goldstone, concluded that the NATO action had been "technically" illegal, but morally justified.

Would collective action to stop the ethnic cleansing in Kosovo have emerged more quickly had the codified provisions of the UN Charter not stood in the way? It is impossible to know, given the relationship between material national self-interest and rule-of-law like considerations in the actions and discourse of states in this area. Would the arguments against intervention have been considered less forceful if the rules of the Charter had not been codified in text but instead existed as softer principles of international relations? If codification of these rules against the use of collective force (except with Security Council authorization, and even then, for perhaps only limited purposes), contributed to inaction or delay in any of these humanitarian contexts in recent years, that would be a serious cost of legal formalization that must be taken into account.

Again, remember that we are dealing with relatively exceptional, singular contexts. The general question is what mix of principle and exception is optimal, given the contexts to which these kind of norms are going to apply—and whether we are more likely to achieve that optimal mix through formal codification of the principles at stake, or by leaving those principles as general principles of the international order. The virtues of law include the clarity and seemingly greater binding nature of written codification. The UN Charter system may well have contributed to stabilizing the post-war world order and, on balance, constituted a major advance. Nonetheless, there can be costs associated with virtues; among those costs is often (as a psychological, sociological, and political matter) reduced flexibility in how the principles might apply to distinct contexts. There is a critical question of whether legalization of norms has, as a dark side, the reduction in flexible interpretation of the underlying norms in new contexts. We ought not to preclude that debate by an overly simple assumption that more law, or more legalization, is always to the good. Perhaps the advantages of general, written rules, despite how over- or under-inclusive they might be—justifies this loss of flexibility; perhaps the relevant actors are likely to be just as appropriately flexible with law as they are with norms. But we need to consider these questions before simply assuming that legalization, clarity, and textual commitment are unadorned virtues.

4. Id. at 181.
5. Id. at 180.
The general theoretical point here is that we need a clear-headed analysis of the costs, as well as the benefits, that follow when a strong norm of international relations, for example, is transformed into a substantive legal rule, embedded in an authoritative legal text, and in contexts outside the UN Charter, enforced through judicial institutions. A common view is that if the substance of the norm and the formal legal rule are the same, there is no dramatic change that takes place by "simply" embodying the norm in a legally binding document. Perhaps there is a belief—in tension with the view that nothing of significance changes—that legalizing the norm will make it more effectively enforced, more binding. Yet that is still a different matter than believing that legalization will have dramatic effects on the substantive content of the norm itself. And that leads to a further confounding feature that makes the simple translation of a general norm, say of international relations, into a formal legal principle—not a neutral act with no effect on the content of the pre-existing norm itself.

Norms, customs, and political practices themselves exist within a complex system in which these norms are applied, enforced, given content, and protected through sanctions. We tend to recognize that a legal rule does not meaningfully exist as some kind of institutionally disembodied, free-floating principle; instead, a legal rule has meaning only insofar as it exists within a system of enforcement that also includes rules of jurisdiction, remedies, and the like, all of which give content to the rule. But the same is true of a norm that exists and is enforced through non-legalized, norm-enforcing processes—like the norms that characterize the politics of international relations. Norms, too, exist, in effect, in a system of jurisdiction: this system as a whole determines who has the power to invoke a norm, in what contexts, and before what other actors. Norms, too, exist in a complex system of remedial discretion—if a norm is violated, complex questions still remain about what is perceived to be an appropriate remedy for the specific violation. Not all "violations" of a norm are given the same remedial consequences: issues of proportionality, mercy, discretion, and the like always remain, just as they do within a legal system.

Once we recognize that a "norm" exists as part of a system of normative structures, it becomes easier to recognize that "legalizing a norm" is not a neutral act—even if the substantive content of the norm and the law are exactly the same. For the effects of legalizing the norm can dramatically alter the actual meaning and content given to that prior norm. This is a point often missed in arguments that ask why countries would resist the legalization and formalization of a norm or a
longstanding practice and custom; if a state genuinely accepts the norm, why would it resist codifying that norm in an authoritative legal text?

But, again, legalization is not a neutral act, unless the legal system imports all the rest of the system within which the substantive norm or practice has previously been given content. Indeed, norms—especially those that regulate in extreme contexts where the stakes are enormous, the events relatively singular—are often fragile balances of diverse considerations. These diverse considerations find reflection not in the substance of the norm itself, which might be stated at a high level of generality and universality, but in the de facto system of jurisdiction, remedies, and the like within which the norm is actually given content. Thus, codifying and legalizing a norm or principle can, in fact, transform the practical meaning and effect of that norm, even when the legal and informal substantive content remains the same.6

To put this in terms of international law issues, the question is what the stakes might be in the transition from "soft law" to "hard law."7 Even if the substantive content of the two is the same, the formalization into hard law can, in practice, alter or influence when the law is enforced, how it is enforced, and when exceptions are recognized. These are further reasons that the move towards legalism, or toward hard law over soft law, is not a neutral act. This is a standard legal realist insight, common to American lawyers and legal academics. Those who resist formalizing into law a strong, pre-existent international practice, custom, or norm are not necessarily obtuse or recalcitrant (though they might be). But codification and institutional enforcement of political custom, practice, and understanding is never a neutral act. Its benefits must always be measured against its potential disadvantages in specific contexts.

III. LAW AND THE PURPORTED VIRTUES OF IMPARTIALITY, INDEPENDENCE, AND THE SEPARATION OF LAW AND POLITICS

A third virtue of the rule of law is relative autonomy and independence from politics, at least from crass partisan politics of the day-to-day sort. But again, we are talking about the role of law in singular, exceptional contexts like the use of force internationally, or the question of what constitutes a war crime. In these contexts, questions

7. For a detailed analytical study of these issues, see Jack Goldsmith's and Eric Posner's contribution to this Symposium.
abound about whether the "independence" of law is, in fact, a good thing, or whether that independence can be maintained.

Recent American experience with the domestic role of an Independent Counsel for the investigation and prosecution of potential crimes by the highest level governmental officers, is a powerful example that tests these questions. Indeed, it is hard to emphasize effectively how much this experience has changed many American views about whether it is either possible or desirable to pursue "independent" legal resolution of politically charged and momentous issues. *Ex ante,* the reasons to create the institution of Independent Counsel seemed convincing to many; it seemed obvious that a political system needed a formal, distinct institutional structure, with all the virtues associated with the strict separation of law from politics, to handle potential crimes at the highest level of government. To those in the thrall of legalism at the time the Independent Counsel was created, the historical fact that the system had managed tolerably well without such an independent office was inconsequential. Yet what the office of the Independent Counsel became in practice disturbed the views of many who had favored the office. This disturbing history was filled with continuing political conflicts over whether the Independent Counsel made these judgments even more political than they had been beforehand; because of the legitimacy thought to follow from an independent legal judgment about whether a high-level governmental official had violated the laws, the judgments of the Independent Counsel—and the pressure to invoke the Independent Counsel process—became all the more politicized. This dynamic culminated in turning one of the most political judgments the American political system can make, whether to impeach the President, into a purportedly "legal" question on which the Independent Counsel would exert extraordinary power. What could be wrong with trying to depoliticize such questions by giving an independent, legal officer a significant role in determining whether there had been legal violations committed?

Yet the role of the Independent Counsel in the Clinton impeachment saga, which some saw as merely the continuation of a highly politicized process and others saw as a more singular event, led American politics to one conclusion: complete bipartisan rejection of this approach. In light of our actual experience with the Independent Counsel, when Congress was asked to renew the legislation that created the Independent Counsel in the wake of the Clinton clash with Independent Counsel Kenneth Starr, Congress overwhelmingly drew the lesson, across partisan lines, that the Independent Counsel experiment had
failed. The office of the Independent Counsel was therefore abolished. In its place, American politics will now return to the practice that prevailed for much of American history before the thirty year Independent Counsel experiment: When high-level government officials are alleged to have committed crimes, those officials will be investigated and prosecuted through the ordinary mechanisms of the Justice Department, unless public pressure demands that an independent counsel be appointed in a particular case.

What are the lessons we can draw from this experiment, and what do they mean? One interpretation is that issues of "law" are so inextricably bound up with questions of politics in certain contexts that the separation between the two domains cannot be maintained effectively. If this is so, then it is also not desirable—indeed, it might be counterproductive—to seek this holy grail of independence. The question of what constitutes an impeachable offense is so profoundly a matter of politics that it is deeply problematic to turn that question into a purely legal judgment and in turn make it independent of politics. Whether it is even possible in theory, it is too difficult to realize this ideal in practice. And precisely because the discretionary judgments involved cannot be made purely legal, the effort to create a legally independent institution to address issues of this sort turns out be misguided. Politics should not have such a dirty connotation: these are political judgments, at some ineliminable level, and for that reason, it is best to keep them tied in some way, at least, to political institutions with political accountability. There might be institutional structures for bringing an optimal mix of law and political judgment to this kind of question, but the effort to turn it into a purely legal subject has been rejected as a matter of American political practice.

Europeans should not underestimate the effect of this experience on American actors. Take the International Criminal Court (ICC) debate: How might the world deal with responsibility for "the most serious crimes of concern to the international community," including "war crimes" and "crimes against humanity"? If we all agree war crimes are bad, and already create ad hoc institutions to punish them, what could be wrong with creating a standing legal institution to do so?

The American experience with the domestic effort to create an Independent Counsel (the eerie closeness of "IC" to "ICC" is, one hopes, merely fortuitous) offers several reasons why many American theorists, in addition to American political actors, are more skeptical of

8. These are the terms used by the Rome Statute of the International Criminal Court in Art. 5.
the ICC than their European counterparts. These reasons are deeper and more general than issues of whether U.S. peacekeeping or military forces might be swept into the ICC net, which has been the primary focus of public debate amongst Americans. First, the debate over the ICC is a good example of the fallacy of framing the choice as one between "law" or "anarchy." Absent an ICC, the world has employed various institutional structures in recent years for sanctioning such violations, including ad hoc legal tribunals created through the UN. There are issues, to be sure, of how effective these alternatives have been, and whether they have more or less perceived legitimacy than a standing ICC would, but that comparative question of different institutional design is sometimes lost in the rhetorical debates over the ICC. Those debates often get framed as if absent the ICC, there is no mechanism at all for holding those who commit war crimes responsible. Second, despite the seeming consensus that the language of "war crime" invokes, judgments about what constitutes a war crime cannot easily be sanitized into pure legal judgments. Perhaps with respect to a small core of the most horrific acts, there will be wide consensus; it is that consensus that underwrites the general bar against such acts. But as soon as we move out of that core, we quickly get to the point where judgments of "war crimes" inevitably blend into judgments that are at least partly political and moral, in addition to legal. The ICC is an effort to draw on conventional legal virtues of independence, impartiality, accountability to law, and the like. But this desire cannot eliminate the political dimensions of these issues; the creation of an institution like the ICC can only transfer control of the resolution of such issues away from politically accountable actors to less accountable, judicial ones.

Yet the political dimensions will creep back in at every level, no matter how much we try to devise legal rules to resolve these issues in advance. Or so the American experience with the Independent Counsel suggests, and so American theorists fear. From the realist perspective so characteristic of American legal thought, it seems simply inevitable that some set of interests will seek to have the actions of Ariel Sharon adjudicated to be war crimes, while other interests will do the same with the actions of Yasser Arafat; and the equivalent of these political conflicts elsewhere will get transformed into legal disputes that various interests will press an ICC to take on as legal violations of international law. Inevitably, the Middle East political conflict, among others, will be quickly reproduced within the ICC, much like the impeachment issue came to be a legal issue for the American Independent Counsel. But should judicial or legal bodies purport to resolve conflicts of this sort?
Legalization assumes that independence—the separation from politics—is an unqualified good. But the underlying issues here irreducibly involve political judgments. As Martti Koskenniemi puts it, in a similar set of concerns about the ICC, judging individual acts of criminal responsibility always presupposes some normative context, but in many cases involving alleged war crimes, it is that very context that is the subject of dispute. As soon as the law tries to assess that larger historical and political context, the law moves into areas of indeterminacy and political conflict. A wholly legal mechanism for trying crimes tries to suppress the inevitable judgments of political morality that must be made. But sound institutional design should perhaps seek, not to deny that reality, but to incorporate it in various ways into the institutional structures for holding responsible those who have committed these kinds of acts.

International bodies and processes can be imagined for addressing those issues that do not involve turning decision-making over to a wholly autonomous, purely judicial institution such as the ICC. We might seek to preserve some role for politics, at least, in judgments that are so inextricably political. One can imagine institutional designs that incorporate some complex mix of political and legal commitments; indeed, that is what we have had in recent years, with the UN authorizing ad hoc legal tribunals in specific contexts. Certain proposals for the ICC would have built more political accountability into the system, with the Security Council required to initiate an action in the ICC. Those were rejected as politicizing the process too much, or in the wrong way, but that does not mean that some other mix of political and legal triggers to action could not be devised. To be sure, there are issues about whether that mix of political and legal input is ideal. And I do not mean to be arguing against the establishment of the ICC per se. Instead, my aim is to raise questions about the current impulse to legalize resolution of all questions of this sort, and to suggest that such questions—whatever else might be behind resistance to the ICC in various arenas—also justify and highlight some of the concern. At the end of the day, the current version of the ICC might be the right approach for particular problems; however, the view that law and legal institutions are always the right answer to highly charged political problems should not be accepted blindly. The effort to substitute law for statecraft requires not genuflection, but serious reflection.

The impulse toward legalization is always in tension with the resolution of conflict through institutions of democratic governance. But in the domestic context, even the most legalized proceedings remain situated within a democratic political order as a whole. There are mechanisms through which democracies keep law and politics in complex relation; it is this structure of the overall political order that gives judicial institutions their legitimacy and facilitates a productive role for law. Some international institutions, including legal ones, continue to find ways of merging law and politics in a way that keeps legal institutions accountable to political ones, even in attenuated form. But the effort to create free-floating legal institutions, in which no governing actors can be held accountable for the inevitable discretionary judgments that they must, with great consequence, make, seeks to free international legal institutions from connections to democratic accountability in a more dramatic way than even the independent courts of democratic states. We should think carefully about the likely consequences of pursuing such a unique elimination of democratic politics from a connection to legal judgments on what are, inevitably, matters with ineliminable dimensions of political judgment at stake.

Based on the more realist sensibility of American legal culture, informed by our experience with efforts to legalize other problems at the intersection of law and politics, Americans are likely to approach issues like the ICC with more concern about the limitations of law than Europeans currently are. This is not a function of the current governing forces in the United States, but of deeper cultural or ideological understandings of the nature and limits of law itself.

IV. LAW AND THE PURPORTED BENEFITS OF RIGHTS

American legal analysis has emphasized the ways in which regulated actors respond to law when the incentives against which law seeks to regulate are powerful. We are by now steeped in predictions of how regulated actors are likely to seek to circumvent the requirements of new law. By circumvention, I do not mean ways of acting illegally to avoid the law. I mean legal measures to minimize the effects of a law otherwise being formally complied with, such as the owner of rent-controlled housing who will decline to make improvements if he or she cannot recover a reasonable return on their investment.

Those steeped in this set of concerns about legal regulation recognize that the formal granting of more legal rights might, for example, lead to
fewer rights existing in practice. The context of terrorism provides one current possible example. As we have struggled with how the law ought to treat those suspected of terrorism, many have come to recognize that we are groping for some model between that of the ordinary criminal context and that of the ordinary war context. The reasons a government may confine suspected terrorists do not parallel the reasons for confining domestic criminals or even prisoners of war. As of now, the particular considerations involving terrorists are reflected in a developing American policy on a distinct category of persons, "enemy combatants"—the question is now to identify the appropriate processes and institutional structures for respecting the legitimate interests of such persons while recognizing the reasons government legitimately seeks to hold such people. Surely, applying the full criminal law model to suspected terrorists would create a framework for greater protection than would be afforded by some intermediate model. But insisting on these greater protections will not necessarily achieve such protections in practice.

The reason is that governments, including liberal, democratic ones, typically believe there to be a higher and different set of stakes at issue in the context of terrorism. Terrorism aims at terrifying a large population, whether or not it also aims at killing large numbers of individuals. This unique governmental concern with terrorism is all the more ensconced after the events of September 11th. This belief that unique considerations are at stake tends to be true for governments of different parties and in different eras. When the government of President Roosevelt captured the Nazi saboteurs who landed in the United States during World War II, for example, Roosevelt immediately ordered them detained and tried by a military tribunal. The saboteurs then brought habeas corpus actions in which they argued that the Constitution and federal law required that they be tried in the ordinary, functioning civilian courts. President Roosevelt’s order creating the military tribunals appeared to preclude any judicial review of its terms, but the Supreme Court nonetheless agreed to hear their claims. In the end, the Court endorsed the government’s position on the merits. But President Roosevelt had also strongly stated to aides that, if the Court were to order the alleged Nazi saboteurs tried in the civilian courts, he would never comply. Whether he would have carried through on that threat was never tested, given that the Court accepted the government’s

10. This account is taken from the currently definitive study of the internal administrative discussions of this issue. See David J. Danelski, The Saboteurs’ Case, 1 J. S. Ct. Hist. 61, 68 (1996).
substantive position. But the threat to defy an order of the Supreme Court would have been inconceivable at that time in American history in any ordinary criminal case. President Roosevelt’s actions reflect the belief that much more is at stake in these contexts than simply the conventional legal contexts of crime. Given beliefs of this sort about the stakes, governments are therefore unlikely to respond passively to judicial rights-guaranteeing decisions. To the extent there are other options, governments are likely to pursue them, unless the various costs of those alternatives are too great. Governments might be willing to extend certain rights in these contexts, but the insistence of courts or others on even greater rights might result in a counterproductive governmental shift to alternative options that guarantee even fewer rights than the government was initially prepared to recognize.

This dynamic might already be in play for two of the controversial issues currently at issue in the United States. The first involves the detention and prosecution of non-citizens who the government views as terrorists, such as Zacharias Moussaui. There are at least three options for how the government proceeds in seeking to confine such a person. One is through an ordinary criminal trial with all the procedures and protections routinely afforded. The second is a modified criminal trial, in which certain considerations specific to terrorism cases lead to justifiable reductions (in the government’s view) in the protections afforded. The third is the use of a military tribunal, with even fewer protections than the second alternative would offer. The government is seeking to pursue the second option; Moussaui is being tried criminally in the ordinary civilian courts, but the government seeks to modify some of the ordinary procedures in light of arguably distinct concerns that a terrorism trial poses. In particular, the government insists that Moussaui’s access to witnesses should be seriously constrained; in effect, the government argues that Moussaui should not be permitted contact with any witnesses who the government believes are also terrorists. It is unclear to what degree the courts will accept this modified form of a criminal trial that the government urges. That is, the courts might not accept the possibility that the second option, a modified, civilian criminal trial, is a permissible option.

But if the courts do declare that view—that the second option is constitutionally impermissible—that declaration would not mean that the government will necessarily accede to the first option. If the government believes, rightly or wrongly, that the first option of a full criminal trial will put national security at risk, the government might very well shift to the third option. Whether it will do so depends on a
weighing of the comparative costs and benefits of the first and the third options at the time. A judicial declaration that Moussaui must be tried with the full panoply of criminal rights will not ensure that result. Given the perceived stakes, the government might seek means of avoiding that result. In other words, Moussaui might end up with more rights in theory, but fewer rights in practice.

A similar, and more interesting, dynamic might also be at work in debates over the use of military tribunals for those currently held as “enemy combatants” at Guantanamo. The government has promulgated an executive order that authorizes military tribunals to adjudicate the status of those detained, but to date it has yet to implement this order. Why? Because the order produced enormous outcry, both in the United States and internationally, despite the government’s assurances that it was simply following the model of President Roosevelt from World War II. The government might, in fact, now perceive the reputational harms to be even greater from the use of military commissions than from continued detention with even less process. The initiation of a military commission process might be a more visible, affirmative act compared to continuation of a status quo that involves detention with no formal process. Again, we might conceive the options here as roughly three: (1) a more formal legal process beyond that of a military hearing; (2) a military hearing; and (3) no formal process at all. If public criticism raises the stakes in the use of option (2) substantially, that does not guarantee that option (1) will come into play. Instead, it might be that option (3) becomes more attractive. The result would then be that outcry over minimal process would have led, not to greater process, but to no process at all. Indeed, this might well have occurred already and be part of the reason that option (3) has remained an option long after the order authorizing military commissions was created. This dilution-of-rights-by-insistence-on-more-rights is not inevitable, of course, but where the stakes are perceived to be extremely high, institutional designers must be particularly attentive to the possibility that the relevant actors will have great incentives to avoid the commands of formal law if methods of circumvention are possible.

I do not mean to endorse any of these efforts of regulated actors to avoid the effects of law. I only mean to suggest that responsible advocates must always consider whether the demand for greater legal process or rights will actually lead to the diminishment of actual legal protections. More law on the books does not always ensure more law in action, as legal realists taught in the American context long ago.
CONCLUSION

My perspective on these issues regarding conflicts between American and European views on the role of international legal institutions and international legal agreements, such as treaties, is that of an outsider steeped in domestic issues of constitutional law. In approaching these conflicts, I have noticed that, at a deeper level, many of these disagreements—within the United States and between the United States and others—seem to reflect (among other dimensions, including more material considerations) disagreements about the virtues and vices of law and legal institutions in a way that transcends specific issues about this or that particular institutional proposal. Responding fully to these tensions requires, it seems to me, engaging at least two more general issues about the role of law itself.

On the one hand, we need fuller attention to the vices or costs of law in the particular contexts that this essay addresses: the use of force in international relations, the standing institutionalization of a “war crimes” adjudicatory body, the domestic institutional handling of cases of terrorism, and others. Given that the United States has been one of the most judicially-oriented and legalistic political cultures, skepticism about the limits of judicial institutions, and concerns about the sometimes counterproductive effects of legal regulation, which are both more characteristic in the United States today than in Europe, might be thought to be particularly meaningful. In articulating the potentially “dark side” of law and legal institutions, American legal academics reflect domestic debates about law that are now also being brought to bear on the international legal regime as well.

But articulating these potential limitations of law will require a more precise focus on the specific advantages and disadvantages of law itself in various, specific contexts. There is no general endorsement or critique of “legalism” as a solution to international issues that can be applied across the range of issues at stake. But many advocates for an increased role for judicial institutions and for formal legal codification in the international context do sometimes instinctively seem to believe—that is, without examining or defending the premise—that if law is absent in the regulation of international affairs, it must be that there are no meaningful checks on power at all. Instead, law should be understood as only one tool or mode of checking power in the international context, just as it is in the domestic context. There are a variety of ways states and other actors are constrained or can be constrained in the international context apart from formal legal rules and the resort to legal adjudicatory institutions.
What is needed is a comparative and pragmatic analysis of the advantages and disadvantages of different modes and tools of checking power. Instead of framing the alternatives as law or "no law," these analyses and public debates ought to see law as one tool among a set of possible tools for dealing with various international issues. Law can be a useful tool in some contexts, to be sure, but one should never think the choice to turn to law is not potentially fraught with certain costs and disadvantages. Nor should the stakes be elevated to a choice between "law" or "anarchy," at least not without analysis of what alternatives to law might exist to check and regulate international affairs.

The question, therefore, is not whether to turn to an idealized, "costless" regime of law. Nor should we posit any utopian vision of international harmony and consensus in the absence of law. But the sole alternative to formal law and legal institutions, both domestically and internationally, is not necessarily a regime of anarchy. The serious debate that we must have is one that understands law as one tool among many for addressing these issues, a tool that can have substantial costs—even for the very aims proponents of legalization themselves seek to realize—as well as potential advantages. The question is which tools, with what benefits and what downsides, are most appropriate for which aspects of international issues, particularly for the kind of singular, momentous, exceptional contexts which international debate is now addressing.

Based on the American experience with law and legal institutions as a means of addressing some of the most profound political issues of the American domestic system, many Americans—academics, governmental actors, and others—are more cautious about the role of law and legal institutions than their European counterparts appear to be at the moment. Beyond the obvious issues of political and material differences between Europeans and Americans reflected in debates over the role of international law and legal institutions, there are profound differences as well about the virtues and vices of law and legal institutions more broadly. These different cultural conceptions of the appropriate domain of law itself transcend the specific contests over particular international institutions. They are also reflected in the increasingly distinct domestic legal systems of European and American countries, where Europeans are seeking a greater emphasis on courts and legal institutions, while Americans have increasingly sought to diminish the role of courts on these foundational questions. In a critical sense, these conceptual differences in terms of the role of law itself form the profound underpinnings to the debates about specific issues in
the legalization of particular international issues. To understand and confront the American-European conflicts now surrounding matters such as the International Criminal Court, or the role of international law in regulating how domestic governments deal with terrorism, or the regulation of the use of force, we must understand these deep differences over the appropriate domain of law itself—given the dark side of legality, as well as its ideal side, as a tool for regulating human affairs.