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## **Bad Reliance in Public Law**

### Research Plan for the 2016-2017 GlobalTrust Program

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When should a legal system protect individual reliance upon an unlawful governmental act? From a rule of law perspective, the answer is: (almost) never. Strictly construed, the principle of the rule of law requires that unlawful governmental acts be invalidated and denied any legal effect. However, in some cases, the invalidation of unlawful governmental acts may be in tension with the need to respect the personal autonomy of those who made plans in reliance upon these acts without being able to discern their unlawfulness or without having adequate alternatives. The question of how to treat individual reliance upon unlawful governmental acts thus revolves around the tension between two basic duties of all governmental authorities, namely, the duty to adhere to the rule of law and the duty to respect the personal autonomy of those subjected to their power (whether these are their own citizens or non-citizens affected by their actions),

For example, consider the case of a court or another governmental authority examining the validity of a property transaction or an act of marriage or divorce conducted in another country in accordance with the laws and regulations of an occupying power that currently controls that country. Although international law generally prohibits occupying powers from introducing new civil legislation into the occupied territory, the foreign court or authority may nevertheless decide to give effect to the act concluded in accordance with this legislation in order to uphold the legitimate expectations of members of the occupied population who relied upon it in the conduct of their daily affairs. To take another example, consider the problem of under-inclusive statutes, which confer benefits or entitlements to one group but not to another in a manner that unconstitutionally discriminates against the latter. Despite this illegality, courts have often refrained from invalidating under-inclusive statutes, reasoning that they might have generated legitimate expectations among members of the included group. Instead, they extended them to the hitherto excluded group. Of course, the problem of individual reliance upon unlawful governmental acts—to which I shall refer as the problem of “bad reliance”—may arise in many other contexts and situations, spanning all areas of governmental activity and all fields of public law.

The purpose of this research project is to develop a normative framework for evaluating and addressing the problem of bad reliance. The research will suggest criteria for striking an appropriate balance between rule of law and personal autonomy considerations in the context of bad reliance. It will argue that, as a general rule, protection of bad reliance should be reserved to exceptional cases in which the affected party hardly had any alternatives to relying upon the unlawful governmental act. Thereafter, the research will examine possible ways to mitigate the adverse effects of the *ex post* protection of bad reliance on the *ex ante* incentives of governmental authorities to comply with the law. In particular, it will emphasize the importance of explicitly acknowledging and condemning unlawful governmental behavior even when it is ultimately given legal effect, and argue that in many cases the long-term reputational costs entailed by such condemnation can outweigh the short-term advantages that governmental authorities may draw from unlawful behavior.

This research can make a valuable contribution to the GlobalTrust Program by drawing attention to the basic duty of sovereigns as trustees of humanities to respect the rule of law and by beginning to explore the complex relations between this duty and the duty of sovereigns to respect the personal autonomy of all human beings. It will demonstrate the relevance of this discussion to various interactions involving governmental authorities and individuals who depend on their lawmaking and law-enforcing powers, and will offer tools for critical evaluation of existing doctrines and practices in the fields of international, constitutional, and administrative law.