ODIOUS DEBT IN RETROSPECT

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I
INTRODUCTION

In the eighty years since Alexander Sack coined the phrase "odious debt," academics and activists have periodically rediscovered Sack's idea, often arguing for its application or extension—to this point, in vain. The articles in this volume, as well as discussions among their authors at the Duke conference, reveal the degree to which current interest in the problem of odious debt is intertwined with other problems that strike more critically at the well-being of developing- and emerging-market countries. Although, as also becomes clear from the articles, there is no consensus on the definition of "odious debt," the concept in all its variations is correlated to a greater or lesser degree with despotic governments, unsustainable external debt burdens, and large-scale official corruption. An important question, mostly addressed only implicitly in the foregoing papers, is how potential doctrinal and institutional elaborations of what is still chiefly an academic concept should be shaped by its relationship to these other problems.

This brief retrospective on the conference identifies considerations of both legal structure and political strategy that are relevant to answering this question. My tentative conclusions are, first, that the necessarily complex effort needed to institutionalize a doctrine of odious debt ex ante would probably be misplaced but, second, that the concept of odious debt is a potentially effective organizing principle for generating the political will to address these other persistent, debilitating problems.

The last section of this essay considers the odious debt concept as an organizing device. However, as is perhaps appropriate in a law journal publishing papers by legal scholars, most of the remainder of this comment explains my tentative conclusion that ex ante development of an odious debt doctrine or other legal mechanism would be inadvisable. This conclusion holds regardless of how narrow or broad a definition of "odious debt" is favored, although for different reasons. If the universe of odious debt cases is relatively small, then it is likely uneconomical to develop an extensive legal apparatus ex ante. If the universe of odious debt cases is relatively large, it is very likely because the definition is so broad as essentially to create a special legal regime

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for lending to sovereigns. Even assuming such a special regime to be desirable, it is almost surely better to create it directly, rather than by stretching the original concept of odious debt beyond recognition. If the universe of odious debt cases falls somewhere between these points, then it likely overlaps substantially with the larger problems of despotism, unsustainable debt, or corruption. In that circumstance, it may be preferable—as a matter of law and politics—to focus on responses to those larger problems.

Before proceeding with this discussion, it is necessary to consider the other three problems in a bit more detail. The relationship among odious debt, unsustainable external debt, corruption, and despotism can be understood as intersecting sets of situations. Set "OD" includes Odious Debts. Set "UD" includes debts that, in the aggregate, constitute Unsustainable Debt for a state, where a restructuring or write-off of at least some sovereign debt is indicated. Set "C" includes transactions involving Corruption, in which officials of a country have appropriated nontrivial sums from the public. Set "D" includes debts incurred by a Despotic regime.

Set UD comprises situations in which a country cannot service its existing levels of debt without severe economic or political consequences. Needless to say, there has long been disagreement over just how severe those consequences must be before a sovereign's debt is characterized by relevant actors as "unsustainable" and thus in need of restructuring. For purposes of the next few steps in this discussion, assume that the definition of "unsustainable" roughly corresponds to the historical incidence of actual debt restructurings and of instances in which a country has drawn on International Monetary Fund (IMF) resources. (This assumption will be relaxed later.) With this definition, set UD would include debts incurred by no more than a handful of sovereigns in most years, though it would swell during periods of international financial crisis such as the early 1980s or the mid-1990s.

The corruption reflected in set C involves actual (mis)appropriation of money. It does not include other actions associated with corruption in government, such as adding one's political allies or relatives to the public payroll in jobs that require little or no work. Set C situations may entail either simple conversion of public funds for officials' personal use or acceptance of bribes in exchange for granting a contract or taking some other governmental action. There is considerable evidence that large-scale official corruption of this sort is, if not quite pervasive in governments around the world, dishearteningly common. Set C would, depending on the threshold for the "nontrivial" sums specified above, comprise somewhere between hundreds and thousands of situations every year, involving a large proportion of countries. Only some of this corruption directly involves an assumption of sovereign debt.

Set D, containing the debt of "despotic" regimes, is included because of its prominence in traditional discussions of odious debt. Unlike the debts in sets OD, UD, and C, the debt included in set D is not necessarily a problem in itself. The fact that the country is ruled by a despot *is* a problem. How large a set of

countries is defined by the term in 2007 is surely debatable. The common dictionary definition of the term—a regime in which the ruler exercises absolute power—presumably describes a fairly small number of countries, since most rulers are effectively constrained in nontrivial ways by other actors (the military, a ruling party, et cetera) even in the absence of constitutional limitations. Some contemporary discussions of odious debt implicitly substitute for "despotic" either "dictatorial" or, more expansively, any government less than at least a rudimentary democracy. As discussed below, others appear to eliminate this fourth set entirely by focusing on whether the proceeds of a loan in fact were in the "interest" of the citizens of the country, regardless of the form of government.

II

IMPLICATIONS OF ALTERNATIVE DEFINITIONS AND OVERLAPPING PROBLEMS

Evaluating the utility of odious debt concepts in an institutional context requires knowing the size of set OD and the portion of set OD that is not contained in any of the other three sets. The latter includes debts that are "odious," but not connected to corruption or part of a country's sovereign debt that is unsustainable. Expressed more formally, the questions are

1. The value of *n*, where *n* is the number of members in the set OD; and
2. The value of *n'*, where *n'* is the number of members in the subset of OD described by the interaction OD – [D ∨ UD ∨ C][1]

The answers to both questions obviously depend on the definition of "odious debt" and on the empirical question of how many real-world situations the chosen definition describes. It is important to answer, or at least hypothesize the answers to, these questions before recommending any doctrinal or institutional change.

The range of circumstances potentially embraced within a definition of "odious debt" is well described in a recent paper by Professors Buchheit, Gulati, and Thompson.[2] As they explain, the concept of odious debt formulated by Alexander Sack in 1927, which has become the starting point for modern discussion, would in practice have been a fairly narrow one. Its application would be limited by the cumulative conditions that the debt be contracted by a despotic power, that it not be for the needs or in the interest of the state, and that the lender know this second condition to be true.[3] As many commentators have pointed out, the fungibility of money means that tracing the proceeds of sovereign borrowing to a particular project or use will frequently be impossible.

1. As will become clear later, the number of members of the other sets is also relevant in some situations.

2. Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1208–24 (2007).

3. ALEXANDER N. SACK, LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES 157 (1927).

Creditors will presumably work harder to foreclose any such linkages if adverse legal consequences could result. Thus the debt-by-debt analysis contemplated by Sack means that there might well be fewer countries afflicted by odious debts than by unsustainable debt levels. There would surely be substantially fewer odious debts than instances of corruption, since the latter includes tainted transactions unrelated to sovereign debt or occurring in nondespotic countries.

Under these circumstances, does it make sense to attempt to negotiate an international agreement or to develop other institutional arrangements specifically addressed to odious debt? Negotiation of a new international agreement, as discussed in several papers in this volume and during the conference proceedings, would probably be necessary to provide ex ante identification of potentially odious debt or to assure that courts in all relevant states apply similar rules.

Just as the familiar analysis of when to use rules or standards suggests that rules are generally not the economical choice for a small universe of cases,[4] so a good case can be made that an international agreement is not the economical choice under such circumstances. An international negotiation on an odious debt regime would almost surely be a difficult one, both technically and politically. With the relative paucity of recent "cases" of odious debt satisfying the Sack definition, and with the complex facts in those cases widely divergent from one another, any effort to specify applicable rules with moderate precision would probably entail an extensive effort to decide whether the doctrine should apply in hypothesized future circumstances. For example, what uses of a loan's proceeds are not "in the interest of" the state? An ex ante effort to answer this question for a small universe of future cases would likely be out of proportion to the benefits of such rules in shaping expectations about how cases would be handled in the future.

The foregoing argument alone suggests the disutility of a well-specified, but narrow, doctrine of odious debt where *n* in the set OD is a small number. However, it is useful to consider the intersection between a set OD that reflects the Sack definition and the other sets, both to reinforce this conclusion and to provide a baseline case for considering the implications of broader definitions of odious debt. As noted earlier, set OD is a subset of set D. While it is conceivable (if unlikely) that despotic regimes will incur no debt that can be linked to odious uses, any debt that *is* odious must, by definition, be owed by a despotic regime. As to corruption, the very image of a "despotic" regime conjures up the picture of a state apparatus that has been converted into the personal fiefdom of a dictator. Most despots see no distinction between state assets and their own property—"*Les biens d'état, ce sont à moi*,"[5] as it were.

4. *See* Louis Kaplow, *General Characteristics of Rules*, *in* 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 502, 503 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000), *available at* http://encyclo.findlaw.com/9000book.pdf.

5. "The state's property belongs to me." (author translation).

Thus set D will substantially intersect with set C.[6] By definition, any odious debts involving proceeds of foreign loans converted to what a nondespotic regime would regard as "personal" use will also be included within set C.

The Sack definition also covers situations in which despots have used the proceeds of loans to suppress internal dissent or to wage "patriotic" wars that are deemed not to be in the interest of the state as a whole. Under such conditions, public funds are directed away from economically productive uses, while internal or external violence degrades the economic capacities of the country. Thus there is a fairly good chance that the country will end up with an unsustainable external debt burden, at least if the despot is in power long enough. The result will be a significant intersection between sets OD and UD.

In short, it is conceivable that most odious debt within the Sack definition is related to either large-scale corruption or unsustainable debt burdens. That is, the value of *n'* would be just a small fraction of *n,* itself already a small number.[7] To the degree that problems of unsustainable debt and corruption are addressed by other mechanisms, the benefits of a substantial ex ante effort to construct a legal regime for odious debt are further diminished.

Turning to the effects of relaxing the conditions in the Sack definition, the consequent enlargement of set OD could be, depending on the new definition, quite dramatic. Although many suggestions and proposals have been advanced, they fit roughly into two categories: One would result in a moderate expansion in the set of odious debts, the second in a very large expansion.

As to the moderate expansion of the definition, Buchheit, Gulati, and Thompson explain how some modern commentators have shifted the operative test from the odious debt of a despotic regime to the "debts of an odious regime." Set OD would thereby be increased for two reasons: First, and more importantly, *all* debts of the governments might be included, without any requirement for those debts to be tied to specific odious purposes. Second, the definition of an "odious" regime may be somewhat broader than that of a "despotic" regime. This shift responds to the frequent criticism that the debt-by-debt assessment contemplated in the classic definition of odious debt makes that test relatively ineffective in dealing with the enabling of dictatorial regimes by foreign creditors.

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6. Again, because of its inclusion of nondespotic regimes, set C will be considerably larger than set D. In set notation terms, the subset of C described by the interaction C–D will include a considerable portion of the members of set C.

7. In literal terms, *n'* should be 0, since all odious debt must be debt of an odious regime. For purposes of considering the utility of an elaborated ex ante doctrine of odious debt based on the Sack definition, I have modified the definition of the subset of OD with *n'* members to ignore D. Thus *n'* is the value of the number of members in the subset of OD defined by the interaction OD – [UD $\vee$ C]. The intuition lying behind an inquiry into the relationship of OD to the other problems is that, where legal mechanisms exist to address the other problems, the resulting small size of *n'* may make creation of a special odious debt regime more costly than would be justified by its benefits. Since there are no legal mechanisms for dealing with despotic regimes as such, this intuition is immaterial here. As explained below, the relationship of OD to D is significant under some other definitions of odious debt.

The effect of the definitional shift is to make set OD identical to set D, because *any* debt incurred by a despotic regime is odious.[8] However, a large portion of that increase in set OD intersects with set UD or C. When a despotic, or at least unsavory, regime accumulates large amounts of external debt, there is likely to be substantial conversion of state assets to the personal wealth of the despot and favored officials. And, as noted in the context of the Sack definition, these regimes are also associated with external "patriotic" wars or internal repression. These military and paramilitary activities both divert scarce resources for reasons unrelated to genuine security needs and, in the process, further destroy or undermine productive economic activities. Not surprisingly, then, postdespotic and postdictatorial regimes frequently face problems of unsustainable debt.

The implications of this definitional shift for an odious debt doctrine are profound. In contrast to the Sack definition, whereby three distinct conditions must be satisfied, now everything rests on the test for determining an "odious" regime. Specification of the characteristics of an odious regime so as to permit creditors to know in advance if their loans will be subject to cancellation (or, in some proposals, recomposition), while still serving the purpose of an odious debt doctrine, would be very hard. If the rule were broad enough to cover a fair number of regimes, it would almost surely be so indeterminate as to discourage creditors from lending to a much wider group of countries than was likely to have been intended by those who drafted it. If, on the other hand, the drafters attempt to foreclose excessive uncertainty, the doctrinal test would be so demanding that very few regimes would be covered. In that case, one would wonder if the outcome were worth the effort.

Cognizant of these problems, some commentators in this volume—including David Skeel and Patrick Bolton[9]—propose an ex ante *process* for determining which regimes are odious, rather than an ex ante rule to be applied later by an adjudicator. The process would designate regimes to which lending would be subject to cancellation or, perhaps, due diligence to assure that it was being used in the interest of the population as a whole. Lenders would thus know in advance whether they were assuming a risk of ex post cancellation. But if—as seems necessary in order to achieve agreement among the nations where creditors are based and debt contracts are litigated—those who will decide whether a regime is "odious" are state representatives,[10] then the process may have little practical impact.

8. Conceivably a despotic regime may eschew any foreign borrowings. In practical terms, the regime is likely to incur at least some debt.

9. Patrick Bolton & David Skeel, *Odious Debts or Odious Regimes?*, 70 LAW & CONTEMP. PROBS. 83, 99 (Autumn 2007).

10. Bolton and Skeel, for example, suggest a two-part, disjunctive standard for an odious regime—if it engages in either systematic suppression or systematic looting. The former would be decided by the United Nations, the latter by the International Monetary Fund. As international institutions where voting rights are allocated only to states, both organizations are in this key sense political. *Id.* at 94.

Instructive here are the difficulties in reaching international consensus on imposing economic or political sanctions on countries that, in the United States at least, would readily be considered bad actors.[11] There are nearly always geopolitical, ideological, or commercial reasons why some influential countries are reluctant to agree to sanctions. For example, China long resisted sanctions on North Korea, and Southern African countries, despite their palpable disapproval, have resisted measures against Zimbabwe. Even close allies may not agree: the United States and the European Union wrangled over sanctions on Iran for well over a decade. There is every reason to believe that a similar dynamic would afflict a process to determine "odiousness," whose result would be a skyrocketing risk premium on lending to the target country, if not the complete unavailability of funds. Since finance ministries are usually reluctant to agree to measures that would, in their view, "politicize" capital markets, the difficulties might be even greater than with political or trade sanctions.

As to the broadest expansion of set OD, there are no counterparts to the thorough proposals for moderate expansion just discussed. Suggestions by some commentators, however, if developed into full proposals, could effect a huge change. Consider, for example, the proposition advanced in one recent paper: that odious debt is a problem of negative externalities as much or more than it is a problem of debt overhang. Thus the financing for "ill advised infrastructure projects" that result in environmental damage or displacement of indigenous populations, or that are "inefficient and expensive," may be considered odious debts.[12] Taking this reasoning a step further, Joseph Stiglitz has suggested, without quite saying, that contractual commitments by a developing country that are highly "disadvantageous" to the country might also constitute odious debts.[13]

These commentators appear to be broadening all three of the criteria in the Sack test. It is no longer necessary that there be an odious regime, in the sense of despotism or a dictatorship. Indeed, Stiglitz's inclusion of an infrastructure project in India as an example of possibly odious debt suggests that the obligations of even a well-established democracy may be covered. So too, the meaning of "not in the interest of the state" has been stretched beyond conversion of state resources to personal benefit or to the use of funds to repress the population. The Sack definition would not cover, for example, a loan to build an infrastructure project that was controversial because of anticipated negative environmental or social effects. Finally, the far-reaching

11. In his article in this volume, Paul Stephan points out, among other things, that the veto power possessed by all five permanent members of the Security Council makes affirmative decisions from that body rare. *See* Paul B. Stephan, *The Institutionalist Implications of an Odious Debt Doctrine*, 70 LAW & CONTEMP. PROBS. 213, 228 (Summer 2007).

12. Stephania Bonilla, A Law-and-Economics Analysis of Odious Debts: History, Trends and Debates 23 (Nov. 20, 2006), *available at* http://ssrn.com/abstract=946111.

13. *See* Joseph E. Stiglitz, *Odious Rules, Odious Debts*, ATLANTIC MONTHLY, Nov. 2003, at 39, 42.

ideas suggested by at least some commentators appear to enlarge the duty of the lender to take account of these kinds of effects.[14]

These proposals enlarge set OD substantially, perhaps to the point that it is larger than any of the other sets. They also appear at first glance to enlarge the subset of set OD that does not intersect with any of the other sets. This change in the scope of the odious debt "problem" would obviously affect my earlier suggestion that ex ante development of a well-specified doctrine of, or institutional process for identifying, odious debts was not advisable because the set of cases is small. However, on closer inspection, these proposals may simultaneously be enlarging the other sets and, in the process, not altering the basic circumstance of substantial intersection between odious debt and the other problems.

In particular, set UD appears to grow as much as set OD. This becomes fairly obvious in Stiglitz's essay, since he uses his discussion of odious debt as a springboard for reiterating his support for, as he puts in it, "an international 'bankruptcy' court . . . to deal with debt restructuring and relief."[15] Although he refers to odious debt and "outlaw" regimes, he immediately applies his proposal for an international court to situations in which "creditors and borrowers are honest" but economic shocks render repayment difficult.[16] That is, Stiglitz implicitly broadens the definition of "unsustainable debt" beyond the circumstances in which countries have actually gotten relief in the past. Thus set OD will at, the very least, substantially intersect with set UD; it may, in fact, become a subset of UD.

Proposals to examine the negative externalities of a loan to decide if it is odious debt similarly appear to expand set UD as much as set OD. The idea is that debt which has not benefited the state, according to some metric other than that applied by officials of the borrowing country, should not have to be repaid because of its negative effect upon development. Here again, set OD will either intersect substantially with set UD or become a subset of UD.

The significance of the foregoing observations for the legal status of odious debt doctrine lies not in the intersections per se. After all, where two problems largely coincide, an effective remedy for one may materially ameliorate the other. The salient point here is that the definitional expansions transform the character of odious debt to the point that it has little significance apart from the problem with which it coincides. Indeed, these proposals could change the basic contractual terms of lending to developing countries. Conceivably, any lending to a developing country government would be subject to ex post review by an adjudicatory body—international or domestic—with the power to reduce or cancel the debt if loan proceeds have not been used productively for the benefit

14. Bonilla, *supra* note 12.
15. *See* Stiglitz, *supra* note 13, at 42.
16. *Id*. at 42–45.

of the population as a whole.[17] Proposals for a supranational, legally binding sovereign-debt-resolution mechanism have been debated for some time now and continue to command a good deal of interest. To date, most observers have judged the unintended deleterious consequences of such proposals greater than their likely benefits for the developing-country borrowers. That is no reason to discontinue the debate, particularly if new events alter the assessments of the cost-benefit calculus. However, this debate principally involves the issues of when, and by whom, any sovereign-debt obligation can be modified. Except as an intuitively appealing additional argument for why changes are needed, odious debt concepts as such have little impact on the merits of those proposals.

Similarly, the proposition that borrowing decisions of developing-country sovereigns are systematically distorted so as to warrant a special set of contract rules is an interesting one. The presence of debt that may be characterized as "odious" contributes to this larger perceived problem. However, a standard that borrowed funds must be wisely spent in a manner that benefits the population—or, at least, that they not be unwisely spent—again reaches well beyond any recognizable concept of odious debt. To call all nonconforming debt "odious" cannot disguise the fact that this proposition implicates a very different set of ideas and problems from those historically associated with the term discussed in the articles in this volume.

III
CONCLUSION

Although the foregoing discussion is decidedly tentative, it has at least raised the possibility that there may be no ex ante doctrinal elaboration or institutional determination of odious debt that is both economical and effective, no matter what the chosen definition of odious debt. Even if this conclusion holds up to further analysis, the question of what to do would remain. After all, the practical unavailability of conceptually optimal policy solutions is hardly an unusual situation. Second (or third, or fourth) best options are often the most that can be achieved. Perhaps an elaborated ex ante approach to odious debt could be a useful partial solution to the broader problems represented by the other sets, in the absence of effective responses to those problems. That is, although odious debt may account for only a fraction of a country's total unsustainable debt burden or of its assets lost to corrupt officials, canceling that debt would presumably be of some help.

Let me conclude, therefore, by examining briefly the implications of this analysis for potential reform initiatives. In doing so, I will adopt the perspective of a policymaker in the government of the United States or Great Britain, critical actors in any international initiative. Assume that this policymaker

17. If only project- or purpose-specific lending were covered, one suspects that there would be a diminution in such lending soon thereafter and, to have the desired effect, the scheme would need to be amended to cover all lending to sovereigns.

shares, as I do, at least a general sympathy for the position of those who argue that the populations of developing countries ought not be burdened with debts incurred by rulers who converted the proceeds of loans to corrupt or oppressive uses.

Perhaps the easiest option to reject is an institutional mechanism for designating "odious regimes" whose debt would thereafter be subject to special treatment to assure it was used in the interests of the population of the debtor government's country. Negotiating an international agreement that would assign this role to the U.N. Security Council, for example, would be a major undertaking in itself. Even if it were successfully negotiated, experience with efforts to impose multilateral sanctions suggests that the Security Council would rarely take action. The problem from the policymaker's perspective is not that the mechanism would work any harm in itself, but that it would be ineffective. However, it is difficult to overstate the relevance of opportunity costs to senior government officials, who are acutely aware of the limits to their political capital and time in office. A senior official of the State Department or any foreign ministry would almost surely conclude that scarce human and political resources could more productively be spent on, for example, strengthening implementation of the asset-recovery provisions of the United Nations Convention Against Corruption, or the various G-8 and international commitments to reduce the official debt burdens of the poorest developing countries.

Similar reasoning would apply to proposals for an international agreement on an odious debt doctrine binding upon national courts called upon to enforce sovereign-debt contracts. Here the negotiation might be even more difficult, since national governments would not have a case-specific role similar to that contemplated in the "odious regime" approach. The agreement would be their only occasion for directly influencing the doctrine to be applied by various independent judiciaries. Negotiators would presumably be particularly attentive to the possibility that what was intended as a narrowly drawn definition of odious debt would be creatively stretched by litigants and courts in ways that might lead to unintended negative dynamic effects on the future availability of capital to developing countries. The consequent effort to anticipate all cases that might be argued as odious debt would make the negotiation even more complex.

In light of the relatively small anticipated payoff from such an effort, our policymaker would again likely conclude that resources would be better spent on the problems that overlap with odious debt. This inclination would be strengthened by her awareness that courts in the United States and United Kingdom—the relevant fora for most sovereign debt litigation—are not without doctrinal tools to deploy in compelling cases. As Deborah DeMott explains in

her article in this volume,[18] common-law agency principles may not have easy and broad application to odious debt issues, but they are relevant and potentially available in appropriate cases. With odious debt cases relatively few and highly fact-specific, the virtues of an incremental common-law approach—now perhaps undervalued because so often oversold in the past—may be worth remembering.

Objections to such a judicial course of action have already been raised, notably the prediction that unilateral adoption of such a doctrinal evolution by courts in the Southern District of New York, for example, would not be followed by courts in London, thereby making British law more attractive to creditors and despotic regimes alike. This is certainly a risk, but I suspect not that great a risk. Given the small number of cases in which courts would find the combination of facts and doctrinal analogies congenial to making some new law, this possibility hardly seems the stuff of major competitive disadvantage. Moreover, there is as much reason to believe that, in this very limited universe of cases, the different national courts would be similarly troubled by a set of egregious facts. Finally, it is worth noting that the long-standing presence of collective-action clauses in sovereign-debt instruments under British law had no noticeable effect on the risk premiums attached to such instruments, despite the view in some quarters that this was an excessively debtor-friendly provision. It may be that discrete variations in New York and British law are just not that significant in determining the jurisdiction in which sovereign debt is issued.

The most interesting situation is posed by proposals that produce the biggest increase in the universe of odious debt situations. Our policymaker, hypothesized to be generally sympathetic to concerns with odious debt, likely shares certain aims with those who advocate either a fairly narrow doctrine or the "odious regime" approach. However, experience and institutional constraints tell her that the proposals of these advocates will not actually advance their shared goals. Furthermore, the far-reaching agenda of proponents of the "odious regime" approach is quite possibly at odds with the preferences of the policymaker's government. She will be unsympathetic to Stiglitz's arguments on odious debt precisely because she disagrees with him on the utility of an international bankruptcy court.

But what of the advocates themselves? Given their disagreement with the policymaker on the underlying agenda of an international bankruptcy court or a new branch of contract law for lending to developing-country sovereigns, they are surely not persuaded by her experience and constraints. For them, the interesting question is whether their invocation of odious debt as a further reason to adopt their broader agendas will succeed as a political strategy. More interesting still is the position of advocates such as those associated with Probe

18. Deborah A. DeMott, *Agency by Analogy: A Comment on Odious Debt*, 70 LAW & CONTEMP. PROBS. 157, 157–58 (Autumn 2007).

International and Jubilee International.[19] They care far less about the legal argumentation that dominates both the papers for, and the proceedings of, the Duke conference. Their interest lies in fighting all the problems discussed in this comment.[20] For them, the concept of "odious debt" is not a legal category so much as an organizing device to advance a broader agenda. Thus, for example, they would find official multilateral or bilateral loans that retard development no less problematic, even though such loans will never be litigated in the Southern District. For those who adopt this broader agenda, the odious debt "campaign" may be judged effective if it leads to increased recoveries of funds from corrupt officials, or to greater write-downs of official debt.

Will this campaign be successful? Here we can only speculate. My own sense is that this strategy will not be effective where the odious debt argument seems to have been invoked mostly to resurrect a proposal that was offered in an entirely different context, such as the international-bankruptcy-court idea. On the other hand, where the concept of odious debt is used to urge policy responses to overlapping problems that are acknowledged but ineffectively addressed, it may be part of a very useful strategy. In the end, then, odious debt may be a legal doctrine whose time will never come, but an organizing principle for a social movement that can galvanize action on a range of problems that continue to afflict many developing countries.

19. For further discussions of Jubilee International, see James V. Feinerman, *Odious Debt, Old and New: The Legal Intellectual History of an Idea*, 70 LAW & CONTEMP. PROBS. 193 (Autumn 2007); Kunibert Raffer, *Odious, Illegitimate, Illegal, or Legal Debts—What Difference Does it Make for International Chapter 9 Debt Arbitration?*, 70 LAW & CONTEMP. PROBS. 221 (Autumn 2007).

20. The catholicity of this strategy is well-illustrated in the web site "Odious Debts" maintained by Probe International. *See* Odious Debts, What Are Odious Debts?, http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=subcontent&AreaID=3 (last visited July 26, 2007). The useful and, in many respects, powerful site covers corruption, official as well as private debt, and a variety of other burdens to developing countries. The various national campaigns against odious debt described on the site cover a similarly wide range of issues. In this respect, the explanation provided on the site itself is instructive:

> The Doctrine of Odious Debts is not the only legal tool available to challenge Third World debts—many legal challenges to foreign debts have been and are being tried. But the term so aptly describes the nature of these debts that we have adopted it for this Web site's signature. *Id*.