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### Presumed Imminence

#### Contention 1 is Presumed Imminence

#### Lower court decisions have lowered evidentiary standards in habeas hearings so that anyone can be detained, guilty or innocent

Denbeaux et al. 12, Professor of Law

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It is an open secret that Boumediene v. Bush’s promise of robust review of the legality of the Guantanamo detainees’ detention has been effectively negated by decisions of the United States Court of Appeals for the District of Columbia Circuit, beginning with Al-Adahi v. Obama. This Report examines the outcomes of habeas review for Guantanamo detainees, the right to both habeas and “a meaningful review” of the evidence having been established in 2008 by the Supreme Court in Boumediene. There is a marked difference between the first 34 habeas decisions and the last 12 in both the number of times that detainees win habeas and the frequency in which the trial court has deferred to the government’s factual allegations rather than reject them.1 The difference between these two groups of cases is that the first 34 were before and the remaining 12 were after the July 2010 grant reversal by the D.C. Circuit in Al-Adahi. Detainees won 59% of the first 34 habeas petitions. Detainees lost 92% of the last 12. The sole grant post-Al-Adahi in Latif v. Obama has since been vacated and remanded by the D.C. Circuit. The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government’s factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations. The effect of Al-Adahi on the habeas corpus litigation promised in Boumediene is clear. After Al-Adahi, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations. Now the government wins every petition. Given the fact-intensive nature of district court fact-finding, the shifting pattern of lower court decisions could only be due to an appellate court’s radical revision of the legal standards thought to govern habeas petitions, raising questions about whether the D.C. Circuit has in fact correctly applied Boumediene. This Report analyzes allegations that repeatedly appear in habeas cases to reveal the actual pattern of district court fact-finding.

#### The denial of habeas to innocent people represents a unique form of cruel and unusual punishment

<slow down on this card if possible (like if its possible to physically go slower)>

Eisenberg 9

[Spring 2009, Stewart “Buz” Eisenberg is Of Counsel to Weinberg & Garber, P.C. of Northampton, MA, serves as President of the International Justice Network, and is a Professor of Civil Liberties at Greenfield Community College. Since 2004 he has provided direct representation to four Guantánamo detainees., “Guantánamo Bay: Redefining Cruel and Unusual”, NORTHEASTERN UNIVERSITY LAW JOURNAL Vol. 1 No. 1, <http://nulj.org/journal/NULJ_v1n1_Eisenberg.pdf>]

Representing Guantánamo detainee Mohammed Abd Al Al Qadir (Guantánamo Internee Security Number 284)1 has been an experience unlike any other of my legal career. While serving as counsel for Mr. Al Qadir (also known as Tarari Mohammed), Jerry Cohen2 and I encountered numerous obstacles unique to Guantánamo cases. Convoluted administrative procedures, allegedly implemented to protect national security, made representation difficult for lawyer and client alike. In 2004, the U.S. Department of Defense issued procedures to assess the need to continue detaining enemy combatant detainees.3 Three years later, Tarari Mohammed was cleared for release or transfer.4 Nevertheless, he was still detained in Guantánamo Bay’s Camp 6 as of our March 20, 2008 visit.5 When Jerry and I arrived at the base, guards escorted us to an interview cell. When the cell door was unlocked, we saw our client shackled to the floor,6 as always, and immediately noticed he was wearing a white respirator on his face. The respirator was of the sort a contractor wears when working with toxic materials. Alarmed, I asked if he was all right. As the interpreter began to translate my question, our client interrupted, saying something in Arabic. The interpreter shot us a look and said, “We will talk about it.” After the guards left the room and locked the door behind them, Tarari uncharacteristically spoke in a serious and determined tone. On all other occasions, he had been extremely polite, deferential, and allowed us to lead the conversation. Tarari Mohammed proceeded to tell his story, one he had clearly been waiting to tell. Approximately three weeks prior, he had an appointment with a representative of the International Committee of the Red Cross (ICRC).7 He met with the representative, who brought a letter from our client’s sister. The letter was the first and only communication our client received from any member of his family in over six years of detention. In the letter, Tarari’s sister informed him of their mother’s death, but did not provide details as to the date or cause. The letter also stated that, prior to her death, his mother had been distraught over her son’s detainment; it also detailed his father’s sadness. Tarari expressed that his heart was breaking and that he wanted to return to his cell. At the conclusion of their meeting, the ICRC representative told Tarari that his family had not received any letters from him. Tarari explained he had written and sent many letters during his detainment. The military never forwarded the letters. Communication is a constant struggle for both detainees and counsel. Lawyers must comply with a protective order (PO)8 entered by the court, regulating the dissemination of information.9 The protective order renders all communication with the detainee, whether to or from him, subject to review by a designated authority.10 More specifically, all communications must be handled, transported, and stored in a secure manner as described in the PO.11 The order places an additional burden on an already strained attorney-client relationship, rendering the detainee’s lawyer powerless, unable to have mail delivered between them, or between the client and his family. Petitioner’s counsel (“habeas counsel”) must treat all written and oral communication with a detainee as classified, unless otherwise determined by the reviewing authority.12 Even the notes we take during our client meetings are subject to review.13 Mail is also a source of constant strife for habeas counsel. There are two types of mail, “legal mail” and “non-legal mail,” which are processed in different manners.14 Legal mail is reviewed in a secure facility in or around Washington, D.C.,15 while non-legal mail is reviewed by the military.16 In theory, POs are intended to surmount the many logistical obstacles generated by these cases, and to reconcile the divergent priorities of the government and habeas counsel.17 Secrecy and national security are of paramount interest to the government,18 while habeas counsel advocates for open communication with clients, their families and home countries, as well as the public at large.19 The government contends that without the prescribed screening process, messages could be transmitted to terrorist organizations, possibly endangering the United States or its allies.20 In reality, the process operates to compound the psychological and emotional damage these men suffer, further isolating them from the outside world.21 Not only are detainees isolated from the outside world, but some, like Tarari, have been punished without cause. Tarari’s few freedoms were drastically reduced after his ICRC meeting. Guards came to his cell to measure him for clothing, explaining he was no longer allowed to wear his white jumpsuit, which indicated compliance, and instead must wear orange.22 When asked why they were punishing him, the guards replied that he was in trouble for spitting.23 Tarari denied ever spitting on anyone, yet the guards said he would not only have to wear the orange jumpsuit, but also a respirator.24 During our visit, Tarari asked how anyone could have such hate in their hearts that they punish someone for the death of his mother. He told us that at 2:00 a.m., on the morning after the guards’ visit, they returned to search his cell, harassing him further.25 Tarari then informed us that following the status change, and before our visit, he sought out a particular Non-Commissioned Officer (NCO) who had always treated him fairly. He asked the NCO why he had been disciplined, maintaining he had never spit and that the accusations were false. Tarari trusted the NCO, who told him he would not be punished further. Yet, despite the NCO’s assurances, the punishment did not cease. The NCO later told him that his superior had ordered the reprimand, offering no further justification. Absent another explanation, my co-counsel and I concluded Tarari was punished for having learned his mother had passed away. We speculated that this was a preemptive effort to ensure his compliance, for should Tarari get upset over his mother’s passing, the sanctions would make him easier to control—lending new meaning to the term “prior restraint.”26 We may never know whether our client actually committed a punishable offense, or whether the guards were simply acting out of spite. While anything is possible, it is unlikely our client would lie to us, given our long-established attorney-client relationship and the many hours we have spent together. Tarari celebrated the beginning of his seventh year in captivity, with no charges ever having been brought against him, by learning that he had lost his mother. Even if this otherwise compliant man had acted out after learning of his mother’s death, is that so hard to understand? Tarari is just one of the many Guantánamo detainees who must suffer punishment without recourse. Together, their stories reveal the government’s actions at Guantánamo, redefining cruel and unusual.

#### These decisions reflect a post 9-11 heuristic of deference to the executive and acceptance of its claims of imminent threat based on irrational fears

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[02/25/2013, Avidan Cover is an Assistant Professor; Associate Director, Institute for Global Security Law and Policy, “PRESUMED IMMINENCE: JUDICIAL RISK ASSESSMENT IN THE POST-9/11 WORLD” works.bepress.com/avidan\_cover/3/‎]

It is difficult to determine the risk of a terrorist attack. The government always runs the chance of underestimating or overestimating the probability of an attack, both of which have costs. The 9/11 attacks themselves were attributed to a failure to appreciate the risk. In its report on the September 11 attacks, the 9/11 Commission criticized the government for its failure to imagine the likelihood of an attack by al Qaeda. Yet based upon this failure of imagination, the pendulum has swung in the other direction. The threat of terrorism summons a post-9/11 impression that although terrible harm is uncertain we must act as though it is imminent. Such thinking is a variant of the Precautionary Principle, which Cass Sunstein describes as positing that “action should be taken to correct a problem as soon as there is evidence that harm may occur, not after the harm has already occurred.” This mindset explains the capacious definition of imminence that the government purportedly relies on as part of it legal justification of targeted killings of American citizens. No one wants to be wrong again. This post-9/11 heuristic now pervades our society, our government, and our courts. Part of this transformation entails an emphasis on, and preference for, an intelligence-based preventative strategy. The preventative approach, which necessarily incorporates fear and uncertainty, is a hallmark of what legal scholars Jack Balkin and Sanford Levinson have called the National Surveillance State. This governing regime “is increasingly statistically oriented, ex ante and preventative, rather than focused on deterrence and ex post prosecution of individual wrongdoing.” In this system advances in technology and globalization may erode distinctions between international and domestic spheres. The blurring of military, intelligence, and criminal lines also wreaks havoc with previously understood standards of proof, suspicion and evidence. The preventative emphasis sets the foundation for “a parallel track of preventative law enforcement” Guantanamo, extraordinary renditions, torture that evades constitutional rights protections. Moreover, the parallel track can creep into established criminal law enforcement and distort the traditional protections afforded in that realm. The Supreme Court has directly addressed a number of the government’s post-9/11 counterterrorism measures. While a number of the Court’s post-9/11 decisions the enemy combatant decisions, in particular were often characterized by the media and some scholars as significant defeats for the government, there is reason to question that narrative. A few years removed, the decisions appear fairly modest in their limitations on the government. These opinions were invariably quite deferential to the political branches. Though the opinions assuredly marked a territorial role for the courts in the post-9/11 world, they offered more heat than light. The opinions derived from Separation of Powers structural principles rather than from the Bill of Rights. Thus the decisions were more procedural than substantive, offering little insight on the nature of detainees’ rights. The decisions also provided minimal guidance even as to process, relegating many of the decisions on the details to lower courts and to the political branches. Finally, consider what the Court has not thus far addressed or done. Richard Fallon points out that the Court has not limited the movement of military and intelligence officers in their counterterrorism operations; it has not opined on the state secrets doctrine; nor has it permitted lawsuits seeking relief for abuses suffered as a consequence of counterterrorism abuses to go forward. More specifically, it has not ordered a release in a habeas case and it does not appear poised to do so anytime soon. Fallon attributes such restraint to the notion that judicial review is “politically constructed,” that is, Justices may decide cases based in part on how their opinions may be popularly received, and the Court’s authority respected. This Article offers another explanation of the Court’s deference: the Justices are afraid. They are afraid of terrorism. They are afraid of what could happen to our security if they rein in government. This Article examines the ways in which fear has affected and influenced judges in addressing terrorism. Importantly, the discussion is not limited to enemy combatant cases or to the Supreme Court, but examines the ways in which the post-9/11 heuristic has affected a range of judicial opinions, from limits on political protests to airport security measures to criminal prohibitions of material support of terrorism. Such rulings invariably entail the courts making their own risk assessments. Yet forecasts of uncertain catastrophic events are notoriously unreliable. This is due to cognitive errors and biases that Cass Sunstein and others have documented. What then is a court to do? Many suggest courts should defer to the political branches. Deference is untenable for a number of reasons. First, it is unclear whether political actors are any more adept at making predictions. Second, the arguments for deference in the terrorism threat context are less compelling than in war because, the Court has intimated, the geographic and temporal limitations to fighting terrorism are not evident. Deference would not be a short-term or limited posture, as it might be for a military armed conflict, but one that would endure as long as the seemingly permanent crisis of terrorism. Third, deferring to the government in all events terrorism-related threatens to upset domestic criminal law jurisprudence because counterterrorism measures involve a mélange of military, intelligence, and criminal approaches that employ differing standards of proof. Finally, even when invoking judicial deference and lack of national security expertise, what can be seen at work in many judges’ post-9/11 opinions are their own risk assessments, which evidence their own cognitive biases impacted by the fears engendered by terrorism. Ironically, their frequent fact finding of risks or lack of threat is wholly at odds with the purported deferential stance that judges insist they are taking in addressing the terrorism cases. This tendency can be seen in various Justices and lower court judges’ opinions, regardless of whether they uphold or strike down government actions. This Article takes Holder v. Humanitarian Law Project as its case study. Part I of the Article reviews the Supreme Court’s 2010 decision upholding application of the criminal prohibition on material support of a foreign terrorist organization to human rights advocates’ training of such groups in international humanitarian law and human rights law. The case reveals much about how the Court undertakes terrorism risk assessments and how the judiciary is likely to handle most terrorism cases going forward. The opinion also illustrates the Court’s tendency to fall prey to cognitive errors and biases in undertaking risk assessments even when stating it is deferring to other branches’ factual determinations. The decision also presages a reduced standard of evidence and suspicion in the name of preventing terrorism in the criminal context. Given the government’s increased emphasis on terrorism, there is reason to worry the standard will infect the criminal justice system. Finally, these findings of fact undermine the Court’s credibility because they will be perceived by the public as bad faith efforts to masquerade personal policy preferences as empirical facts. Part II of the Article explores the literature on decision making and risk assessment and how certain dread risks can influence people’s decisions, particularly those of judges. Part II does not limit the discussion to Sunstein’s focus on cognitive errors but builds on Dan Kahan, Paul Slovic, and others’ critique of that account by also reviewing social and cultural influences that affect a person or a judge’s perception of risk. Part III then examines various court opinions, in particular Humanitarian Law Project, to explore how these errors and influences manifest. Next Part IV addresses and ultimately rejects judicial deference as a means to adapting to the concomitant errors of judicial review of terrorism-related matters. Finally, Part V proposes solutions that will enable courts to overcome cognitive biases and other social and cultural influences. The Article concludes that evidentiary standards favoring those whose civil liberties are targeted is a necessary step toward overcoming particular biases that ignore probability. In addition, courts should resist writing in terms of certainty, including findings of fact, but should instead candidly disclose their uncertainty and anxiety over terrorism threats.

#### Applying standardized burdens of proof through the plan solves deference and checks against cognitive errors in judicial decisionmaking

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[02/25/2013, Avidan Cover is an Assistant Professor; Associate Director, Institute for Global Security Law and Policy, “PRESUMED IMMINENCE: JUDICIAL RISK ASSESSMENT IN THE POST-9/11 WORLD” works.bepress.com/avidan\_cover/3/‎]

This section proposes a way forward in which judicial review is less deferential to the political branches and less subject to the various cognitive errors that generally pervade risk assessments. Building on Cass Sunstein’s framework for judicial analysis, which attempts to counteract the Precautionary Principle’s adverse effects, this section proposes refinements to that framework. In particular, I propose that courts should apply burdens of proof and presumptions regarding evidence that favor the persons or groups whose civil liberties are curtailed. Second, courts should insist on specific evidence that supports deprivations of liberty, particularly those aimed at minority groups. In light of courts’ tendencies to defer to government interpretations of evidence and dilute evidentiary requirements, imposing set standards may counter these propensities. Finally, drawing from literature on the regulation of judicial emotions I propose that courts adopt candid disclosures, in the mien of Judges Lipez and Silberman, concerning the post-9/11 heuristic’s impact on their thinking. These admissions are more likely to earn the court trust in the public discourse of terrorism in a post-9/11 world. A. Adjusting Sunstein’s Framework Cass Sunstein accepts both that courts lack information and expertise to gauge whether curtailing civil liberties may be justified and that the probability of an attack may defy estimation. Notwithstanding these institutional limitations, Sunstein proposes a framework for judges to review government counterterrorism measures. Specifically, courts should (1) require restrictions on civil liberties to be authorized by the legislature; (2) exact special scrutiny to measures that restrict the liberty of members of identifiable minority groups, because the ordinary political safeguards are unreliable when the burdens imposed by law are not widely shared; and (3) apply second-order balancing because case-by-case ad hoc balancing is more likely to permit excessive intrusions. How might Humanitarian Law Project have fared in Sunstein’s framework? Congress’s passage of the material support law suggests that a court should defer under the first prong. However, the ambiguity as to whether the teaching of peaceful advocacy constitutes “training,” or “expert advice or assistance,” under the material support ban would warrant careful judicial review. Under the second prong, because the ban targets political speech it would also deserve special scrutiny. Roberts may have come fairly close to applying the level scrutiny envisioned by Sunstein as he analyzed the law’s application somewhere between strict scrutiny and that reserved for conduct. Finally, what second order balancing applies? Sunstein identifies the considerations of imminence and likelihood from Brandenburg as factors a court might consider. It was precisely these elements that Breyer asked to be considered in his dissent. But would the second order balancing have made a difference to Roberts? The answer is almost certainly no. And it is this fact that illustrates the limitations of Sunstein’s proposal. Just as the gravity of the harm may be exaggerated, the probability and imminence of that harm also may be overstated. Much of this may be attributed to cultural cognition, Roberts’ understanding that we now live in a “different world.” As a result, Roberts, like many other judges, appeared to presume the probability and imminence of an attack. Sunstein’s second example of torture similarly illustrates the inevitably subjective calculations, or fact finding, that also pervade second-order balancing. Theorizing that torture might be justified in a specific instance under ad hoc balancing, Sunstein contends that utilitarian arguments of the potential for widespread and unjustified torture would lead courts not to approve its isolated use. But it’s not clear that these utilitarian considerations would make a judge any more likely to strike down the use of torture. Based on various biases and cultural affinities, courts could come to different conclusions, even if this second order balancing is adopted, that the potential number of lives saved by torture could offset significant numbers of lives wrongly tortured. Judge Silberman adverted to this in his acceptance of the idea of letting a potentially guilty man go free in the criminal context based on second-order considerations, and in his refusal to authorize the release of a possible al Qaeda detainee because of the “infinitely greater downside risk to our country.” As a result, specific standards of evidence that the government must satisfy in order to justify infringements of civil liberties should be grafted onto the Sunstein framework. These standards should favor the individual or groups whose liberties may be infringed because the government is likely to pursue measures that not only disregard probability but are also calculated to curry popular favor. Researchers found in a series of studies that judgments of blameworthiness for failing to prevent an attack are far more likely to affect anti-terror budget priorities than probability judgments. These studies’ authors concluded that because people blame policy makers more for high consequence events than for more probable ones, policy makers will be tempted to “prevent attacks that are more severe and upsetting without sufficiently balancing the attack’s likelihood against its outcome.” To counteract this emotional tendency, the studies’ authors suggested that policy makers explicitly consider likelihood data in formulating counterterrorism policy. Similarly, without prescribed evidentiary standards, courts are likely to craft opinions that defer to the government’s interpretation of evidence and ignore probability and imminence, often by diluting the evidentiary requirements to the point where they favor the government. Indeed, Roberts decried the dissent’s call in Humanitarian Law Project for “detail,” “specific facts,” “specific evidence,” and “hard proof” “that [the advocates’] activities will support terrorist attacks.” Rather, it was sufficient to rely on the Blood and Belief-sourced notion that “[a] foreign organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt.” And Roberts was content to rely simply on the idea that “[t]his possibility is real, not remote.” But failing to require any demonstrable risk when the First Amendment and national security conflict, invites imaginings of the possible and plausible, without sufficient regard for the probable. Applying such a rule, Breyer argued, will grant the government a victory in every instance. Breyer’s and Roberts’ dispute over the quantum of evidence required to establish a connection between the human rights advocates’ speech and terrorist attacks reverberates in the lower courts. This has played out most fully in the post-Boumediene litigation in the D.C. Circuit and district courts. In most instances, the D.C. Circuit has crafted evidentiary standards that benefit the government. For example, the D.C. Circuit has held that the government need only show by a preponderance of the evidence that a detainee is a member of al Qaeda or associated forces. Yet many of the judges have chafed at even the preponderance standard, advocating a lesser burden of proof. Not content with the reduced burden of proof, the D.C. Circuit also held that government intelligence reports enjoy a presumption of regularity. The D.C. Circuit has also insisted that courts undertake “conditional probability analysis,” or a “mosaic approach,” which entails reviewing evidence collectively as opposed to in isolation. The practical effect of these decision has been to, in the words of D.C. Circuit Judge David Tatel, “mov[e] the goal posts,” and “call[ ] the game in the government’s favor.” Humanitarian Law Project and the post-Boumediene litigation demonstrate that in the absence of clearly prescribed evidentiary standards, courts will craft a set of standards that support the government’s contentions, fearful of both the potential for harm and the public’s ire. Thus my proposal requires that burdens of proof be placed squarely on the government and that presumptions about evidence should not tilt against the person or group whose liberty interest has been implicated. This proposal does not ignore valid security interests or call the game in civil liberties’ favor. What it does recognize, however, is that the government, and judges, often overstate the harm, the probability, and imminence of terrorist threats. In order to justify a limitation on a liberty interest, the government must provide specific evidence supporting its assessments of the danger, probability, and imminence of a terrorist attack. Evidence must rise above generality and speculation. Courts should also adopt Cristina Wells’ proposed refined balancing, which entails clarifying the interests implicated and examining the government’s evidence supporting curtailment of the protected activity. A prescribed set of questions or checklist might have the salutary effect of moving judges from an intuitive process to a more deliberative one. Moreover, requiring such specificity is consistent with Philip Tetlock’s admonition that “we as a society would be better off if participants in policy debates stated their beliefs in testable forms.” This approach can only obtain greater accuracy and accountability of all participants, including the government, experts, and judges. Finally, requiring the government to meet a substantial burden of proof should not be alarming. It is hard to understand, for example, how a “clear and convincing” burden of proof in the detention context would prize civil liberty too dearly. This is not an unbearable burden for the government. As Baher Azmy argues, courts have applied this standard in a variety of sensitive and complex contexts including the pretrial detention of people for dangerousness, the civil commitment of “sexually violent predators,” and the commitment of those found not guilty by reason of insanity. A lesser standard is more likely to feed biases, neglecting probability and presuming imminence.

### Plan Text

#### Thus, the plan: The United States federal government should apply burdens of proofs and presumptions regarding evidence in habeas corpus hearings that favor individuals in military detention.

### Deference and the Law

#### Contention 2 is Deference and the Law

#### Judicially challenging these legal structures through the plan is critical—the law is inevitably formed by race, but it also actively legitimizes and maintains those belief on a large scale—refusing to accept the constructions of the executive is a necessary step

Joo 2, Professor of Law

 [Fall, 2002; Thomas W. Joo, Professor, University of California, Davis, School of Law (King Hall), “PRESUMED DISLOYAL: EXECUTIVE POWER, JUDICIAL DEFERENCE, AND THE CONSTRUCTION OF RACE BEFORE AND AFTER SEPTEMBER 11”, 34 Colum. Human Rights L. Rev. 1]

Because of its peculiar position as the official voice of society, law plays an important role in the construction of social institutions and beliefs, even those that are not typically considered "legal." The study of law and social norms and the study of expressive law focus on this aspect of law. n1 Of course, law does not make up social institutions from whole cloth, but neither is it a passive mirror of existing social beliefs. By demanding precise articulation and justification, law can transform vague and contested ideas into [\*2] legitimate and even enforceable concepts. In so doing, the law not only reflects social institutions but actively constructs them. Critical race theory teaches that race is one of the social institutions shaped by law. Law helps define the boundaries of racial groups. n2 Moreover, the legal treatment of racial groups disseminates and legitimates ideas about the supposed characteristics of members of those groups. n3 For example, American law and society have a long tradition of treating non-White immigrants and their descendants (including U.S. citizens) as permanently foreign and un-assimilable. n4 In times of conflict or perceived conflict with foreign powers, the presumption of foreignness gives rise to a further presumption that these "permanent foreigners" are loyal to those nations and disloyal to America. Our government and law often give official approval of the presumption of disloyalty and thus help to inscribe disloyalty as a racial characteristic. This is an important step in the ongoing process of constructing the meaning of racial categories. In the wake of the terrorist attacks of September 11, 2001, Arab, South Asian, and Muslim Americans have borne the brunt of the presumptions of foreignness and disloyalty. Previously, the foreignness and disloyalty presumptions have been central to the construction of the "Asian"/"Oriental" racial category in America. Thus, although current American usage does not usually apply the racial labels "Asian" and "Oriental" to Arab, South Asian, or Muslim Americans, n5 Asian American legal history holds many lessons about their racial construction since September 11. In the years just prior to September 11, Chinese Americans were the main targets of the "Oriental" disloyalty presumption. The investigation of the American nuclear scientist Wen Ho Lee was the most prominent example of [\*3] this focus. During World War II, the Japanese American internment provided the most vivid and notorious example of the outrages the disloyalty presumption can create. Part I of this Article sets the stage with a description of the Wen Ho Lee investigation. Part II places the Lee case in a larger context. The Lee case implicates racialized presumptions of "Oriental" foreignness and disloyalty that have consistently influenced Asian American legal history, most notoriously in the internment of Japanese Americans during World War II. Part III critiques the courts' deference to the executive branch in the Supreme Court's internment cases and the Lee case. This type of deference does twofold damage. First, and most obviously, it cedes excessive power to the executive branch. Second, by relying on the racial presumption of disloyalty, it constructs the meaning of the "Oriental" racial category to include disloyalty and legitimates the analytical relevance of such racial myths. Finally, Part IV will look at the "war on terrorism" as a new example of similar presumptions in action in another ongoing episode of racial construction. In the modern post-segregation era, the law rarely makes explicit reference to race. But the law often gives government agents discretion to act within broad race-neutral parameters. If discretion is broad enough, racial assumptions can work their way into the application of discretion. The most commonly recognized example of this phenomenon is the police practice of racially profiling suspects. In many areas, police officers have stopped African American drivers or pedestrians at disproportionate rates without significant reasons, or treated African American suspects more harshly than non-Black suspects. n6 The disproportionality is at least partly due to the racial stereotype, held by individual officers or the law enforcement culture, that an African American person (especially a young man) is likely to be a criminal. n7 Similarly, even though laws may not explicitly discriminate against Asian Americans today, Asian Americans may be the subject of racial profiling based on the stereotype of Oriental disloyalty. Wen [\*4] Ho Lee may have been a victim of this kind of thinking. Many of the individuals caught up in the September 11 investigation may be as well. It is critical to recognize the threads that connect the internment, the Lee investigation, the "war on terrorism," and police use of racial profiling. The concept of "racism" should not be limited to specific or isolated acts or policies explicitly based on discriminatory hatred. That view focuses on the moral blameworthiness of the "racist." Race and racism should be viewed as overarching processes and structures that result in subordination of certain people based on their supposed membership in a "non-White" group. n8 This approach emphasizes the effect on the persons who are "raced" - that is, the persons who are the objects of racial thinking. It also acknowledges that law and policy can construct and communicate racial thinking even when they are not explicitly based on race. As we know from the debate over racial profiling in conventional criminal law enforcement prior to September 11, it is difficult to determine whether racial stereotyping is involved when government policy is not based explicitly on race. But the absence of explicit stereotyping does not necessarily mean that government actions are not influenced by racial stereotypes. n9 Negative racial stereotypes are deeply ingrained in our culture and history, and thus reflected in the law and in government conduct. When government acts are consistent with historical discriminatory assumptions and are difficult to explain on race-neutral grounds, racialized assumptions should be considered a plausible explanation. Our society relies heavily on judicial and public scrutiny to control abuses of power by executive agencies such as law enforcement and the military. This requires judges, the press, and the public to take into account the unconscious and pervasive nature of racism. The Japanese American internment, and more recently the Wen Ho Lee [\*5] case, show how excessive judicial and public deference to executive discretion in the name of national security can permit racial scapegoating. Simultaneously, accepting racial scapegoating as a policy justification can permit the expansion of unchecked executive discretion. The current "war against terrorism" shows the same forces at work once again.

#### Voting affirmative is an act of resistance to restore the humanity of detainees—demanding habeas corpus rights is life affirming because it challenges dehumanizing state violence

Ahmad 9, Professor of Law

[2009, Muneer I. Ahmad is a Clinical Professor of Law, Yale Law School, “RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION”, Northwestern University Law Review, Vol. 103, p. 1683, American University, WCL Research Paper No. 08-65]

Rights as Resistance.—Habeas corpus, whose history has been explored exhaustively by others,297 translates as ―show me the body,‖ and captures the communitarian, corporeal, and testimonial dimensions of not just rights claims, but citizenship. For a judge to order the government to produce a defendant for the purposes of considering the legality of his detention is to recognize the defendant‘s a priori membership in the community. To require that the defendant himself—his corpus—be produced, and not just reasons for his detention proffered, is to acknowledge the physicality and inescapably human experience of an otherwise abstract liberty interest. And to permit the defendant to not only attend his own hearing, but to speak on his own behalf, is to credit his standing as an actor and agent. Taken together, the communitarian, corporeal, and testimonial bespeak a shared concern: human dignity. It is this human dignity, the human as distinguished from the merely biological, with which Arendt was fundamentally concerned. For Arendt, rights are indispensable to humanity, a protective membrane poised between the state and the individual. What she saw, and Giorgio Agamben has recently revived,298 is the idea that a confrontation between the state and the individual unmediated by rights reduces the individual to bare life, or naked life,299 which is life without humanity. It is this unmediated, unmitigated confrontation that both requires and enables the rendering of the human inhuman, animal, and savage.300 It is this rights-free confrontation that permits torture—the hand of the state encumbered by no law other than the laws of physics. And it is this unmediated confrontation that permits the transmogrification of a child into a terrorist. For Arendt, to be a citizen is to be human, and to be anything else is merely, and barely, life. The conception of rights as a bare protection interposed between the individual and state violence is intuitively familiar to the anti-death penalty advocate301 and to criminal defense lawyers generally. But the American legal embodiment of citizenship as rights is Dred Scott.302 While Scott was suing for his freedom from slavery, the case turned upon his citizenship. The Supreme Court found that Scott was not a ―citizen of a State,‖ and therefore, under the jurisdictional limits of Article III of the Constitution, could not bring suit in federal court.303 Thus, the case removed Scott‘s right even to be heard, by removing him from the polity. Like the Guantánamo prisoners, he had no right to have rights, and the negation of his political citizenship condemned him to the unmitigated violence of slavery. The denial of habeas to Omar and the other prisoners similarly placed them outside the communitarian consent that rights require. This expulsion from the polity authorizes the expulsion from humanity that torture represents. Here, we must remember that this expulsion was prefigured by the state iconography that placed the prisoners outside the realm of human understanding, and therefore outside of humanity itself.304 Stripped of the mediation of rights, Guantánamo reveals the essential and inescapable violence of law. Politics may dictate who is entitled to mediation and what form it will take, but all are subject to the force of the state that, fundamentally, animates law. The demand for rights is a plea to blunt state force, and not to fundamentally reorganize the structure of power. With this understanding of rights in mind, I return to the litigation strategy we adopted in Omar‘s case. By invoking rights, we sought recognition of Omar in a polity of significance. In this way, rights hailed Omar into the community, though his admission would depend upon community consent. As Arendt‘s analysis suggests, the demand for recognition is tantamount to a claim to humanity. To be human, to rise above biological existence and to secure political and social life, requires rights. And yet, once more, this bid was subject to political forces. No amount of rights-claiming could overcome a political will to deny the prisoners‘ humanity. In light of this, our strategy can be understood in a third way: rights as resistance. By this account, the rights claim sought not to escape the violence of the state, but to make that violence more costly to the state. To continue its brutal regime at Guantánamo, the government first would have to do violence to rights; to lay its hands on Omar again, the state would have to crash through his rights claims. Rather than avoid the state‘s confrontation with the individual, this strategy seeks to expose it. The onus then shifts from the prisoner trying to establish the existence of rights to the state establishing their nonexistence, from the individual establishing harm done to the state justifying its own violence. In some respects, this strategy has worked. So long as it could avoid any discussion of Guantánamo, as it long attempted to do, the government could enact violence without political cost. But rights claims force the government into discourse in which the violence of the state is put on display and must be justified. The claim of rights itself may interpose a membrane between the state and the individual even if the right itself ultimately is found not to exist. Thus, our rights-based strategy could be understood as interposing a protective membrane between Omar and the state. In this way, we wanted to mediate, and moderate, the relationship between the state and Omar, with the hope of ultimately transforming the relationship from one of potentate and biological mass to one more recognizable as warden and prisoner. This was a form of resistance to Omar‘s mistreatment, which required the state either to stop its violence or to engage in it in the public forum of the court. This approach had some success, as the worst of the mistreatment of Omar and the other prisoners stopped once the government was forced to grapple with it in the daylight of federal court.305 And yet, Omar‘s other fundamental material conditions—indefinite detention, and trial before a substandard tribunal—remained the same, just as the fundamentals of Guantánamo have remained largely the same for the hundreds of other prisoners. At the end of the day, I believe our approach has not proven more successful because the fundamental question of political citizenship has not been resolved in the prisoners‘ favor, and as I have argued, the success of even first-order rights depends upon a priori political membership. When I have rehearsed these arguments for others, particularly lawyers, the response I have often gotten is that we did the best that we could, and that there was no alternative. To argue the existence of rights, and to do so forcefully, is to fulfill the professional obligation of a lawyer. But this strikes me as too weak a conception of professional obligation. I believe that the rights-based approach has been worthy and necessary, but not merely because it was a form of last-resort lawyering. Rather, the rightsbased lawyering has performed an essential role of mounting resistance to the unbridled exercise of state violence, essential not because there is nothing else to be done, but because of the opportunities and potentialities that resistance creates. This is consistent with what Scott Cummings has termed ―constrained legalism,‖ 306 for it capitalizes on what law can accomplish, even as it recognizes what law cannot.

#### specific policy analysis is key – engagement with nitty gritty policy details is more effective than vague generalizations in equipping students for politics

Ferguson, Professor of Anthropology at Stanford, 11

(The Uses of Neoliberalism, Antipode, Vol. 41, No. S1, pp 166–184)

If we are seeking, as this special issue of Antipode aspires to do, to link our critical analyses to the world of grounded political struggle—not only to interpret the world in various ways, but also to change it—then there is much to be said for focusing, as I have here, on mundane, real- world debates around policy and politics, even if doing so inevitably puts us on the compromised and reformist terrain of the possible, rather than the seductive high ground of revolutionary ideals and utopian desires. But I would also insist that there is more at stake in the examples I have discussed here than simply a slightly better way to ameliorate the miseries of the chronically poor, or a technically superior method for relieving the suffering of famine victims.¶ My point in discussing the South African BIG campaign, for instance, is not really to argue for its implementation. There is much in the campaign that is appealing, to be sure. But one can just as easily identify a series of worries that would bring the whole proposal into doubt. Does not, for instance, the decoupling of the question of assistance from the issue of labor, and the associated valorization of the “informal”, help provide a kind of alibi for the failures of the South African regime to pursue policies that would do more to create jobs? Would not the creation of a basic income benefit tied to national citizenship simply exacerbate the vicious xenophobia that already divides the South African poor,¶ in a context where many of the poorest are not citizens, and would thus not be eligible for the BIG? Perhaps even more fundamentally, is the idea of basic income really capable of commanding the mass support that alone could make it a central pillar of a new approach to distribution? The record to date gives powerful reasons to doubt it. So far, the technocrats’ dreams of relieving poverty through efficient cash transfers have attracted little support from actual poor people, who seem to find that vision a bit pale and washed out, compared with the vivid (if vague) populist promises of jobs and personalistic social inclusion long offered by the ANC patronage machine, and lately personified by Jacob Zuma (Ferguson forthcoming).¶ My real interest in the policy proposals discussed here, in fact, has little to do with the narrow policy questions to which they seek to provide answers. For what is most significant, for my purposes, is not whether or not these are good policies, but the way that they illustrate a process through which specific governmental devices and modes of reasoning that we have become used to associating with a very particular (and conservative) political agenda (“neoliberalism”) may be in the process of being peeled away from that agenda, and put to very different uses. Any progressive who takes seriously the challenge I pointed to at the start of this essay, the challenge of developing new progressive arts of government, ought to find this turn of events of considerable interest.¶ As Steven Collier (2005) has recently pointed out, it is important to question the assumption that there is, or must be, a neat or automatic fit between a hegemonic “neoliberal” political-economic project (however that might be characterized), on the one hand, and specific “neoliberal” techniques, on the other. Close attention to particular techniques (such as the use of quantitative calculation, free choice, and price driven by supply and demand) in particular settings (in Collier’s case, fiscal and budgetary reform in post-Soviet Russia) shows that the relationship between the technical and the political-economic “is much more polymorphous and unstable than is assumed in much critical geographical work”, and that neoliberal technical mechanisms are in fact “deployed in relation to diverse political projects and social norms” (2005:2).¶ As I suggested in referencing the role of statistics and techniques for pooling risk in the creation of social democratic welfare states, social technologies need not have any essential or eternal loyalty to the political formations within which they were first developed. Insurance rationality at the end of the nineteenth century had no essential vocation to provide security and solidarity to the working class; it was turned to that purpose (in some substantial measure) because it was available, in the right place at the right time, to be appropriated for that use. Specific ways of solving or posing governmental problems, specific institutional and intellectual mechanisms, can be combined in an almost infinite variety of ways, to accomplish different social ends. With social, as with any other sort of technology, it is not the machines or the mechanisms that decide what they will be used to do.¶ Foucault (2008:94) concluded his discussion of socialist government- ality by insisting that the answers to the Left’s governmental problems require not yet another search through our sacred texts, but a process of conceptual and institutional innovation. “[I]f there is a really socialist governmentality, then it is not hidden within socialism and its texts. It cannot be deduced from them. It must be invented”. But invention in the domain of governmental technique is rarely something worked up out of whole cloth. More often, it involves a kind of bricolage (Le ́vi- Strauss 1966), a piecing together of something new out of scavenged parts originally intended for some other purpose. As we pursue such a process of improvisatory invention, we might begin by making an inventory of the parts available for such tinkering, keeping all the while an open mind about how different mechanisms might be put to work, and what kinds of purposes they might serve. If we can go beyond seeing in “neoliberalism” an evil essence or an automatic unity, and instead learn to see a field of specific governmental techniques, we may be surprised to find that some of them can be repurposed, and put to work in the service of political projects very different from those usually associated with that word. If so, we may find that the cabinet of governmental arts available to us is a bit less bare than first appeared, and that some rather useful little mechanisms may be nearer to hand than we thought.

#### specifically Guantanamo issues require a more detailed focus on the legal system—student advocacy enables us to make change

Marguiles 11, Professor of Law

[February 9, 2011, Peter Margulies is Professor of Law, Roger Williams University., “The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education’s Responses to Terrorism”Journal of Legal Education, Vol. 60, p. 373, 2011, Roger Williams Univ. Legal Studies Paper No. 100]

If timidity in the face of government overreaching is the academy’s overarching historical narrative,1 responses to September 11 broke the mold. In what I will call the first generation of Guantánamo issues, members of the legal academy mounted a vigorous campaign against the unilateralism of Bush Administration policies.2 However, the landscape has changed in Guantánamo’s second generation, which started with the Supreme Court’s landmark decision in Boumediene v. Bush,3 affirming detainees’ access to habeas corpus, and continued with the election of Barack Obama. Second generation Guantánamo issues are murkier, without the clarion calls that marked first generation fights. This Article identifies points of substantive and methodological convergence4 in the wake of Boumediene and President Obama’s election. It then addresses the risks in the latter form of convergence. Substantive points of convergence that have emerged include a consensus on the lawfulness of detention of suspected terrorists subject to judicial review5 and a more fragile meeting of the minds on the salutary role of constraints generally and international law in particular. However, the promise of substantive consensus is marred by the peril of a methodological convergence that I call dominant doctrinalism. Too often, law school pedagogy and scholarship squint through the lens of doctrine, inattentive to the way that law works in practice.6 Novel doctrinal developments, such as the president’s power to detain United States citizens or persons apprehended in the United States, get disproportionate attention in casebooks and scholarship. In contrast, developments such as an expansion in criminal and immigration law enforcement that build on settled doctrine get short shrift, even though they have equal or greater real-world consequences. Consumers of pedagogy and scholarship are ill-equipped to make informed assessments or push for necessary changes. If legal academia is to respond adequately to second generation Guantánamo issues, as well as issues raised by any future attacks, it must transcend the fascination with doctrine displayed by both left and right, and bolster its commitment to understanding and changing how law works “on the ground.” To combat dominant doctrinalism and promote positive change, this Article asks for greater attention in three areas. First, law schools should do even more to promote clinical and other courses that give students first-hand experience in advocacy for vulnerable and sometimes unpopular clients, including the need for affirming their clients’ humanity and expanding the venue of advocacy into the court of public opinion.7 Clinical students also often discover with their clients that legal rights matter, although chastened veterans of rights battles like Joe Margulies and Hope Metcalf are correct that victories are provisional and sometimes pyrrhic.8 Second, legal scholarship and education should encourage the study of social phenomena like path dependence—the notion that past choices frame current advocacy strategies, so that lawyers recommending an option must consider the consequences of push-back from that choice. Aggressive Bush Administration lawyers unduly discounted risks flagged by more reflective colleagues on the consequences of push-back from the courts. Similarly, both the new Obama Administration and advocates trying to cope with Guantánamo’s post-Boumediene second generation failed to gauge the probability of push-back from the administration’s early announcement of plans to close the facility within a year. In each case, unexpected but reasonably foreseeable reactions skewed the implementation of legal and policy choices. Students should learn more about these dynamics before they enter the legal arena. Third, teachers need to focus more on ways in which bureaucratic structures affect policy choices. For example, terrorism fears gave conservative politicians like John Ashcroft an opportunity to decimate asylum adjudication, harming many victims of persecution who have been unable to press meritorious claims for refugee status and other forms of relief. Similarly, creation of the Department of Homeland Security turned a vital governmental function like disaster relief into a bureaucratic orphan, thereby paving the way for the inadequate response to Hurricane Katrina. Students need more guidance on what to look for when structure shapes substance.

#### Legal strategies are more effective than the alternative—focusing on habeas challenges enables us to mobilize attention and utilize the state to undermine its legitimacy—our evidence assumes the malleability of the law

Ahmad 9, Professor of Law

[2009, Muneer I. Ahmad is a Clinical Professor of Law, Yale Law School, “RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION”, Northwestern University Law Review, Vol. 103, p. 1683, American University, WCL Research Paper No. 08-65]

As I have discussed thus far, we believed the commission to be a purely political apparatus, devoid of legal legitimacy, and yet, rather than boycott the proceedings, we participated in them. Moreover, despite our keen awareness that the system was built upon a rights-free edifice, we insisted on making rights-based arguments in the commission, as opposed to accepting the rights-free system presented to us. Thus, we argued that the Constitution, and in particular, Fifth Amendment due process protections, extended to Omar, as did substantive and procedural protections of the Geneva Conventions;255 we argued that Omar had rights as a child, under in-ternational treaty obligations256 as well as customary international law; and we argued that human rights law applied, and could not be displaced by international humanitarian law.257 In contrast, the Pentagon would have had us accept their system as is, and either persuade our clients to plead guilty (as the first defense lawyers were asked to do) or proceed to a trial governed by substandard rules and an unknown jurisprudence. This rights-based strategy might seem futile given the malleability of law and the contingency of its definitions and structures at Guantánamo, epitomized by the ever-shifting nature of such seemingly bedrock questions as who is an ―enemy combatant‖ and what is a ―war crime‖; so long as the political context in which rights reside can be redefined, so, too, can the rights themselves.258 While all rights questions are subject to change over time, as I have argued, the legal indeterminacy at Guantánamo was especially problematic because of the novelty of its core principles, its disavowal of extant jurisprudence, and the unavailability of meaningful judicial review. Moreover, the danger of a rights-based strategy is not merely futility, but complicity in the commission‘s project of self-legitimation, a concern that haunted us throughout the process. Indeed, one of the most sobering events for me came during the first session of Omar‘s commission, in which I had made a lengthy legal argument. During a break, a presiding officer from another case thanked me for the quality of my presentation and said that I had elevated the process. Although I did not create it, I had helped to hold up the commission‘s curtain of legitimacy. The indeterminacy of rights at Guantánamo did not only render them unstable, but suggested that they were politically determined as well. Like the velvet drapes in the military commission room, it seemed clear that law and its rhetoric, structures, and trappings were serving as a cover for the operation of political power. Still, we doggedly pursued a rights-based strategy on Omar‘s behalf. The question of why one might engage in rights-based litigation in as rights-starved an environment as Guantánamo involves tactical, strategic, and theoretical considerations,259 each of which is discussed below. Rights Tactics and Rights Strategies When confronted with profound, seemingly irremediable injustice in the primary forum of contest, the lawyer‘s instinct, if not the human one, is to appeal to a higher authority. In the military commissions, that higher authority was a federal habeas court, which, unlike the commission, stood independent of the Executive and enjoyed a legitimacy to which the commission could only aspire. As a tactical matter, therefore, we sought in the commission proceedings to dramatize the irregularity of the commission, in contrast to the proceedings a criminal defendant could expect in a regular court—either a military court martial or federal district court. Rights were an effective discourse strategy for this project, for they provided instantly recognizable handles for the comparison: the right to see the evidence against you, the right to confront witnesses, and the right to competent counsel were all so familiar within the American courtroom that their invocation in the commission—not just in principle but in the language of rights—would help to cast the commission as fatally deficient in the eyes of the habeas court when they reviewed the proceedings. This recalls Rick Abel‘s insight regarding the apartheid regime in South Africa: ―Because the regime used legal institutions to construct and administer apartheid, it was vulnerable to legal contestation.‖ 260 Similarly, Abel has observed that even though a reflection of power, law nonetheless can be a source of countervailing power as well, because state power is divided among the branches and therefore potentially heterogeneous.261 Such heterogeneity creates opportunities for even nonstate actors to wield power, strategically and interstitially, working the gaps and crevices within a complex state apparatus. Notably, recourse to the habeas court proved to be the most successful strategy in challenging the legitimacy of the military commissions: the Hamdan case, which invalidated the original military commission system at Guantánamo, was brought via a collateral habeas action.262 As a corollary to Abel‘s theorem, our invocation of rights was designed not only to appeal to the judiciary, but also to Congress, civil society actors, and the press. Rights may be an impoverished discourse, susceptible of manipulation and, even when recognized, unable to execute themselves without political consent, but they are nonetheless a familiar and shared discourse whose resonance carries across branches of government and across different segments of society. When we engaged in rights talk within the military commission, we knew that we were speaking to multiple au-diences simultaneously—―playing to the gallery,‖ as it is often pejoratively described—and we knew that the language of rights, as a metric of both correctness and fairness, was accessible to all. As I have discussed previously, the structure of the commissions and their early conduct convinced us that our assertions of rights would almost always fail. But claiming the language of rights forced the government to disclaim it. Each time we argued that the Geneva Conventions compelled some protection for Omar, the government was forced to argue the inapplicability of the Geneva Conventions. This was also the case when we argued constitutional due process and international human rights claims. Our hope was to dramatize, through the cumulative governmental disclaiming of rights, what Omar understood intuitively: that Guantánamo was a rightsfree zone. The fact of divided government and diffuse power263 does not, of course, compel the exercise of countervailing power. Just as the commissions rejected our rights-based arguments, so, too, could the federal courts, Congress, and the public. But the existence of multiple sources of power also permits different relationships between law and power. The appeal of rights, their narrative and jurisprudential meaning, can be expected to vary with the narrative frame of the audience; rights may vary across space and time. Because the commissions were a creation of the Executive and housed within the cultural and command structures of the military, they were institutionally situated far differently than the Article III habeas courts and subject to different political pressures than Congress. Thus, the repeated failure of rights-based arguments in the commissions was not necessarily itself a failure if competing arbiters of rights, in both the popular and legal imaginations, were to come to different conclusions. In many ways, our rights-based strategy was focused less on U.S. institutions and more on Canada, Omar‘s country of citizenship. This reflects a geopolitical view that Omar‘s continued detention and his trial by military commission are partially the function of Canadian acquiescence to American power. To date, the Canadian government has not publicly criticized either Guantánamo or Omar‘s trial by military commission. In contrast, other countries, most notably Great Britain, have rejected both the detention and trial by military commission of their citizens, stating publicly the unacceptability of these practices, and expending political capital in order to end them.264 As a result of these efforts, all Britons have been released from Guantánamo,265 suggesting that international political arrangements circum-scribe Omar‘s legal predicament at Guantánamo. The political domain, then, includes not only the United States, and not only U.S.–Canada relations, but the domestic politics of Canada as well. The case of former Guantánamo prisoner David Hicks is instructive in this regard. Hicks, an Australian citizen, was one of the first Guantánamo prisoners to be charged before a military commission. Through the extraordinary work of his legal counsel and effective advocacy in Australia by his family, Hicks became a cause célèbre in Australia, and a symbol of American injustice toward an Australian citizen.266 His advocates forged a narrative according to which as an Australian, Hicks was entitled to rights which the military commissions failed to afford. Hicks ultimately pleaded guilty to a single charge and was transferred back to Australia267 under an agreement that was widely understood to be a political compromise between the Australian and American governments rather than the product of independent legal process.268 Thus, even if rights-based arguments fall flat in the United States, Omar‘s circumstances might be improved if rights-based arguments were to alter political discourse in Canada. This strategy could be viewed as reducing rights to politics, and deploying rights as mere political devices. But once more we see how the value of rights can vary. Even as we worried that a post-September 11 politics had made the United States inhospitable to rights claims on behalf of terrorist suspects, we understood that in the same historical moment, rights might have greater purchase in Canada. A rightsbased strategy therefore feeds into what is essentially ongoing interlocutory review of Omar‘s case by the Canadian government (admittedly, governed by its own political process, but a different politics), which is in turn informed by broader Canadian public opinion. And so our rights-based strategy in the military commissions attempted to negotiate the uneasy relationship between law and politics, to view rights as less than self-defining but more than ―nonsense on stilts.‖ 269 We sought to subject the ―law‖ of the commissions to the scrutiny of a range of political actors. Thus, our strategy did not depend on victory in the commission itself. Indeed, the goal of demonstrating the legal emptiness of the commissions was better served by our arguments—for due process, for rules of evidence, for prohibitions on coerced testimony—failing in them. We used the commission, and its rejection of our rights-based strategy, for its political and educational value, echoing Jules Lobel‘s call for deliberate use of courts as forums for protest.270 In so doing, we ―drag[ged] the courtroom into politics.‖ 271 Clearly, not all of our tactics worked, and certainly they did not produce our ultimate goal of returning Omar to Canada. Moreover, even these tactics came at a cost of partially legitimizing the commission as a site of legal contest.272 Nonetheless, I believe the strategic potential of rights-based argument was sufficient to make our approach defensible. I must admit, however, that it was not all clear-eyed strategy that led me to the rightsbased approach, for even before I had thought through the strategic potential, I was inclined toward arguing rights. This rights tropism is the logical and predictable consequence of our professional training as lawyers. Indeed, it is an occupational hazard. I do not mean to disclaim rights wholesale, but at the same time, I am mindful, and wary, of rights as the first recourse for helping our clients achieve their goals.273 Rights become the faith story for many of us, holding out hope for a gradualist, liberal perfection of the injustice in the world.

#### Our focus on policy concerns and institutional practices is a valuable heuristic that is more descriptive of reality than a focus on personal politics

Wight – Professor of IR @ University of Sydney – 6

(Colin, Agents, Structures and International Relations: Politics as Ontology, pgs. 48-50

One important aspect of this relational ontology is that these relations constitute our identity as social actors. According to this relational model of societies, one is what one is, by virtue of the relations within which one is embedded. A worker is only a worker by virtue of his/her relationship to his/her employer and vice versa. ‘Our social being is constituted by relations and our social acts presuppose them.’ At any particular moment in time an individual may be implicated in all manner of relations, each exerting its own peculiar causal effects. This ‘lattice-work’ of relations constitutes the structure of particular societies and endures despite changes in the individuals occupying them. Thus, the relations, the structures, are ontologically distinct from the individuals who enter into them. At a minimum, the social sciences are concerned with two distinct, although mutually interdependent, strata. There is an ontological difference between people and structures: ‘people are not relations, societies are not conscious agents’. Any attempt to explain one in terms of the other should be rejected. If there is an ontological difference between society and people, however, we need to elaborate on the relationship between them. Bhaskar argues that we need a system of mediating concepts, encompassing both aspects of the duality of praxis into which active subjects must fit in order to reproduce it: that is, a system of concepts designating the ‘point of contact’ between human agency and social structures. This is known as a ‘positioned practice’ system. In many respects, the idea of ‘positioned practice’ is very similar to Pierre Bourdieu’s notion of habitus. Bourdieu is primarily concerned with what individuals do in their daily lives. He is keen to refute the idea that social activity can be understood solely in terms of individual decision-making, or as determined by surpa-individual objective structures. Bourdieu’s notion of the habitus can be viewed as a bridge-building exercise across the explanatory gap between two extremes. Importantly, the notion of a habitus can only be understood in relation to the concept of a ‘social field’. According to Bourdieu, a social field is ‘a network, or a configuration, of objective relations between positions objectively defined’. A social field, then, refers to a structured system of social positions occupied by individuals and/or institutions – the nature of which defines the situation for their occupants. This is a social field whose form is constituted in terms of the relations which define it as a field of a certain type. A habitus (positioned practices) is a mediating link between individuals’ subjective worlds and the socio-cultural world into which they are born and which they share with others. The power of the habitus derives from the thoughtlessness of habit and habituation, rather than consciously learned rules. The habitus is imprinted and encoded in a socializing process that commences during early childhood. It is inculcated more by experience than by explicit teaching. Socially competent performances are produced as a matter of routine, without explicit reference to a body of codified knowledge, and without the actors necessarily knowing what they are doing (in the sense of being able adequately to explain what they are doing). As such, the habitus can be seen as the site of ‘internalization of reality and the externalization of internality.’ Thus social practices are produced in, and by, the encounter between: (1) the habitus and its dispositions; (2) the constraints and demands of the socio-cultural field to which the habitus is appropriate or within; and (3) the dispositions of the individual agents located within both the socio-cultural field and the habitus. When placed within Bhaskar’s stratified complex social ontology the model we have is as depicted in Figure 1. The explanation of practices will require all three levels. Society, as field of relations, exists prior to, and is independent of, individual and collective understandings at any particular moment in time; that is, social action requires the conditions for action. Likewise, given that behavior is seemingly recurrent, patterned, ordered, institutionalised, and displays a degree of stability over time, there must be sets of relations and rules that govern it. Contrary to individualist theory, these relations, rules and roles are not dependent upon either knowledge of them by particular individuals, or the existence of actions by particular individuals; that is, their explanation cannot be reduced to consciousness or to the attributes of individuals. These emergent social forms must possess emergent powers. This leads on to arguments for the reality of society based on a causal criterion. Society, as opposed to the individuals that constitute it, is, as Foucault has put it, ‘a complex and independent reality that has its own laws and mechanisms of reaction, its regulations as well as its possibility of disturbance. This new reality is society…It becomes necessary to reflect upon it, upon its specific characteristics, its constants and its variables’.

# 2AC

### 2AC Topic Failures

#### The topic has presented debates that have focused on legal liberalism at the expense of racial justice—the aff is a corrective to the failures of legal liberalism—focusing on the role of national security discourse in racial subordination moves beyond the law vs. security framing and addresses the socially contingent nature of the law

Gott 5, Professor of International Studies

[01/01/05, Gil Gott is a Professor of International Studies at DePaul University, “The Devil We Know: Racial Subordination and National Security Law” Villanova Law Review, Vol. 50, Iss. 4, p. 1075-1076, http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1235&context=vlr]

This article asks the "subordination question" with regard to contemporary national security law and policy.2 It will consider how our scholarship and institutions construct national security law and policy in ways that afford either greater or lesser degrees of analytical and normative primacy to the problems of racialized group-based social harms that commonly surround exercises of national security-related powers. The anti-subordinationist methodology deployed here foregrounds such problems and allows us more accurately to assess the real costs of "states of emergency" by moving beyond standard law-versus-security framings. By focusing on "enemy group" demonization we are also better able to grasp the identity-inflected basis of the constructed security horizon itself, in effect analytically opening up to contestation the statist "black box" of emergency construction. Finally, the normative pre-commitments of an anti-subordinationist perspective allow us to judge the merits and the desirability of national secur-ity law and policy from a perspective that resists resolving the law-security binarism into unrestrained political decisionism.3 Given an abundance of historical and contemporary evidence that national security rationales and measures are socially contingent in both conception and effect (reflecting at the bottom, societal pathologies such as racial and ethnic animus), it would seem likely that mainstream legal scholars would treat the resulting group-based harms as central to the post-September 11 national security law and policy debates. Indeed, the research I present in this article shows that it is not the case that liberal legal sensibilities wholly fail to apprehend the problems of group demonization in security crises. Legal liberalism, in fact, evinces due concern for state abuse of emergency powers and acknowledges the "distributional" inequalities inherent in such abusive practices, that is, the disproportionate burdening of "out-groups" in state security crises. The legal literature, however, typically orients itself around the narrow problem of how best to balance the conflicting demands of law-usually conceived of as minimalized individual civil liberties protections and/or institutional balancingand state security. I will show that legal liberalism has not effectively confronted the devil we know all too well-the subordination of racialized enemy groups, in this case, Arabs, Muslims or South Asians. I look at two categories of post-September 11 liberal and progressive legal responses, accommodationist approaches 4 and more oppositional, albeit formalistic, civil liberties-based critiques. The first group of approaches seeks generally to accommodate law and justice to national security- related "necessity" and is animated in part by valorization and even identification with the state and its putative security needs. Alternatively, the formalistic civil liberties approaches would generally apply the Constitution in more or less the same way regardless of the state's perceived security dilemma. This "business as usual" approach distrusts hypertrophied governmental powers and uses civil liberties framings to critique security regimes, such as the one arising from the war on terrorism. 5 While I consider the work of civil liberties advocates to be courageous and crucial for the broader project of creating a more just national security culture, I will consider how both accommodationist and formalistic civil liberties approaches similarly may occlude key subordinationist dimensions of the war on terrorism. Anti-subordinationist principles require taking more complete account of how enemy groups are racialized, and how they come to be constructed as outsiders and the kinds of harms that may befall them as such. Group-based status harms include those that have been inscribed in law and effectuated through state action, and those that arise within civil society, through social structures, institutions, culture and habitus. Familiarity with the processes of racialization is a necessary precondition for appreciating and remedying such injuries. Applying anti-subordinationist thinking to national security law and policy does not require arguing that only race-based effects matter, but does require affording significant analytical and normative weight to the problems of such status harms. Racial injuries require racial remedies. Foregrounding anti-subordinationist principles in national security law and policy analysis departs significantly from traditional approaches in the field. Nonetheless, arguments based in history, political theory and pragmatism suggest that such a fundamental departure is warranted. Historically, emergency-induced "states of exception" 6 that have suspended legal protections against governmental abuses have tended to be identity based in conception and implementation. 7 Viewed from the perspective of critical political theory, the constellation of current "security threats" rests on the epochal co-production of identity-based and market-driven global political antagonisms, referred to somewhat obliquely as civilization clashes or perhaps more forthrightly as American imperialism. Pragmatically, it makes no sense to fight terrorism by alienating millions of Muslim, Arab and South Asian residents in the United States and hundreds of millions more abroad through abusive treatment and double standards operative in identity-based repression at home and in selective, preemptive U.S. militarism abroad. Such double standards undermine the democratic legitimacy of the United States both in its internal affairs and in its assertions of global leadership. Indeed, there seems to be no shortage of perspectives from which liberal legal institutions would be enjoined from embracing a philosophy of political decisionism precisely at the interface of law and security, an anomic frontier along which are likely to arise identity-based regimes of exception and evolving race-based forms of subordination.

### 2AC Williams

#### All their reasons the state is bad are a reason to vote affirmative—engaging means we know the tactics of the oppressor

Williams 70

[1970, Robert F. Williams, interviewed by The Black Scholar, “Interviews,”, Vol. 1, No. 7, BLACK REVOLUTION (May 1970), pp. 2-14, http://www.jstor.org/stable/41163455]

Williams: It is erroneous to think that one can isolate oneself completely from institutions of a social and political system that exercises power over the environment in which he resides. Self-imposed and premature isolation, initiated by the oppressed against the organs of a tyrannical establishment, militates against revolutionary movements dedicated to radical change. It is a grave error for militant and just minded youth to reject struggle-serving opportunities to join the man's government and the services, police forces, peace corps and vital organs of the power structure. Militants should become acquainted with the methods of the oppressor. Meaningful change can be more thoroughly effectuated by militant pressure from within as well as without. We can obtain valuable know-how from the oppressor. Struggle is not all violence. Effective struggle requires tactics, plans, analysis and a highly sophisticated application of mental aptness. The forces of oppression and tyranny have perfected highly articulate systems of infiltration for undermining and frustrating the efforts of the oppressed in trying to upset the unjust status quo. To a great extent, the power structure keeps itself informed as to the revolutionary activity of freedom fighters. With the looming threat of extermination looming menacingly before black Americans, it is pressingly imperative that our people enter the vital organs of the establishment. Infiltrate the man's institutions.

### 2AC Malleability

#### Legal strategies are more effective than the alternative—focusing on habeas challenges enables us to mobilize attention and utilize the state to undermine its legitimacy—our evidence assumes the malleability of the law

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[2009, Muneer I. Ahmad is a Clinical Professor of Law, Yale Law School, “RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION”, Northwestern University Law Review, Vol. 103, p. 1683, American University, WCL Research Paper No. 08-65]

As I have discussed thus far, we believed the commission to be a purely political apparatus, devoid of legal legitimacy, and yet, rather than boycott the proceedings, we participated in them. Moreover, despite our keen awareness that the system was built upon a rights-free edifice, we insisted on making rights-based arguments in the commission, as opposed to accepting the rights-free system presented to us. Thus, we argued that the Constitution, and in particular, Fifth Amendment due process protections, extended to Omar, as did substantive and procedural protections of the Geneva Conventions;255 we argued that Omar had rights as a child, under in-ternational treaty obligations256 as well as customary international law; and we argued that human rights law applied, and could not be displaced by international humanitarian law.257 In contrast, the Pentagon would have had us accept their system as is, and either persuade our clients to plead guilty (as the first defense lawyers were asked to do) or proceed to a trial governed by substandard rules and an unknown jurisprudence. This rights-based strategy might seem futile given the malleability of law and the contingency of its definitions and structures at Guantánamo, epitomized by the ever-shifting nature of such seemingly bedrock questions as who is an ―enemy combatant‖ and what is a ―war crime‖; so long as the political context in which rights reside can be redefined, so, too, can the rights themselves.258 While all rights questions are subject to change over time, as I have argued, the legal indeterminacy at Guantánamo was especially problematic because of the novelty of its core principles, its disavowal of extant jurisprudence, and the unavailability of meaningful judicial review. Moreover, the danger of a rights-based strategy is not merely futility, but complicity in the commission‘s project of self-legitimation, a concern that haunted us throughout the process. Indeed, one of the most sobering events for me came during the first session of Omar‘s commission, in which I had made a lengthy legal argument. During a break, a presiding officer from another case thanked me for the quality of my presentation and said that I had elevated the process. Although I did not create it, I had helped to hold up the commission‘s curtain of legitimacy. The indeterminacy of rights at Guantánamo did not only render them unstable, but suggested that they were politically determined as well. Like the velvet drapes in the military commission room, it seemed clear that law and its rhetoric, structures, and trappings were serving as a cover for the operation of political power. Still, we doggedly pursued a rights-based strategy on Omar‘s behalf. The question of why one might engage in rights-based litigation in as rights-starved an environment as Guantánamo involves tactical, strategic, and theoretical considerations,259 each of which is discussed below. Rights Tactics and Rights Strategies When confronted with profound, seemingly irremediable injustice in the primary forum of contest, the lawyer‘s instinct, if not the human one, is to appeal to a higher authority. In the military commissions, that higher authority was a federal habeas court, which, unlike the commission, stood independent of the Executive and enjoyed a legitimacy to which the commission could only aspire. As a tactical matter, therefore, we sought in the commission proceedings to dramatize the irregularity of the commission, in contrast to the proceedings a criminal defendant could expect in a regular court—either a military court martial or federal district court. Rights were an effective discourse strategy for this project, for they provided instantly recognizable handles for the comparison: the right to see the evidence against you, the right to confront witnesses, and the right to competent counsel were all so familiar within the American courtroom that their invocation in the commission—not just in principle but in the language of rights—would help to cast the commission as fatally deficient in the eyes of the habeas court when they reviewed the proceedings. This recalls Rick Abel‘s insight regarding the apartheid regime in South Africa: ―Because the regime used legal institutions to construct and administer apartheid, it was vulnerable to legal contestation.‖ 260 Similarly, Abel has observed that even though a reflection of power, law nonetheless can be a source of countervailing power as well, because state power is divided among the branches and therefore potentially heterogeneous.261 Such heterogeneity creates opportunities for even nonstate actors to wield power, strategically and interstitially, working the gaps and crevices within a complex state apparatus. Notably, recourse to the habeas court proved to be the most successful strategy in challenging the legitimacy of the military commissions: the Hamdan case, which invalidated the original military commission system at Guantánamo, was brought via a collateral habeas action.262 As a corollary to Abel‘s theorem, our invocation of rights was designed not only to appeal to the judiciary, but also to Congress, civil society actors, and the press. Rights may be an impoverished discourse, susceptible of manipulation and, even when recognized, unable to execute themselves without political consent, but they are nonetheless a familiar and shared discourse whose resonance carries across branches of government and across different segments of society. When we engaged in rights talk within the military commission, we knew that we were speaking to multiple au-diences simultaneously—―playing to the gallery,‖ as it is often pejoratively described—and we knew that the language of rights, as a metric of both correctness and fairness, was accessible to all. As I have discussed previously, the structure of the commissions and their early conduct convinced us that our assertions of rights would almost always fail. But claiming the language of rights forced the government to disclaim it. Each time we argued that the Geneva Conventions compelled some protection for Omar, the government was forced to argue the inapplicability of the Geneva Conventions. This was also the case when we argued constitutional due process and international human rights claims. Our hope was to dramatize, through the cumulative governmental disclaiming of rights, what Omar understood intuitively: that Guantánamo was a rightsfree zone. The fact of divided government and diffuse power263 does not, of course, compel the exercise of countervailing power. Just as the commissions rejected our rights-based arguments, so, too, could the federal courts, Congress, and the public. But the existence of multiple sources of power also permits different relationships between law and power. The appeal of rights, their narrative and jurisprudential meaning, can be expected to vary with the narrative frame of the audience; rights may vary across space and time. Because the commissions were a creation of the Executive and housed within the cultural and command structures of the military, they were institutionally situated far differently than the Article III habeas courts and subject to different political pressures than Congress. Thus, the repeated failure of rights-based arguments in the commissions was not necessarily itself a failure if competing arbiters of rights, in both the popular and legal imaginations, were to come to different conclusions. In many ways, our rights-based strategy was focused less on U.S. institutions and more on Canada, Omar‘s country of citizenship. This reflects a geopolitical view that Omar‘s continued detention and his trial by military commission are partially the function of Canadian acquiescence to American power. To date, the Canadian government has not publicly criticized either Guantánamo or Omar‘s trial by military commission. In contrast, other countries, most notably Great Britain, have rejected both the detention and trial by military commission of their citizens, stating publicly the unacceptability of these practices, and expending political capital in order to end them.264 As a result of these efforts, all Britons have been released from Guantánamo,265 suggesting that international political arrangements circum-scribe Omar‘s legal predicament at Guantánamo. The political domain, then, includes not only the United States, and not only U.S.–Canada relations, but the domestic politics of Canada as well. The case of former Guantánamo prisoner David Hicks is instructive in this regard. Hicks, an Australian citizen, was one of the first Guantánamo prisoners to be charged before a military commission. Through the extraordinary work of his legal counsel and effective advocacy in Australia by his family, Hicks became a cause célèbre in Australia, and a symbol of American injustice toward an Australian citizen.266 His advocates forged a narrative according to which as an Australian, Hicks was entitled to rights which the military commissions failed to afford. Hicks ultimately pleaded guilty to a single charge and was transferred back to Australia267 under an agreement that was widely understood to be a political compromise between the Australian and American governments rather than the product of independent legal process.268 Thus, even if rights-based arguments fall flat in the United States, Omar‘s circumstances might be improved if rights-based arguments were to alter political discourse in Canada. This strategy could be viewed as reducing rights to politics, and deploying rights as mere political devices. But once more we see how the value of rights can vary. Even as we worried that a post-September 11 politics had made the United States inhospitable to rights claims on behalf of terrorist suspects, we understood that in the same historical moment, rights might have greater purchase in Canada. A rightsbased strategy therefore feeds into what is essentially ongoing interlocutory review of Omar‘s case by the Canadian government (admittedly, governed by its own political process, but a different politics), which is in turn informed by broader Canadian public opinion. And so our rights-based strategy in the military commissions attempted to negotiate the uneasy relationship between law and politics, to view rights as less than self-defining but more than ―nonsense on stilts.‖ 269 We sought to subject the ―law‖ of the commissions to the scrutiny of a range of political actors. Thus, our strategy did not depend on victory in the commission itself. Indeed, the goal of demonstrating the legal emptiness of the commissions was better served by our arguments—for due process, for rules of evidence, for prohibitions on coerced testimony—failing in them. We used the commission, and its rejection of our rights-based strategy, for its political and educational value, echoing Jules Lobel‘s call for deliberate use of courts as forums for protest.270 In so doing, we ―drag[ged] the courtroom into politics.‖ 271 Clearly, not all of our tactics worked, and certainly they did not produce our ultimate goal of returning Omar to Canada. Moreover, even these tactics came at a cost of partially legitimizing the commission as a site of legal contest.272 Nonetheless, I believe the strategic potential of rights-based argument was sufficient to make our approach defensible. I must admit, however, that it was not all clear-eyed strategy that led me to the rightsbased approach, for even before I had thought through the strategic potential, I was inclined toward arguing rights. This rights tropism is the logical and predictable consequence of our professional training as lawyers. Indeed, it is an occupational hazard. I do not mean to disclaim rights wholesale, but at the same time, I am mindful, and wary, of rights as the first recourse for helping our clients achieve their goals.273 Rights become the faith story for many of us, holding out hope for a gradualist, liberal perfection of the injustice in the world.

### 2AC Lobel

#### Extralegal movements are worse for racial justice—conservatives coopt their criticism of legal structures to end welfare and social justice programs

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[February, 2007; Orly Lobel is an Assistant Professor of Law, University of San Diego. LL.M. 2000 (waived), Harvard Law School; LL.B. 1998, Tel-Aviv University, “THE PARADOX OF EXTRALEGAL ACTIVISM: CRITICAL LEGAL CONSCIOUSNESS AND TRANSFORMATIVE POLITICS”, 120 Harv. L. Rev. 937]

A basic structure of cooptation arguments as developed in relation to the labor and civil rights movements has been to show how, in the move from theory to practice, the ideal that was promoted by a social group takes on unintended content, and the group thus fails to realize the original vision. This risk is particularly high when ideals are framed in broad terms that are open to multiple interpretations. Moreover, the pitfalls of the potential risks presented under the umbrella of cooptation are in fact accentuated in current proposals. Paradoxically, as the extralegal movement is framed by way of opposition to formal legal reform paths, without sufficiently defining its goals, it runs the very risks it sought to avoid by working outside the legal system. Extralegal paths are depicted mostly in negative terms and as resorting to new alternative forms of action rather than established models. Accordingly, because the ideas of social organizing, civil society, and legal pluralism are framed in open-ended contrarian terms, they do not translate into specific visions of social justice reform. The idea of civil society, which has been embraced by people from a broad array of often conflicting ideological commitments, is particularly demonstrative. Critics argue that "some ideas fail because they never make the light of day. The idea of civil society ... failed because it [\*972] became too popular." n164 Such a broadly conceived ideal as civil society sows the seeds of its own destruction. In former eras, the claims about the legal cooptation of the transformative visions of workplace justice and racial equality suggested that through legal strategies the visions became stripped of their initial depth and fragmented and framed in ways that were narrow and often merely symbolic. This observation seems accurate in the contemporary political arena; the idea of civil society revivalism evoked by progressive activists has been reduced to symbolic acts with very little substance. On the left, progressive advocates envision decentralized activism in a third, nongovernmental sphere as a way of reviving democratic participation and rebuilding the state from the bottom up. By contrast, the idea of civil society has been embraced by conservative politicians as a means for replacing government-funded programs and steering away from state intervention. As a result, recent political uses of civil society have subverted the ideals of progressive social reform and replaced them with conservative agendas that reject egalitarian views of social provision. In particular, recent calls to strengthen civil society have been advanced by politicians interested in dismantling the modern welfare system. Conservative civil society revivalism often equates the idea of self-help through extralegal means with traditional family structures, and blames the breakdown of those structures (for example, the rise of the single parent family) for the increase in reliance and dependency on government aid. n165 This recent depiction of the third sphere of civic life works against legal reform precisely because state intervention may support newer, nontraditional social structures. For conservative thinkers, legal reform also risks increasing dependency on social services by groups who have traditionally been marginalized, including disproportionate reliance on public funds by people of color and single mothers. Indeed, the end of welfare as we knew it, n166 as well as the [\*973] transformation of work as we knew it, n167 is closely related to the quest of thinkers from all sides of the political spectrum for a third space that could replace the traditional functions of work and welfare. Strikingly, a range of liberal and conservative visions have thus converged into the same agenda, such as the recent welfare-to-work reforms, which rely on myriad non-governmental institutions and activities to support them. n168