## 2AC

**T-Restrict = Prohibit: 2AC**

**Restriction means a limit and includes conditions on action**

**CAA 8**,COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT A, STATE OF ARIZONA, Appellee, v. JEREMY RAY WAGNER, Appellant., 2008 Ariz. App. Unpub. LEXIS 613

P10 The term "restriction" is not defined by the Legislature for the purposes of the DUI statutes. See generally A.R.S. § 28-1301 (2004) (providing the "[d]efinitions" section of the DUI statutes). In the absence of a statutory definition of a term, we look to ordinary dictionary definitions and do not construe the word as being a term of art. Lee v. State, 215 Ariz. 540, 544, ¶ 15, 161 P.3d 583, 587 (App. 2007) ("**When a statutory term is not explicitly defined, we assume**, unless otherwise stated, **that the Legislature intended to accord the word its natural and obvious meaning**, which may be discerned from its dictionary definition."). P11 **The dictionary definition of "restriction" is "[a] limitation or qualification**." Black's Law Dictionary 1341 (8th ed. 1999). In fact, "**limited" and "restricted" are considered synonyms.** See Webster's II New Collegiate Dictionary 946 (2001). **Under these** **commonly accepted definitions**, **Wagner's driving privileges were "restrict[ed]" when they were "limited" by the ignition interlock requirement.** **Wagner was not only** [\*7] **statutorily required** **to install an ignition** **interlock device on all of the vehicles he operated,** A.R.S. § 28-1461(A)(1)(b), **but he** was also **prohibited from driving any vehicle that was not equipped with such a device**, regardless whether he owned the vehicle or was under the influence of intoxicants, A.R.S. § 28-1464(H). **These limitations constituted a restriction** on Wagner's privilege to drive, **for he was unable to drive in circumstances which were otherwise available** to the general driving population. Thus, the rules of statutory construction dictate that the term "restriction" includes the ignition interlock device limitation.

**A restriction on war powers authority limits Presidential discretion**

Jules **Lobel 8**, Professor of Law at the University of Pittsburgh  Law School, President of the Center for Constitutional Rights, represented members of Congress challenging assertions of Executive power to unilaterally initiate warfare, “Conflicts Between the Commander in Chief and Congress: Concurrent Power  over the Conduct of War,” Ohio State Law Journal, Vol 69, p 391, 2008, http://moritzlaw.osu.edu/students/groups/oslj/files/2012/04/69.3.lobel\_.pdf

So too, **the congressional power to declare or authorize war has been long held to permit Congress to authorize and wage a limited war**—“limited in place, in objects, and in time.” 63 **When Congress places such restrictions on the President’s authority to wage war, it limits the President’s discretion to conduct battlefield operations**. For example, **Congress authorized** President George H. W. **Bush to attack Iraq** in response to Iraq’s 1990 invasion of Kuwait, **but** it **confined the President’s authority to the use of U.S. armed forces pursuant to U.N. Security Council resolutions** directed to force Iraqi troops to leave Kuwait. **That restriction would not have permitted the President to march into Baghdad** after the Iraqi army had been decisively ejected from Kuwait, a limitation recognized by President Bush himself.64

**Court Politics DA: 2AC**

**Empirics prove the Court doesn’t consider capital**

**Schauer 04** [Frederick, Law prof at Hravard, “Judicial Supremacy and the Modest Constitution”, California Law Review, July, 92 Cal. L. Rev. 1045, ln //uwyo-kn]

Examples of the effects of judicial supremacy hardly occupy the entirety of constitutional law. As the proponents of popular constitutionalism properly claim, it is simply not plausible to argue that all of the Supreme Court's decisions are counter-majoritarian, nor that the Court is unaware of the potential repercussions if a high percentage of its decisions diverges too dramatically from the popular or legislative will. Nevertheless, **there is no indication that the Court uses its vast repository of political capital only to accumulate more** political capital, and in many areas judicial supremacy has made not just a short-term difference, but a long-term difference as well. Perhaps most obvious is school prayer. For over forty years the Court has persisted in its view that organized prayer in public schools is impermissible under the Establishment Clause 59 despite the fact that public opinion is little more receptive to that view now than it was in 1962. 60 So too with flag burning, where the Court's decisions from the late 1960s 61 to the present have remained dramatically divergent from public and legislative opinion. 62 Or consider child pornography, where the Court's decision in Ashcroft v. Free Speech Coalition 63 flew in the face of an overwhelming congressional majority approving the extension of existing child pornography laws to virtual child pornography. Similarly, in the regulation of "indecency," **the Court has spent well over a decade repeatedly striking down acts of Congress that enjoyed overwhelming public and** [\*1059] **congressional support**. 64 Most dramatic of all, however, is criminal procedure, where the Supreme Court's decision in Dickerson v. United States, 65 invalidating a congressional attempt to overrule Miranda v. Arizona, 66 underscores the persistent gap in concern for defendants' rights between Congress and the public, on the one hand, and the Supreme Court, on the other.

**Winners win**

**Law 09** (David, Professor of Law and Professor of Political Science, Washington University in St. Louis, Georgetown Law Journal, March 2009, 97 Geo. L.J. 723; “A Theory of Judicial Power and Judicial Review,” Lexis, rwg)

Part IV of this Article discusses a counterintuitive implication of a coordination-based account of judicial power. **Conventional wisdom suggests that courts secure compliance with their decisions by drawing upon their store of legitimacy, which is undermined by decisions that are unpopular, controversial, or lack intellectual integrity. n25 Part IV argues that precisely the opposite is true: an unpopular or unpersuasive decision can, in fact, enhance a court's power in future cases, as long as it is obeyed. Widespread compliance with a decision that is controversial,** unpopular, or unpersuasive **serves only to strengthen the widely held expectation that others comply with judicial decisions. This expectation, in turn, is self-fulfilling**: those who expect others to comply with a court's decisions will find it strategically prudent to comply themselves, and the aggregate result will, in fact, be widespread compliance. Part IV illustrates these strategic insights--and the Supreme Court's apparent grasp of them--by contrasting [\*734] Bush v. Gore n26 with Brown v. Board of Education n27 and Cooper v. Aaron. n28

**Issues are compartmentalized**

**Redish and Cisar 91** prof law @ Northwestern and Law clerk to US Court of Appeals, 1991

(MARTIN H. REDISH, prof law and public policy @ Northwestern; ELIZABETH J. CISAR, Law Clerk to Chief Judge William Bauer, United States Court of Appeals, Seventh Circuit, Dec 1991, “CONSTITUTIONAL PERSPECTIVES: ARTICLE: "IF ANGELS WERE TO GOVERN" \*: THE NEED FOR PRAGMATIC FORMALISM IN SEPARATION OF POWERS THEORY.”41 Duke L.J. 449)

**Choper's assumption that the judiciary's institutional capital is transferable from structural cases to individual rights cases is no more credible**. Common sense should tell us that **the public's reaction to con- troversial individual rights cases**-for example, cases **concerning abor- tion**,240 school prayer,241 busing,242 **or criminal defendants' rights**243- **will be based largely, if not exclusively, on the basis of its feelings con- cerning those particular issues. It is unreasonable to assume that the public's acceptance or rejection of these individual rights rulings would somehow be affected by anything the Court says about wholly unrelated structural issues.**

**Decision is announced in May, after the DA**

**SCOTUS 12** (Supreme Court of the United States, 7/25/2012 “The Court and Its Procedures,”

http://www.supremecourt.gov/about/procedures.aspx, Accessed 7/25/2012, rwg)

**The Court maintains this schedule each Term until all cases ready for submission have been heard and decided. In May and June the Court sits only to announce orders and opinions.** The Court recesses at the end of June, but the work of the Justices is unceasing. During the summer they continue to analyze new petitions for review, consider motions and applications, and must make preparations for cases scheduled for fall argument.

**Public supports the plan**

**Reuters 13** (Quoting John McCain, Republican Senator, 6-9-13, "Support growing to close Guantanamo prison: senator" Reuters) www.reuters.com/article/2013/06/09/us-usa-obama-guantanamo-idUSBRE9580BL20130609

Republican Senator John **McCain said** on Sunday **there is increasing public support for closing the military prison at Guantanamo** Bay, Cuba, and moving detainees to a facility on the U.S. mainland. **"There's renewed impetus. And I think that most Americans are more ready," McCain**, who went to Guantanamo last week with White House chief of staff Denis McDonough and California Democratic Senator Dianne Feinstein, **told CNN's "State of the Union" program. McCain**, a senior member of the Senate Armed Services Committee, **said he and fellow Republican Senator** Lindsey **Graham,** of South Carolina, **are working with** the **Obama** administration **on plans that could relocate detainees** to a maximum-security prison in Illinois. "We're going to have to look at the whole issue, including giving them more periodic review of their cases," McCain, of Arizona, said. President Barack **Obama has pushed to close Guantanamo**, saying in a speech in May it "has become a symbol around the world for an America that flouts the rule of law."

**Prez Flex DA: 2AC**

#### Flexibility is irrelevant in the hegemonic era—rule-breaking is a greater risk

Knowles 09 (Robert, Assistant Professor, New York University School of Law, Spring 2009, "American Hegemony and the Foreign Affairs Constitution" Arizona State Law Journal, Lexis)

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424 The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429 In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.

#### Executive flexibility is bad—leads to arbitrary decisions and mismanagement

Pearlstein 09 (Deborah, Visiting Scholar and Lecturer in Public and International Affairs, Woodrow Wilson School of Public & International Affairs, Princeton University, "Form and Function in the National Security Constitution" Connecticut Law Review) uconn.lawreviewnetwork.com/files/archive/v41n5/formandfunction.pdf

The new functionalists’ instinctive attraction to flexibility in decisionmaking rules or structures—and its corresponding possibilities of secrecy and dispatch—is not without foundation in organization theory.183 Flexibility ideally can make it possible for organizations to adapt and respond quickly in circumstances of substantial strain or uncertainty, as conditions change or knowledge improves, and to respond to events that cannot be predicted in advance.184 In a crisis or emergency setting in particular, one can of course imagine circumstances in which taking the time to follow a series of structurally required decision-making steps would vitiate the need for action altogether.185 What the new functionalists fail to engage, however, are flexibility’s substantial costs, especially in grappling with an emergency. For example, organizations that depend on decentralized decision-making but leave subordinates too much flexibility can face substantial principal-agent problems, resulting in effectively arbitrary decisions. The problem of differences in motivation or understanding between organizational leaders and frontline agents is a familiar one, a disjunction that can leave agents poorly equipped to translate organizational priorities into priority consistent operational goals. As Sagan found in the context of U.S. nuclear weapons safety, whatever level of importance organizational leadership placed on safety, leaders and operatives would invariably have conflicting priorities, making it likely that leaders would pay “only arbitrary attention to the critical details of deciding among trade-offs” faced by operatives in real time.186 One way of describing this phenomenon is as “goal displacement”—a narrow interpretation of operational goals by agents that obscures focus on overarching priorities.187 In the military context, units in the field may have different interests than commanders in secure headquarters;188 prison guards have different interests from prison administrators.189 Emergencies exacerbate the risk of such effectively arbitrary decisions. Critical information may be unavailable or inaccessible.190 Short-term interests may seek to exploit opportunities that run counter to desired long-term (or even near-term) outcomes. 191 The distance between what a leader wants and what an agent knows and does is thus likely even greater. The Cuban Missile Crisis affords striking examples of such a problem. When informed by the Joint Chiefs of Staff of the growing tensions with the Soviet Union in late October 1962, NATO’s Supreme Allied Commander in Europe, American General Lauris Norstad, ordered subordinate commanders in Europe not to take any actions that the Soviets might consider provocative.192 Putting forces on heightened alert status was just the kind of potentially provocative move Norstad sought to forestall. Indeed, when the Joint Chiefs of Staff ordered U.S. forces globally to increase alert status in a directive leaving room for Norstad to exercise his discretion in complying with the order, Norstad initially decided not to put European-stationed forces on alert.193 Yet despite Norstad’s no-provocation instruction, his subordinate General Truman Landon, then Commander of U.S. Air Forces in Europe, increased the alert level of nuclear-armed NATO aircraft in the region.194 In Sagan’s account, General Landon’s first organizational priority—to maximize combat potential—led him to undermine higher priority political interests in avoiding potential provocations of the Soviets.195 It is in part for such reasons that studies of organizational performance in crisis management have regularly found that “planning and effective response are causally connected.”196 Clear, well-understood rules, formalized training and planning can function to match cultural and individual instincts that emerge in a crisis with commitments that flow from standard operating procedures and professional norms.197 Indeed, “the less an organization has to change its pre-disaster functions and roles to perform in a disaster, the more effective is its disastetr [sic] response.”198 In this sense, a decisionmaker with absolute flexibility in an emergency— unconstrained by protocols or plans—may be systematically more prone to error than a decision-maker who is in some way compelled to follow procedures and guidelines, which have incorporated professional expertise, and which are set as effective constraints in advance. Examples of excessive flexibility producing adverse consequences are ample. Following Hurricane Katrina, one of the most important lessons independent analysis drew from the government response was the extent to which the disaster was made worse as a result of the lack of experience and knowledge of crisis procedures among key officials, the absence of expert advisors available to key officials (including the President), and the failure to follow existing response plans or to draw from lessons learned from simulations conducted before the fact. 199 Among the many consequences, basic items like food, water, and medicines were in such short supply that local law enforcement (instead of focusing on security issues) were occupied, in part, with breaking into businesses and taking what residents needed.200 Or consider the widespread abuse of prisoners at U.S. detention facilities such as Abu Ghraib. Whatever the theoretical merits of applying coercive interrogation in a carefully selected way against key intelligence targets,201 the systemic torture and abuse of scores of detainees was an outcome no one purported to seek. There is substantial agreement among security analysts of both parties that the prisoner abuse scandals have produced predominantly negative consequences for U.S. national security.202 While there remain important questions about the extent to which some of the abuses at Abu Ghraib were the result of civilian or senior military command actions or omissions, one of the too often overlooked findings of the government investigations of the incidents is the unanimous agreement that the abuse was (at least in part) the result of structural organization failures 203—failures that one might expect to produce errors either to the benefit or detriment of security. In particular, military investigators looking at the causes of Abu Ghraib cited vague guidance, as well as inadequate training and planning for detention and interrogation operations, as key factors leading to the abuse. Remarkably, “pre-war planning [did] not include[] planning for detainee operations” in Iraq.204 Moreover, investigators cited failures at the policy level—decisions to lift existing detention and interrogation strictures without replacing those rules with more than the most general guidance about custodial intelligence collection.205 As one Army General later investigating the abuses noted: “By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved.”206 It was thus unsurprising that detention and interrogation operations were assigned to troops with grossly inadequate training in any rules that were still recognized.207 The uncertain effect of broad, general guidance, coupled with the competing imperatives of guidelines that differed among theaters of operation, agencies, and military units, caused serious confusion among troops and led to decisionmaking that it is overly kind to call arbitrary.208 Would the new functionalists disagree with the importance of government planning for detention operations in an emergency surrounding a terrorist nuclear attack? Not necessarily. Can an organization anticipate and plan for everything? Certainly not. But such findings should at least call into question the inclination to simply maximize flexibility and discretion in an emergency, without, for example, structural incentives that might ensure the engagement of professional expertise.209 Particularly if one embraces the view that the most potentially damaging terrorist threats are nuclear and biological terrorism, involving highly technical information about weapons acquisition and deployment, a security policy structure based on nothing more than general popular mandate and political instincts is unlikely to suffice; a structure that systematically excludes knowledge of and training in emergency response will almost certainly result in mismanagement.210 In this light, a general take on role effectiveness might suggest favoring a structure in which the engagement of relevant expertise in crisis management is required, leaders have incentives to anticipate and plan in advance for trade-offs, and organizations are able to train subordinates to ensure that plans are adhered to in emergencies. Such structural constraints could help increase the likelihood that something more than arbitrary attention has been paid before transcendent priorities are overridden.

**Iraq disproves the link**

National Institute of Military Justice, Amicus Brief, Rasul v. Bush, 2003 U.S. Briefs 334, January 14, 2004, p. 12-13.

The experience of United States armed forces in combat belies the Government's expressed concern that judicial review of the claims of combatants "would interfere with the President's authority as Commander in Chief." (Opp. at 11) Courts-martial, prisoner status determinations, and other legal processes have been a regular adjunct of American wartime operations throughout the period since Eisentrager. During the Vietnam era, the United States Army held approximately 25,000 courts-martial in the war theater. In 1969 alone, 7691 of these were special and general courts-martial, which are trials presided over by a military judge in which the defendant is entitled to a panel equivalent to a jury as provided in the UCMJ. Frederic L. Borch, Judge Advocates In Combat: Army Lawyers in Military Operations from Vietnam to Haiti 29 (2001). Another 1146 special and general courts-martial were held in Vietnam by the Marine Corps in 1969. In addition, still only in 1969, the Army held 66,702 less formal disciplinary proceedings under Article 15 of the UCMJ, 10 U.S.C. § 815. Id. . The United States Military Assistance Command in Vietnam enforced strict requirements for the classification of captured personnel, including providing impartial tribunals to determine eligibility for prisoner of war status. Military Assistance Command Vietnam, Directive No. 381-46, Annex A (Dec. 27, 1967) and Directive No. 20-5 (Sept. 21, 1966 as amended Mar. 15, 1968.) . During the 1991 Persian Gulf War, the status of approximately 1200 detainees was determined by "competent tribunals" established for that purpose. Dep't of Defense, Final Report to Congress: Conduct of the Persian Gulf War 578 (1992); Army Judge Advocate General's School, Operational Law Handbook 22 (O'Brien ed. 2003). . At this very time, United States forces in Iraq, a theater of actual combat, are providing impartial tribunals compliant with Article 5 of the GPW to adjudicate the status of captured belligerents. Although details are difficult to come by, American commanders of forces in Iraq acknowledge that as many as 100 prisoners there have had their status adjudicated by impartial tribunals under Article 5 of the GPW.

**Military necessity claims empirically exaggerated—Korematsu proves**

Fred Korematsu, Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, Stephen J. Schulhofer, Counsel of Record, in Fawzi Khalid Abdullah Fahad Al Odah, et al., Petitioners, v. United States of America, et al., Respondents. Shafiz Rasul, et al., Petitioners, v. George W. Bush, et al., Respondents, Nos. 03-334, 03-343, 2003 U.S. Briefs 334; 2004 U.S. S. Ct. Briefs LEXIS 38, January 14, 2004, LN.

It is no doubt essential in some circumstances to modify ordinary safeguards to meet the exigencies of war. But history teaches that we tend to sacrifice civil liberties too quickly based on claims of military necessity and national security, only to discover later that those claims were overstated from the start. Fred Korematsu's experience is but one example of many in which courts unnecessarily accepted such claims uncritically and allowed the executive branch to insulate itself from any accountability for actions restricting the most basic of liberties. Fortunately, there are counterexamples. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), this Court invalidated President Truman's nationalization of the steel mills during the Korean Conflict, despite the Commander-in-Chief's insistence that his actions were necessary to maintain production of essential war material. During the Vietnam War, this Court rejected a Government request to enjoin publication of the Pentagon Papers, refusing to defer to executive branch claims that publication of this top-secret document would endanger our troops in the field and undermine ongoing military operations. New York Times Co. v. United States, 403 U.S. 713 (1971). In deciding the cases now before [\*\*11] it, this Court should follow the tradition those cases represent, not the one exemplified by Korematsu. To avoid repeating the mistakes of the past, this Court should reverse the decision of the District of Columbia Circuit and affirm that the United States respects fundamental constitutional and human rights -- even in time of war.ARGUMENT Since September 11th, the United States has taken significant steps to ensure the nation's safety. It is only natural that in times of crisis our government should tighten the measures it ordinarily takes to preserve our security. But we know from long experience that the executive branch often reacts too harshly in circumstances of felt necessity and underestimates the damage to civil liberties. Typically, we come later to regret our excesses, but for many, that recognition comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. These cases provide the Court with the opportunity to protect constitutional liberties when they matter most, rather than belatedly, years after the fact. As Fred Korematsu's life story demonstrates, our history merits attention. Only by understanding the errors of the past can we do better in the present. Six examples illustrate the nature and magnitude of the challenge: the Alien and Sedition Acts of 1798, the suspension of habeas corpus during the Civil War, the prosecution of dissenters during World War I, the Red Scare of 1919-1920, the internment of 120,000 individuals of Japanese descent during World War II, and the era of loyalty oaths and McCarthyism during the Cold War. I. THROUGHOUT ITS HISTORY, THE UNITED STATES HAS UNNECESSARILY RESTRICTED CIVIL LIBERTIES IN TIMES OF STATED MILITARY CRISIS History teaches that, in time of war, we have often sacrificed fundamental freedoms unnecessarily. The executive and legislative branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored. In retrospect, it is clear that judges and justices should have scrutinized these claims more closely and done more to ensure that essential security measures did not unnecessarily impair individual freedoms and the traditional separation of powers.

**UCMJ disproves the link**

National Institute of Military Justice, Brief for the National Institute of Military Justice as Amicus Curiae in Support of Petitioners, Ronald W. Meister, Counsel of Record, in Fawzi Khalid Abdullah Fahad Al Odah, et al., Petitioners, v. United States of America, et al., Respondents. Shafiz Rasul, et al., Petitioners, v. George W. Bush, et al., Respondents, Nos. 03-334, 03-343, 2003 U.S. Briefs 334; 2004 U.S. S. Ct. Briefs LEXIS 20, January 14, 2004, LN.

The UCMJ established not only a code of substantive and procedural law, but also a tiered system of judicial review, including intermediate appellate courts, UCMJ art. 66, 10 U.S.C. § 866, and extending up to the civilian United States Court of Appeals for the Armed Forces, [\*\*9] formerly the United States Court of Military Appeals, UCMJ arts. 67, 141-45, 10 U.S.C. § § 867, 941-45. The Military Justice Acts of 1968, Pub. L. No. 90-632, 82 Stat. 1335, and of 1983, Pub. L. No. 98-209, 310(a)(1), 97 Stat. 1405, further professionalized court-martial personnel, see UCMJ arts. 26, 66, 10 U.S.C. § § 826, 866, and added certiorari jurisdiction in this Court, UCMJ art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259. Congress has forbidden military officers and other persons subject to the UCMJ to influence unlawfully the actions of courts-martial and other military tribunals, UCMJ art. 37, 10 U.S.C. § 837, and the military services have taken further steps to reduce command influence and insure the independence of the judiciary. This Court, as well as courts throughout the military justice system, regularly re-affirm that military personnel do not forfeit their rights to the protection of the law when they enter the military. United States ex rel. Toth v. Quarles, 350 U.S. 11, 21-22 (1955); United States v. Jacoby, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960). [\*\*10] Military personnel and prisoners of war in custody of the armed forces enjoy the following protections and guarantees, among others: . Against self-incrimination, compare U.S. Const. amend. 5 with UCMJ art. 31, 10 U.S.C. § 831. . Against double jeopardy, compare U.S. Const. amend. 5 with UCMJ art. 44, 10 U.S.C. § 844. . Against cruel and unusual punishment, compare U.S. Const. amend. 8 with UCMJ art. 55, 10 U.S.C. § 855; see United States v. Matthews, 16 M.J. 354 (C.M.A. 1983). . To a speedy trial, compare U.S. Const. amend. 6 with Rule for Courts-Martial 707. . To a knowing, intelligent and voluntary waiver of trial rights before entering a guilty plea. United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1967). Significantly, the rule of law in the military has also been enforced through the issuance of writs of habeas corpus by civilian courts. E.g., Reid v. Covert, 354 U.S. 1 (1957); Toth, supra. Over a half century of experience with the UCMJ has justified the Legislative determination that the rule of law can be applied in peace and war without modification and without concern that doing so will interfere with Executive Branch power.

### Legalism

**The permutation is best—legal reforms can utilized to protect vulnerable populations if we remain conscious of its dangers—the alternative leaves groups stranded**

**Lobel 7, Assistant Professor of Law**

[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]

B. Conceptual Boundaries: When the Dichotomies of Exit Are Unchecked At first glance, **the idea of opting out of the legal sphere and moving to an extralegal space using alternative modes of social activism may seem attractive to new social movements**. We are used to thinking in binary categories, constantly carving out different aspects of life as belonging to different spatial and temporal spheres. Moreover, **we are attracted to declarations about newness - new paradigms, new spheres of action, and new strategies that are seemingly untainted by prior failures.** n186 However, the critical insights about law's reach must not be abandoned in the process of critical analysis. Just as advocates of a laissez-faire market are incorrect in imagining a purely private space free of regulation, and just as the "state" is not a single organism but a multiplicity of legislative, administrative, and judicial organs, "nonstate arenas" are dispersed, multiple, and constructed. **The focus on action in a separate sphere** broadly defined as civil society **can be self-defeating precisely because it conceals the many ways in which law continues to play a crucial role in all spheres of life.** Today, **the lines between private and public functions are increasingly blurred**, forming what Professor Gunther Teubner terms "polycorporatist regimes," a symbiosis between private and public sectors. n187 Similarly, new economic partnerships and structures blur the lines between for-profit and nonprofit entities. n188 Yet much of the current literature on the limits of legal reform and the crisis of government action is built upon a privatization/regulation binary, particularly with regard [\*979] to social commitments, paying little attention to how the background conditions of a privatized market can sustain or curtail new conceptions of the public good. n189 In the same way, **legal scholars often emphasize sharp shifts between regulation and deregulation, overlooking the continuing presence of legal norms that shape and inform these shifts.** n190 These false dichotomies should resonate well with classic cooptation analysis, which shows how social reformers overestimate the possibilities of one channel for reform while crowding out other paths and more complex alternatives. Indeed, in the contemporary extralegal climate, and contrary to the conservative portrayal of federal social policies as harmful to the nonprofit sector, **voluntary associations have flourished in mutually beneficial relationships with federal regulations**. n191 A dichotomized notion of a shift between spheres - between law and informalization, and between regulatory and nonregulatory schemes - therefore neglects the ongoing possibilities within the legal system to develop and sustain desired outcomes and to eliminate others. **The challenge for social reform groups and for policymakers** today **is to identify the diverse ways in which some legal regulations and formal structures contribute to socially responsible practices while others produce new forms of exclusion and inequality**. Community empowerment requires ongoing government commitment. n192 In fact, **the most successful community-based projects have been those** which were not only supported by public funds, but **in which public administration also continued to play some coordination role**. n193 At both the global and local levels, with the growing enthusiasm around the proliferation of new norm-generating actors, **many envision a nonprofit, nongovernmental organization-led democratization of new informal processes**. n194 Yet this Article has begun to explore the problems with some of the assumptions underlying the potential of these new actors. Recalling the unbundled taxonomy of the cooptation critique, **it becomes easier to identify the ways extralegal activism is prone to problems of fragmentation, institutional limitation, and professionalization**. [\*980] **Private associations**, even when structured as nonprofit entities, **are frequently undemocratic institutions whose legitimacy is often questionable.** n195 There are problematic structural differences among NGOs, for example between Northern and Southern NGOs in international fora, stemming from asymmetrical resources and funding, n196 and between large foundations and struggling organizations at the national level. Moreover, direct regulation of private associations is becoming particularly important as the roles of nonprofits increase in the new political economy. Scholars have pointed to the fact that nonprofit organizations operate in many of the same areas as for-profit corporations and government bureaucracies. n197 This phenomenon raises a wide variety of difficulties, which range from ordinary financial corruption to the misrepresentation of certain partnerships as "nonprofit" or "private." n198 Incidents of corruption within nongovernmental organizations, as well as reports that these organizations serve merely as covers for either for-profit or governmental institutions, have increasingly come to the attention of the government and the public. n199 Recently, for example, the IRS revoked the tax-exempt nonprofit status of countless "credit counseling services" because these firms were in fact motivated primarily by profit and not by the not-for-profit cause of helping consumers get out of debt. n200 Courts have long recognized that the mere fact that an entity is a nonprofit does not preclude it from being concerned about raising cash revenues and maximizing profits or affecting competition in the market. n201 In the [\*981] application of antitrust laws, for example, almost every court has rejected the "pure motives" argument when it has been put forth in defense of nonprofits. n202 Moreover, akin to other sectors and arenas, nongovernmental organizations - even when they do not operate within the formal legal system - frequently report both the need to fit their arguments into the contemporary dominant rhetoric and strong pressures to subjugate themselves in the service of other negotiating interests. This is often the case when they appear before international fora, such as the World Bank and the World Trade Organization, and each of the parties in a given debate attempts to look as though it has formed a well-rounded team by enlisting the support of local voluntary associations. n203 One NGO member observes that "when so many different actors are drawn into the process, there is a danger that our demands may be blunted ... . Consequently, we may end up with a "lowest common denominator' which is no better than the kind of compromises the officials and diplomats engage in." n204 Finally, local NGOs that begin to receive funding for their projects from private investors report the limitations of binding themselves to other interests. Funding is rarely unaccompanied by requirements as to the nature and types of uses to which it is put. n205 These concessions to those who have the authority and resources to recognize some social demands but not others are indicative of the sorts of institutional and structural limitations that have been part of the traditional critique of cooptation. In this situation, local NGOs become dependent on players with greater repeat access and are induced to compromise their initial vision in return for limited victories. **The concerns about the nature of both civil society and nongovernmental actors illuminate the need to reject the notion of avoiding the legal system and opting into a nonregulated sphere of alternative social activism. When we understand these different realities and processes as also being formed and sustained by law, we can explore new ways in which legality relates to social reform**. **Some of these ways include efforts to design mechanisms of accountability** that address the concerns of the new political economy. Such efforts include [\*982] treating private entities as state actors by revising the tests of joint participation and public function that are employed in the state action doctrine; extending public requirements such as nondiscrimination, due process, and transparency to private actors; and developing procedural rules for such activities as standard-setting and certification by private groups. n206 They may also include using the nondelegation doctrine to prevent certain processes of privatization and rethinking the tax exemption criteria for nonprofits. n207 All of these avenues understand the law as performing significant roles in the quest for reform and accountability while recognizing that new realities require creative rethinking of existing courses of action. **Rather than opting out of the legal arena, it is possible to accept the need to diversify modes of activism and legal categories while using legal reform in ways that are responsive to new realities**. **Focusing on function and architecture**, rather than on labels or distinct sectors, **requires legal scholars to consider the desirability of new legal models** of governmental and nongovernmental partnerships and of the direct regulation of nonstate actors. In recent years, scholars and policymakers have produced a body of literature, rooted primarily in administrative law, describing ways in which **the government can harness the potential of private individuals to contribute to the project of governance**. n208 These new insights develop the idea that administrative agencies must be cognizant of, and actively involve, the private actors that they are charged with regulating. These studies, in fields ranging from occupational risk prevention to environmental policy to financial regulation, draw on the idea that groups and individuals will [\*983] better comply with state norms once they internalize them. n209 For example, in the context of occupational safety, there is a growing body of evidence that focusing on the implementation of a culture of safety, rather than on the promulgation of rules, can enhance compliance and induce effective self-monitoring by private firms. n210 Consequently, social activists interested in improving the conditions of safety and health for workers should advocate for the involvement of employees in cooperative compliance regimes that involve both top-down agency regulation and firm-and industry-wide risk-management techniques. Importantly, in all of these new models of governance, the government agency and the courts must preserve their authority to discipline those who lack the willingness or the capacity to participate actively and dynamically in collaborative governance. Thus, **unlike the contemporary message regarding extralegal activism that privileges private actors and nonlegal techniques to promote social goals**, **the new governance scholarship is engaged in developing a broad menu of legal reform strategies** that involve private industry and nongovernmental actors in a variety of ways **while maintaining the necessary role of the state to aid weaker groups in order to promote overall welfare and equity**. **A responsive legal architecture has the potential to generate new forms of accountability and social responsibility and to link hard law with "softer" practices and normativities**. **Reformers can potentially use law to increase the power and access of vulnerable individuals and groups and to develop tools to increase fair practices and knowledge building within the new market.**

**No alternative---other ideas bring more inequality and abuse**

Jerold S. **Auerbach 83**, Professor of History at Wellesley, “Justice Without Law?”, 1983, p. 144-146

**As cynicism about the legal system increases, so does enthusiasm for alternative** dispute-settlement **institutions**. The search for alternatives accelerates, as Richard Abel has suggested, "when some fairly powerful interest is threatened by an increase in the number or magnitude of legal rights.\*'6 Alternatives are designed to provide a safety valve, to siphon discontent from courts. With the danger of political confrontation reduced, the ruling power of legal institutions is preserved, and the stability of the social system reinforced. Not incidentally, **alternatives prevent the use of courts for redistributive purposes in the interest of equality, by consigning** the **rights of disadvantaged citizens to institutions with minimal power to** enforce or **protect them. It is, therefore, necessary to beware of the seductive appeal of alternative institutions. They may deflect energy from political organization by groups of people with common grievances; or discourage effective litigation strategies that could provide** substantial **benefits**. They may, in the end, create a two-track justice system that dispenses informal "justice" to poor people with "small" claims and "minor" disputes, who cannot afford legal services, and who are denied access to courts. (Bar associations do not recommend that corporate law firms divert their clients to mediation, or that business deductions for legal expenses—a gigantic government subsidy for litigation—be eliminated.) **Justice according to law will be reserved for the affluent**, hardly a novel development in American history but one that needs little encouragement from the spread of alternative dispute-settlement institutions.¶ It is social context and political choice that determine whether courts, or alternative institutions, can render justice more or less accessible—and to whom. Both can be discretionary, arbitrary, domineering—and unjust. Law can symbolize justice, or conceal repression. It can reduce exploitation, or facilitate it. It can prohibit the abuse of power, or disguise abuse in procedural forms. It can promote equality, or sustain inequality. **Despite the resiliency and power of law, it seems unable to eradicate the tension between legality and justice**: even in a society of (legal) equals, some still remain more equal than others. **But diversion from the legal system is likely to accentuate that inequality. Without legal power the imbalance between aggrieved individuals and corporations, or government agencies, cannot be redressed. In American society**, as Laura Nader has observed, "**disputing without the force of law ... [is| doomed to fail**."7 **Instructive examples document the deleterious effect of coerced informality** (even if others demonstrate the creative possibilities of indigenous experimentation). **Freed slaves after the Civil War and factory workers at the turn of the century, like inner-city poor people now, have all been assigned places in informal proceedings that offer substantially weaker safeguards than law can provide**. Legal institutions may not provide equal justice under law, but in a society ruled by law it is their responsibility.¶ **It is chimerical to believe that mediation or arbitration can now accomplish what law seems powerless to achieve. The American deification of individual rights requires an accessible legal system for their protection**. Understandably, diminished faith in its capacities will encourage the yearning for alternatives. But the rhetoric of "community" and "justice" should not be permitted to conceal the deterioration of community life and the unraveling of substantive notions of justice that has accompanied its demise. There is every reason why the values that historically are associated with informal justice should remain compelling: especially the preference for trust, harmony, and reciprocity within a communal setting. These are not, however, the values that American society encourages or sustains; **in their absence there is no effective alternative to legal institutions**.¶ The quest for community may indeed be "timeless and universal."8 In this century, however, the communitarian search for justice without law has deteriorated beyond recognition into a stunted off-shoot of the legal system. The historical progression is clear: from community justice without formal legal institutions to the rule of law, all too often without justice. **But injustice without law is an even worse possibility, which misguided enthusiasm for alternative** dispute settlement **now seems likely to encourage**. Our legal culture too accurately expresses the individualistic and materialistic values that most Americans deeply cherish to inspire optimism about the imminent restoration of communitarian purpose. **For law to be less conspicuous Americans would have to moderate their expansive freedom to compete, to acquire, and to possess, while simultaneously elevating shared responsibilities above individual rights. That is an unlikely prospect unless Americans become, in effect, un-American. Until then, the pursuit of justice without law does incalculable harm to the prospect of equal justice.**

**Liberal legal thought provides space for the K**

**Altman**, Professor of Philosophy; Georgia State University, **90** (Andrew, Critical Legal Studies: A Liberal Critique, page 8)

In addition, it would be a distortion of liberal theory to suggest that it has no place for nonlegal modes of social regulation, such as mediation. Liberals can and do acknowledge the value of such nonlegal mechanisms in certain social contexts and can consis that the liberal view requires us to recognize that such procedures and rules have a central role to play in resolving fairly and effectively the conflicts that arise in a society characterized by moral, religious, and political pluralism. Thus, **the liberal endorsement of legalism does not necessarily involve a commitment to legalism in the sense that Judith Shldar defines the term: “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.**” Shldar, Legalism (Cambridge: Harvard University Press, 1986), p. 1. Shlclar understands full weli that a commitment to **the liberal rule of law does not entail an acceptance of legalism** in her sense of the term. See Legalism, pp. xi-xli. And **those who reject the rule of law can argue in the political arena for extending the role of such informal mechanisms**. Of course, a liberal state could not allow the antinomians to eradicate legal institutions; in that sense, one might say that **the liberal rule of law** is not neutral. But the kind of political neutrality which the liberal defends does not aim to guarantee that any normative view has an opportunity to remake society wholly in its vision. It **does guarantee an opportunity to negotiate and compromise within a framework of individual rights, and there is no reason why those who defend non- legal modes of social regulation cannot seize the opportunity under a liberal regime to carve out a significant role for nonlegal modes of social regulation within the liberal state.** The liberal ver sion of political neutrality demands that antinomians have such an opportunity, but there is nothing remotely inconsistent in liberal thought in making that demand or prohibiting antilegalism from going so far as to destroy all legal institution

**Discussions of structure should precede substance—second generation 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 review**5 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.**

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### K Top: Guantanamo

#### Working through the courts is necessary to solve Gitmo—popular activism can’t solve

Cole 2011 - Professor, Georgetown University Law Center (Winter, David, “WHERE LIBERTY LIES: CIVIL SOCIETY AND INDIVIDUAL RIGHTS AFTER 9/11,” 57 Wayne L. Rev. 1203, Lexis)

Unlike the majoritarian electoral politics Posner and Vermeule imagine, the work of civil society cannot be segregated neatly from the law. On the contrary, it will often coalesce around a distinctly legal challenge, objecting to departures from specific legal norms, often but not always heard in a court case, as with civil society's challenge to the treatment of detainees at Guantanamo. Congress's actions on that subject make clear that had Guantánamo been left to the majoritarian political process, there would have been few if any advances. The litigation generated and concentrated pressure on claims for a restoration of the values of legality, and, as discussed above, that pressure then played a critical role in the litigation's outcome, which in turn contributed to a broader impetus for reform.