Death Squads and Death Lists: Targeted Killing and the Character of the State

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DEATH SQUADS AND DEATH LISTS: 
TARGETED KILLING AND THE CHARACTER OF THE STATE

Jeremy Waldron

1. Targeted killing as a topic

My topic is targeted killing—the officially authorized and premeditated killing by military or intelligence officials of named and identified individuals without the benefit of any judicial process. American killings of this kind take place as part of what we call the war on terror or the global war against terrorism. There have been thousands of such killings. The killings are authorized within the national security structure, under the command of the President of the United States and his high national security councils and officials. They are deliberate killings of named, identified individuals at times and places of our choosing, sometimes by squads of special forces on the ground in various countries (like the killing of Osama bin Laden in Pakistan), but most often from the sky by unmanned armed

1 University Professor, School of Law, New York University. *Apologies for the notes, which are still rough in this draft.*

2 The following is a useful definition of targeted killing: “The use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.” (Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, 2008), p.5.)


4 Citation: Report of the UN Special Rapporteur (Philip Alston) on Extrajudicial, Summary, or Arbitrary Executions; Addendum on Targeted Killing, May 28, 2010.

5 Philip Alston, “The CIA and Targeted Killings Beyond Borders,” *Harvard National Security Journal*, 2 (2001), 283, at p. 286: “[T]he targeted killing of Osama bin Laden in May 2011 was not a dramatic departure from the United States’ established practice, but rather just another example of its increasingly frequent use of extraterritorial targeted killings as an integral part of its overall national security strategy. As the CIA Director observed at the time, the Special Forces that carried out the bin Laden raid—the United States Navy SEALS—‘conduct these kinds of operations two and three times a night in Afghanistan.’”
aerial vehicles (or drones), flying over countries like Afghanistan, Iraq, Pakistan, and Yemen, which fire missiles at identified individual targets.

Sometimes friends, family, and acquaintances of the named individuals are killed as well in these drone strikes. Our drones fire at a car with several passengers, for example, or at a wedding or family gathering where the identified target is present. We refer to these additional killings impersonally as “collateral damage”—though more accurately these are foreseen but unintended killings that accompany the intended killings of the named targets.

Also sometimes our drones pass over areas like insurgent or terrorist training camps where, it is presumed, any young man present especially if he is armed is deemed a legitimate target whether he has been specifically identified or not. For some reason, we refer to these killings—which don’t involve the targeting of named individuals—as “signature strikes.” Signature strikes raise all sorts of issues. But they are not my subject here today. I want to talk specifically about the deliberate killing of named and identified individuals by our forces and I want to reflect on some distinctive aspects of the use of lethal force by the state that this practice of targeted killing represents. I believe it raises important issues that we have to confront about the normalization of individualized targeted killing as a practice used by the state.

I emphasize at the outset that my topic includes but is not limited to killings by drones. In all sorts of ways, drone warfare is interesting and unique. But for my purposes here today, we should regard drone killings as part of a broader category of targeted killings, which include the use of death squads on the ground as well as drones in the air. Considered more broadly as a category that includes activity by countries other than the United States, targeted killing may also comprise the use “sniper fire, … missiles from helicopters, gunships, … the use of car bombs, and poison….”

As I understand it, the practice works like this. The President and a committee of his high national security advisors maintain one or more lists of persons whose continued existence is deemed to be not in the best interests of the

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6 Some argue that drone warfare as such has ushered in a new relation of the state to deadly force: see, for example, Gregoire Chamayou, A Theory of the Drone (New Press, 2013)

7 Report of the UN Special Rapporteur (Philip Alston) on Extrajudicial, Summary, or Arbitrary Executions; Addendum on Targeted Killing, May 28, 2010, §8
United States. (The variety of lists may be theater-specific.) The lists contain names, photographs, and dossiers, drawn up on the basis of intelligence. These are the death lists. Names on these lists are ranked according to the prioritization of their destruction. From time to time, as the opportunity presents itself, names are taken up from this list or lists and assigned to officials who arrange for the killing of the named individuals, usually by drone strikes from the air or by the use of death squads on the ground.

2. No distractions

As already indicated, what I am going to say about targeted killing will proceed on a pretty narrow front. There are of course all sorts of issues with the practice.

- Many critics are concerned about the effect of targeted killing on innocent civilians—what we sometimes refer to as “collateral damage.” They seek assurances—or they wonder whether it is possible to give assurances—that people will not be injured or killed in targeted killings who are not actually those being targeted.

- Some critics worry too about the process by which individuals are targeted. They wonder whether the right names are on the death lists. They ask about the integrity of the process by which names are added to the lists and chosen for targeting. Are there proper processes for reviewing and vetting the death lists, and for taking names off a list as well as adding names?

I shall not pursue either of these points. Pursued in isolation, each of these criticisms seems to assume that if only we could be sure that the names on the death list were really those of the “bad guys,” or if only we could be sure that the targeted bad guys and only the targeted bad guys were being killed, then there not be a problem with targeted killing—or there would be much less of a problem.

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9 The use of this terminology—”death lists” and “death squads”—is of course an issue. In a way, it is the issue of this paper. Discussion of it begins in section 3.

10 For a fine collection of some of the work that has been done, see Claire Finkelstein, Jens Ohlin, and Andrew Altman (eds.) Targeted Killings: Law and Morality in an Asymmetrical World (Oxford University Press, 2012).
Each of these issues does define a problem with targeted killing as it is currently practiced by the United States and other powers, and someone needs to think about them. But they do not get at the problem with targeted killing. The central issue, from which we must not flinch in our reflections on this practice, is not whether we are killing the right people but whether killings of this kind are appropriate at all. The issue is the sheer existence and use of such death-lists by our government, however scrupulously and transparently they are maintained.

- The same can be said about issues like infringements of sovereignty that are involved in targeted killings. Of course this is not just an issue for drones. The targeted killing of Osama bin Laden by a team of Navy SEALs in 2011 involved an unauthorized incursion into Pakistan by an American death squad. Once again: the violation of sovereignty in some of these cases is an issue, and someone ought to be concerned with it. But it is not the issue. For even if we were working only in our own sovereign territory or in the territory of a friendly power that was happy to accommodate our death squads, there would still be an issue about targeted killing.

And there are a host of other side issues.

- For example, people criticize the targeting of American citizens in these killings, like the killing of Anwar Al-Awlaki in Yemen in September 2011—a criticism pursued as though the practice of targeted killing would not be so bad if the only names on the death lists were the names of foreigners.

- People worry about the use of drones as a new form of warfare, which seems finally to abandon any element of chivalry or reciprocity in combat: the vulnerability of targeted individuals to drone strikes from the air is now

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11 Compare the observation of Chamayou, *A Theory of the Drone*, p. 53: “The drone counters the terrestrial forms of territorial sovereignty, founded upon the enclosure of land, with the continuity of the air above.”

12 As we did in [date] with the Phoenix program of assassinations in South Vietnam, for example. For rival accounts, see Dale Andrade, *Ashes to Ashes: The Phoenix Program and the Vietnam War* (Lexington Books, 1990) and Douglas Valentine, *The Phoenix Program* (William Morrow, 1990). Valentine’s figure is 25,000 assassinations; Andrade’s view is that the number of assassinations was much, much lower than that.

13 Camus – “you can’t kill unless you are prepared to die.” (Chamayou 153-4) → the suggestion that maybe the privilege of killing depends on reciprocity (Chamayou 161-2).
coupled with the complete invulnerability of those who are operating the unmanned armed aerial vehicles, often from thousands of miles away. The concern is that this presages utterly new forms of armed conflict, for which new rules, ethics, and customs will be necessary.

- Some worry about the drone and drone technology itself and the way it presages a new era of surveillance—yet another new era of surveillance—from the skies.14

These are all important issues about targeted killings and it is good that people are pursuing them. But their pursuit should not be allowed to distract us from the main issue, which is the adoption of a new practice of individualized killing by our government: the maintenance of death lists and the use of death squads.

It is the targeting that concerns me—the hunting down and killing of individuals named and identified on a list as being marked for death, and the maintenance of such lists, setting out an apparently never-ending agenda for our death squads.

Of course, in the last resort, it is the killings themselves that are the issue. Human individuals are targeted for death and hunted down and killed. These practices are homicidal, though many have convinced themselves that they are privileged by the laws of armed conflict or, in a less formal sense, privileged as a matter of national self-defense.15 The homicidal character of these practices ought to invoke the most serious reflection and consideration of the kind of country we are becoming (or have been forced to become) in the war on terror.

It is not just a matter of thinking hard so that we can “come up with” a justification for targeted killing. There are all sorts of things that we might justify that nevertheless would reflect badly on us as a community or reflect badly on our political system. Whatever the provocation, whatever the justification, we must ask ourselves whether we want to become the kind of country that maintains death lists and sends out death squads. Do we want this to become a permanent feature of state practice? Do we want it to become a permanent capability available in

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14 Mention “eye-of-God” surveillance issues.
15 The relationship between the legal status and alleged legal justification of these killings, on the one hand, and, on the other hand, the point of the characterization I am pursuing here will be discussed in sections 5 and 6. For now, the question is not whether these killings are privileged or justified, but what sort of state practice they represent.
principle to any of the 192 sovereign states in the world that think of themselves as having particular persons as enemies?

3. The terminology of “death lists” and “death squads”
The language I am using—“death squads” and “death lists”—is ugly and emotive, and it will upset many people who are otherwise comfortable with the practice of targeted killing. But the terminology is not ugly and emotive because of any way I have embellished it. The phrases are crude and to the point: they are, as are these practices, about death. And they simply mention the fact that lists are maintained by the state for people marked for death and that the killings are carried out designated squads of military and/or intelligence people either operating on the ground or remotely operating the machinery of death in the air. It is not possible to quibble with the literal meaning of these brutal phrases or their application to the practice we are considering.

The terminology is ugly nonetheless because of its connotations. “Death lists” and “death squads” make our national security and military apparatus sound sinister and brutal, like the tools used by Latin American dictatorships years ago: in El Salvador in the early 1980s for example. They conjure up images of informal teams of brutal men, operating in a partly clandestine partly visible way, under the deniable orders of a ruthless regime, to kill—and make an example of the killing—of opponents of the regime in the cities and in the countryside as an alternative to negotiating with them or respecting their human rights or allowing them to take part in national politics. (I shall call these “classic cases” of death squads and death lists.)

I make no apology for these connotations. The resemblance (such as it is) between our targeted killing and these brutal practices—both covered under the terminology of “death lists’ and “death squads”—is a salutary reminder of the sort of the sort of state we may be turning into. I mean a state in which this sort of killing is a standard way of dealing with those whose continued existence is deemed unacceptable to the governing regime.

I make nothing of allegations that the United States, historically, was complicit in the organization and activity of death squads in Central and South America in the 1980s.16 It does no harm to recall that in 2004, there were credible

16 Cite to allegations
reports of the United States having helped implement what was called the “Salvador Option” in Iraq under the auspices of its counter-insurgency program in that country. (The claim is that the US helped organize and train squads of Shia special police commandos or militia-men who killed or captured and tortured large numbers of Sunni insurgents.) But again this is not the issue I am getting at. The issue for this paper is the now-acknowledged use by us of our own death lists and our own death squads, not our complicity in the use of these methods by others.

“Death lists” and “death squads” are not the terminology used by US officials to characterize the practices that I want to address. The death lists are sometimes called “kill lists,” which is not much better, or “kill-or-capture lists” (a phrase in which “the capture part has become largely theoretical”). I am informed that in Afghanistan the death list is referred to euphemistically as the “Joint


18 See note 3 above.


20 Ibid. In rare cases, targets are captured who might have been killed, but the “or capture” part is necessarily theoretical where drones are involved. See Steve Coll, “Kill or Capture,” The New Yorker, August 2, 2012, available at http://www.newyorker.com/news/daily-comment/kill-or-capture
Prioritized Effects List.” The death squads are sometimes called “hit squads,” though usually the language of “squads” is avoided altogether.

At the very beginning of the recent wave of targeted killings, President George W. Bush suggested it would involve a new form of warfare, “a war that requires us to be on an international manhunt.” The language of hunting—hunting down named individuals and killing them—was used throughout the 2000s. Donald Rumsfeld asked: “How do we organize the Department of Defense for manhunts?” A 2009 report published by something called the Joint Special Operations University, called for the setting up of a “national manhunting agency” and “building a manhunting force for the future.” And Admiral Eric T. Olson, head of U.S. Special Operations Command described U.S. Special Forces as “the most lethal hunter-killers . . . that any nation has to offer.”

For the killings themselves, all sorts of euphemisms are used. “Take out” and “eliminate” are used by officials who want to sound hard but don’t want to say “put to death.” As for other terminology, Philip Alston notes that “leadership decapitation,” … captures only some of the practices at stake”; ‘assassinations,’ has become a term of art and may be a distraction; and ‘extrajudicial executions,’ … has the downside of building per se illegality into the description of the process. The Israelis have urged the use of terms like “preventive killing,” and “targeted pre-emptive actions.” Obviously this is a playground for what the philosopher C.L. Stevenson called “persuasive definition.”

When the terminology of “death lists” and “death squads” is used, it is sometimes used in connection with concerns that I sought to exclude as the

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24 Again, I am indebted to Chamayou, pp. 32-3 for this paragraph. See George A. Crawford, Manhunting: Counter-Network Organization for Irregular Warfare, JSOU Report 09-7 (September 2009), available at www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA514554

25 cited at beginning of the Alston article. Date?


subject-matter of this paper. Afsheen John Radsan and Richard Murphy observe that

> [e]ntrusting drones to the CIA, an intelligence agency with a checkered history as to the use of force whose activities are largely conducted in secret, heightens concerns in some quarters that strikes may sometimes kill the wrong people for the wrong reasons. If applied sloppily or maliciously, targeted killing by drones could amount to *nothing more than advanced death squads*.28

The same authors have also observed that “our democracy has a deep and abiding interest in avoiding *secret death squads*. That translates into a need for procedures on the use of lethal force that are as transparent, fair, and accurate as national security permits.”29 And the author of an op-ed piece in the Los Angeles asks, “Should the executive branch be allowed to put a citizen on a CIA death list without judicial review?”30

Others use the terminology to get to the heart of the matter. So, for example, conservative law professor Robert Delahunty worries about the administration’s brushing aside objections to the practice. Referring to former State Department legal advisor Harold Koh, he says:

> If Koh returns to the legality of targeted killing of al Qaeda and Taliban terrorist suspects, he should deal far more adequately with the human rights objection that targeting an un-uniformed combatant is akin to outlawing and sentencing him without trial—something more like killing individuals by *paramilitary death squads* than ordinary military combat. In my opinion, there are legally and morally persuasive answers to that objection. But the

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problem is a serious one that deserves something more than Koh's shallow and evasive response.\(^{31}\)

Various journalists, especially outside the United States, have shown no reluctance to use the terminology of “death squads.” Seamus Milne of *The Guardian* in London talks of drone crews as “hi-tech death squads,”\(^{32}\) and says of special forces on the ground in Afghanistan, “What emerges is both the scale of covert killings by US special forces—running 20 raids a night at one point in Afghanistan—and the unmistakable fact that these units are operating as death squads, whose bloodletting is dressed up as "targeted killings" of terrorists and insurgents for the benefit of a grateful nation back home.”\(^{33}\) Pakistani journalists in particular talk this way. A 2013 editorial in *Pakistan Today* talks of “the mechanical death squads operated by the CIA,”\(^{34}\) while a writer in *The Frontier Post* tells his readers that “American strategists sponsor death squads in Afghanistan and Pakistan” and that “[t]he aim is to terrorize the masses by drone attacks and death squads.”\(^{35}\)

I mention these uses of what I have acknowledged is ugly and emotive language not to validate what I am saying in this paper, but to indicate that it is not coming entirely “out of the blue,” particularly so far as foreign observers are concerned. The characterization of our targeted killing practices in terms of “death lists” and “death squads” is not uncommon; it needs to be taken seriously and confronted squarely without evasion.

**4. Differences and disanalogyes?**

Are American practices of targeted killing redeemed perhaps by the many differences that distinguish them from the classic case of death squads in (say) El

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\(^{33}\) Seamas Milne, “UK Up to its Neck in US Dirty Wars,” *The Guardian*, December 5, 2013:


Salvador in the early 1980s? Certainly many differences can be cited, and it is worth reflecting on their significance.

Some differences are trivial, albeit colorful. We think of the classic death squad as a poorly disciplined bunch of brutal and unshaven men in sweaty uniforms, cruel and sadistic in their actions and mentality beyond perhaps what their assignment requires. But deodorant and air-conditioning (in a trailer in Nevada or Langley used by drone operators) take us only so far. It is true that no one accuses drone operators of sadism, and the brutality that their actions involve is simply the brutality of the lethal means they use for quick and devastating strikes. But these are surely inessential differences.

Is this true of the contrast between disciplined and undisciplined forces? In some ways, yes. For a while, American drone operators were acting outside the military chain of command, involving intelligence operatives rather than or as well as military personnel. Strictly speaking, such intelligence operatives would count as unlawful combatants, unless they were somehow legitimately patched into military units. True, this is not the sort of indiscipline we envisage in the classic paradigm. It may still be important because it illustrates that targeted killings by our government have not always conformed to a strict military model.36

In a recent collection of essays on death squads by a group of anthropologists, Jeffrey Sluka suggests that in classic death squads, the mix of personnel is between military, police, and intelligence personnel on the one hand, and “paramilitary civilian groups,” on the other.37 But his point in emphasizing the mixed character of the groups is to reconcile the fact that “death squads are usually directly or indirectly under official or unofficial state control,” being “generally and secretly fully integrated into the state’s regular security network,” while at the same time establishing sufficient distance between the group and the formal and


publicly recognized apparatus of the regime to allow for “plausible deniability.”\(^{38}\)

Death squads, in the classic paradigm, are kind of half-legitimate. They are associated with the state but not publicly avowed by the state. This twilight character of death squads in the classic paradigm may be an important feature and we should note it as a possible point of distinction from the practice of targeted killing with which we are concerned. Whether this difference is diminished by the use of state secrecy and concealment in the early years of the American practice (until denial of targeted killing became politically impossible), is likely to be a matter of dispute.

In the classic paradigm, the killings carried out by death squads are “politically motivated murders” of political opponents of the regime, carried out in the regime’s own territory.\(^{39}\) This is a major difference. As far as I am aware, targeted killings by our forces have never taken place in American territory and, even when they have been directed at American citizens, they have taken place in foreign countries and have been motivated by concerns about terrorism rather than domestic political opposition. American use of targeted killing has not been pursuant to any domestic political agenda associated with political authoritarianism as it is in many of the classic cases.

In Sluka’s account, however, the authoritarian element is not essential; the use of death squads is typical, he says, of “national security states” as well as authoritarian states.\(^{40}\)

And the contrast between the killing of terrorists by US death squads and the killing of political opponents in the classic model is complicated by two points. First, targeted killing is used by the US not just to impact members of bona fide terrorist organizations like Al Qaeda, but also against insurgents rising up against our forces or against the regimes that we have been trying to establish in Afghanistan and Iraq. So, for example, although the Taliban has had strong connections with Al Qaeda in the past, the use of targeted killings against Taliban leaders is related mainly to their violent attempt to overthrow the US-sponsored regime in Kabul or to establish pockets or regions of resistance to its authority. In that endeavor, the Taliban use methods that can be labelled terroristic and the same

\(^{38}\) Ibid.

\(^{39}\) Ibid., p. 2.

\(^{40}\) Cite to Sluka.
can certainly be said about ISIS and other insurgent forces in Syria and Iraq. But whether these violent insurgents can plausibly be labelled terrorists or not, they are plainly not terrorists in a sense that would distinguish them importantly from political opponents of regimes we are supporting or political opponents of our presence in the countries in which they operate.

It might be said that in the classic paradigm, death squads target the political opponents of a regime whether they are engaged in armed struggle or not, and that that element of the indiscriminate use of force is the key to a distinction, not the applicability of the label “terrorist.” In the classic case, death squads target armed and unarmed political opponents indiscriminately, whereas our practices of targeted killing are focused on combatants (usually unlawful combatants). I don’t think we should ignore this distinction, but nor should we exaggerate it. Consider the killing of Anwar Al-Awlaki, the American citizen operating in Yemen, whom I have alluded to a couple of times. A case can be made that Al-Awlaki was a bad person, whose activities were certainly not in the interests of the United States: he was an able propagandist and recruiter and he incited terroristic actions. He was not, as far as I know, a combatant. Targeting him would be like targeting a high enemy civilian official in a regular war. In the classic paradigm, death squads target armed and unarmed political opponents indiscriminately, whereas our practices of targeted killing are focused on combatants (usually unlawful combatants). I don’t think we should ignore this distinction, but nor should we exaggerate it. Consider the killing of Anwar Al-Awlaki, the American citizen operating in Yemen, whom I have alluded to a couple of times. A case can be made that Al-Awlaki was a bad person, whose activities were certainly not in the interests of the United States: he was an able propagandist and recruiter and he incited terroristic actions. He was not, as far as I know, a combatant. Targeting him would be like targeting a high enemy civilian official in a regular war. Also, beyond members of terrorist and insurgent organizations, we should note that in Afghanistan at least, targeted killings have been used against drug lords, probably on account of their connections to the opponents of the regime rather than simply as a narcotics control measure.

(I will want to return to this issue of the breadth of targeting and the malleability of the label “terrorist” in section 8, when we consider the possible use of death lists and targeted killing by regimes other than the United States if this catches on as a respectable form of state practice.)

The sub-title of the book that Jeffrey Sluka edited is “The Anthropology of State Terror.” He and his fellow authors believe that classic death squads are used by authoritarian or national security regimes not just to eliminate their political

41 Some philosophers have suggested that the rule against targeting such civilians has no justification: see, e.g. Jeff McMahan, “The Ethics of Killing in War,” Ethics 114 (2004), p. 693. See also the discussion in Jeff McMahan, Killing in War (Oxford University Press, 2009). But McMahan does not deny that this is the rule.


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opponents but also at the same time to terrorize their subjects.\textsuperscript{43} Is there any comparable terroristic element in the targeted killing practices that we are interested in? I am not sure. It has been suggested that drone killings have this as a side-effect:

The dark psychology of state terror in the use of unmanned assassination drones is revealed in their names: ‘Predators’ and (Grim) ‘Reapers.’ These names in themselves suggest a willful obtuseness about the efficacy of information operations. Civilians hear these names and are psychologically conditioned by them: they are not only terrified by hunter-killer drones overhead, many are radicalized\textsuperscript{44}

Grégoire Chamayou argues that drones “inflict mass terror upon entire populations.” He quotes David Rohde, a \textit{New York Times} journalist held hostage in Waziristan: Rohde suggests that both he and his captors found the drones terrifying. “From the ground it is impossible to determine who or what they are tracking as they circle overhead. The buzz of a distant propeller is a constant reminder of imminent death.”\textsuperscript{45} Obviously the terror element is related also to the possible indiscriminate nature of the strikes and the prospect of civilian damage, understood not from the point of view of Washington risk assessments but that of the people who are actually at risk.

Everyone is scared all the time. When we’re sitting together to have a meeting, we’re scared there might be a strike. When you can hear the drone circling in the sky, you think it might strike you. We’re always scared. We always have this fear in our head.\textsuperscript{46}

\textsuperscript{43} Cite to Sluka book.

\textsuperscript{44} Jeffrey A. Sluka, “Death from Above: UAVs and Losing Hearts and Minds, \textit{Military Review}, 93 (2013), p. __.


I said at the beginning that I didn’t intend to dwell on the element of “collateral damage,” important though it is. In the present context, it does help diminish the difference between death squads as an element of state terrorism and targeted killings as a means of cowing as well as killing the inhabitants of certain areas.

In general: of course there are differences between the use of death squads in (say) El Salvador in the early 1980s and the use of targeted killing by American forces under the Obama presidency. There are always differences between any two sets of social/political/military phenomena. The differences do not necessarily preclude our arraying them under the same classification. Everything depends on whether the differences are differences of detail, or differences that go to the essence of the concept under discussion. Or—if one eschews essentialism—everything depends on whether the differences seriously diminish the point that is supposed to be made by arraying both sets of practices under the same term.

It is not my argument that the American practice of targeted killing is the exact equivalent of the activities of outfits we call “death squads,” either sociologically or morally. My position is that the American practice is much more like such activities than we ought to be comfortable with, and that the classification of our practice in the same category as classic cases of death squads and death lists may be salutary in our reflections upon our own practices.

I say all this because, when comparisons and analogies are made in regard to features of American practice or policy, the indignant complaint is often heard: “Are you saying these practices are morally equivalent?” People say this without much idea of what the phrase “morally equivalent” means.

If the question is supposed to be, “Is the one set of practices as bad or as evil as the other?” one can answer, I think, “Probably not.” Tens of thousands of people were killed by El Salvadorian death squads, and only thousands (not tens of thousands) have been killed so far by America’s targeted killings, and the terroristic and authoritarian element was no doubt much worse in the former case.

But if the “moral equivalence” question means something like, “Does the one set of practices raise the same sort of concerns as the other?” the answer may be “Yes.” For in both cases there are concerns of exactly the same kind about the state’s relation to these killings: the killings are extra-judicial, they stand in a problematic relation to privileged killings in combat, and they betoken a form of state practice—drawing up lists of enemies and trying to kill them one by one—
that is radically at odds with how a democratic constitutional state, even one rigged for war and capital punishment, is supposed to operate.

5. Justifying targeted killing

The question about moral equivalence might also be taken to mean: “Is targeted killing just like the activity of Salvadorian death squads in this respect—that there is no justification for the activity?” No one thinks that the activities of Salvadorian death squads were justified (though it is said that the US kind-of supported them at the time). But most people believe it is possible to justify targeted killing by the present US administration.47

All sorts of justifications are put forward. Some see targeted killing as just a limited instance of the killing of combatants in an armed conflict. Harold Koh, for example, former dean of the Yale Law School and formerly legal counsel in the State Department, maintained in a speech to the American Society of International Law in 2010 that

as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.48

Against this background he said it was appropriate to target individuals belonging to Al Qaeda as combatants, just as one would target soldiers in an opposing army. He rejected the idea that these targeted killings were extra-judicial executions, insisting that “a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force.”49 And he brushed aside as irrelevant the distinction that targeted killing goes specifically after named individuals, whereas in ordinary warfare the killing of combatants is largely anonymous:

[S]ome have suggested that the very act of targeting a particular leader of an enemy force in an armed conflict must violate the laws of war. But

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47 Cite opinion polls, indicating majority support for targeted killing as a tactic.


49 Ibid.
individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.  

The gist of Koh’s position is to ask how we can quibble about death squads going about the business of individualized killing when we have no equivalent ethical problem with military units operating impersonally in ordinary warfare with lethal force? How can we quibble about targeted killing if we are prepared to allow and support, however reluctantly, ordinary warfare and the much less discriminate death and mayhem that it involves?  

There are all sorts of things one might say in response to this, to support the suggestion that the listing and specific targeting of individuals by name might be significant. I have found the following hypothetical case useful in my own reflections.  

Suppose you are a company commander in regular warfare, who is ordered to attack a defended position. The position is held by a few score enemy soldiers and you are commanded to attack it with a company of men. Just before the jump-off time, one of your superior officers hands you a list of names and photographs

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50 Ibid. Others have accepted Koh’s brushing aside of this issue: Philip Alston, until recently UN Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, thought this was a red herring. Talking about Koh’s consideration of the possible objection that “the very act of targeting a particular leader of an enemy force in an armed conflict must violate the laws of war,” Alston says in “The CIA and Targeted Killings Beyond Borders,” at p. 321, that he is “not aware of any reputable author who might have made such an argument and the proposition, as stated, is clearly without foundation.”

51 See Claire Finkelstein, ‘Targeted Killing as Preemptive Action,’ in Finkelstein et al. (eds.) Targeted Killings, pp. . See also Melzer, Targeted Killing in International Law, p. 434-5: “In military hostilities, the killing of human beings is [usually] understood as an impersonal act motivated by the military necessity of achieving victory over the adversary in an inter-collective confrontation” … “as targeted killings, by definition, are directed against selected individuals, they constitute the conceptual antithesis of [anonymous] depersonalized, inter-collective warfare”
of, say, fifteen members of the defending force, instructing you (if at all possible) to ensure that these individuals are killed in the course of the operation. Would one simply accept the list and shrug and say, “Well that’s war; these people are enemy soldiers and they are liable to be targeted anyway”? Or would we expect alarm-bells to go off in the mind of the company commander?

Why am I being given this list of names? I know they are all combatants, but why are these ones being singled out? Is it because their surviving the campaign will make post-bellum governance more difficult? Are they communists or fanatics of some other kind? Is it because of their background? Are they Jews? Is someone taking the opportunity presented by otherwise legitimate combat to settle a score? Or what?

Part of the worry no doubt is about the prospect for quarter so far as the named individuals are concerned. The company commander may worry: “Am I being told not to accept the surrender of any of the individuals on the list?” But even if quarter is not ruled out, the mere fact of the list and its presentation to the company commander would feel rum. It would feel like some sort of abuse of military privilege, a distorting of military ethos.

I am sure that Professor Koh can see the concern here and that he would not want to dismiss it out of hand. But if that’s the case, then we can’t say that the mere fact that the names on the list are legitimate combat targets anyway answers all of our concerns. There is something about the targeting of named individuals that ought to give us pause, particularly if it is adopted as a regular practice. Like Delahunty, I wish Koh had paused for more reflection on this aspect of the matter in his remarks to the American Society for International Law.

The point I want to make in this paper is that perhaps even if we can concoct a justification for targeted killing, we should distinguish between justifying he practice, in a narrow legalistic sense, and the broader issue of the misgivings we should feel about the character of the practice or the character of the statecraft that now uses these methods as a regular instrument of national policy. I worry that

53 Cf Robert Delahunty’s remarks about Koh’s argument in text accompanying note 28 above.
Professor Koh and others write as though, once a plausible or even just a presentable line of justification has been sketched out, there can be no further room for concern.

Much the same can be said about justifications concocted along a different line. Joseph de Maistre once remarked that “[w]e restrict this right to kill to the executioner and the soldier.”54 If our death squads can’t be seen, exactly, as soldiers, perhaps they can be seen as executioners. Nigel Biggar, Regius Professor of Moral and Pastoral Theology at Oxford, who is also participating in this conference, has suggested that some targeted killings may be understood as acts of justice. In a letter to The Times in London, he wrote:

Those who argue that Osama bin Laden should have been brought to trial, rather than killed, tend to suppose that justice only takes place in courts. … [W]hen soldiers mount a highly discriminate operation (rather than a more risky missile attack) in order to put an end to the active threat posed by an inveterate and murderous enemy, when they have good reason to allow him no chance of escape, when he does not immediately and unequivocally surrender, and when they therefore kill him, justice is … done. If that is indeed what happened in Abbottabad, then justice was done. Rough justice may be rough, but it is still justice.55

Professor Biggar is surely right to insist on the category of “rough justice” and on its possible applications in warfare.56 But justice can be “rough” in two senses. It can be rough in the sense that there was a rough version of the procedure that justice would ordinarily require. Or it can be rough in the sense that it omits any element of procedure whatsoever and assesses the killing purely on an outcome-basis.57 Bin Laden’s being alive after the terrorist attacks of September

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54 Quoted in Chamayou, p. 153.
55 Letter to The Times (London) on May 10, 2011
56 Biggar’s predecessor in the Regius Chair, Oliver O’Donovan, has suggested that war itself can sometimes be an act of justice, where no more formal procedure is possible. He compares its roughness to an urgent surgical operation conducted by amateurs with a pen-knife on a mountainside where qualified surgeons and hospitals are unavailable. See Oliver O’Donovan, The Just War Revisited (Cambridge University Press, 2003), p. 18.
57 The killing of Osama bin Laden was like that. Not only was the execution “rough” but nothing remotely approaching a trial was held. Maybe a trial, even a rough version of a trial,
11, 2001 was an injustice; his being dead in May 2011 is justice, from (say) a God’s-eye point of view. We do sometimes talk of justice in this outcome-focused way. Whether we should be comfortable with this as a general approach to justice is another matter. I do not know how far Professor Biggar wants to generalize what he says about the bin Laden killing. I do know that we should feel quite uncomfortable about the Justice Department’s maintaining a list of escapees from regular justice who are to be dealt with roughly in this way. It is a long time since the FBI’s most-wanted list presented itself under the heading “Wanted—Dead or Alive.”

A third line of justification that is sometimes heard is that targeted killings are justified as bare acts of self-defence, whether or not they conform (in whatever way) to justice paradigms or combat paradigms. Kenneth Anderson has put this forward as a substitute for the Harold Koh killing-of-combatants argument, which he regards as inadequate certainly by the terms of “the law of war treaties and customary law defining armed conflict.”

The better approach to this, rather than a global war on terror …, is the customary law of self-defense. … That’s the legal authority that permits the US to strike at its enemies whether in a combat theater or not, in safe havens far away from any regular battlefield, and it is the traditional authority on which the US has always relied.

Elsewhere, Anderson has called this justification “naked self-defense” because it does not claim the benefit of the complicated laws and customs of armed conflict.

was unnecessary because “we all know” bin Laden was guilty. And that is almost certainly right, though nevertheless it is worth reflecting on the fact that we have trials—even rough trials—because sometimes “things we all know” turn out to be false. I wish Professor Biggar had said something to this point.


59 Ibid.

In my view, this is the most promising line of justification available, though some have questioned it and though there must be misgivings about the absence of any parameters of limits on the self-defense claim.\(^{61}\) It has the advantage over the other lines of justification of not trying to turn targeted killing into anything else. It is what it is. After all, the American practice of targeted killing is not unmotivated—and the Anderson approach simply identifies the motivation and calls it the justification. That’s an honest approach.

I have said some critical things about some of these lines of possible justification. But those criticisms are not key to the argument of this paper. For, as I shall show in section 6, an action can be justified but still be the focus of concern as a state practice; legal objections to an action can be answered, but still the action considered as part of a settled practice can warrant further scrutiny and reflection.

Nevertheless, I began this section with a question, and we should answer it. Defective though (I think) some of them are, the justificatory arguments that we have rehearsed in this section are certainly more convincing than anything one might hear in defence of the activity of death squads in El Salvador in the early 1980s. So this is a ground of difference between the classic case of a death squad and this modern manifestation of the phenomenon.

In this regard, then, they are definitely not moral equivalents. But moral equivalence is not the basis for categorizing two phenomena under the same heading. Describing American targeted killings in terms of “death lists” and “death squads,” using the same vocabulary as we use to describe El Salvadorian death lists and death squads from the early 1980s, may be salutary even if they are not moral equivalents. It may help us see something important about the former practice even if we have rejected the idea that it is the moral equivalent of the latter.\(^{62}\)


\(^{62}\) Sometimes it is helpful to align two non-morally-equivalent practices under the same disreputable heading. We do this all the time with words like “killing” and “undemocratic.” Not everything that is properly described as a killing is the moral equivalent of everything else that can be properly described as a killing. Not everything that can be condemned as undemocratic is the moral equivalent of everything else that can be condemned as undemocratic.
6. The character of targeted killing

I don’t want to rule out the possibility that targeted killing or some instances of targeted killing might be justified. But what if they are? What if we have no alternative but to engage in killings of this kind as part of the global war against terrorism? We should still consider the kind of state that our (possibly justified) response to these exigencies is turning us into. And the language of “death squads” and “death lists” may be helpful in jolting us into this additional layer of consideration.

Concocting a moral or a legal justification of a practice is not all there is to a critical or evaluative assessment of it. Legal justifications, in particular, can sometimes seem narrow and even obtuse. They may be designed simply to block or answer particular legal objections, leaving broader ethical issues untouched. They can give the impression sometimes of being rigged.63 Or in some cases justifications may address just one facet of an issue, without seeing what we might call the big picture. For example, a senior civil servant in the British Ministry of Defence has been quoted as saying that “[t]he use of unmanned aircraft prevents the potential loss of aircrew lives and is thus in itself morally justified.”64 But he can’t mean that literally: he must have meant the avoiding loss of aircrew lives is one element that might factor into a justification, not that it is a complete justification in itself.

More importantly, a justification does not necessarily reconcile us to the practice. For that we may want to consider its broader character: what more generally can be said about us and our practices in light of the fact that we have

63 Finkelstein, ‘Targeted Killing as Preemptive Action,’ in Finkelstein et al. (eds.) Targeted Killings, pp. 168-9, illustrates this with the following imaginary example:

Imagine we would like to target a head of state of a humane democracy. … [W]e have only to declare war on that country in order to convert the relationship [between our armed forces and that head of state] into one between belligerents, and although such a declaration would be impermissible from an ad bellum standpoint, it would entitle us to target the now-enemy head of state without subjecting ourselves to liability for war crimes. As long as the in bello criterion for the legitimacy of killing enemy combatants does not depend on the justice of our cause in declaring war in the first place, we can kill with impunity as long as we have committed the quite different wrongful act of engaging in a wrongful declaration or act of war.

64 Quoted in Walter Pincus, “Are Predator drones a technological tipping point in warfare?” Washington Post, April 24, 2011.
seized on and advanced this or that line of argument to justify action of a certain sort.

In ethics, we sometimes distinguish between the assessment of actions (in either deontological or consequentialist terms) and the assessment of character in terms of virtue ethics. They are not necessarily the same. A justified action may in certain circumstances reveal a bad character or a character of a certain sort that might not involve a favorable assessment. Sometimes, for example, we may describe a morally scrupulous person as a prig or a pedant. Sometimes we may have reason for avoiding the company of and not wanting to have anything to do with a person who has acted in a certain way, even when his so acting is justified.

Or consider classic cases of “dirty hands” in politics or in warfare. As Michael Walzer has pointed out, sometimes we accept that certain actions that would normally be regarded as wrong actions or even atrocities must be undertaken by those who have responsibility for the security and well-being of a community even though such actions inevitably taint the character of those who feel compelled to undertake them. A president orders the nuclear bombing of an enemy city that doesn’t involve a military target in order to end a war; or a politician orders the torture of a prisoner to get information that will help avoid some catastrophic horror that might arise in a ticking bomb situation. Even if we were to accept that such action was justified, we would not necessarily say that the character of the individual who undertook them was left untainted thereby.

Max Weber cites “Machiavelli [who] in a beautiful passage, if I am not mistaken, of the History of Florence, has one of his heroes praise those citizens who deemed the greatness of their native city higher than the salvation of their souls.” That may be a bit extreme. But Weber’s more general thesis is not: the person who has a vocation for politics must understand that politics is (ultimately and potentially) a violent practice and “he lets himself in for the diabolic forces


lurking in all violence. … He who seeks the salvation of his soul, of his own and of others, should not seek it along the avenue of politics.”68

This is not the place to embark on a general consideration of the problem of dirty hands. My invocation of Machiavelli and Weber is intended just to illustrate the point that the justification of an action may not be all there is to be said about the character of those who undertake it.

Anyway, I should emphasis it is not my intention in this paper to assess the character of the persons who actually engage in these killings. No doubt there are things to be said on this front. With regard (say) to regular military operations and with regard to executions, it is possible to say of those who engage in state-authorized killings that they are men not murderers. It may not be so easy to say this of the members of death squads, even when circumstances have driven a country to use death squads and even when killing by death squads appears justified. The tinge of something like murder and assassination may be present and not altogether displaced by the justifications we concoct or the reasons we manufacture for not using these terms.69 What interests me, however, is the character of the state that authorizes these operations not the character of the killers themselves.70

I raised the difference between virtue ethics on the one hand, and consequentialist or deontological justification on the other. We don’t usually talk about the virtues of states; but we do talk about their character. We do often


69 I can’t resist mentioning, however, the observation of Immanuel Kant in §57 of “The Doctrine of Right” (6: 347) in The Metaphysics of Morals (1797), trans. Mary Gregor (Cambridge University Press, 1991), p. 154—who wrote

A state against which war is being waged is permitted to use any means of defense except those that would make its subjects unfit to be citizens…. Means of defense that are not permitted include using its own subjects as … assassins or poisoners (among whom so-called snipers, who lie in wait to ambush individuals, might well be classed)….

70 See also Fernando R. Tesón, “Is Targeted Killing Ever Justified?” in Finkelstein et al (eds.) Targeted Killings, p. “[L]iberal governments should behave in accordance with the civic virtues that inform the civil society they represent. Assassination seems hardly compatible with political virtue.”

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attempt to describe, sometimes in a morally- or politically-loaded sense the character of the state.

So: we classify states in various ways and for various purposes. We talk about nation-states, confessional states, liberal states, constitutional states, rule-of-law states, welfare states, mercantile states, laissez-faire states, night watchman states, police states, totalitarian states, national-security states, and rogue states. Obviously these are not all value-neutral terms, but nor are the derogatory connotations of some of them simply the result of the performance of unjustified actions by state in question. They have to do with ethos and character and fundamental aims and pervasive principles of organization. I think it is worth dwelling on these characterizations when they become available or when it becomes plausible to apply them to a state in which we are interested (or implicated).

At the birth of political theory, states were classified in terms of their political structure and in terms of their quality. Aristotle distinguished rule by one person, rule by the few, and rule by the many, and he cross-hatched that in a three-by-two matrix in terms of whether they were good or bad: so we had monarchy and tyranny, aristocracy and oligarchy, and polity and democracy—the last of these being often a term of abuse. Aristotle also considered the possibility of a further dimension according to whether any of these forms involved rule by law. A couple of thousand years later, Montesquieu essayed a set of broad classifications, partly formal and partly sociological. He distinguished republics, monarchies, and despotisms; among republics, he distinguished democracies and aristocracies; and in general he added a distinction depending on whether the constitution of a state was “moderate” or not. But not only that—he invited us to consider also the principle or animating ethos of each form: virtue in a republic; honor in a monarchy; and fear in a despotism. Montesquieu never really aligned these characterizations directly with moral evaluation—except perhaps in the case of despotism. But they were certainly put forward as significant, and significant not just for social science but for the citizens or subjects of the regimes involved. It was something for them to ponder or reflect upon.

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71 Aristotle, *The Politics*, Bks. III and IV.

In my view, the use of death lists and death squads changes (or complicates) the character of our state (the United States) so far as the use of lethal force is concerned. And it is worth contemplating as such. It does so, even if the justifications discussed in the previous section go through. For even if there is a military/laws-of-war justification, the use of death squads is a different kind of operation from the combat operations we are used to. Or even if the use of death squads is intended as “rough justice,” it is a radical departure from the business of trying and punishing terrorists and insurgents and those who organize terrorism or insurgency as criminals. Or even if, as Kenneth Anderson maintains, it is simply our country’s means of “naked self-defense,” it is a reflection upon the threat posed by terrorism that we have been driven to this defensive expedient. Our country—considered as a political system that uses and regulates the use of lethal force—has changed its character in these and other ways.

7. Lethal Force and the Character of the State
We owe to Max Weber the proposition that states are to be defined as such by reference to the force that they monopolize. They can’t be defined functionally:

Sociologically, the state cannot be defined in terms of its ends. There is scarcely any task that some political association has not taken in hand, and there is no task that one could say has always been exclusive and peculiar to those associations which are designated as political ones…. Ultimately, one can define the modern state sociologically only in terms of the specific means peculiar to it, as to every political association, namely, the use of physical force.73

States have to be defined modally, in terms of the way they carry out whatever tasks they take on. “If no social institutions existed which knew the use of violence, then the concept of ‘state’ would be eliminated….” In the past all sorts of organizations claimed the right to use force in pursuit of their own aims. But “[t]oday the relation between the state and violence is an especially intimate one,” because the state purports to control all such legitimation of violence. “A state,”

73 Weber, “Politics as a Vocation,” at pp. 77-8.
says Weber, “is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.”

In his great work, *Economy and Society*, published originally in 1921, Weber added the following qualification:

It goes without saying that the use of physical force is neither the sole, nor even the most usual, method of administration of political organizations. On the contrary, their heads have employed all conceivable means to bring about their ends. But, at the same time, the threat of force, and in the case of need its actual use, is the method which is specific to political organizations and is always the last resort when others have failed.

Notice that ‘physical force” here can cover a variety of phenomena from pushing, shoving, and “kettling,” through incarceration, all the way to killing (the use of deadly force). Though he refers to force of all kinds, we might be particularly interested in that aspect of Weber’s conception that refers to lethal force. We might want to say, in particular, that a state is an organization that (successfully) claims the monopoly of the legitimate use of lethal force within a given territory.

Under the auspices of this conception, one might begin categorizing states according to the way or the various ways in which it governs, regulates, and authorizes the use of lethal force: how exactly does it legitimize the use of deadly force? The United States does this under legal auspices in a number of ways:

1. Under the most stringent conditions, ordinary people and law enforcement officers are permitted and authorized to use deadly force in defense of themselves or others in the face of an imminent threat to their own or others’ lives.

2. Deadly force may be used by way of execution, for the most serious offenses, but only in an institutionally regimented way, tightly controlled,

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74 Ibid., p. 78.


76 *Wikipedia* tells us that “kettling” (also known as containment or corralling) refers to a police tactic for controlling large crowds during demonstrations or protests. It involves the formation of large cordons of police officers who then move to contain a crowd within a limited area.
and pursuant to a judicial order following a criminal trial, with all sorts of safeguards and appellate opportunities.

(3) The state may authorize the use of military force in combat against enemy combatants in a war, but strictly pursuant to the privileges and under the strict regulation of the laws of armed conflict.\footnote{We might possibly want to distinguish also between versions of (3) that privilege citizen militias and versions that privilege standing professional armies.}

In this package of possibilities, the modern state reveals itself in its broadly rule-of-law character. The rule of law is thought particularly important where death is involved. It remains a Weberian entity, with deadly force available as a last resort, but the use of that force is highly regulated by familiar bodies of law. Some modern states reject (2), although they may reserve the right to resurrect the death penalty should it be needed or demanded by their citizenry. Be that as it may, these three conditions together define a particular kind or character of state on the basis of how the use of deadly force is regulated.

Some have worried that the availability of large numbers of nuclear weapons to states like ours has changed their character somewhat, so far as the use of lethal force is concerned. In a recent book Elaine Scarry expresses concern about the emergence of “thermonuclear monarchy”—a situation in which, in countries like Britain and the United States, one or a very small number of officials are empowered to authorize the release of large numbers of nuclear weapons which will have the effect of incinerating or irradiating tens or hundreds of millions of people, mainly civilians.\footnote{Elaine Scarry, \textit{Thermonuclear Monarchy: Choosing Between Democracy and Doom} (W. W. Norton, 2014).}

(4) Our head of state, acting on his or her own initiative,\footnote{Mention the role of secretary of defense. President Obama can command a nuclear strike all by himself. (Or almost by himself: the Secretary of Defense, or someone with whom the President chooses to replace the Secretary of Defense, must confirm his order.) And the President does have to have his identity verified—we wouldn’t want an imposter in a thermonuclear monarchy. There is also, necessarily, a chain of military command between those who receive the President’s message and those who actually “push the button” and blow everything up.} has the power to authorize the use of weapons of mass destruction (WMDs)—nuclear weapons—against civilian as well as military populations. We retain
hundreds of such weapons available for immediate use. These WMDs have long been targeted against certain major cities around the world.

This, she argues, is a drastic change in the character and posture of powerful modern democracies, so far as dealing with death is concerned. We ourselves recognize that the development or acquisition of WMD betokens a massive change in the character of other states when they get them. They have become like us (though usually with a much smaller arsenal), and we worry that their leaders cannot be trusted to exercise the uncompelled restraint which our leaders have exercised since 1945. This is not the place to discuss Professor Scarry’s concern. I put it forward here as another example of how a state may change its character in relation to the use of deadly force.

My claim in this paper is that our present practice of making official lists of people who are to be killed and authorizing small squads of military and intelligence people to hunt them down and kill them also represents a new kind of relation between the state—in this case the United States—and its definitive power of authorizing lethal force.

(5) The state maintains lists of individuals who are designated as enemies of the state, whose continued existence is thought seriously adverse to the interests of the state, and from time to time names are taken from these lists and their bearers are hunted down and killed by squads of military and intelligence people dedicated to that mission.

It is not unprecedented for states to operate in this way. My intention in taking advantage of the ugly connotations of the language of “death lists” and “death squads” is to draw abrupt attention to that point. We are not the first to go down this path of the state maintaining lists of enemies to be “eliminated.” But it is a terrifying path.

We saw in the previous section that attempts have been made to justify targeted killing by assimilating it to the exercise of state powers (1) through (3). I argued in the previous section that even if these arguments succeed on a narrow justificatory front—and it is by no means clear that they do—they do not settle the question of whether a new form of state control of deadly force is emerging here. That’s what is helpful in our inquiry—by analogy—about (4), the acquisition of WMDs. Although (4) arises out of (3), i.e. out of the military context, it is pretty evident that it also represents a dramatically new development in the character of
the states that have this capacity. The main use of (4)—from 1950s through the
1980s, the threat to use nuclear weapons as a deterrent against their use by other
states—has required a threat to murder by incineration and irradiation huge
numbers of civilians in enemy cities. Everyone hoped the threat would never have
to be carried out. But its character and its logic differed so radically from ordinary
military operations that it needed to be understood as involving a distinct relation
between the state and deadly force.

Well, similarly, even if the use of death lists and death squads arises out of
(3) or even if it is—as Professor Biggar believes—a rough form of (2), it is in itself
still sui generis as a form of state involvement with death. We don’t ordinarily
make lists of named individuals in the course of combat; and although we do
execute named individuals in criminal cases we do so after processes of trial and
arrays of safeguards that have no equivalent whatever in the case of targeted
killing. Even in the lines of justification that attempt to connect targeted killing
with (1)—the privilege of killing in self-defense—what we find in fact are
tendentious attempts to revise the logic of “imminence” to make available the sort
of targeted killing we have made provision for.80

In general, then, attempts to cabin (5) within categories (1) or (2) or (3),
involve a great deal of pushing and shoving and misconception and distortion.
Moreover, suppose we were considering the relation between classic death squads
on the Salvadorian model, and possibilities (1), (2), and (3). I don’t think we
would countenance for a moment any argument that the use of death lists and death
squads could be put into any of these three categories. Classic death squad practice
would strike us as a distinct form—and a distinctively disreputable form—of the
relation between state and deadly force. We should have to have something like
(5) available anyway to account for the distinctive character of those operations.
And then my point is that once (5) is available, it is at the very least an open

80 See Amos Guiora and Laurie Blank, “Targeted killing’s ‘flexibility’ doctrine that enables US
to flout the law of war,” The Guardian (London), August 10, 2012, criticizing John Brennan’s
suggestion that that a more flexible understanding of “imminence” may be appropriate.” This
article is available at http://www.theguardian.com/commentisfree/2012/aug/10/targeted-killing-
flexibility-doctrine-flout-law-war
question whether our practices of targeted killing should be put into that category rather than squeezed in category (1) or (2) or (3).81

This analysis has been rather formalistic. Is it important that our state has taken on this new character, that it has added (5), targeted killing, to its other modes of organizing and regulating the use of lethal force?

I don’t want to say that it is the most important characterological trait or that it overwhelms all other interests in the sort of state we have. As we saw in section 6 there are all sorts of ways in which the character of the state can be described. Weber didn’t think that the state as such could be described in terms of its ends, but certainly the character of the modern American state as a welfare state and a regulatory state is massively important, and more important certainly than the character of its regulation of lethal force.

Nevertheless characterizing the state’s use and regulation of lethal force is important. And the use of lethal force under heading (5) is itself quite important within that category. Targeted killings by the United States number in the thousands.82 We put to death through targeted killing more people than are executed pursuant to judicial order in the United States. And there are many more targeted killings than there are other kinds of justified homicides in self-defense.83 As for combat casualties inflicted by our forces (apart from targeted killings), the numbers are much higher: a half million or more in Iraq alone since 2003. On the other hand, the statistics on targeted killing are in the same order of magnitude as the combat deaths that American forces have suffered in this conflict. These statistics are not conclusive of anything except that targeted killing is not a minor or inconsiderable aspect of the state’s use and regulation of lethal force. It is up there with the other killings that our government authorizes and commands.

81 Bear in mind, too, that is not just a matter of adding a new category of the use of lethal force. Its introduction—certainly its normalization, taints the other categories, the first three categories, as well. Lethal power, organized as “assassination from the skies,” untroubled by judicial process, gives an entirely new feel to the laws of war, and perhaps also a new and brutal aspect to our criminal process as well.

82 Philip Alston, “The CIA and Targeted Killings beyond Borders,” Harvard National Security Journal, 2 (2011), 283, at p. 286: “The CIA’s drone-based killing programs have so far killed well in excess of 2,000 persons in Pakistan, and it has been involved in such drone programs in at least four other countries.”

83 “Self-defense killings in US nearly doubled from 2000-2010, statistics show,” New York Post, March 31, 2012: “So-called justifiable homicides nearly doubled from 2000 to 2010, the most recent data available, when 326 were reported, according to a Wall Street Journal analysis of crime statistics from all 50 states.”
8. Universalizing the use of death lists and death squads

Maybe we can trust President Obama and his advisors to make good and careful and, if possible, conscientious use of this new state practice of killing. But it is part of the wisdom of our constitutionalism and our political philosophy always to consider the ways in which a given power might be abused. Obviously this should be of particular concern in our reflections on new ways of using lethal force.

These reflections require us to stand back from our present support for or dissent from what the administration is currently doing, to take a longer view of the possibility of abuse by other administrations down the road. We can do this historically by considering ways in which programs akin to use of death squads and death lists have been abused in the past. The Phoenix program in South Vietnam springs to mind.84

Or, another way to ponder this is to imagine that the use of this power—to list and target enemies of the state with deadly force—becomes a regular feature not just of our state practice, in this global war on terror, but of that of other countries as well. Countries like Russia and Israel already engage in something like our program of targeted killings, though in Russia’s case we certainly see the possibilities of abuse. But imagine this became true of all countries. Just as all countries maintain defense forces, just as all countries have used and reserved the right to use the power of capital punishment at least in the past, just as all countries privilege self-defense—so it would be the case that all countries keep and maintain a list of enemies of the state, and authorize squads of men on the ground or using drones to hunt them down and kill them. And so there would be something like State Department or CIA reports on all countries, telling what we have found out about the exercise of this power by—I don’t know—Belgium or New Zealand or South Africa. We have to reflect in other words on this practice becoming “business as usual” for modern statecraft.85

I guess someone might resist this demand by associating American use of death lists and death squads with some sort of non-proliferation principle. This

84 See note 12_ above.
practice is to be used by us, but it is too dangerous to be used by just any country. It might be like (4), in section 7 above: we have nuclear weapons, we have used them against enemy cities, and we reserve the right to use them again; but we regard it as a matter of grave concern when other countries, whom we do not trust as we trust ourselves, acquire this capability. Somehow I don’t find this plausible, however. Given the way that our use of death lists and death squads is justified, it would be hard to deny other sovereign states the power to fight or execute or defend themselves in similar ways. Or rather, if the objections to death list and death squads are overwhelming, they are overwhelming for their use by anyone. If the arguments for their use are good arguments, they are good—presumably—for any sovereign that regards their use as necessary. The arguments back and forth ought to be neutral, not tailored to the situation of just one country (us).86

Also, if we imagine this power in the hands of other states—as part of the process of reflecting on the character that arises out of our use of this power—we do need to consider how the categories that govern our use of it might expand in the hands of other regimes. I don’t mean rogue states, like those I referred to as the classic cases of death squads and death lists. I mean also our closest allies. The best example is the United Kingdom. As I said in an earlier article, “[t]he British experience is particularly sobering.”

As it clung to the remnants of empire, Britain faced insurgencies in Palestine, Cyprus, Aden, India, Kenya, Malaya, and elsewhere. At one time or another, the British government denounced as terrorists those who emerged to become leaders of these countries: Kenyatta and Makarios are two well-known examples. The temptation to respond to insurgency by targeting people who could be described as terrorists (convincingly, plausibly, or conveniently) would no doubt be irresistible if it were not for the presence of strong legal norms prohibiting assassination. Or think of the use that might have been made of such principles in the conflict in Northern Ireland. We know the British government was comfortable framing and imprisoning innocent people in the struggle against terrorism and would no doubt have been comfortable hanging them, had hanging been available. It is impossible to imagine that if [targeted killing had been respectable as a state practice] in the 1970s it would not have been used to take out IRA and Sinn

86 See ibid., pp. ___, for the distinction between neutral and non-neutral arguments.
Fein leaders, including some who are currently Stormont and Westminster politicians.\textsuperscript{87}

All of this we need to reflect on—not just to denounce or condemn other governments or ourselves in past manifestations, but as a matter of what, in Max Weber’s words, we are “letting ourselves in for” when we approach the problems of politics with this weapon.

\textbf{8. The standard temptations of politics.}

Max Weber said that the distinctive means for politics is violence and that he who goes in for politics as a vocation lets himself in for the quite specific problems that organized use of violence involves.\textsuperscript{88}

The temptation to respond to insurgency or other serious political difficulties at home, or in outlying provinces, or abroad in regimes that we support, by targeting people who could be described as terrorists (convincingly or, for public relations purposes, plausibly) is no doubt difficult for a state to resist. In politics and the pursuit of national security and the maintenance of empire, the stakes sometimes seem to be very high. The viability of national policy may be at stake, or innocent lives, or the survival in office of not-so-innocent politicians.

Politicians have to deal with things like insurgencies. An insurgency, whether justified or unjustified, may pose what seems to be a grave threat to values like public order, innocent lives, or the survival in office of not-so-innocent politicians. And it may seem that sometimes it would be better to simply hunt down and “eliminate” or “take out” some of those who are leading the insurgency—posing this threat to the life of the nation—than to continue risking the values that the government stands for. Such a tactic may seem less costly and more decisive than what can be achieved through the scrupulous, uncertain and long drawn-out procedures of ordinary law-enforcement or less costly and more decisive than what can purchased in the uncertain currency of compromise, negotiation, the addressing of grievances, and so on.

Assassinating one’s enemies (or those who can be designated “enemies of society”) is and always has been one of the standing temptations of politics and

\textsuperscript{87} Pin cite.

\textsuperscript{88} See text accompanying notes 65-8 above.
government. If it has been held at bay in the practice of some advanced
democracies over the past hundred years, it has been held at bay only partially and
uncertainly, through fragile structures of law, ethics, and humanity that place very
firm restrictions on what a state can do so far as the use of lethal force against
individuals is concerned. Indeed what is needed is not just for this temptation to be
held at bay but put literally “out of the question.” In the words of philosopher
Bernard Williams, “I mean by that, that there is no question of it, and it would be
thought outrageous or insane to mention it as an option. The situation is not one of
those in which such options are mentioned and then, all things considered, laid
aside.”89 I believe Williams glossed this once by insisting that what we don’t want
are politicians facing difficulties with some enemy or opponent to go round saying,
“Of course we could have him killed, but that’s out of the question.” That would
be one thought too many. I fear that the adoption and establishment of targeted
killing as a state practice—as one among many state practices involving the use of
lethal force—is a step (though perhaps just a baby step) on the path to a situation in
which killing opponents who can be defined as enemies of the state is no longer
out of the question.

Certainly, as Philip Alston has argued, it represents a fundamental regression
in the evolution of both international law and United States domestic law.”
Internationally,

attempts to legitimate targeted killings under international law represent a
dramatic reversal of history. By the last decades of the twentieth century, the
notion that an individual could legally be targeted and killed by one state on
the territory of another in circumstances to which the law of armed conflict
did not clearly apply had been thoroughly discredited.”90

Nationally too,

[t]argeted killings by the CIA … represent a significant regression in terms
of United States law and policy. … a regime of prohibitions against
arbitrary extraterritorial killings was painstakingly constructed during the

89 Bernard Williams, “Politics and Moral Character,” in Stuart Hampshire (ed.) Public and
90 Alston article 287.
1970s in response to the CIA’s excesses in the 1950s and 1960s and the extensive use of large-scale programs during the Vietnam War.91

I believe we need to think very seriously about what it will be like to live in a world where those restraints are unravelling, because that is the direction in which our leadership in normalizing this practice of targeted killing seems to be taking us now.

9. Conclusion

This paper is not friendly to the practice of targeted killing. One can understand the motivation for the practice and the pressures and dilemmas that are facing those charged with protecting the security of the American people. One can appreciate the attempts that have been made to provide a legal justification for it. But ultimately, it is a practice of hunting down and killing persons who have been identified individually as enemies of the state. Their names are on a death list and they are hunted down and killed by death squads, pursuant to an executive determination that their continuing to exist is incompatible with the interests of the United States.

I believe that confronting the practice using exactly this vocabulary is a helpful way of coming to terms with the character of targeted killing, in a way that goes beyond mere justification and deeper than mere justification. What is this practice? What is it like? And what is its normalization turning us into? These are the questions we should be raising. I hope that talking the talk of death lists and death squads can help jolt us into asking them.

91 Alston article 289: