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6-2013

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Recommended Citation

Issacharoff, Samuel and Pildes, Richard H., "Drones and the Dilemma of Modern Warfare" (2013). *New York University Public Law and Legal Theory Working Papers*. 404.

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DRONES AND THE DILEMMA OF MODERN WARFARE

SAMUEL ISSACHAROFF AND RICHARD PILDESⁱ

Forthcoming in **DRONES AND THE PROMISE OF LAW:
HOW ADVANCES IN MILITARY TECHNOLOGY ARE
TRANSFORMING ARMED CONFLICT AND CHALLENGING POLICY AND
PRACTICE**

(Peter Bergen and Daniel Rothenberg, eds.
Cambridge University Press 2013)

The morality and legitimacy of the practices of war – or at least, the use of military force – are undergoing a fundamental transformation. This transformation is not yet directly or fully reflected in the formal laws of war, but as these changes embed themselves in the practices of states, especially dominant states, these changes in practice might well eventually come to be embodied in the legal frameworks that regulate the use of force. The fundamental transformation is this: whereas the traditional practices and laws of war defined “the enemy” in terms of categorical, group-based judgments that turned on *status* – a person was an enemy not because of any specific actions he himself engaged in, but because he was a member of an opposing army – we are instead now moving to a world which implicitly or explicitly requires *the individuation of personal responsibility* of specific “enemy” persons before the use of military force is considered justified, at least as a moral and political matter. This shift applies not to any one particular type of military force, such as lethal force, but to all exertions of military power over enemies, including the ways in which they are captured, detained, incapacitated, or tried.

To a limited but significant extent thus far, this transformation is reflected in the domestic law of some countries. Some of these issues have been addressed, for example, in evolving U.S. constitutional jurisprudence resulting from recent decisions of the United States Supreme Court, as well in interpretations of international law by different domestic courts, including the Israeli Supreme Court.ⁱⁱ However, this quiet, subtle, and inadequately appreciated transformation has been taking place far more as a matter of slowly accepted practices than as settled legal development.ⁱⁱⁱ The process of legal transformation in turn shapes arguments about the proper uses of military force in the context of fighting terrorism, yielding a debate that often comes across as polarized or confused or simply unable to engage with diverse positions, however reasonable. Precisely because we are in the midst of this transformation, we do not have clear prior legal

frameworks, either domestically or internationally, to draw on to provide determinate legal guidance for addressing the transformed and transforming nature of modern warfare.

1. INDIVIDUATING ENEMY RESPONSIBILITY

Three principal sets of factors are driving this transformation in the morality and practices of modern uses of military force. First, the unique structure of modern terrorism inherently creates a need for responsive states to be able to identify correctly the specific individuals who are, in fact, terrorists. Second, modern technological developments, which make terrorism more potentially threatening, also enable dominant states to respond in more discriminating ways; the capacity to do so is likely to generate pressure toward an obligation to do so (if “ought” implies “can,” as theorists have long debated, “can” sometimes implies “ought”). Third, the post-Second World War rise of the more general concern for human rights, as a legal and cultural matter, has created pressure for dominant states seeking legitimacy for their actions to incorporate a more general humanitarian concern into their actions, including with respect to the rights of enemies during wartime.

The key to the traditional, status-based regime of the laws of war was that conventional soldiers fought openly as members of an organized military under state control. In particular, they wore uniforms (except for covert operatives), displayed weapons, and fought under an organized command structure. As a result, it was accepted, legally and morally, that the opposing side could treat them on the basis of their status, as simply members of the opposing fighting force.^{iv} As an initial matter, little dispute typically existed about their identity as a member of the enemy – the open carrying of weapons and wearing of uniforms resolved that issue.^v

In addition, there was no need to determine whether such a soldier had committed any specific identifiable act that would legitimately make him a target for the use of military force. Whether a soldier had fired at the opposing side, or planted a bomb, or engaged in any specific act, or even just handled clerical duties, was irrelevant: group membership in the opposing army was sufficient.^{vi} Thus on the front end of the use of force – capture, detention, even uses of lethal force – there was no need to differentiate among soldiers and attempt to individuate personal responsibility for participation in the enemy’s war machinery. Only if someone was going to be tried for acts outside the permissible scope of the laws of war – for war crimes – was there a need to determine individual levels of responsibility.^{vii} Finally, the same status-based, group-membership principles applied on the back end of the use of force: how long an enemy soldier would be detained was not a function of his own individual

responsibility for specific acts, but of his membership in the group. Prisoners of war were released collectively, as part of a group, at the war's end or as part of mutually agreed prisoner exchanges.^{viii}

Terrorism inherently changes all of this. Among the distinct features of terrorism are two that remove it clearly from conventional warfare and that pose significant challenges for states forced into combat. Both turn on the strategic centrality of placing civilian populations at risk, a clear violation of the evolved laws of war. First, terrorists as a matter of practice target civilians as civilians, and not because of proximity to conventional military objectives. Targeting civilians breaks down any traditional understanding of the battlefield or even of the potential zone of engagement. A nightclub in Indonesia is interchangeable with a commuter train in Madrid or the Boston Marathon. This places great pressure on states responding to terrorism to become proactive and to respond anticipatorily to perceived terrorists. In turn, the need to act swiftly outside any confined battlefield leads to the second complicating feature of terrorism. Because terrorists do not wear uniforms, attributions of status based on group membership are far more uncertain and complex. Terrorists (and some guerilla forces in civil wars) violate the cardinal principle of “distinction” by which combatants can be clearly differentiated from the civilian population. Moreover, even apart from the issue of uniforms, the ability to know that an individual is part of a terrorist organization, based on anything other than his own individual acts of terrorism, is also difficult. Terrorists typically do not “join” the organization in some formally visible way equivalent to the wearing of uniforms.^{ix} While some terrorists do swear oaths of affiliation to signify their membership in the organization, many do not; in addition, even if such an oath has been taken, obtaining proof of it is far more difficult than proof that a soldier was wearing a uniform. Indeed, it might be easier to prove that an individual committed a specific act of terrorism than it is to prove that he or she took an oath of affiliation.^x Attributions of status, through group membership alone, are therefore extremely difficult to establish. Most terrorists against whom military force is used, therefore, are not identified on the basis of membership per se, but because of the specific acts in which they have engaged. Perversely, the act defines the status.

As a result of the nature of modern terrorism, therefore, these structural features inevitably and unavoidably propel the use of military force to be directed against specific individuals based on the specific *acts* those individuals are believed to have committed, as opposed to their status. That is why the use of military force against terrorists *necessarily* must shift, and has shifted, away from the traditional group-based membership attributions of responsibility to individuated judgments of responsibility.^{xi}

And this individuation applies – or the pressure to maintain this individuation – to every stage of the use of military force.

First, the initial threshold issue of identification becomes far more complex and consequential: is this actually the specific person believed to have committed specific acts? A whole new regime (whatever its precise contours) to ensure the *accuracy* of the initial identification question becomes necessary – something virtually irrelevant in the traditional war context. Second, the *degree and type* of the appropriate use of military force up front might suddenly become relevant in a way that they are not in the traditional context. In traditional war contexts, one did not distinguish among soldiers and officers based on any sense of specific responsibility; if a barracks could be bombed or artillery directed at an advancing force, these things were done without any attempt to differentiate the different levels of responsibility or culpability of individual soldiers or officers. Today, however, it might well be that uses of lethal force, in the form of targeted killings of specific individuals through measure like drone attacks, are more appropriate and justified against high-level commanders than low-level foot soldiers.^{xii} Similarly, on the back end of the use of military force, when it comes to matters like detention of enemy terrorists, it might also be proper – as a moral and political matter, at least – to individuate responsibility. We might hold the architects of 9/11 indefinitely, but it might not be appropriate similarly to hold low-level couriers or others indefinitely. In traditional wars, of course, these distinctions were mostly irrelevant; all members of the enemy, based on their status, were released as part of group-based releases.^{xiii}

The central focus of this chapter is on the effects of the altered battlefield on the conduct of war. There is a great, but unrecognized, paradox underlying the emerging individuation of responsibility. This paradox accounts for a good deal of the polarized positions that have circulated since 9/11 about the legitimate uses of military force. As the fundamental transformation in the practice of the uses of military force moves, even implicitly, toward an individuated model of responsibility, military force inevitably begins to look justified in similar terms to the uses of punishment in the criminal justice system. That is, to the extent that someone can be targeted for the use of military force (capture, detention, killing) only because of the precise, specific acts in which he or she as an individual participated, military force now begins to look more and more like an implicit “adjudication” of individual responsibility. A tremendous premium immediately comes to be placed on what we might call “adjudicative facts” – is this the person who did X – rather than “legislative facts” – is this person a soldier in the opposing army. And as soon as military force must be tied to individuated judgments of responsibility, it is easy to understand why, for some critics of the use of force, questions will

arise regarding why it is the military, and not the judicial system, that is making these individualized, adjudicative judgments. These kind of individuated judgments have not traditionally been the province of the military, after all. And there is an understandable impulse to conclude that if we are in the world of individualized, adjudicative-like judgments, the institution most traditionally designed for that function is the judicial system.^{xiv}

Thus, as the unavoidable structural forces that drive uses of military force against modern terrorism come to depend on individuated judgments of responsibility, it is also inevitable that the boundaries between the military system and the judicial system will become more permeable than in the past. The two systems are unlikely to exist in hermetic isolation from each other. The considerations that have traditionally informed one will spill over into the other – and vice versa. That is the fundamental reason that the debates over the appropriate uses of military force have been, or are likely to remain for some time, so unresolved, uncertain, confused, and polarized.

In our view, the principal task of the modern morality and, eventually, law of war – the task this chapter sets for itself – is to come to terms with the transformed legal and military environment of modern warfare and with the emerging imperative to individuate responsibility when using lethal force against terrorism. We believe it is a serious mistake to conclude from this inevitable individuation that the traditional civil and criminal judicial system should, as a result, fully supplant and displace the uses of military force altogether. But on the other hand, the use of military force must be adapted – as it already is in the midst of doing, under both internal and external pressures – to embrace and to take fully into account the reality that “enemy” responsibility in this era must be individuated. The military, for example, is already in the process of trying to generate procedural protections, analogous to those used in more traditional adjudicative settings but adapted to the unique context of military force, that provide sufficient accuracy and legitimacy to ensure that these individuated attributions of responsibility are being made through credible processes and structures to make them as accurate and fair as possible.^{xv} That is true whether the military force at issue involves detention or targeted killings. To the extent the government as a whole succeeds in generating the novel structures, institutions, and processes necessary to legitimate the use of military force in an age of individuated enemy responsibility, these uses of force will be more widely accepted. Our aim is to contribute to that project.

We structure our inquiry around the key issue of the individuation of proper targets in modern war settings, whether for purposes of long-term detention or – more dramatically – for purposes of targeted killing.

Although our discussion here is limited to the consequences of the projection of lethal force, targeted killing shares with the detention of irregular combatants the critical features of targeted warfare. Both turn on proper and legally justifiable decisions about the nature of the individuals selected for coercive action, either through capture or physical elimination. To the extent the objective is not prospective punishment but incapacitation of a military threat, both detention and targeted killing fall within the historic domain of military conduct. Yet the requirement of certainty as to individual complicity in threatening activities lends a legalization to the individual-specific determinations, and begins to bleed into the civilian law concepts of criminal proof and due process. However, even the individual-specific determinations mask the fundamentally different objectives of the criminal versus military determinations. In its pure form, the criminal law justifies ongoing detention by a retrospective examination of the severity of the proven crime. Military decisions, whether through detention or targeted attack, are prospective assessments of the future dangerousness of the enemy combatant,^{xvi} a decision for which past conduct may be the most important evidentiary consideration, yet one that may not be determinative – as we shall set out further.

2. TARGETED KILLINGS AND DRONES

The general legal concerns over lawful and appropriate uses of military force in today's circumstances were acutely brought to light in the context of the lethal use of force when the United States government killed Anwar al-Awlaki, an American-born radical Islamist cleric, on September 30, 2011, while he was traveling between Marib and Jawf Provinces in northern Yemen.^{xvii} The killing, carried out by the Joint Special Operations Command, in apparent cooperation with the CIA,^{xviii} occurred when two Predator drones flew from a secret American base in the Arabian Peninsula into Yemen and fired Hellfire missiles at a car that was carrying Awlaki and other alleged operatives from al-Qaeda's branch in Yemen.^{xix} The Obama administration had explicitly authorized the targeted killing of Awlaki early in 2010, placing him on lists of terrorists approved for capture or killing^{xx} – lists that are maintained, and made operational by the CIA and the military.^{xxi}

Such targeted killings highlight the reality that the modern practice of military force in asymmetric conflicts cannot be carried forward without a kind of individuation of enemy responsibility that was largely unknown to the traditional laws of war. As a result, analogous kinds of novel *ex ante* and *ex post* process and institutional issues inevitably emerge concerning when specific individuals can properly be targeted for lethal military force. Targeting a particular enemy combatant may be viewed as the antithesis to

the general, indiscriminate bombing of civilian centers during WWII, or the general strafing of enemy armies. Indeed, as practiced, the most sophisticated targeted killing programs make fine-grained distinctions among and between enemy “soldiers”; only those exceptionally high-up in the command and operational structures are singled out for personalized targeting. Thus, as with detention, there is a tremendous premium on making sure the initial identification decision is accurate, unlike in conventional wars when battlefield armies and uniforms inherently resolve the identification and accuracy issues. What processes should suffice to ensure sufficient accuracy in the critical initial determination that the specific acts of a particular individual rise to the level appropriate to trigger the use of lethal force? Which institutions in the government, and how many branches of the government, should be required to participate in that decision and in what form?

Similarly, *ex post* process and accountability issues arise concerning how to assess whether the individuated judgments of enemy responsibility were indeed accurate and how proportionate the effects of a targeted killing were to the legitimate military objectives. Retrospective refinement of the criteria and processes used for decision-making emerges as critical to all targeted warfare decisions. While the *ex post* issues differ between detention and targeted killings in certain obvious ways – in detention, the issue is how to determine appropriately whether someone represents a continuing threat, while in targeted killings, the issue is retrospective analysis of the initial targeting judgments – the fact that individualized judgments of responsibility are involved creates similar pressures for *ex post* assessment to ensure the justification of subsequent military action.

Finally, the recurring paradox associated with individuation arises just as much with targeted killings as with detention: if government is making such adjudicative-like judgments of individual responsibility before using military force, should it be required to use the more traditional institutions and processes through which similar ascriptions of individual moral and legal responsibility are traditionally made – namely, the criminal law.^{xxii} The Awlaki case provides a useful introduction because “[u]nlike detention, for which litigation has produced detailed public elaboration of the government’s legal standards, the drone program is shrouded in secrecy, though presumably targeting decisions are based on similar law of armed conflict standards in assessing who is or is not an enemy fighter.”^{xxiii}

Targeting critical enemy leaders is a longstanding, if delicate, facet of warfare. Whether the means involve training the long rifles of the post-Civil War era on opposing field commanders, or deploying snipers, or shooting down the airplane of Admiral Yamamoto during WW II, warring armies have always recognized that all soldiers may be soldiers, but some pose a more lethal threat than others or at least may be subjected to specific

targeting. Nor is the fact that the new forms of targeting allow warfare to be conducted from a distance far removed from the exchanges of fire on the battlefield. The history of military technology has always focused on the ability to deliver lethal force from a distance. The current debate over drones and targeted killings is in one sense a mere technological update of earlier efforts to degrade the military ability of the enemy.

In an important sense, however, modern targeting and the use of drones is a more central part of contemporary warfare. What may have originated as a tactical response now emerges as a central strategy for attacking enemy forces. The specific forms of targeting are a reflection of the particular geo-political context in which we live, the military technology now available, and weak or failed states that cannot or will not control the threat these groups pose to citizens and residents of other countries.

Military attacks conducted from a distance involve either static or dynamic targeting. Static targeting, in which the aim is to take out a particular, fixed facility, is essentially no different than bombing runs of World War II, save for the technology. By contrast, the new technology, as with cruise missiles, offers the ability to engage in dynamic targeting that responds to momentary windows of opportunity against specific individuals or activities, rather than the more examined decision to take out fixed structures.^{xxiv}

Drones present the question of dynamic targeting most clearly, but do so in at least two different contexts, according to public accounts. In one, the government might be aware, for example, that a certain house is used by Taliban-associated forces for bomb making. When drone surveillance detects a group of militants entering the house carrying weapons and materials used to make bombs, and the drone operators launch a missile strike at the house, they might not know the names of any of the individuals involved. In a second context, intelligence actors might have been tracking the whereabouts of the Taliban's chief bomb making expert, and when he enters the house, the drones are ordered to strike – in this context, military decision-makers know the name of the figure involved.

Traditionally, the laws of war grew out of the intersection between the Law of Armed Conflict (“LOAC”) developed by militaries to govern the rights of combatants, on the one hand, and International Humanitarian Law (“IHL”), which largely developed to govern the treatment of civilian noncombatants and combatants hors service (as when prisoners of war).¹ Even for soldiers who fell under the LOAC, the use of lethal force

¹ The terms “international humanitarian law,” “law of war,” and “law of armed conflict” are all used to describe the legal regime governing the battlefield, with some disputation about whether they are fully synonymous or evolutions of one from the other. See Robin Geiss, Book Review, 24 EUR. J. INT’L L. 722, 727 (2013) (reviewing

was limited to the military objective, usually defined territorially as the need to take a particular hill or equivalent objective.

The first formal international gathering on war practices, the St. Petersburg conference of 1868, issued a series of limitations on the application of lethal force. For example, the St. Petersburg Declaration prohibited the use expanding bullets under a certain size that would not so much disable enemy forces but guarantee subsequent death. Similarly later military conventions would ban serrated bayonets on the grounds that a straight-edge bayonet wound would disable an enemy combatant, whereas the serrated edge would serve to ensure subsequent death from an infected wound that could not heal. This logic took hold even in the worst of direct combat, and French troops in WWI had a standing order to shoot immediately any German prisoner captured with a serrated bayonet – a consequence that was quickly internalized by the German forces who abandoned the prohibited weapon.^{xxv} Thus, even in traditional wars against conventional enemies, the LOAC contained incipient, if not highly developed, principles against the infliction of gratuitous or excessive violence against enemy soldiers outside the need to disable the enemy's military capacity. In our view, there are four myths about the modern use of drones to target specific, identifiable individuals for lethal force. The first myth is that targeting specific individuals for death is a modern innovation in military practice. But targeted killings have long been a part of military practice; the invention of the long rifle, for example, gave snipers the ability to pick off opposing field officer. The modern practice, however, begins with the discrete act of seeking out military enemies outside normal wartime engagements based on an individualized assessment of the threat they present. The use of lethal force is not incidental to a battlefield objective of capturing a particular piece of territory but becomes a distinct response to the generalized threat posed by a particular individual. Killing is now not secondary to a distinct military objective but becomes the objective itself because of a specific determination about the threat posed by the continued operation of an individual. At a more fundamental level, as Professor Eyal Benvenisti argues, the laws of war had two major premises that fail in modern asymmetric conflict. First, it was possible to distinguish military and civilian objectives, and, second, battle could be directed to military objectives, as with the capturing of territory or overtaking a military installation. Neither premise necessarily characterizes military engagements

TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (2012); ROLAND OTTO, TARGETED KILLINGS AND INTERNATIONAL LAW (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012); WILLIAM H. BOOTHBY, THE LAW OF TARGETING (2012)). For our purposes, the terms are used interchangeably.

in asymmetric war – or put another way, the military objective becomes killing itself.^{xxvi}

The object of the targeted attack changes as well, in a way that seems morally defensible. Drones enable military planners to focus on high-level targets. There is a further morality in that and we should appreciate a technology that can discriminate between low-level and high-level combatants: doing so can minimize the larger loss of life to foot soldiers of the other side by concentrating fire on selected leaders. Precision targeted killings should be seen as a substantial humanitarian advance in warfare, assuming that use of force is justified in the first place. Whereas the tradition LOAC placed the foot soldier at greatest risk of being killed in combat, the new targeted killing regime initially redirected lethal force to the command structure of the enemy.

In our view, it is a mistake to focus exclusively on the level of force being used without also understanding that the targets (if accurately identified) bear a moral culpability for unlawful warfare completely distinct from anything that could be attributed to conventional soldiers in a state-authorized war, especially in the case of conscript armies. As the technology improved, most notably with drones, the targets could expand from the command structure to operational centers, as with attacks on remote sites at which enemy combatants trained or assembled.

A second myth concerning targeted killings as a new form of warfare is that this ability to project force from a distance itself raises new legal issues. But this view is simply an exercise at drawing a technological line that, in our view, has little moral or legal force in and of itself. Drones present the same *legal* issues as any other weapons system involving the delivery of lethal force. Advances in military technology have often been about the ability to project force from a distance. Ancient technological innovations, such as catapults and longbows, involved the delivery of force from a distance and represented advances over hand-to-hand personalized combat. Drones are a relatively new military technological development, but this does not change the core legal issues, under either domestic or international law, relevant to deciding whether particular uses of force are justified. In technologically advanced countries, militaries have long been in the business of delivering lethal force at great distances from their targets. The U.S. Navy has engaged enemy personnel by firing cruise missiles from ships in the Mediterranean into Libya, Iraq, and Sudan. Air Force pilots frequently take off from bases hundreds and even thousands of miles from the actual theater of conflict and drop their bombs based on computer-generated targeting information from far above the ground. For example, the bombing campaign over Serbia during the Kosovo war involved pilots taking off from the Midwest in the United States and returning there

U.S. drone operations reportedly follow the same rules of engagement and use the same procedures as manned aircraft that use weapons to support ground troops.^{xxvii} The military's use of drones operates within the same military chain of command, subject to civilian oversight, as all other uses of military force.^{xxviii} One can view the technological advances that make drone warfare possible with horror or with fascination, but the idea of projected force beyond hand-to-hand warfare does not of itself present radically new legal issues. As the philosopher David Luban rightly concludes, targeted killings "are no different in principle from other wartime killings, and they have to be judged by the same standards of necessity and proportionality applied to warfare in general: sometimes they are justified, sometimes not."^{xxix}

A third myth, or prevalent misconception, is that drones and targeted killing pose a major threat to the humanitarian purposes and aims of the laws of war. The key concepts of the laws of war are the principles of necessity, distinction and proportionality – the ideas that force should intentionally be used only against military targets and that the damage to civilians and non-military targets should be minimized and proportionate. The technological and informational sophistication of drones, as compared to many other tools of military force, better realize these principles than any other technology currently available. Indeed, they allow for *the most discriminating uses of force in the history of military technology and warfare*, in contexts in which the use of force is otherwise justified. If the alternative is sending US ground forces into Yemen or the frontier regions of Pakistan, the result will be far greater loss of civilian life, and far greater loss of combatant lives, than with drone technology.

A fourth myth arises from a more subtle concern that perhaps underlies the humanitarian critique of targeted killings: that drone warfare might make the use of force "too easy." Since powerful states do not have to put their own pilots or soldiers directly at risk, will they resort to force and violence more easily? This is a serious issue, but some historical perspective might help put this concern in a broader frame.

Throughout the modern history of warfare, there has been concern that humanitarian developments in the way war is conducted will, perversely, make it more likely that states will go to war. The argument is essentially that there is a Faustian tradeoff between the laws of war and the initial decision to go to war. This is an enduring, moral complex issue that has attended virtually every effort in the paradoxically-sounding project of making warfare more humane; pacifists in the 19th century objected to the formation of the International Committee of the Red Cross and its efforts to mitigate the horrors of war.^{xxx} Moreover, the same paradox surrounds even purely humanitarian aid during wartime; in some contexts, access to such aid has become a strong economic incentive to continue the war, for

the very purpose of extracting more of this financial assistance.^{xxxii}

A more complicated picture emerges if we shift from the perspective of the civilian leaders who authorize the use of force to those who actually deliver that force. One of the consequences created by individuating the responsibility of specific enemies, combined with drone technology, is the possibility of a much greater sense of personal responsibility and accountability on the part of drone operators for lethal uses of force than that exhibited by prior generations of fighters. At least some drone operators report exactly this kind of experience of personal responsibility for their actions, including their mistakes, that was much less likely in earlier generations when “the enemy” was faceless and undifferentiated in most circumstances.^{xxxiii}

Of course, if such a perverse tradeoff does end up driving state practice, the same concern could be applied to the use of force for humanitarian purposes, as in Libya. Did the use of drones in the Libya operation make humanitarian interventions “too easy?” The right question, it seems to us, should focus on whether the use of force is justified in the first place. Moreover, one should be careful not to romanticize traditional combat and the pressures toward excessive violence it nearly always unleashes. To the extent the humanitarian critique of the use of drones is that sending in ground troops acts as a restraint on the use of force, compared to the use of force from remote locations, such as with drones technology, this idea might have matters backwards, at least once the decision to use force at all has been made (and made, hopefully, for appropriate and lawful reasons).

Dramatic overuse of force is more likely when young soldiers who may be inexperienced, frightened and lacking in accurate information come under attack on an active battlefield and respond with massive uses of force directed at only vaguely identified targets. Remoteness from the immediate battlefield – with operators able to see much more of what is going on – almost surely enables much more deliberative responses. One Air Force combat officer who became a drone operator supports this conclusion; he comments that compared to conventional combat, both in the air and on the ground, the distance involved with drones enable operations to be “deliberate instead of reactionary;”^{xxxiv} compared to manned combat flights, he experienced drones as affording “the ability to think clearly at zero knots and one G;”^{xxxv} and he observed that other “methods of warfare could be, and often were, much more destructive”^{xxxvi}—indeed, he goes so far as to comment that when marines were sent into operations, they “broke things and killed people” while drones enabled U.S. military force to be “less brutal.”^{xxxvii}

Whether one accepts or not this particular self-reported drone operator experience, a realistic appraisal of all the costs and benefits of the

use of drones must confront the “compared to what” question. Perhaps in some contexts, if drones were not available, no force would be used; but in many cases, it seems likely that much greater force would be used instead. Put another way, powerful nation-states are unlikely to remain passive in the face of significant risks to the physical security of their citizens and property that emanate from other nations that are unwilling or unable to control these threats. Nor is it clear why states should be understood to have a moral obligation to permit their citizens and territory to be attacked. If states have the capacity to do so, they will neutralize these threats through killing or capture; and at times, the humanitarian costs of capture, in terms of harm to and loss of innocent life will be great, and at other times, capture might not be practicable for any number of reasons.. As a result, any general humanitarian critique of the targeted killing has a moral obligation to offer a credible, practical alternative that a state can realistically employ to protect the lives of its citizens and that better serves the humanitarian aims of the laws of war.

3. LEGAL JUSTIFICATIONS: THE NOVEL ROLE OF INDIVIDUATION

The government’s legal justifications under domestic and international law for targeted killings, including of American citizens overseas in certain contexts, has been laid out in broad outline through a series of speeches by key legal and counterterrorism officials, including national Security Advisor John Brennan,^{xxxvii} State Department Legal Advisor Harold Koh,^{xxxviii} and, in the most important speech, Attorney General Eric Holder.^{xxxix} We do not want to tarry long on these already-much discussed general legal principles, or on the puzzles presented about applying them properly at the borders (such as whether the same principles appropriate for the conventional battlefield of Afghanistan can properly be extended to targeted killings in places like Yemen and Somalia^{xl}, or whether the same principles that justify targeted killings of al Qaeda operatives can properly be extended to individuals working for groups loosely affiliated with al Qaeda or generally aligned in aim, such as Al Shabab (which indeed became formally affiliated with al Qaeda in 2012). Instead, we want to focus on the ways in which these legal justifications reflect our central theme, which is the increasing individuation of enemy responsibility under both the practice of modern military uses of force against alleged terrorists and the legal understandings (or at least, the perceived legal understandings of the United States) of what the law permits and requires with respect to targeted killings. Some aspects of this individuation are well recognized by specialists in this area, but others are more subtle.

In the administration’s first major articulation of its legal justification for the targeted-killing program, Legal Adviser Koh concluded

that the United States was engaged in an ongoing armed conflict, under international law, with al Qaeda, the Taliban, and associated forces, and that a state that is “engaged in an armed conflict or in legitimate self-defense” has the right to use lethal force and is not legally required to provide those targets with any kind of legal process before targeting them.^{xii} This use of lethal force also had to meet the IHL requirements of distinction and proportionality as well.

In a later and more detailed speech that specifically addressed the application of these principles to the intentional targeted killing of American citizens who are overseas and allegedly involved in terrorism (of which there has been one, at the time of this writing), Attorney General Holder asserted that such targeting was permitted at least when the citizen targeted is (1) located overseas; (2) has a senior operational role; (3) with an al Qaeda or al Qaeda-associated force; (4) is involved in plots that aim at harm or death of Americans; (5) the threat is “imminent,” though the precise boundaries of this concept remain to be given more specific content;^{xiii} (6) there is no feasible option of capture without undue risk; and (7) the attack complies with IHL principles of necessity, distinction, and proportionality.

And in a more recent, important further elaboration of the legal, ethical, and prudential principles that inform the administration’s targeted killing decisions, key White House adviser John Brennan asserted that lethal force was used only when capture was “not feasible.” Brennan described this principle as an “unqualified preference,” which suggests ambiguity about whether the administration regards the principle as a legal constraint or an ethical and prudential one; he also appeared to limit the infeasibility of capture as a constraint that applied to those targeted away from the “hot battlefield” of Afghanistan – which suggests this constraint might not apply to targeted killings on more conventional battlefields.^{xiiii}

What emerges is a new American doctrine governing the use of lethal force outside the traditional battlefield context. The result does not yet have the form of hard law, but provides legal-style guidance. Within this general framework, the emergence of individuated enemy responsibility as an essential predicate to the use of military against that individual force – as in the detention context – arises at two points at least.

First, all these accounts of the legal framework employed make clear that lethal force outside the conventional battlefield context is not employed against any “member” of the enemy. As John Brennan put it: “We do not engage in lethal action in order to eliminate every single member of al-Qa’ida in the world.” Targeted killings are limited to those who pose a “significant threat” to U.S. interests. Brennan offered illustrative examples, such as an individual identified as an operational leader of al Qaeda or associated forces; an operative, in the midst of

training for or planning to carry out attacks against U.S. interests; or someone with “unique operational skills that are being leveraged in a planned attack.” In his remarks, Koh used the language of “high-level al Qaeda leaders who are planning attacks” to refer to the individuals who were being targeted, without any further specification of how far the legal and/or ethical justifications for targeted killings extended. And Holder referred only to targeting “senior operation leaders of al Qaeda and associated forces.” In addition, credible journalistic accounts report highly-focused internal deliberations and even debates about whether specific individuals, based on extremely specific facts about their alleged role, can or should be targeted.^{xliv}

It is important not to lose sight of the profound transformation these developments reflect. The crucial point is that, even as the U.S. government asserts that it is at war and has the power to use lethal force against its enemies, it is not adhering to the traditional law of war principle that lethal force can be directed against any member of the enemy armed forces, whether high-level commander or low-level foot soldier. Instead, the government is individuating the responsibility of specific enemies and targeting only those engaged in specific acts or employed in specific roles.

The government is making what has all the appearance (and reality) of adjudicative-like judgments based on highly specific facts about the alleged actions of particular individuals (and not their membership per se in the opposing side). And here too, as with detention, this individuation of enemy responsibility is undoubtedly part of what fuels the demand in some quarters that the criminal justice system, rather than unilateral executive direction of military force, should be used instead: if the government is using force only after such fact-bound determinations of responsibility are made, isn't that the traditional province of the criminal law (of course, this criticism does not address the fundamental underlying problem, which is that the government cannot feasibly capture these individuals in the first place).

What motivates this change in practice in the perceived legitimate use of military force? The short answer is that the lines between law, morality, and prudence become blurred here; the categories spill over into each other, and they spill over into each other in the context of unconventional war and technological change in the conduct of war. It is not clear whether the Obama administration believes that some or all of this individuation is already legally required by international law or whether this individuation is thought necessary as a matter of morality and sound strategy. Because courts play so little role in adjudicating these questions, particularly in the targeted killing area, the line between law, morality, and prudence is likely to remain blurred for some time to come.

Much greater technological capacity at refining the use of force

undoubtedly also plays a role in driving the law, morality, and prudence of these uses of force in a more individuated direction. As Jack Goldsmith nicely notes, “technological developments that in once sense enhance the United States’ military authority also end up constraining it because once there is capacity to be precise in targeting, the moral or political (and, soon, legal) duty to do so soon follows, regardless of what the law previously required.”^{xlv} That dynamic is part of what is fueling the transformation of the law of war into the more individuated framework of enemy responsibility.

The “preference” for capture over killing is a second, more subtle, outcropping of the emerging norm of individuation. Again, the departure from the traditional laws of war is striking; no such preference, let alone legal requirement, exists during the traditional laws of war. Enemy soldiers can be killed, even if they could be captured, except in the limited circumstance in which they have engaged in extremely clear manifestations of surrender or are considered *hors combat* as a result of wounds. There is no obligation to differentiate between soldiers whose threat can be neutralized by capture versus those who can be neutralized only by killing. To be sure, there is ambiguity in the emerging American practice about whether what we might call the “least restrictive alternative requirement” of “capture over killing” is a legal requirement necessary to justify targeted killings or merely a policy preference rooted in strategic calculations (capture enables mining for intelligence) or moral considerations (killing is gratuitous when capture is possible); John Brennan’s statement suggest a policy preference, not a legal requirement.

In Israel, the legal understanding of the constraints under which targeted killings can permissibly take place does appear to make this “least restrictive alternative” constraint an actual legal requirement.^{xlvi} Thus, even before the Israeli High Court adjudicated the legality of these killings, the internal executive branch guidelines developed from 2000-02 specified a six-factor set of requirements, including that “arrest is impossible” and that such operations were to be limited to areas not under Israeli control (presumably because in those areas, capture is feasible).^{xlvii} Moreover, in the most important judicial decision thus far on the legality of targeted killing, the Israeli High Court in 2005 specifically seemed to hold that Israeli law precludes a targeted killing “if a less harmful means can be employed.”^{xlviii} As a matter of Israeli domestic law, Justice Aharon Barak concluded for the High Court, Israeli law includes a proportionality requirement, which entails the constraint that, among available military measures, the military “must choose the means whose harms to the human rights of the harmed person is smallest.”^{xlix}

If this principle actually becomes embedded in Israeli law, it would constitute in two respects an even more radical reconceptualization of the

legal constraints on the use of military force during wartime. Moreover, this appears to be example in which the emerging legal rules of warfare concerning terrorism might be spilling over into even more conventional war contexts; nothing in the Israeli High Court decision suggests that this principle of “minimal force required” is limited to the asymmetric warfare settings as opposed to being a general legal principle applicable to all war contexts. That would constitute an even more remarkable move toward construing law (either domestic or international) in ways that highly individualize both the nature of the specific individual actions involved and the contexts in which force can be applied against particular persons.

Within American domestic law, the requirement that capture not be feasible before killing is justified does appear to be a *constitutional* requirement with respect to American citizens at least in the understanding of Attorney General Holder and the Obama administration. Thus, whatever the ambiguity whether this “least restrictive alternative” requirement applies to targeted killings in general, as reflected in the uncertainties about how to construe John Brennan’s statement, the targeted killing of American citizens overseas does specifically require that capture not be feasible.

A host of questions arise, of course, about precisely what it means for capture not to be “feasible.” It appears that the term “feasible” in this context derives from the military risk involved in capture, rather than any sense of impossibility. What remains most essential to notice about this requirement is that, at least with respect to American citizens, we are seeing further recognition even from within the executive branch, without judicial compulsion, of an even more individuated approach to uses of military force.

As this move toward individuating enemy responsibility continues to develop, one question it will confront is whether law itself (as opposed to morality or political prudence) will require or permit different treatment of a country’s own citizens who pose terrorist threats from that of non-citizens who pose the identical threat. Currently, American legal understandings apparently are that there is a significant difference, as reflected in the differences and tensions between the Brennan and Holder speeches. American citizens overseas who pose identical threats have greater substantive protection than non-citizens; force must be the only feasible option for the former but not the latter.

Differentiating the treatment of threats coming from citizens as opposed to non-citizens is a deeply controversial matter, both in theory and in international law. Particularly when force can be used only once the enemy “target” is highly individuated, in terms of his specific actions, it is not at all clear why, in principle, an American citizen in the same overseas location who poses the identical threat as a non-American should have

greater legal protection. As a matter of domestic politics, perhaps, one can understand why political leaders would want to ensure their own citizens that they receive special protection against the exceptional circumstance of their own government using lethal force against them. But as a matter of law, why should governments have the power to kill non-citizens who could otherwise be captured but not kill citizens in that circumstance? As a matter of morality, David Luban argues, “the nationality of casualties is irrelevant. . . . To focus on the lives of Americans is parochial in a way that the morality of war is not.”¹

Further, as a matter of international law and the domestic law of some countries, providing greater protections to one’s own citizens in the terrorism context can be a reason to *condemn*, not praise, the practices by which a country metes out its use of military force; political process theory would suggest that the only protections non-citizens are likely to have in these and similar contexts is if a country’s own citizens must live under the same legal regime. Indeed, United Kingdom’s House of Lords held British anti-terrorist detention policy illegal precisely because it imposed greater restrictions on non-nationals than on British citizens.ⁱ

And finally, despite the apparent distinctions suggested by Attorney General Holder’s speech between targeting citizens and non-citizens, Daniel Klaidman, in describing President Obama’s decision to authorize the killing of Al-Awlaki, writes that after the President reviewed the intelligence and was left with no doubt that Al-Awlaki posed a major and imminent threat to American security, the fact that Al-Awlaki was an American, President Obama believed, “was immaterial.”^{lii} Perhaps there is journalistic license in that summary statement, but whether the emerging individuation of the *laws* of war, both in domestic and international law, requires or permits the further individuation and differentiation of citizens and non-citizens remains a difficult and unresolved question. Indeed, President Obama stated after the Attorney General’s speech that the United States will apply the same substantive principles to the targeting of both citizens and noncitizens.²

4. PROCEDURAL SAFEGUARDS

As with all use of lethal force, there must be procedures in place to maximize the likelihood of correct identification and minimize risk to innocents. In the absence of formal legal processes, sophisticated institutional entities engaged in repeated, sensitive actions – including the military – will gravitate toward their own internal analogues to legal process,

² President Barack Obama, Remarks at National Defense University: The Future of Our Fight Against Terrorism (May 23, 2013), *available at* <http://www.lawfareblog.com/2013/05/text-of-the-presidents-speech-this-afternoon/>.

even without the compulsion or shadow of formal judicial review. This is the role of bureaucratic legalism^{liii} in developing sustained institutional practices, even with the dim shadow of unclear legal commands.

These forms of self-regulation are generated by programmatic needs to enable the entity's own aims to be accomplished effectively; at times, that necessity will share an overlapping converge with humanitarian concerns to generate internal protocols or process-like protections that minimize the use of force and its collateral consequences, in contexts in which the use of force itself is otherwise justified. But because these process-oriented protections are not codified in statute or reflected in judicial decisions, they typically are too invisible to draw the eye of constitutional law scholars who survey these issues from much higher levels of generality.

In theory, such review procedures could be fashioned alternatively as a matter of judicial review or accountability to legislative oversight (using the processes of select committee reporting), or the institutionalization of friction points within the executive branch (as with review by multiple agencies). Each could serve as a check on the development of unilateral excesses by the executive. And, presumably, each could guarantee that internal processes were adhered to such that mechanisms of accountability could prevent inappropriate application of force.

The centrality of dynamic targeting in the active theaters such as the border areas between Afghanistan and Pakistan make it difficult to integrate legislative or judicial review mechanisms. Conceivably, the decision to place an individual on a list for targeting could be a moment for review outside the boundaries of the executive branch, but even this has its drawback. Any court engaged in the *ex parte* review of the decision to execute someone outside the formal mechanisms of crime and punishment risks appearing as a modern variant of the Star Chamber. Similarly, there are difficulties in forcing a polarized Congress as a whole to assume collective responsibility for decisions of life and death and the incentives have turned out to not to be well aligned to get a subset of Congress, such as the intelligence committees, to play this role effectively.^{liv} Perhaps the executive branch (or Congress, if capable of acting in this area) could create an independent, after-action review process that would be able, credibly, to provide some public assessment of the accuracy and error-rate of these strikes, without compromising confidential intelligence.

Under President Obama, the choice has been a far more formalized process of executive oversight drawing on multiple agencies to cross-check targeting decisions. The recent work of Professor Gregory S. McNeal sets out the detailed formal procedures that exist *ex ante*, and the mechanisms of accountability that exist *ex post*, for evaluating pre-planned targeted strikes

by the military, including targeted killings by military-controlled drones, in Afghanistan (it is important to keep in mind that this analysis covers only military strikes, not those that the CIA, for example, might engage in).^{lv} Any evidence on these questions at this stage of experience must, of course, be viewed as highly uncertain, given that these attacks take place by definition in areas in which it is very difficult to get reliable reports on the numbers and identities of those killed or wounded. Moreover, we must stress that McNeal's account involves only operations the military conducts. There is a fair amount of public information now available, as in McNeal's work and that of journalists, about the extensive interagency processes involved in targeting decisions involving the military. By contrast, there is at this stage virtually no public-record information about the *ex ante* and *ex post* processes used for targeting operations that the CIA allegedly conducts.³ Thus, there might well be significant differences in many of the key elements—how accurate the identifications are, or what the ratio of combatant to civilian deaths or injuries are—between targeted strikes conducted by the military and those conducted by the CIA.

Two striking findings Professor McNeal reports are, first, that civilian casualties reportedly occurred in less than 1 percent of pre-planned strikes (and other strikes, when time and combat circumstances make it possible)^{lvi} that followed the protocol the military now employs, called a Collateral Damage Mitigation Assessment (CDM), and second, that under internally self-generated guidelines, a senior commander (typically a General officer), the President, or the Secretary of Defense is required to approve in advance any pre-planned military strike in Afghanistan in which one or more collateral civilian casualties is projected. To be sure, as the first analysis to open up these issues, McNeal's work has yet to be tested; the empirical facts on matters such as these are likely to be much debated. But as the first actual descriptive account of the processes and protocols the military uses in pre-planned targeted strikes, McNeal's work advances public knowledge considerably.^{lvii}

As McNeal describes, even *before* military planners and their lawyers turn their attention to law of war and international legal requirements, such as proportionality analysis, they engage in a process known as CDM, designed to generate a less than 10 percent probability that a pre-planned strike will produce any "collateral damage." In any targeted strike, a first and essential stage is implementing the law of distinction, of course, which means correctly identifying the person who is properly treated as a legitimate target of lethal military force. Both legally, with respect to who can be made a lawful target, and factually, with respect to the accuracy of

³ For the most extensive analysis of the CIA's targeted killing program, see MARK MAZZETTI, *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH* (2013).

these initial determinations, this subject is one of those most often discussed in academic literature and public debate.

But McNeal describes a far less familiar second *ex ante* stage, in which military planners first identify the collateral damage concerns, to persons or the environment, within the radius likely to be affected by the strike. These planners then implement a series of “mitigation techniques” designed to minimize the probability, and amount, of damage or injury to collateral individuals and property. These techniques, based on empirical data and computer analyses, involve the use of “progressively refined analysis of available intelligence, weapon type and effect, the physical environment, target characteristics and delivery scenarios keyed to risk thresholds established by the Secretary of Defense and the President of the United States.”^{lxviii} These measures aim to ensure less than a 10 percent probability of serious or lethal wounds to non-combatants and percentage probability of damage to collateral structures.^{lix} These techniques *precede* legal analysis of the proportionality issue.

These protocols also build in heightened procedural mechanisms and enhanced executive branch accountability when the analysis suggests substantial collateral damage. The rules of engagement contain a non-combatant casualty cutoff value, established by the President and Secretary of Defense. For estimates below this level, a senior commander (such as a Major General) may authorize the operation; for estimates above, the target must be approved by an entity called the National Command Authority^{lx} and military commanders must go through a special “sensitive target approval and review process.” According to McNeal, for pre-planned strikes in Afghanistan, the current cutoff is one, which reflects the strategic importance in counterinsurgency operations of minimizing civilian casualties.

Thus, if a targeted strike operation is expected to result in one civilian casualty, the National Command Authority must approve it. The reported results, no doubt still subject to confirmation, reveal low levels of unintended casualties,^{lxi} certainly light years removed from the carpet bombing of the aerial wars of the 20th century. Independent of the accuracy of reported numbers of such casualties,^{lxii} though, the point is that the CDM and related processes reveal the internal development of “lawlike” institutional procedures and protocols that the military and executive branch can develop to discipline their discretion, without the direct intervention of courts (and where even the shadow of judicial oversight is small).

With respect to alleged CIA targeted killings in Pakistan, one important source of independent evidence, the New America Foundation (which works through prominent Western and Pakistani media sources to compile statistics on remote killings in Pakistan),^{lxiii} is that these formal

procedures are effective. In several recent articles, Peter Bergen of the New America Foundation has argued that the data suggest a precipitous decline in civilian casualties from drone strikes, falling from a high of nearly 50 percent of drone strike casualties in 2008 to the rather remarkable conclusion that the rate had dropped by 2012 effectively to zero percent.^{lxiv} Bergen attributes this rapid improvement to the use of smaller munitions, improved drone flight technology, increased Congressional oversight, and stricter Executive guidelines regarding the use of drones.^{lxv} Regardless, tallies of civilian deaths remain an inexact science and Berger's reports have been met with some criticism.^{lxvi} But it is noteworthy that even the London-based Bureau of Investigative Journalism, which is generally more skeptical of the strikes, in addition to being skeptical of Bergen's claim that no civilians were killed in 2012, recorded a similar dramatic decline by 2012.⁴

In addition, as of May 2013, civilian casualties are at their lowest ever. That is partly the result of a sharply reduced number of drone strikes in Pakistan -- 12 in 2013 at time this chapter is being written, compared with a record 122 in 2010 -- and also more precise targeting. According to data collected by the New America Foundation, three to five "unknown" individuals-- where its isn't clear if the victims were civilians or militants-- have been killed in drone strikes by May 2013. Two other organizations that track the CIA drone program in Pakistan, the London-based *Bureau of Investigative Journalism* and the *Long War Journal*, report zero to four civilian deaths and 11 civilian deaths respectively for the same time period.

Even a procedurally regulated use of targeted weaponry will remain highly dependent, of course, on military intelligence about the enemy. The fewer the resources on the ground, the more likely mistakes are going to be made, including terrible losses of civilian life. To the extent that drones or air strikes are used as the primary form of engagement, as for example in Yemen, the greater the risk of error appears to be.^{lxvii}

What emerges overall is the beginning of institutional practices rooted in the hazy intersection of the laws of war, the moral obligations of democratic states, and evolving military capabilities. As a substantive matter, there are many myths or confusions or misunderstandings in public

⁴ Shane Scott, *The Moral Case for Drones*, N.Y. TIMES, July 14, 2012, at SR4 ("The bureau has documented a notable drop in the civilian proportion of drone casualties, to 16 percent of those killed in 2011 from 28 percent in 2008. This year, by the bureau's count, just three of the 152 people killed in drone strikes through July 7 were civilians."); *Pakistan Civilian Deaths from US Drones 'Lowest Since 2008': Report*, EXPRESS TRIB. (PAK.) (July 2, 2012), <http://tribune.com.pk/story/402505/pakistan-civilian-deaths-from-us-drones-lowest-since-2008/>; Conor Friedersdorf, *CNN's Bogus Drone-Deaths Graphic*, THE ATLANTIC (July 6, 2012, 10:44 AM), <http://www.theatlantic.com/politics/archive/2012/07/cnns-bogus-drone-deaths-graphic/259493/>; Chris Woods & Jack Serle, *June 2012 Update: US Covert Actions in Pakistan, Yemen and Somalia*, BUREAU OF INVESTIGATIVE JOURNALISM (July 2, 2012), <http://www.thebureauinvestigates.com/2012/07/02/june-update-us-covert-actions-in-pakistan-yemen-and-somalia/> ("[F]ewer civilians are being killed in CIA drone strikes in Pakistan than at any time in the Obama presidency.").

debates about drones and targeted killings. But the technological and technique do not raise exceptional legal issues; the question is whether use of force is justified, and if it is, the delivery of that force through a drone rather than a manned plane or cruise missile doesn't raise novel issues. As a procedural matter, though, it is extremely important that: first, the legal justifications for this power be articulated fully and publicly and as transparently as possible; second, that the processes/institutional structures for making targeting decisions be as accurate as possible at the identification stage, as well as in minimizing civilian losses; and, third, that there be after the fact review and accountability. That such processes are likely to be internal to the executive branch does not remove the importance of the formalization of legal safeguards.

5. THE FUTURE OF WARFARE

We are at the early stages of a profound but partial transformation regarding the legitimate use of military force. An emerging imperative increasingly requires adjudicative-like individualized judgments about the particular responsibility of specific individual "enemies" before military force can legitimately be used against them. This is a transformation from the traditional status-based or group-based justifications for use of force against "the enemy" to a more act-based or individuated justification for when force is legitimate.

This change is being propelled by a combination of the inherent structural differences between the nature of insurgent, guerilla, and terrorist groups today (the principal targets of military force by democratic forces in today's world) and the conventional armies of the past; by technological changes that enable far more discriminating deployments of force; and by the post-World War II emergence of a more general humanitarian sensibility among Western democracies, at least.

This change is already beginning to be reflected in the evolving military practices of dominant states. Military practice and moral arguments about this change will move far more quickly than legal change, but to extent, this transformation is also beginning to be reflected in the domestic law of some states and in arguments about obligations under international law. Military practice, perceptions of morality, and legal obligation will mutually influence each other as this transformation unfolds.

The ramifications of this emerging imperative to individuate enemy responsibility are wide-ranging. Military forces will inevitably have to develop analogues appropriate to the military context for the procedural protections (hearings, evidence-based assessments, and the like) designed to ensure accuracy of adjudicative-like judgments of individual responsibility when coercive state power is deployed domestically. The United States

military in its evolving post 9/11 self-understanding has been doing that, and these types of procedural protections will have to be credible if military force will be sustainable over the long run in these contexts.

Similarly, it is probably also inevitable that courts will step in to play a somewhat more significant role to assess the use of at least certain exercises of military force (perhaps more in the context of detention than military operations themselves) than they have in the past; as the justification for force becomes more closely tied to ascriptions of individualized responsibility, the courts will instinctively experience certain of these issue as closer to the kinds of questions with which courts deal traditionally. Once we recognize that we are moving toward a regime of individuating enemy responsibility, at least to some extent, it is also perhaps inevitable that pressure will arise from some quarters to insist that only the most traditional model for how to assign those judgments – the criminal justice system – is fit for this task.

But a central theme of this chapter is that the existing legal frameworks, both domestic and international, do not provide direct answers to the critical legal questions this transformed military context spawns. The question is not whether terrorism is more “like” war or crime. Neither the legal regimes for regulating war (primarily, international law) nor for regulating crime (primarily, domestic law) were designed to reflect the emerging individuation of responsibility towards which practice and morality are moving. The question is how best to adapt either international law or domestic law or both to come to terms with the perceived imperative to individuate responsibility while also recognizing the functional and practical constraints under which military power must inevitably be deployed.

While we seek to capture one important emerging strand in the practice of warfare in certain modern contexts, we do not suggest that our account offers a comprehensive descriptive or normative perspective on all forms of modern military practice. Surely there will continue to be contexts in which traditional armies of nation states confront each other on conventional battlefields, as in the two recent wars the United States fought against Iraq. In addition, even outside this traditional warring of nation-state armies, there will be many contexts in non-conventional wars in which military force still continues to be directed against groups of individuals believed to consist of enemy forces (or against military objects, such as training camps, where such groups of individuals are thought to be present). In these contexts, the traditional status-based distinctions and justifications for the use of military force continue to characterize its use. But how might the emerging individuation of enemy responsibility affect these more traditional contexts?^{lxviii}

In one projection of the future path of the morality and law of the use of military force, we might envision two distinct regimes that manage to co-exist side by side: a regime of status-based uses of force in more “traditional” contexts alongside the more individuated regime of enemy responsibility we describe here. But we might also ask whether it is plausible or stable that two such distinct regimes could be sustained in such stark “acoustic separation” from each other.^{lxix}

In a different projection of that future, therefore, we might imagine that the emergence of the more individuated regime will have moral or legal ramifications that spill back, to some extent, into the more traditional regime. Professor Gabriella Blum, for example, speaks of the “changing nature of the battlefield” creating a military environment that “is increasingly dependent on case-by-case judgments.”^{lxx} To the extent technologies of intelligence and military force enable more discriminating judgments even in more traditional contexts between those enemy “soldiers” who pose a serious threat and those who do not (by virtue of their specific role, for example, in the enemy’s army), perhaps pressure will arise to refine traditional status-based attacks to more individuated, threat-based attacks.

We are not arguing that the use of military force in all contexts is moving from a status-based to act-based regime; there are and will continue to be many contexts in which the traditional status-based approach will continue to be justified and legitimate, both morally and legally. But we have only dimly seen that the fundamental imperative driving policy and argument on these issues is the need to individuate enemy responsibility in a credible and justifiable way. The more we grasp that fundamental transformation, the more clarity we can bring to the creative act of deciding how to design military and legal regimes that will appropriately reflect this transformed military, moral and legal environment.

ⁱ A longer version of this chapter, which integrates issues concerning military detention and those concern targeted killings, will appear as *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. Rev. 101 (2013).

ⁱⁱ See, e.g. *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) (American citizen held in United States as enemy combatant entitled to habeas petition to challenge factual basis of his detention); *Boumediene v. Bush*, 553 U.S. 723 (2011) (holding congressional act suspending habeas review for detainees at Guantánamo unconstitutional given the inadequate protections of Combatant Status Review Tribunals as then-constituted); HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. (*PCATI*) [2005] (Isr.), *available at* *at*

http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf (restricting conditions under which Israeli military could select militants for targeted killing and mandating that all such killings be followed by *ex post* independent inquiry to determine their appropriateness).

ⁱⁱⁱ The Obama administration has developed a set of elaborate protocols for making the determination of whether and under what circumstances to place enemy combatants on the “kill list” used for targeted killing determinations. See Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>.

^{iv} The Supreme Court addressed the significance of uniforms to military identity in *Ex Parte Quirin*, 317 U.S. 1 (1942) (“The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals”). The emphasis on recognized membership in an armed force was later codified in the Geneva Conventions, in which prisoner of war protections for militia or volunteer forces is made contingent upon their “carrying arms openly” and “having a fixed distinctive sign recognizable at a distance.” Geneva Convention Relative to the Treatment of Prisoners of War art. 4 Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

^v See *id.*

^{vi} For example, in discussing the general power to detain in wartime, the Supreme Court in *Hamdi* cited authority to the effect that “The time has long passed when ‘no quarter’ was the rule on the battlefield It is now recognized that ‘Captivity is neither a punishment nor an act of vengeance,’ but ‘merely a temporary detention which is devoid of all penal character.’ ... ‘A prisoner of war is no convict; his imprisonment is a simple war measure.’” *Hamdi v. Rumsfeld*, 507, 518 (2004) (quoting WILLIAM WINTHROP MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920).

^{vii} See, e.g. *id.* (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incidents of war’”)(quoting *Ex Parte Quirin*, 317 U.S. 1, at 28, 30).

^{viii} Geneva III art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

^{ix} See Matthew C. Waxman, *Detention As Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 Colum. L. Rev. 1365, 1382-83 (2008) (“Al Qaida and other terrorist organizations do not generally identify their membership. They do just the opposite, operating in the shadows, blending in with local populations. . . . In these respects, terrorist networks take the identification problems long posed by guerrilla warfare to new heights”); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2113 (2005) (explaining the difficulty of identification).

^x Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 Stan. L. Rev. 1079, 1099 (2008) (“associational status as a detention trigger is difficult to apply to an amorphous clandestine network such as al Qaeda. Beyond the leadership core, it is difficult to determine what degree of association with al Qaeda suffices to warrant status-based detention even if the facts can accurately be determined”).

^{xi} In the detention context, Afghan detainees now routinely have the appropriateness of their detention evaluated on an individual basis. See generally Lieutenant Colonel Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAW., June 2010, at 9 (describing the evolution and structure of detainee review procedures in Afghanistan). With respect to targeted killings, evaluation of the threat posed by specific *individuals* dictates their inclusion or exclusion from the Obama administrations’ “kill list.” See Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all> (“Given the contentious discussions, it can take five or six sessions for a name to be approved, and names go off the list if a suspect no longer appears to pose an imminent threat . . .”).

^{xii} Officials associated with the United States’ targeted killing program have apparently determined that strikes against individuals are, in fact, most appropriately directed at terrorist leaders rather than foot soldiers. Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all> (“William M. Daley, Mr. Obama’s chief of staff in 2011, said the president and his advisers understood that they could not keep adding new names to a kill list, from ever lower on the Qaeda totem pole.”).

^{xiii} Geneva III art. 118.

^{xiv} Among the critiques that Daphne Eviatar of the NGO Human Rights First advances with respect to the current Detention Review Board system

for detainees in Afghanistan, for instance, is the fact that fundamentally adjudicative proceedings are conducted by military tribunals without sufficient trappings of the civilian justice system. DAPHNE EVIATAR, HUMAN RIGHTS FIRST, *DETAINED AND DENIED IN AFGHANISTAN: HOW TO MAKE U.S. DETENTION COMPLY WITH THE LAW* 13-19, 27-28, (2011), *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf> (arguing for the importance of providing legal counsel to detainees and claiming that the current system of “personal representatives” for detainees (who need not be lawyers) is insufficient as a substitute).

^{xv} Aware of the importance of perceived legitimacy and credibility, the military in Afghanistan has begun to allow NGOs to observe the non-classified portions of proceedings in Detainee Review Board adjudications. Bovarnick, *supra* note ____, at 38.

^{xvi} Becker & Shane, *supra* note ____, (“[N]ames go off the list if a suspect no longer appears to pose an imminent threat.”); Bovarnick, *supra* note ____, at 29 (“[T]he board must determine whether the detainee meets the criteria for internment and, if so, whether continued internment is necessary to mitigate the threat the detainee poses.”).

^{xvii} See Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?_r=2&pagewanted=all; Sudarsan Raghavan, *Awlaki Hit Misses al-Qaeda Bombmaker, Yemen Says*, WASH. POST (Sept. 30, 2011), http://www.washingtonpost.com/world/anwar-al-aulaqi-us-born-cleric-linked-to-al-qaeda-killed-yemen-says/2011/09/30/gIQAsoWO9K_story.html.

^{xviii} See Jennifer Griffin & Justin Fishel, *Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike*, FOXNEWS.COM (Sept. 30, 2011), <http://www.foxnews.com/politics/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed/>.

^{xix} See Mazzetti et al., *supra* note 145; Griffin & Fishel, *supra* note 146.

^{xx} See Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES (Apr. 6, 2010), <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>; *American-Born Cleric Added to Capture-or-Kill List, Called ‘Terrorist No. 1’*, FOXNEWS.COM, Apr. 6, 2010, <http://www.foxnews.com/politics/2010/04/06/radical-cleric-reportedly-added-capture-kill-target-list/>.

^{xxi} See *id.* The U.S. Treasury Department also added Awlaki to its list of Specially Designated Global Terrorists on July 16, 2010. This froze any U.S. bank account he may have possessed, forbade Americans from doing

business with him, and banned him from traveling in the U.S. See *U.S.-Born Radical Cleric Added to Terror Blacklist*, FOXNEWS.COM (July 16, 2010), <http://www.foxnews.com/us/2010/07/16/born-radical-cleric-added-terror-blacklist/>.

^{xxii} Others have also explored the potential relationship between detention and targeted killings. Matthew Waxman, for example, has asserted that the more tolerant standard of “reasonable care” that attaches to targeting decisions should govern, at least initially, the decision to detain. Matthew Waxman, *Detention as Targeting*, *supra* note 99, at 1401–04. See also Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1366 (2012) (arguing against utility of the binary combatant/noncombatant and civilian/noncivilian division and in favor of proportionality test applied in individualized decision framework).

^{xxiii} Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 431, 450 (2010).

^{xxiv} Our thanks to Major Andrew Gillman, USAF, for addressing this distinction.

^{xxv} See MICHAEL L. GROSS, MORAL DILEMMAS OF MODERN WAR 51 (2010).

^{xxvi} Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT’L L. 339, 341 (2010).

^{xxvii} MATT J. MARTIN WITH CHARLES W. SASSER, PREDATOR – THE REMOTE-CONTROL AIR WAR OVER IRAQ AND AFGHANISTAN: A PILOT’S STORY 104 (2010) (commenting that “[t]o us, the Predator is a longer-duration, lightly armed (and much less survivable) version of an F-16 ...”).

^{xxviii} *Id.*

^{xxix} David Luban, *What Would Augustine Do: The President, Drones, and Just War Theory*, Online, Boston Review, June 6, 2012.

^{xxx} For some perspective, this was exactly the argument that led Florence Nightingale to oppose, initially, the development of the International Committee of the Red Cross to monitor treatment of prisoners; as she wrote to the founder of the ICRC in initially rejecting the organization: “Such a society would relieve governments of responsibilities which really belong to them which they only can properly discharge . . . and being relieved of which would make war more easy.” She eventually changed her mind, of course. CLAIRE FINKELSTEIN ET AL., TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 389 (2012). For an excellent account of the moral ambiguities and complexities of these issues, see Ken Anderson, *First in the Field: The Unique Mission and Legitimacy of the Red Cross in a Culture of Legality*, Times Literary Supp. July 31, 1998 (review of CAROLINE MOREHEAD, DUNANT’S DREAM: SWITZERLAND AND THE HISTORY OF THE RED CROSS) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=935781.

^{xxx} See Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 Cal. L. Rev. 1171, 1197-1204 (2009) (discussing the factors that led rebel factions in Darfur to behave intransigently at peace talks in order to exploit the possibility that outside intervention could force a favorable settlement to the conflict). See also JOHN RYLE & JUSTIN WILLIS, *Introduction: Many Sudans*, in THE SUDAN HANDBOOK 27, 29 (2012) (similarly addressing disequilibrium created by foreign humanitarian intervention).

^{xxxii} As an example, consider the following account of an exchange between a drone operator and Harold Koh, the Legal Adviser to the State Department, when Koh commented that he had heard drone operators had a “PlayStation mentality:”

The lead operator lit into Koh. “I used to fly my own air missions,” he started, defensively. “I dropped bombs, hit my target load, but had no idea who I hit. Here I can look at their faces. I watch them for hours, see these guys playing with their kids and wives. When I get them alone, I have no compunction about blowing them to bits, but I wouldn't touch them with civilians around. After the strike, I see the bodies being carried out of the house. I see the women weeping and in positions of mourning. That's not PlayStation; that's real. My job is to watch after the strike too. I count the bodies and watch the funerals. I don't let others clean up the mess.”

See DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 217 (2012). Similarly, as Martin puts it: “I doubted whether B-17 and B-20 pilots and bombardiers of World War II agonized over dropping bombs over Dresden or Berlin as much as I did over taking out one measly perp in a car.” See MARTIN, *supra* note ____, at 53.

^{xxxiii} MARTIN, *supra* note ____, at 104.

^{xxxiv} *Id.*

^{xxxv} *Id.*

^{xxxvi} *Id.* at 108.

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<http://www.lawfareblog.com/wp-content/uploads/2012/04/WilsonCenterFinalPrepared1.pdf> and <http://www.state.gov/s/1/releases/remarks/139119.htm>

^{xxxviii} <http://www.state.gov/s/1/releases/remarks/139119.htm>

^{xxxix} <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>

^{xi} For a significant article on legal issues concerning the proper geographic scope of detention and targeted killings outside conventional “hot battlefield” settings, from a former Human Rights Watch lawyer and national-security lawyer in the Obama administration, see Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PENN. L. REV. ____ (2012). For a critical response to Daskal’s attempt to resolve these issues, see Kenneth Anderson at: <http://www.lawfareblog.com/2012/05/readings-jennifer-c-daskal-the-geography-of-the-battlefield-a-framework-for-detention-and-targeting-outside-the-hot-conflict-zone/>.

^{xii} Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Address Before the Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/1/releases/remarks/139119.htm> (“[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. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.”).

^{xiii} According to Klaidman’s account, Harold Koh argued for a legal theory called “elongated imminence,” which Koh analogized to the battered wife syndrome defense; if alleged terrorists showed a consistent pattern of violence, that should be understood to meet the “imminence” standard, even if they were not about to engage in any specific strike at the moment at which they were targeted. KLAIDMAN, *supra* note ____ at 220. This “elongated imminence” legal theory might be appropriate for the context of terrorism, but whether it is consistent with prior understandings of imminent threat under international law doctrines might be the subject of continuing debate. Holder himself appeared to reject strict notions of temporal imminence for what he instead called the “last window of opportunity” to stop an attack. Consider also this striking passage on how the administration defines “imminence” from John Brennan’s speech, given before Holder’s speech:

This Administration’s counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qa’ida and its associated

forces. Practically speaking, then, the question turns principally on how you define “imminence.”

We are finding increasing recognition in the international community that a more flexible understanding of “imminence” may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts.

John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Strengthening our Security by Adhering to our Values and Laws, Remarks at Harvard Law School (Sep. 16, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

^{xliii} *Id.*

^{xliv} <http://www.nytimes.com/2011/09/16/us/white-house-weighs-limits-of-terror-fight.html?hp=&adxnnl=1&adxnnlx=1344279630-QC6mNTCJ2e1dJ0d+HVhULA>.

^{xlv} <http://www.lawfareblog.com/2011/09/thoughts-on-the-latest-round-of-johnson-v-koh/>. *See also* Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69, 74 (2010) (changing form of warfare “requires states to invest in military technologies that enable them to tell combatants apart from civilians and target the former without harming the latter. To do this, they must often engage in individual-based determinations of the identity and role of their target.”).

^{xlvi} The emerging American doctrine has striking parallels to the decision of the Israeli Supreme Court on the lawfulness of targeted killing. Israel accepts a much greater judicial role in overseeing military operations, thus leading to an earlier hardening of the legal categories. Per the decision by President Aharon Barak, there are four requirements:

- (1) “Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities”
- (2) “Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed.”
- (3) Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is

to be performed (retroactively). That investigation must be independent”

(4) “Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test.”

HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. (*PCATI*) [2005], slip op. para. 40, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf

^{xlvii} See Laura Blumenfeld, *In Israel, a Divisive Struggle over Targeted Killing*, WASH. POST. (Aug. 27, 2006), at 3 http://www.washingtonpost.com/wp-dyn/content/article/2006/08/26/AR2006082600917_4.html (describing internal executive branch processes for targeted killings by Israeli forces).

^{xlviii} HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. (*PCATI*) [2005], slip op. para. 40, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf

^{xlix} *Id.*

¹ Luban, *supra* note ___, at ¶ 40 (“From the point of view of just war theory, the nationality of casualties is irrelevant. If they are enemy belligerents, they can be targeted, regardless of their nationality; if they are not enemy belligerents, they can’t be, regardless of their nationality. . . . To focus only on the lives of Americans is parochial in a way that the morality of war is not.”).

^{li} *A v Secretary of State for the Home Department*, [2004] UKHL 56, at 68 (HL) (the “A Case”).

^{lii} KLAIMAN, *supra* note ___, at 265.

^{liii} We borrow the term from John Witt. See John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261 (2007).

^{liv} See AMY B. ZEGART, *EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY* (2011).

^{lv} See Gregory S. McNeal, *The U.S. Practice of Collateral Damage Estimation and Mitigation*, SSRN (Nov. 4, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954795. Given that any drone program the CIA might control has not been publicly acknowledged by the United States government, there is, needless to say, no comparable information on any such program, assuming from news accounts that one does exist.

^{lvi} McNeal reports that since June 2009, pre-planned operations constituted all air-to-ground operations in Afghanistan other than emergency situations in which close air support was called in. *Id.* at 5 n.9.

^{lvii} Recent disclosures confirm the high-level authorization requirement. Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), at <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all> (“In Pakistan, Mr. Obama had approved not only “personality” strikes aimed at named, high-value terrorists, but “signature” strikes that targeted training camps and suspicious compounds in areas controlled by militants. . .”).

^{lviii} *Id.* at 18.

^{lix} *Id.* at 24–25.

^{lx} This authority is apparently delegated to the commander of US and ISAF forces, which had been General Petraeus and as of this writing is General Allen. *Id.* at 29 n. 108.

^{lxi} Chris Woods, *Analysis: CNN Expert's Civilian Drone Death Numbers Don't Add Up*, BUREAU OF INVESTIGATIVE JOURNALISM (July 17, 2012), <http://www.thebureauinvestigates.com/2012/07/17/analysis-cnn-experts-civilian-drone-death-numbers-dont-add-up/>.

^{lxii} See Jo Becker, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=1&pagewanted=all.

^{lxiii} See generally, *An Analysis of U.S. Drone Strikes in Pakistan, 2004-2012*, NEW AMERICA FOUNDATION *available at* <http://counterterrorism.newamerica.net/drones>; See Woods, *supra* note ___ (noting that New America Foundation’s data is “the most frequent source of statistics for the US media, including CNN itself. So the accuracy of its material is important”).

^{lxiv} See Peter Bergen, *Drones Decimating Taliban in Pakistan*, CNN (July 4, 2012), <http://edition.cnn.com/2012/07/03/opinion/bergen-drones-taliban-pakistan/index.html?iref=allsearch>; Peter Bergen, *Civilian Casualties Plummet in Drone Strikes*, CNN (July 14, 2012), <http://www.cnn.com/2012/07/13/opinion/bergen-civilian-casualties/index.html>.

^{lxv} See Bergen, *Civilian Casualties Plummet*, *supra* note ___.

^{lxvi} Even the London-based Bureau of Investigative Journalism, which, in addition to being skeptical of Bergen’s claim that no civilians have been killed in 2012, is generally more skeptical of the strikes, recorded a similar dramatic decline in by 2012 in its own comprehensive database. Chris Woods, *June Update - US Covert Actions in Pakistan, Yemen and Somalia*,

BUREAU OF INVESTIGATIVE JOURNALISM (July 2, 2012) (“fewer civilians are being killed in CIA drone strikes in Pakistan than at any time in the Obama presidency”), <http://www.thebureauinvestigates.com/2012/07/02/june-update-us-covert-actions-in-pakistan-yemen-and-somalia/>; Scott Shane, *The Moral Case for Drones*, N.Y. TIMES (July 14, 2012) (“The bureau has documented a notable drop in the civilian proportion of drone casualties, to 16 percent of those killed in 2011 from 28 percent in 2008. This year, by the bureau’s count, just three of the 152 people killed in drone strikes through July 7 were civilians”), <http://www.nytimes.com/2012/07/15/sunday-review/the-moral-case-for-drones.html?hp>; *Pakistan Civilian Deaths from US Drones ‘Lowest Since 2008’: Report*, EXPRESS TRIBUNE (PAKISTAN) (July 2, 2012), <http://tribune.com.pk/story/402505/pakistan-civilian-deaths-from-us-drones-lowest-since-2008/>. Conor Friedersdorf, *CNN’s Bogus Drone-Deaths Graphic*, THE ATLANTIC (July 6, 2012), <http://www.theatlantic.com/politics/archive/2012/07/cnns-bogus-drone-deaths-graphic/259493/>.

^{lxvii} For a remarkable piece of reporting on a recent strike in Yemen that appears to have rested on faculty intelligence, with major loss of innocent lives and serious counterproductive strategic consequences, if the article is accurate. See Sudarasan Raghavan, *When U.S. Drones Kill Civilians, Yemen’s Government Tries to Conceal It*, WASH. POST (Dec. 24, 2012) http://www.washingtonpost.com/world/middle_east/when-us-drones-kill-civilians-yemens-government-tries-to-conceal-it/2012/12/24/bd4d7ac2-486d-11e2-8af9-9b50cb4605a7_story.html.

^{lxviii} We are particularly indebted to Marty Lederman for pressing this point with us.

^{lxix} See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. (1984).

^{lxx} Blum, *supra* note ____, at 74.