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THE LEGAL AND ETHICAL LIMITS OF TECHNOLOGICAL WARFARE: INTRODUCTION

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Deciding a year in advance the theme of a law review symposium is, at best, a tricky proposition. The considerations are varied: what topic will be relevant to academics and policymakers, who should be invited as panelists, how will invited individuals mix and collaborate with each other, what issue will be of interest to the larger community, and what kind of contribution will the symposium and subsequent publications make to the issue chosen? In conjunction with the Utah Law Review Board and faculty colleagues, we decided that addressing the legal and ethical aspects of technological warfare met the criteria we outlined for ourselves: it is an issue of enormous public interest, significant scholars would facilitate extraordinary discussion, and we would be able to impact the public debate. The remaining question was whether the issue would be "hot" at conference time.

Hot it was, and hotter it became less than a week after the symposium. A mere five days after the conference was held, the Department of Justice released a White Paper[1] regarding the Obama administration's drone policy. Had the White Paper been released days before the conference, our timing would have been beyond extraordinary; perhaps remarkably prescient is a more appropriate term. Whether or not we anticipated the unknown is left to others to address; what is clear is that our distinguished panelists addressed the essence of the White Paper prior to its release.

Did some of our panelists have knowledge as to its existence? Regardless of the answer to that rhetorical question, the reality is that the very issues that have caused widespread concern regarding the paper were the focal point of our discussion; particularly the two-hour scenario-based roundtable discussion. Had

 Professor, University of Utah S.J. Quinney College of Law. My colleagues, Professor Tony Anghie and Professor Wayne McCormack, whose graciousness and generosity of spirit define them, were reflective and thoughtful as panel moderators while ensuring, with enormous charm, that we stayed on schedule throughout the day. A special word of thanks to Clark Collings (J.D., May 2013), the Symposium Editor of the Utah Law Review; Clark was my partner in every sense of the word this past year and his unstinting efforts were essential to the symposium's success. A very loud "shout out" is in order to Miriam Lovin, the remarkably efficient and overwhelmingly competent Events Director; Lynette Saccomanno, who handles travel arrangements with uncommon aplomb; Barry Scholl, the Director of External Relations; Dana Wilson, the Director of Marketing; and Mark Beekhuizen, the Director of the IT team, for their terrific efforts to bring the symposium to the public's attention.

[1] U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2013), *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

the White Paper authors (unsigned) heard the discussion, it is not beyond the realm of the possible that second thoughts—if not much doubt—regarding the legal, moral, and practical paradigm would have been their response. The White Paper

> sets forth a legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force of al-Qa'ida—that is, an al-Qa'ida leader actively engaged in planning operations to kill Americans.[2]

According to the White Paper,

> [T]he United States would be able to use lethal force against a U.S. citizen, who is located outside the United States and is an operational leader continually planning attacks against U.S. persons and interests, in at least the following circumstances: (1) where an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) where a capture operation would be infeasible—and where those conducting the operation continue to monitor whether capture becomes feasible; and (3) where such an operation would be conducted consistent with applicable law of war principles.[3]

However, the White Paper *dramatically* broadens the definition of legitimate target: "[T]he condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."[4]

History, tragically, shows that when a "legitimate" target is broadly defined, significant collateral damage is, largely, inevitable. Needless to say, the dangers emanating from the White Paper raise deeply disturbing questions regarding the policy's legality and morality. There is an additional concern that must be addressed: the White Paper has created a significant dilemma for commanders and decision-makers that place them in an extraordinarily complicated paradigm.

By comparison: when writing my book *Constitutional Limits of Coercive Interrogation*,[5] I met with U.S. interrogators based in Iraq; their most powerful request was that guidelines and criteria for the limits of interrogation be clearly articulated in detailed written instructions. Their "demand" was predicated on a

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[2] *Id.* at 1.
[3] *Id.* at 6.
[4] *Id.* at 7.
[5] AMOS N. GUIORA, CONSTITUTIONAL LIMITS ON COERCIVE INTERROGATION (2008).

deeply held conviction (with which I agreed) that the Bybee Memo[6] established a paradigm best described as "by all means necessary." Their concern was that superiors would demand application of interrogation measures in violation of domestic and international law. Rearticulated: experienced interrogators were convinced superiors, in accordance with the Bybee Memo, would demand they violate the law. By analogy, it is troubling, albeit reasonable, to presuppose the White Paper will result in actions that violate domestic and international law. But not because commanders are inherently prone to nor particularly relish in committing crimes, not in the least.

The panel discussions and roundtable highlighted the enormous complexity of technological warfare; whether by design or force of nature, the conversations focused quickly on the ethical aspects of U.S. drone policy. Perhaps that focus resulted from the unique mix of subject matter experts; perhaps it reflects the enormous ethical dilemmas posed by technological warfare, as compared to more traditional conflict. Whatever the cause, this emphasis is particularly noteworthy for it suggests recognition that while drones are legal there is greater concern, if not active questioning, about their morality. It is possible, however, that were the conference held after release of the DOJ White Paper, discussion would have largely focused on legal questions, in particular definitions of "imminence," "senior operational leader," and "al-Qa'ida.

This unique mix reflected our conscious effort to address the issue of technological warfare from distinct perspectives: the law, philosophy, intelligence gathering and analysis, operational decision-making, and policy ramifications and implications. To do so would require not only an eclectic group of panelists—stretching far beyond the traditional academic conference model of inviting recognized experts—but also their individual and collective willingness to directly engage and challenge each other. In contrast to "set piece" gatherings where panelists deliver stock comments, we felt a roundtable discussion, requiring addressing distinct scenarios relevant to technological warfare, would significantly enhance the discussion.

The depth of the panel discussions, the extraordinary engagement amongst the panelists during a unique two-hour scenario-based roundtable discussion, and the extent of audience (including remote) engagement and participation unequivocally suggest the symposium clearly passed the high bar we set. One of the most important decisions we made was to invite a limited number of recognized subject-matter experts from a wide range of fields—academic and nonacademic alike. Our panelists included extremely thoughtful and deeply knowledgeable professors of law and philosophy (from the United States and Canada), two retired U.S. flag officers (lieutenant general and brigadier general) who served with great

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[6] *See* OFFICE OF LEGAL COUNCIL, U.S. DEP'T OF JUSTICE, MEMORANDUM FOR JOHN RIZZO ACTING GENERAL COUNSEL OF THE CENTRAL INTELLIGENCE AGENCY: INTERROGATION OF AL QAEDA OPERATIVE (2002), *available at* http://media.luxmedia.com/aclu/olc_08012002_bybee.pdf.

distinction in the intelligence community, and a highly recognized policy expert (who graduated from the U.S. Military Academy).

Our keynote speaker was Professor Trevor Morrison—who at the time was a Professor at Columbia University School of Law but is now Dean of New York University School of Law—and panelists included Professor Laurie Blank, Emory University Law School; James Carafano, the Heritage Foundation (Washington, D.C.); Professor Geoff Corn, South Texas School of Law; Professor Claire Finkelstein, University of Pennsylvania Law School and Department of Philosophy; Professor Monica Hakimi, University of Michigan Law School; Brigadier General (Ret.) David Irvine, Former Deputy Commander for the 96th Regional Readiness Command; Professor George R. Lucas, Professor of Ethics and Public Policy, Naval Postgraduate School; Professor Frederic Mégret, Faculty of Law, McGill University; and Lieutenant General (Ret.), Harry Soyster, former Director, Defense Intelligence Agency. These participants were, in a word, outstanding, both in their panel presentation/discussion and in the remarkable exchanges that occurred in the round table.

Professor Morrison's thoughtful keynote address provided an important theoretical basis for the conference. By articulating legal architecture relevant to the articulation and implementation of the Obama administration's drone policy in the context of executive power, Professor Morrison set the stage for subsequent discussion and disagreement. The interplay between academic voices and those of retired flag officers was fascinating to observe; the latter focusing on the human cost to soldiers and innocent civilians alike while the former engaged in addressing the legal, moral, and policy aspects of implementing such a policy. The extraordinary engagement and dialogue between the two distinct worlds was fascinating, as it highlighted the range of issues inherent to a thoughtful discussion regarding drones.

The panels touched upon an extraordinary number of discussion points, perhaps reflecting powerfully disparate backgrounds and professional experiences. To highlight a few: the role of judicial review regarding both the drone policy and its implementation[7]; whether drone policy should be subject to transparency requirements regarding criteria and guidelines[8]; the "human cost" of weapons from the perspective of the "trigger-puller"[9]; the limits of executive power; defining effectiveness in the decision-making process; the importance of recognizing the history of warfare (particularly in understanding the changing nature of conflict); understanding the impact of technology on the law (the reference was made, in

[7] To that end, recent public discussion has suggested creation of a "drone court." Neal K. Katyal, Op-Ed., *Who Will Mind the Drones?*, N.Y. TIMES, Feb. 21, 2013, at A27, *available at* http://www.nytimes.com/2013/02/21/opinion/an-executive-branch-drone-court.html?_r=1&; Amos Guiora, Op-Ed, *Drone Policy: A Proposal Moving Forward*, JURIST (Mar. 4, 2013), http://jurist.org/forum/2013/03/amos-guiora-drone-policy.php.

[8] *See Anwar Al-Awlaki—FOIA Request*, ACLU, http://www.aclu.org/national-security/anwar-al-awlaki-foia-request (last visited June 10, 2013).

[9] *See generally* JAMES R. MCDONOUGH, PLATOON LEADER: A MEMOIR OF COMMAND IN COMBAT 233 (1985).

particular, regarding surveillance technology); defining (whether narrowly or broadly is an important point of distinction) direct participant and degree of threat an individual poses in determining when force can be used and its limits[10]; the moral consequences of drone warfare; the extent of "tolerable" collateral damage; the requirement to define (whether narrowly or broadly is again an important point of distinction) the objective of the military operation (in the context of defining war and peace); how to define winning (predicated on a belief that winning is possible in asymmetrical warfare)[11]; the requirement, and difficulty, in gathering intelligence when "fighting amongst the people"; and whether managing terrorism is a legitimate objective; recognizing the importance of local culture and mores and the distinction between drones and "boots on the ground."

These issues and Professor Morrison's keynote address provided an extraordinarily rich and vibrant basis for the roundtable discussion. Our objective with respect to the scenario-based roundtable was to facilitate engaged discussion amongst the panelists; the high-level discussion, marked by disagreement and agreement alike, reflects the complexity and controversy inherent to the drone policy. The active participation suggests both that scenario-based discussion engenders intense debate and dialogue and that the drone discussion is remarkably complicated, complex, and controversial.

In addressing distinct scenarios, the panelists had to resolve questions about when implementing the drone policy would reflect respect for the laws of war and standards of morality and ethics. The scenarios were predicated on real-time decision-making; that is, the luxury of time and reflection was denied the participants. In resolving the legal and moral aspects of the drone policy, participants were forced to assess different scenarios including whether women and children are legitimate targets based on intelligence information provided by a source. While consensus was expressed regarding identification of women as legitimate targets, differences of opinion were articulated regarding children. The lack of unanimity was of particular importance because it suggested distinct categories of threats and permissible use of state power; furthermore, the impact on the decision-maker/trigger-puller with respect to engaging a child was repeatedly mentioned.

Engaging a child may, perhaps, appear to be on the edge of tolerable operational counterterrorism; to that end, the discussion regarding children was particularly important because it forced panelists to confront the limits of self-defense, morality, and the rule of law. While panelists expressed consensus regarding women as legitimate targets, no military, according to reliable sources, has conducted either a drone or targeted killing operation against women regardless of their involvement in terrorism. The lack of consensus regarding children mirrors actual operational decision-making, because militaries also have

[10] Needless to say, the Department of Justice White Paper is on point with respect to the definitional discussion.

[11] Charles J. Dunlap Jr., *America's Asymmetric Advantage*, ARMED FORCES J. (Sept. 2006), http://www.armedforcesjournal.com/2006/09/2009013.

not conducted drone or targeted killing operations against minors, in spite of their involvement in terrorism.

In the aftermath of the DOJ White Paper, this discussion is particularly important in the context of defining "legitimate target" and circumstances that justify engaging that individual. Were the conference held after the White Paper's release, the discussion would have focused on specific terms that have caused significant discomfort amongst academics and commentators. Needless to say, not all observers and pundits have expressed concern; those who have, focus on "the condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future"[12]. The importance of this phrase is paramount, for it highlights the tension between the legitimacy of the drone policy and its limits. Rearticulated, the fundamental question is how to define and determine whether an individual poses an imminent threat. In other words, what is imminence?

The legitimacy of the drone policy—legally and morally—demands resolution of this question. As the conference discussion made clear, however, determining the limits of state power also requires addressing the dilemmas inherent to warfare. That is, even though the trigger-puller is removed from the zone of combat, the moral quandary in determining whether a particular individual poses an imminent threat is not dissimilar to the moral quandary confronted by "boots on the ground." To that extent, articulating a paradigm where "imminence" and "legitimate target" are broadly defined is not cost-free from the soldier's perspective. This, frankly, is an issue that has largely flown under the proverbial radar: the widespread assumption is that "joy-stick operators" do not face moral dilemmas akin to commanders and soldiers who directly confront the enemy.

Whether that is indeed an accurate representation of the dilemmas of the new conflict is a matter of conjecture and interpretation. What is beyond doubt, as reflected in the thoughtful comments during the symposium, is the need to address this question. That requirement takes on increased urgency in the aftermath of the White Paper that significantly broadens the range of legitimate targets thereby increasing, arguably, the moral dilemmas confronting decision-makers and trigger-pullers alike. This is an issue—as made clear during the conference—that requires careful attention and additional research.

Undoubtedly, the nature of conflict is undergoing significant changes; perhaps an exaggeration, but the transition from direct to remote engagement most dramatically describes this powerful transformation. To that end, the focus on the ethical dilemmas inherent to the drone policy that dominated much of the conference discussion anticipated the powerful and concerning questions raised in the aftermath of the White Paper. While participants were largely sanguine with respect to the legality of the policy (pre-release of the White Paper), that comfort zone was not articulated regarding the policy's morality. The confluence between

[12] U.S. DEP'T OF JUSTICE, *supra* note 1, at 7.

ethical concerns raised by symposium participants and the broad definitions in the White Paper will become an important focal point regarding drone policy.

One of the dominant, and admittedly controversial, issues we discussed in the conference is that states have an obligation to conduct themselves morally, including during armed conflict. Although some may find this notion inherently contradictory, "morality in armed conflict" is a term of art (and not an oxymoron) that lies at the core of the instant discussion. This concept imposes an absolute requirement that soldiers treat the civilian population of areas in which they are engaged in conflict with the utmost dignity and respect. This obligation holds true whether combat takes place house-to-house or using remotely piloted aircraft tens of thousands of feet up in the sky. This concept may be simple to articulate, yet it is difficult to implement; the operational reality of armed conflict short of war requires a soldier to make multiple decisions involving various factors, all of which have never-ending spin-off potential. After all, every decision is not only complicated in and of itself, but also each operational situation has a number of "forks." The implication is that no decision is linear, and every decision leads to additional dilemmas and spurs further decision-making.

Operational decision-making is thus predicated on a complicated triangle that must incorporate the rule of law, morality, and effectiveness. I have been asked repeatedly whether that triangle endangers soldiers while giving the other side an undue advantage. The concern is understandable; however, the essence of armed conflict is that innocent civilians are in the immediate vicinity of combatants and there is a duty to protect them even at the risk of harm to soldiers.[13] The burden to distinguish between combatant and civilian is extraordinarily complicated and poses significant operational dilemmas for, and burdens on, soldiers.

For armed conflict conducted in accordance with the rule of law and morality, this burden of distinction can never be viewed as mere mantra. Distinction,[14] then, is integral to the discussion. It is as relevant and important to the soldier standing at a checkpoint, uncertain whether the person standing opposite him is a combatant or civilian, as it *must be* in any targeted killing dilemma. The decision whether to operationally engage must reflect a variety of criteria and guidelines.[15] Otherwise, the nation state conducts itself in the spirit of a video game where victims are not real and represent mere numbers, regardless of the degree of threat they pose.

At the most fundamental level, operational decision-making in the context of counterterrorism involves the decision whether to kill an individual defined as a legitimate target.[16] Although some argue killing is inherently immoral, I argue that

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[13] *See generally* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[14] *See, e.g.*, Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 (declaring that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy).

[15] *See* Amos N. Guiora, *Determining a Legitimate Target: The Dilemma of the Decisionmaker*, 47 TEX. INT'L L.J. 315, 332–36 (2012).

[16] *See id.* at 336.

killing in the context of narrowly defined self-defense is both legal and moral provided that the decision to pull the trigger is made in the context of a highly circumscribed and criteria-based framework. If limits are not imposed in defining a legitimate target, then decisions take on the hue of both illegality and immorality.

As the conference discussion highlighted, we are at a crossroads: traditional state war has morphed, by force of circumstances, into conflict between States and nonstate actors. Traditionally, international law sought to establish criteria and limits by which nation states fought wars against other States, although violations of the laws of war inevitably occurred.[17] Nevertheless, the rules were clearly articulated and understood, although not always implemented or respected.[18] The era of State versus nonstate conflict, in contrast, has been marked by both random and deliberate attacks against innocent civilians by nonstate actors.[19] The State, in response, has been forced to develop and implement operational counterterrorism measures intended to protect the civilian population while striking at those responsible for the attacks. Such response has been legitimate and necessary. The primary obligation of the State is to protect its innocent civilian population and valuable national resources and assets.[20] While this obligation is unambiguous, the question remains: How can a State meet these obligations? Should there be limits imposed regarding the use of force? And if so, what are those limits?

The concern for a moral and legal basis in conflict and counterterrorism operations is not based on compassion for terrorists. Anyone who deliberately targets innocent men, women, and children is a legitimate target.[21] Decision-making subject to moral and legal restraints, however, must go beyond an indiscriminate application of power that is devoid of articulated and narrowly applied criteria. Although collateral damage may well be inevitable to war and counterterrorism alike, it is nevertheless essential that States recognize their absolute obligation to *proactively* minimize the deaths of innocent individuals.

The callous decision by nonstate actors to deliberately place *their* innocent civilians in harm's way unduly impacts that burden. Human shielding is a clear violation of international law and reflects extraordinary disregard for the value of human life.[22] As made clear during Operation Cast Lead (i.e., the Gaza War),[23]

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[17] *See, e.g.*, Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[18] *See* GUIORA, *supra* note 5, at 320.

[19] *See generally* U.N. Global Counter-Terrorism Strategy, G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006); *see also* Richard A. Oppel, Jr. & Taimoor Shah, *Differing Theories in Killing of 17 in Taliban Stronghold*, N.Y. TIMES, Aug. 28, 2012, at A8 (discussing attacks on civilians by non-state actors).

[20] G.A. Res. 60/288, *supra* note 19, at 2 (noting the threat nonstate actors can pose to state security through acts of terrorism).

[21] *See* Charli Carpenter, *Fighting the Laws of War*, FOREIGN AFF., Mar.–Apr. 2011, at 146 (discussing the challenges posed by modern warfare, but concluding that traditional laws of war, including those that prohibit targeting innocent civilians, still apply).

[22] *See generally* Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292 (2009).

terrorist organizations deliberately use *their own* civilians as human shields.[24] However, that fact does not and must not justify targeted killing that results in undue collateral damage. The fact that terrorist organizations violate standards of law and morality must be universally condemned, but such conduct does not justify a paradigm in which collateral damage is tolerated. Ethical decision-making, human judgment, a moral conscience, and the rule of law must all work together to ensure that Americans do not become the enemy we are fighting.[25]

A. Role of Modern Technology

The use of drones, also known as unmanned aerial vehicles ("UAVs"), has further complicated the relationship between counterterrorism, self-defense, and morality in armed conflict. Many argue that the combination of modern technology and sophisticated intelligence analysis all but ensures that UAV policy is the most effective contemporary means to conduct operational counterterrorism.[26] The argument sounds compelling and convincing: What is more attractive than killing terrorists from the air with the use of sleek technology while minimizing risk to ground forces? We are in an age where shiny technology and seemingly sophisticated intelligence gathering and analysis converge, potentially removing the human element, and humanity, from decision-making.[27] However, targeted killing is fraught with extraordinary risk. Computers and advanced technology are, undoubtedly, essential to intelligence gathering and other important aspects of counterterrorism and armed conflict; suggesting otherwise would be folly. But the trend toward relaxed or flexible definitions of imminence, legitimate targets, and proportionality means that such an increasing reliance on technology can exacerbate rather than curtail these dangers.

Our focus on the legal, moral, and policy aspects of the drone policy was a direct reflection of the extraordinary subject matter experts who participated in the Utah Law Review symposium. The broad range of disciplines and experiences represented among the ten participants enabled candid, forthright, and insightful discourse. While consensus on substantive issues is nearly impossible, widespread

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[23] *See Israel Says Gaza Death Toll Lower than Claimed*, CNN (Mar. 26, 2009, 1:08 PM), http://articles.cnn.com/2009-03-26/world/israel.gaza.death.toll_1_israeli-military-palestinians-civilian-deaths?_s=PM:WORLD (discussing Operation Cast Lead).

[24] *See Terrorists Use Palestinian Civilians as Human Shields* (Info Live television broadcast Jan. 1, 2010), *available at* http://www.youtube.com/watch?v=n_YP6AtdwJQ&feature=fvwrel; *see also Cast Lead Video: Hamas Terrorist Uses Children as Human Shield* (Israeli Def. Forces online video Sept. 17, 2009), http://www.youtube.com/watch?v=2vHDyuSTneA.

[25] My gratitude to Margaret Hu for articulating this point so clearly for me.

[26] *See, e.g.*, Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT'L L. 675, 679, 701 (2011) (discussing the potential impact of unmanned drones on the law of armed conflicts).

[27] DAVID E. SANGER, CONFRONT AND CONCEAL 244 (2012) (reporting a top Obama administration official's concern that new technology distracts from human realities).

agreement was sounded regarding the remarkable intellectual, academic, and practical benefit that results from dialogue amongst distinct, powerful voices.

The U.S. drone policy raises profoundly important questions regarding the very nature of operational counterterrorism; its implementation reveals how morality and the rule of law are applied in an inherently ambiguous and amorphous paradigm. At present, the increasingly broader and more flexible definition of imminence, combined with a continually growing reliance on sleek new technology, is highly problematic and raises significant concerns about whether law and morality are truly serving as the necessary guiding force here. Law not only provides a State with the right to engage those who deliberately and randomly target innocent civilians, it also provides the essential guiding framework for the extent to which, and manner by which, the State can target and engage those individuals.

Simply articulating an aggressive, tough-on-terrorism policy is not sufficient. Rather, the devil truly is in the details: the State must carefully define both the limits of force and how that limited force is to be applied. Such a carefully defined limit and application of force is the essence of both morality in armed conflict and the rule of law. In contrast, deliberately operating in an open-ended paradigm with opaque parameters where state power is broadly defined and implemented opens the door, unnecessarily, to significant violations of morality and law.

Unlimited drone warfare where limits, targets, and goals are not narrowly defined creates an operational environment in which anyone killed, regardless of whether intended or unintended, is considered a legitimate target. This expanded articulation of "legitimate target," premised on significant expansion of tolerable collateral damage, creates a slippery slope that inevitably results in the deaths of otherwise innocent individuals. The allure of modern technology has led many decision-makers to minimize the need to carefully distinguish between the individuals who pose a threat and those who do not.

Decision-makers must not lose sight of the fact that targeted killing, on the basis of received and actionable intelligence information, is inherently problematic; it poses extraordinary operational challenges that must be resolved precisely because of targeted killing's importance to lawful self-defense. It must be operationalized in the most careful, narrow, and specific manner possible—meaning that a discriminating analysis of who is a legitimate target must be matched by equally discriminating analysis of who constitutes collateral damage, how much collateral damage is likely, and, most important, how much collateral damage is legally and morally acceptable or tolerable.

Morality in armed conflict is not a mere mantra; it imposes significant demands on the nation state that it must adhere to limits and considerations beyond simply killing the other side. For better or worse, drone warfare of today will become the norm of tomorrow. Multiply the number of attacks conducted regularly in the present and you have the operational reality of future warfare. It is important to recall that drone policy is effective on two distinct levels: it takes the fight to terrorists directly involved, either in past or future attacks, and serves as a powerful

deterrent for those considering involvement in terrorist activity.[28] Its importance and effectiveness, however, must not hinder critical conversation, particularly with respect to defining "imminence" and "legitimate target." The overly broad definition, "flexible" in the Obama administration's words,[29] raises profound concerns regarding how imminence is applied. That concern is concrete for the practical import of Brennan's phrasing is a dramatic broadening of the definition of "legitimate target." It is also important to recall that operators—military, CIA, or private contractors—are responsible for implementing executive branch guidelines and directives.[30] For that very reason, the approach Brennan articulated on behalf of the administration is troubling.

This approach, while theoretically appealing, fails on a number of levels. First, it undermines and does a profound injustice to the military and security personnel tasked with operationalizing defense of the State, particularly commanders and officers. When senior leadership deliberately obfuscates policy to create wiggle room and plausible deniability, junior commanders (those at the tip of the spear, in essence) have no framework to guide their operational choices.[31] The results can be disastrous, as the example of Abu Ghraib shows all too well.[32]

Second, it gravely endangers the civilian population. What is done in the collective American name poses danger both to our safety because of the possibility of blow-back attacks in response to a drone attack that caused significant collateral damage, and to our values because the policy is loosely articulated and problematically implemented.[33]

Third, the approach completely undermines our commitment to law and morality that defines a nation predicated on the rule of law. If everyone who constitutes "them" is automatically a legitimate target, then careful analysis of threats, imminence, proportionality, credibility, reliability, and other factors becomes meaningless. Self-defense becomes a mantra that justifies all action, regardless of method or procedure.

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[28] *See* Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 107–09 (2010) (explaining the geographic expansiveness of drone policy and its use to prevent future attacks).

[29] John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Program on Law and Security at Harvard Law School (Sept. 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.

[30] *See* HUMAN RIGHTS INST. COLUMBIA LAW SCH., TARGETING OPERATIONS WITH DRONE TECHNOLOGY: HUMANITARIAN LAW IMPLICATIONS 25 (Background Note for the Am. Soc'y of Int'l Law Annual Meeting, 2011).

[31] *See* Amos N. Guiora & Martha Minow, *National Objectives in the Hands of Junior Leaders*, *in* COUNTERING TERRORISM AND INSURGENCY IN THE 21ST CENTURY 179, 184–85 (James J.F. Forest ed., 2007).

[32] *See id.* at 184.

[33] *See id.* (discussing the illustrative "black flag" incident in which fifty-six innocent Israeli civilians were killed after junior leaders mistakenly interpreted a commanding officer's comment that God should have mercy on any villager out after curfew to be a command to shoot anyone returning from the fields after curfew).

Accordingly, the increasing reliance on modern technology must raise a warning flag. Drone warfare is conducted using modern technology with the explicit assumption that the technology of the future is more sophisticated, more complex, and more lethal. Its sophistication and complexity, however, must not be viewed as a holy grail. While armed conflict involves the killing of individuals, the relevant questions must remain whom, why, how, and when. Seductive methods must not lead us to reflexively conclude that we can charge ahead. Indeed, the more sophisticated the mechanism, the more questions we must ask. Capability cannot substitute for process, and technology cannot substitute for analysis.