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Targeted Killing as Preemptive Action

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I. Introduction

Detention of terror suspects in the war against Al Queda has become unfashionable. With the public awareness of the use of "enhanced interrogation" at multiple detention centers, the apparently genuine lack of information possessed by the vast majority of the detainees, the generally shocking conditions of detention, the lack of access to counsel, the open-ended nature of the detention in most cases, and the near total lack of clarity surrounding the appropriate trial system for such detainees, detention of terror subjects has become a stain on America's conscience and a source of international embarrassment.[1] It is not surprising, then, that the State

[1] See responses to Executive Order of March 7, 2011, *For the Periodic Review of individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, which authorized the continuation of a system of permanent detention for terror suspects detained in the course of fighting the war on terror. Criticism of this Order was immediate and unambiguous. Human Rights Watch, for example, said that the continuation of "the practice of indefinite detention without trial," is one that "violates international law." http://www.hrw.org/en/category/topic/counterterrorism/guantanamo. The Center for Constitutional Rights (CCR) released a statement to the effect that, "Today's executive order....codif(ies the lawless) status quo. The creation of a review process that will take up to a year (then repeated quadrennially) is a tacit acknowledgment that the Obama administration intends to leave Guantanamo as a scheme for unlawful detention without charge and trial for future presidents to clean up." Http://ccrjustice.org/newsroom/press-releases/ccr-condemns-president-obama%E2%80%99s-lifting-of-stay-military-tribunals. And Anthony Romero, Executive Director of the ACLU, issued the following statement by way of response:

Department has recently shifted its attention away from detentions and towards targeted killing as the principal strategy for fighting the war on terror.[2] During the years 2004 to 2008, the Bush Administration authorized 42 targeted killings by drone, by comparison with the Obama Administration's current count of 180 authorized drone strikes.[3] The reliance on targeted killing has grown exponentially under the current Administration, with no more of an honest legal and moral examination of that practice than the Bush Administration genuinely grappled with the legality and morality of its interrogation and detention practices. The point of the greatly expanded use of this practice is not far to seek: to the extent it is possible to fight the war on terror without engaging in large numbers of morally questionable and potentially illegal detentions, that war can be sanitized and removed from public view. Indeed, the Obama Administration appears to have unabashedly endorsed this rationale for expanding the targeted killing program, as various officials self-consciously embrace the sage *Realpolitik* of law professor Ken Anderson: "Since the U.S. political and legal situation has made aggressive interrogation a questionable activity anyway, there is less reason to seek to capture rather than kill . . .. And if one intends to kill, the incentive is to do so from a standoff position because it

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While appearing to be a step in the right direction, providing more process to Guantánamo detainees is just window dressing for the reality that today's executive order institutionalizes indefinite detention, which is unlawful, unwise and un-American. The detention of Guantánamo detainees for nine years without charge or trial is a stain on America's reputation that should be ended immediately, not given a stamp of approval. Moreover, the procedures for providing more process are flawed as they vest too much discretion and power in the Secretary of Defense, essentially asking the fox to guard the hen house. http://www.aclu.org/national-security/president-obama-issues-executive-order-institutionalizing-indefinite-detention.

[2] See Harold Koh, Legal Adviser to Dept. of State, Address at American Society of International Law: International Law and the Obama Administration (March 25, 2010), available at **www.state.gov/s/l/releases/remarks/139119.htm** (defending the use of targeted killing as part of armed conflict with enemies in the war on terror).

[3] Need Cite. Newsweek article?

removes potentially messy questions of surrender."[4] Anderson's point seems hard to deny: if our interrogation and detention policies are to be conducted at the edge of, or beyond the bounds of the legal treatment of captured enemy combatants in war, as well as beyond the pale of moral decency, why shy away from killing instead of capturing, given that *that* practice appears to be no worse, and perhaps slightly better, than our recent practices involving detention and interrogation? And once one is committed to *targeted killing as an alternative to detention*, it is important to minimize the chances for the enemy to surrender. The use of drones enables killing from a distance, and thus minimizes the possibility of attempted surrender by the target, and with it the risk that an unwanted detention of suspected terrorists may be difficult to avoid.

Yet the turn away from a policy of detention towards that of targeted killing has not quite removed the war on terror from political controversy in the way the Obama Administration might have hoped.[5] On the contrary, it now appears that the myriad difficulties with the capture and detention of Al Qaeda suspects, or those potentially connected with Al Qaeda, are not eliminated by killing them in lieu of arresting them. The basic problem remains, but has been moved to a different spot under the rug. The political and military exigencies operating on the Bush Administration in the wake of 9/11 led it to fashion the in-between category of "non-enemy combatants" in order to justify ignoring the Geneva Conventions' protections for prisoners of war, the Federal Torture statute, the Convention on Torture (C.A.T.) and the many other national and international rules governing the trial and detention procedures for captured enemy combatants. These are the same pressures that have led the Obama Administration to identify a

[4] Cite to Anderson article; quoted in Newsweek piece.
[5] See Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* (May, 2010) (criticizing use of targeted killing in areas beyond zone of hostilities); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan*, 2004-2009 (Notre Dame Law School Legal Studies Research Paper No. 09-43, 2010).

category of persons in the targeted killing domain in between belligerents and non-combatant civilians. Thus the same recalcitrant task of discovering a justification for the enhanced interrogation of non-enemy combatants finds a parallel in the need to justify the decision to *target* non-combatants, such as Anwar Al-Aulaqi.[6] The same concerns about the role of the CIA in conducting interrogations of terror suspects, and whether the constraints that operate on military interrogators also apply to members of the executive branch, also arise in the controversy over whether it is legitimate for non-uniformed executive officials to engage in targeted killing.[7]

In both of these morally and legally fraught areas of policy we essentially find ourselves caught between two possible paradigms of justification: the basic paradigm of killing in war, on the one hand, towards which one would traditionally have looked to justify actions concerning both detainees and for the right to kill in war, versus some more "personal" justification for the use of harsh detention and interrogation techniques, such as self-defense or necessity, on the other. While it is not clear that either will ultimately succeed in rationalizing the morality of the practice under consideration, these two sources of possible justification—one public, the other essentially private, or at least *personal* in the sense of *self-regarding*—seem to exhaust the moral resources we have at our disposal to justify the practices in question. Thus despite the specific differences between the context of detention and that of targeted killing, and despite the different sources of domestic and international law that apply to the foundational problems each raises, the

[6] *See* Nasser Al-Aulaqi v. Obama, Gates and Panetta, Civil Action No. 10-1469 (JDB).
[7] *See* remarks by Gary Solis, *infra.*

central moral and legal questions that arise with respect to each practice are likely to follow a familiar pattern. This may hold out the hope that they will admit of a common solution.[8]

In this Essay, I shall focus on the practice of targeted killing, which I take to be the practice of *killing on the part of military agents or executive branch officials according to a policy of assassinating individuals whose names are contained in a pre-conceived list of legitimate targets*. In one sense, all justified killing in war is "targeted killing": It is obviously impermissible to attack targets indiscriminately in war, without a prior identification of their status. Moving outward from the most clearly permissible use of targeted killing, namely the killing of an active combatant in uniform who is part of the official belligerent forces of the enemy, the question will be whether the core permission of the right to kill in war extends to certain kinds of more attenuated cases. If we find that the rationale for making use of targeted killing in the straightforward cases under the law of war does *not* extent to cases more remote from the core justifications of the law of war, we may still ask whether there is justification to be had from elsewhere, such as those known within the domain of the domestic justification defenses.

This paper begins by answering the above question in the negative: the justification that applies to the practice of killing in war, in its traditional form, cannot properly be extended to the practice of targeting previously identified individuals in a way that abstracts from the proximity of their connection to active hostilities. The practice of targeted killing, as currently fashioned, is therefore not justifiable under the traditional laws of war in at least many of its applications. It will turn out, however, that the domestic law of *personal* justifications fares no better in most of the kinds of cases with which we shall we concerned. Finally, however, I shall suggest however,

[8] Need Citations.

that there are yet other rationales for killing those who pose a danger to the national security of a country that do not rely on either traditional just war theory or on the domestic law of personal justifications. One such alternative can be found in an extension of the privilege to *prevent* the commission of rights violations against one's person or the person of another whom one is entitled to defend. Although as applied to the practice of targeted killing, the justification will not turn out to be a traditional preventive rationale, I shall advance an argument for an expansive approach to prevention I call "pre-emptive killing." Pre-emption, unlike prevention, extends the preventive privilege to a number of cases in which the anticipated harm is non-imminent. Pre-emptive killing, however, is also more limited than either preventive killing or killing in accordance with just war theory, and thus its scope needs to be carefully identified and its application sharply circumscribed in accordance with its background justification.[9] The practice that emerges as justified on this account is somewhat different from the use of targeted killing as currently practiced. Normative theory as applied to national security practices in the war on terror thus suggest a re-examination of current policy in ways I shall suggest in the last Section of the current essay.

II. *Targeted Killing and the Realities of Modern Warfare*

Even more than the legal and moral soul-searching raised by the practice of detaining so-called "non-enemy combatants," the practice of targeted killing, and its perceived role in calculations of military necessity, casts in relief the complicated realities of modern warfare. This is in significant part a reflection of the degree to which the practice of targeted killing

[9] I develop the category of pre-emptive practices in response to threats of violence in *Threats and Preemptive Practices*, 5 LEG. THEORY 311 (1999).

departs from the traditional battlefield form of combat, and hence from the core justifications for killing in war. First, as mentioned above, individuals "targeted" according to a policy of targeted killing are *named* in advance of the attempt on their lives. They are identified on a list of legitimate targets and thus singled out for offensive action regardless of whether they are actively aggressing against the United States at the moment that they are killed. Hence some commentators identify the practice as "named killing," rather than merely as killing that is targeted to particular individuals.[10] Advance naming of individuals for targeting presents justificatory problems, points that have to this point in the debate about targeted killing gone unnoticed, as I shall explain momentarily.

Second, a quite independent concern from advance naming is the relative expansiveness of the criteria for inclusion on the list of "named suspects." Unlike where killing in war is concerned, the practice of naming and targeting terror suspects tends to extend well beyond those who are anchored in the activity of active combat.[11] The question then arises whether it is legitimate to target individuals engaged in the "war on terror" who lack the status of active combatants, and what the outer reaches of the criteria for inclusion on the list of those who can be targeted should be. Without clear criteria, we cannot begin to theorize about the moral and legal justification for targeting such individuals. This is a significant lacuna in the practice of targeted killing, because the relationship between the standard act of killing in war and the targeted killing of quasi-combatants, "non-enemy combatants," or engaged and active bystanders is signficantly under-therorized.

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[10] See Michael L. Gross, *Assassination and Targeted Killing: law enforcement, Execution or Self-Defense?* 23 J. Applied Phil. 323, 324 (2006).
[11] See Al-Auqi case.

Third, there is the much discussed issue of who may engage in the killing. If targeting those with a somewhat more attenuated relationship to active combat does not strictly speaking constitute an act of war, does that have implications for who may legitimately engage in targeting? Does relaxing the rules on the identity of the target imply a similar relaxation of the rules on the identity of the killer? The difficulty is that allowing CIA officials to conduct targeted killing, while a natural extension of many of its past practices, seems tantamount to hiring civilians to engage in acts of war, albeit executive branch officials. As Gary Solis has argued, allowing CIA officials to operate unmanned aerial vehicles makes them "civilians directly engaged in hostilities," an act for which they could be branded "unlawful combatants" and subject to prosecution.[12] He writes:

> CIA civilian personnel who repeatedly and directly participate in hostilities may have what recent guidance from the International Committee of the Red Cross terms "a continuous combat function." That status, the ICRC guidance says, makes them legitimate targets whenever and wherever they may be found . . . While the guidance speaks in terms of non-state actors, there is no reason why the same is not true of civilian agents of state actors such as the United States. [13]

As for the arguments in defense of this practice that CIA officials can constitute belligerents assisting the military, the practice arguably flies in the face of a time-honored side constraint on

[12] GARY SOLIS, THE LAW OF ARMED CONFLICT.
[13] Gary Solis, CIA drone attacks produce America's own unlawful combatants, *The Washington Post*, March 11, 2010.

the right to kill in war: that belligerents identify themselves by visible insignia.[14] When combined with the second point, namely that it is not always active combatants that are placed on the "kill lists," we have an official governmental policy of hiring civilians to target other civilians—a far cry from the traditional conditions on killing in war. Thus although the practice of targeted killing is derived from a model based on combatant killing in war, the practice is a *significantly* attenuated version of lawful killing in war, and hence merits careful legal and moral scrutiny.

Finally, the practice of targeted killing has become associated with the use of drones in order to effectuate the assassination of individuals on the named list. As Anderson rightly points out, this is at least in part because drone killing minimizes the risk that the target will attempt to surrender and convert himself into a detainee. The question that arises, however, is whether the justification for targeted killing, once identified, should be understood as placing any restrictions on method of killing or the form such killing takes. While commentators often express ambivalence about the use of drone technology, [15] whether it is ultimately justified depends on several crucial factors: does the "target" have a right under the laws of war to surrender if affording him this opportunity is militarily feasible? From a policy perspective, should the use of drone technology be discouraged because it unduly escalates killing in a quasi-combat situation, and thus draws international conflict further and further away from a model of lawful, symmetrical killing in war? To the extent that this question has not been adequately identified, the foregoing questions will remain unanswered. Worse, the failure to identify with clarity the justification for the application of the laws of war to the marginal and more attenuated cases of

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[14] Need Cite.
[15] *See* Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan*, 2004-2009.

targeted killing has a reverse inferential effect on the more standard cases of killing in war: if the justification for targeting attenuated belligerents is not clearly established, perhaps it is because the rationale for killing in war generally is not established with sufficient clarity.

The problem on which I shall focus—whether targeted killing in marginal cases of belligerency can be morally justified—goes to the heart of the difficulties associated with modern warfare. So great have the changes been in warfare since, roughly, the Vietnam War, that one might now say that the case of clearly permissible "targeted" killing against active and readily identifiable enemy combatants is a rare occurrence. No longer is the distinction between enemy soldier and innocent civilian bystander easily discernible, as would once have been the case when enemy combatants were identifiable from their uniforms or other identifiable insignia, as well as by their physical location relative to the heart of hostilities, namely on a clearly demarcated "battlefield." With the demise of the battlefield, it is not only difficult to distinguish combatants from non-combatants, as belligerents are cheek by jowl with civilians, but there may be no underlying fact of the matter as to who is combatant and who mere bystander. The moral and legal ambiguities of modern "targeted killing" are thus a reflection of the profound ambiguity of modern warfare. And for this reason, the traditional paradigm, represented in just war theory as a conflict between enemy soldiers attacking and counter-attacking in a clearly defined physical space of combat, has only a tenuous application to the moral problem of justifying lethal acts in war.

What are the problems with attempting to justify the practice of targeted killing as an extension of traditional just war theory? Let us begin by focusing on the practice of naming subjects to be targeted in advance of any observations with regard to their behavior at the moment of their assassination. What difference does it make whether subjects are named on a

"kill list" in advance of attack or whether the decision to target them is based on their behavior, or status as belligerents, at the time of killing? There are two that come clearly to mind, and these differences with the standard form of killing in war suggests significantly increased difficulties finding a justification for the practice in its current form. The two problems are, as I shall call them, *the bootstrapping problem,* and *the problem of statistical versus identified targets*. First the bootstrapping problem.

The question has recently arisen whether it would be permissible for the United States to assassinate Colonel Muammar Gaddafi. On the one hand, he is, by his own admission, responsible for terrorist attacks against the United States, in particular the bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988. He continues to support terrorism, and he is a sworn enemy of the United States and of his own civilian population. Surely the world would be a better place without him, almost no matter what arises in Libya to fill the void he would leave. On the other hand, it is not clear that under the laws of war the foregoing considerations are relevant. Whatever his crimes, Gaddafi is a sitting head of state, and as such possesses certain rights of sovereignty that cannot be ignored with respect to any foreign leader. There is little justification under the laws of war for assassinating a head of state on the ground that he is guilty of a crime against the United States, for which he could potentially be duly tried in the International Court of Justice, or because we see him as a tyrant to his own people and may be guilty of crimes against humanity on multiple occasions. The only legitimate basis for targeting him in the absence of an existing state of war between the United States and Libya would be that we have reason to fear his instigation of imminent attacks against the United States through terrorist attacks or otherwise that could not be prevented through lesser means.

Matters are different, of course, if we are at war with Libya. Gaddafi is the commander of the armed forces and therefore by definition a part of Libya's combat forces in times of war. That enemy forces are entitled to kill him is a non-controversial byproduct of the theory of war, insofar as killing him is deemed militarily necessary. It is, of course, a further question whether they are entitled to give up an opportunity to *capture* him in order to kill him instead, if they are in a position of being able to do either (and either would serve the purposes of military necessity). One would have thought the principle of using the least amount of force necessary to satisfy the demands of military necessity would govern here, but that added dimension of the debate about targeted killing is one I will leave to one side for the moment.[16]

There is, however, a rather more controversial aspect of the targeted killing decision with respect to Gaddafi, in light of which it is less clear whether we can consider killing Gaddafi a legitimate act of war or whether we must regard it as an illegitimate act of prior targeting of a sovereign head of state. And this is the fact that we cannot regard the fact of war in Libya as a neutral fact, just something that happened to occur that creates a combat relationship with Gaddafi and so justifies assassinating him. We, after all, are the ones who declared war on Libya, and to treat that as later justifying targeting him as head of state, on the ground that he is a belligerent with respect to the United States seems a piece of morally specious reasoning. It is, indeed, reminiscent of the doctrine of the *Actio Libera in Causa*, otherwise known as *creating the conditions of one's own defense.*[17] If I want to kill my enemy, but do not want to be guilty of murder, the best thing to do is to induce him to attack me, with the advance plan of killing him in supposed *self-defense.* Most criminal codes will, however, deny a defendant a self-defense claim

[16] Footnote needed on the kill or capture issue. What are the laws of war on this? Geneva?
[17] On this doctrine see Claire Finkelstein and Leo Katz, *Contrived Defenses and Deterrent Threats: Two Facets of One Problem* (co-authored with Leo Katz), 5 OHIO. J. CRIM. L. 479 (2008).; Paul Robinson, *Creating the Conditions of One's Own Defense…*

if "the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter."[18] Similarly, the defense of duress is generally unavailable "if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress."[19]

Moreover, even in the absence of specific code provisions denying the application of a defense when the defense is either the product of an intentional scheme, or is anticipated as resulting from a defendant's otherwise legal course of conduct, legal and moral intuition speaks strongly against allowing the defense in such situations, though the point remains controversial. Thus whether the fact that Gaddafi's status as a "belligerent" relative to the United States, at least most recently, is a product of our own potentially illegal attacks on Libya may or may not seem a basis for denying the defense of killing an opposing combatant in war.[20] The concern about the application of the reasoning of the *action libera in causa* in this context makes clear that there are at least some situations in which the justification for targeting a given individual may depend in a crucial way on *why* he bears the status of *belligerent* with respect to the United States, thus effacing to at least some degree the line between the *jus ad bellum* and the *jus in bello*.[21] At the very least, a total severance of *ad bellum* reasoning and *in bello* reasoning who allow for the following sort of abuse.

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[18] Model Penal Code § 3.04(2)(b)(i) (Use of Force in Self-Protection).
[19] See Model Penal Code § 2.09(2) (Duress).
[20] The point remains controversial in domestic criminal law as well, as some commentators take the view that creating the conditions of our own defense does not eliminate the entitlement to claim it, since from the standpoint of the aims of the criminal law, the self-defender has done "nothing wrong," even if his own impermissible scheming placed him in a position in which he was able to claim the defense.
[21] I discuss the general point below in commenting on Jeff McMahan's view of the relation between these two concepts.

Imagine we would like to target a head of state of a humane western democracy. We know placing such an individual, who is a non-belligerent, on the list of targets is impermissible under the laws of war. According to the above logic, we have only to declare war on that country in order to convert the relationship into one between belligerents, and although such a declaration would be impermissible from an *ad bellum* standpoint, it would then entitled us to target the now-enemy head of state without subjecting ourselves to liability for war crimes. As long as the *in bello* criterion for the legitimacy of killing enemy combatants does not depend on the justice of our cause in declaring war in the first place, we can kill with impunity as long as we have committed the quite different wrongful act of engaging in a wrongful declaration or act of war. But, finally, because wars are rarely "declared" in this day and age, it seems we need only perform an act of combat in order to turn ourselves into combatants. And *this* requirement is satisfied by an attempt to assassinate the sitting head of state of the other country! So it seems we can bootstrap our way up into establishing the legitimacy of our own wrongful acts of targeting by engaging in illegal-targeting-turned-legal by its own existence. The constraints formerly posed by the law of war are here doing no work towards creating a normative constraint on the act of killing in war.

The second questionable aspect about naming non-belligerents (or self-created belligerents) in advance of an actual attack based on their current conduct has to do with the difference between statistical and previous named victims, a moral phenomenon of much more general applicability that nevertheless appears to play a role in this context. Consider the following example.

Suppose a real estate developer is trying to decide whether to go ahead with the building of a large sky scraper in the middle of a busy downtown area. Imagine two scenarios that might

alternatively obtain. Scenario One: The developer knows to a very high degree of certainty that at least one person will die or be severely injured in the construction of this building.[22] He will of course take all precautions against the materialization of this risk, but he must consider the "cost" of going ahead with the project as containing some forecast of either wrongful death compensation or of payment for injury and/or disability. In general, we accept the permissibility of welfare-enhancing projects that bear negative externalities, as long as those projects remain socially productive once externalities are internalized. A foreseeable risk of social loss does not leave a moral stain on high-risk construction, any more than foreseeable risk of a certain level of road fatalities leaves a moral stain on driving.

However, consider Scenario Two: The developer this time is aware not only that there is a high degree of certainty that *someone* will die or become severely injured in the building of the sky scraper, but that Fred, one of his workers, will be the one to succumb to this loss. Is it permissible for Developer to proceed with the construction project in the face of the *known* or *anticipated* loss of an identifiable member of his work team? A distinction much noted, philosophers and legal scholars generally treat risks that fall in the first category—what they call "statistical risks"—as acceptable to run, but ascribe a wholly different character to risks to identifiable individuals. Why is not clear, but the intuition tends to be strongly felt. It is particularly odd, given that statistical risks can be run over a group of individuals all of whom are known to the risk taker, and still the sense is that statistical risks are acceptable if the underlying activity is productive, but that risks with the lives of previously identified individuals are usually not.

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[22] *See* Guido Calabresi, THE COST OF ACCIDENTS, p. __

It seems reasonable to suppose that the discomfort one might feel with the first feature of targeted killing we have identified, namely that it involves the prior identification of *named* targets, may be morally disturbing in a way that comparable to the additional moral discomfort of named versus statistical risk. The intuition is perhaps reflected as well in the Constitutional prohibition on *bills of attainder,* in which individuals were previously identified as meriting judicial exile, and their status as legal persons was systematically eliminated, both through criminal punishment and through escheat of their possessions to the State.[23] While I do not have a clearly identifiable account of what is objectionable about prior identification, either in the case of "kill lists" or in bills of attainder, it is plausible to think the former practice inconsistent with just war theory. Killing in war is a statistical process: each soldier places himself at risk for the sake of advances of the collective. They retain, however, a chance of being among those to survive that risk, and thus the process of waging war does not require their overt sacrifice, but merely a personal exposure based on the place occupied by an individual in the context of a collective. A targeted individual, however, does not share in the possibility of survival granted to members of the collective. He is singled out, not for exposure to greater risks than comparably situated others, but for elimination. His risks relative to others fighting on his side are *not* statistical risks, and do not carry the upside of membership in the war-making collective. He is a criminal awaiting execution rather than a belligerent fighting for a cause or for his own defense.

Next, consider the willingness of the Administration to include quasi-belligerents, or semi-active civilians on the list of targeted suspects. This problem was raised in a visible way in

[23] I am indebted to Leo Katz for noticing the connection.

the case of Al-Aulaqi v. Obama, Gates and Panetta.[24] Aulaqi, if a terrorist at all, is threatening to U.S. National Security by being a member of an organization that has extreme hostile intentions towards the United States. With group membership as the primary criterion for his inclusion in the government "kill list," we have no assurance that Al-Aulaqi's inclusion on the list is based on either his status as a belligerent in the traditional sense, or that it is based on a personal self-defense claim, that would also suffice to bring it within the permissible grounds for fighting in war. The threat he poses might not rise to the level of full-blown belligerency, and it might also fail as providing a basis for the exercise of self-defense against him by U.S. agents, due to lack of imminence. In this case Al-Aulaqi's representation on the targeted list cannot be justified either in terms of the law of war, or in terms of the domestic law of self-defense. His inclusion would represent an extension of the practices of war, with some modification, to what I have been calling the more attenuated cases relative to the privileges of war. Without belligerency on the one hand, and imminence on the other, the targeting of Al-Aulaqi is not defensible from traditional theory of fair combat.

Third, we considered above the problem of who may engage in targeting once we have discovered a justification for the presence on the list of a given targeted individual. If the individual has been morally and rightly placed on a target list, does the justification for assassinating him generalize to a universal justification, such that anyone has the right to act on the basis of the list and carry out killings of those targeted just by virtue of the fact that there is a generalizable justification for killing in war? Because my focus is more on the identification of those who are the subjects of the list rather than those empowered to carry it out its dictates, I shall not address this question further at the present moment. It is, however, useful to see that this

[24] *See* Nasser Al-Aulaqi v. Obama, Gates and Panetta, Civil Action No. 10-1469 (JDB).

uncertainty also plays a role in the questionable status of kill lists and how they may be permissibly implemented under current circumstances.

Finally, there is the distinctive feature that targeted killing can and often does take place by drone technology. Is there any difference between killing with a remotely-controlled drone and killing in hand-to-hand combat? As mentioned above, the crucial difference between manual killing and killing with drone technology is that the "target" is deprived of the opportunity to surrender at the point at which surrenders usually occur in traditional combat, namely at the point of death. On the other side, the same phenomenon might be identified as a riding roughshod over the possible obligation of the forces doing the targeting to capture rather than kill. If targeting takes place from a distance, the target is denied his opportunity to surrender, and the killer is able to avoid his obligation to capture rather than kill. In this regard, the use of drone technology "locks" the aggressor into a "killing scenario," where the initiation of the plan of action, starting with the placing of an individual's name on a "kill list," and committing to effectuate that killing with a technology that enables killing at a distance. Although the killing itself is not "automatic;" the drone is manually operated from a remote location. Still, the likelihood of deflecting the killing into a non-lethal course of action is greatly reduced. And in this sense, the use of drone technology raises normative problems similar to those raised in law enforcement by the use of spring guns and other automatically firing defensive machines.[25] In *Katko v. Briney*, the Supreme Court of Iowa found the use of a spring gun to protect a home from intruders to warrant liability by the owner of the home to a harmless

[25] See Larry Alexander, *The Doomsday Machine: Proportionality, Punishment and Prevention*, 63 MIND 199 (1980)

trespasser, on the ground that the automatic firing of the device made adjustment to unusual emergency situations impossible.[26] It wrote:

> A possessor of land cannot do indirectly and by a mechanical device that which, were he present, he could not do immediately and in person. Therefore, he cannot gain a privilege to install, for the purpose of protecting his land from intrusions harmless to the lives and limbs of the occupiers or users of it, a mechanical device whose only purpose is to inflict death or serious harm upon such as may intrude, by giving notice of his intention to inflict, by mechanical means and indirectly, harm which he could not, even after request, inflict directly were he present.[27]

In other words, since there is no privilege to protect one's home with deadly force against a non-violent trespasser, the same cannot be accomplished by means of a indiscriminate mechanical device that "automatically" subjects all who may enter the property, whether malevolent or excused, justified or merely misguided. The same point can be made about drone technology to effectuate military technologies: the element of human judgment that is eliminated when distant technologies are used to implement decisions about life and death of pre-selected targets plays an essential role in justifying the decision to eliminate a human target based on suspicions of dangerousness. Though technically reversible, decisions to target subjects with remote technology obviate the proximate human judgment that would most readily allow for reversal or

[26] 183 N.W.2d 257 (Iowa 1971).
[27] *Katko*, 183 N. W. 2d ___.

adjustment based on the target's demeanor or activity. As such it operates like a mandatory death statute that leaves no room for individual evidence in mitigation of sentence.[28]

Finally, even if one were to regard being "locked in" to a kill rather than a capture scenario and desirable, and hence justified from the standpoint of military necessity, there is a question whether it is morally acceptable to conduct assassinations of suspected, low-level terrorists at a great remove, given that the distance between attacker and victim also minimizes the opportunity for human intuition and appropriate empathy to play a role. Consider the heart-wrenching scene in *The Mascot*, a memoir written by a son of the tragic tale of his survivor father, who fled the small village of Koidanov, Belarus at the age of five after witnessing his mother and two siblings, along with several hundred other Jews from their village, murdered and thrown into a pit by a Belarussian Einsatzgruppen.[29] After wandering through the forest for a period of months thereafter, he was caught by a Latvian SS unit in the process of executing a group of Jewish prisoners who were at that moment lined up against a Church wall waiting to be shot. For some reason, the boy at that moment asked the Commander, who was about the pull the trigger, if he could have a piece of bread. As the son Mark Kurzem explained, the simple humanity of the request, the reminder the executioner and victim were both embodied and creatures of appetite, led the Latvian SS officer to remove the boy from the line up. After verifying his Jewish identify, and instructing the boy never to let anyone "pull down his pants," the officer adopted and protected the child, fitting him with a child-size Latvian SS uniform of his own, and allowing him to live as the "mascot" of the SS unit of which he was a part until near the end of the war. The shared humanity of that moment of rescue depended upon the physical

[28] Such have been held to be unconstitutional. Woodson v. North Carolina, 428 U.S. 280 (1976).
[29] MARK KURZEM, THE MASCOT (2002).

proximity of attacker and victim—the interlocking gazes and the officer's consequent ability to see a piece of himself in this desperate child. The more distance, the less the tug of that humanity that can, on occasion, lead to mercy, or the recognition of an injustice in the making.

For all of the above reasons, I conclude that the traditional justification for targeted killing in war fails with respect to the attenuated cases of modern warfare. Failing the just war hypothesis about why such killings might be justified, there is a second possibility that merits consideration, namely that an alternative reason for killing in war is that there is an imminent threat to the personal security of combatants. While the just war hypothesis about why such killings might be justified, there is a second possibility that merits consideration, namely that an alternate reason for killing in war is that there is an imminent threat to the personal security of combatants. While the just war and the personal defense rationales for killing in war operate substantially differently, both are valid in traditional combat, and both provide a justification for targeted killing in the context of traditional battlefield warfare. If the status-centered approach of traditional just war theory failes to justify a practice of advance identification of quasi-combatants, could the realm of agent-relative, personal justifications fare any better?

III. Belligerency and Self-Defense

Thus far we have considered the case for the suggestion that traditional just war theory does not readily accommodate the practice of targeted killing, as I have identified that practice above. Although we have not explored the essential justification for killing in war according to just war theory in any depth, the concept that does the work in that context, as well as in the laws

of war more specifically, is the concept of *belligerency.* This concept is what makes it permissible for one soldier to kill another in war, and for him to kill not just *defensively*, namely when he has an imminent fear for his own life, but *offensively* as well, namely in pursuit of victory for his side in the battle, regardless of the danger posed by the enemy soldier at the moment of attack. The concept of belligerency is also, arguably, what makes it permissible for one soldier to kill an enemy soldier regardless of the moral status of their country's claim to justice in the cause of war. According to Michael Walzer's view of the relationship between belligerents or combatants, the status of the enemy solider as belligerent carries in and of itself the justification to kill him because the relationship among enemy combatants reflects a "moral equality," in which each combatant, regardless of the moral status of his country's cause, possesses an equal entitlement to kill soldiers of the other side in virtue of his own adherence to a set of neutral rules governing the waging of war. These are the *jus in bello* rules for conduct war: those that govern *how* war is waged, rather than the *jus ad bellum*, namely *why* it was waged in the first place. The "moral equality of soldiers," as Walzer puts it, is a function of adherence to the *jus in bello,* rather than the *jus ad bellum*, or the justness of an enemy's cause in war,[30] and belligerency is a concept that operates in the *jus in bello*, rather than in the *jus ad bellum*. The right to kill the enemy soldier at all times, then, is a *status-dependent justification* for killing, rather than an act or character dependent criterion.

Jeff McMahan, by contrast, rejects the traditional thesis of the moral equality of soldiers, but he nevertheless subscribes to the thought that there is a justification for killing in war that stands apart from the justification for killing in other situations. For McMahan, it is the combatant whose cause reflects the true *jus ad bellum*, meaning that his fight reflects the just

[30] *See* MICHAEL WALZER, JUST AND UNJUST WAR (1977, 3rd ed. 2000).

cause of his country in going to war. The individual combatant inherits his country's right to wage war on the side of justice, just as the individual soldier fighting an unjust war is deprived of any such right, and the fact that his conduct adheres to the *jus in bello* does not immunize him from moral criticism based on his inherited reason for fighting.[31]

On either account—Walzer's or McMahan's—the justification for killing in war remains particular to the domain of war, despite the parallels both authors note with respect to the concept of self-defense in domestic criminal law. The distinctiveness of just war theory is particularly clear in Walzer's account: the *moral equality* thesis would appear to be unique to war, and the attempt to find parallels in the personal morality of life and death situations seems to elude the Walzerian theorist.[32] McMahan, by contrast, is explicit both in rejecting the moral equality thesis, and in claiming that the moral significance of the *jus ad bellum* over the *jus in bello* finds a parallel in the domestic rules regarding justification, in particular with regard to the law of self-defense: the rules of combat are, by McMahan's lights, mirrored in the normative relationship of agents aggressive against one another in ordinary morality, and outside the context of war. There too, McMahan suggests that the strength of an agent's right to kill another person depends significantly on the moral justifiability of the aggressor's cause as compared with that of the self-defender.[33]

Yet, by McMahan's own admission, the law of self-defense, as it is currently structured, requires significant revision in order to mirror the effacing of the *ad bellum/ in bello* split of traditional just war theory. To cite just one example, McMahan thinks that an individual

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[31] JEFF MCMAHAN, KILLING IN WAR (2009)
[32] But see my argument in *Responsibility for Acts of War* (unpublished manuscript, 2011) to the effect that the moral equality thesis exists in domestic criminal law doctrine as well.
[33] McMahan, at __.

attacked who is lacking in an overall justification for killing based on the superior morality of his cause, and who is confronted with a morally adequate basis for killing *him* on the part of his adversary, should, strictly speaking, just stand there and allow himself to be killed.[34] This is because he has no moral ground for attacking the adversary who is fighting a just war, as the fact that he is being attacked is not strictly speaking relevant to answering the question whether he has a justification for killing a belligerent attacker. But since it is not reasonable to expect a person attacked by an aggressor, even a justified aggressor, to remain still and allow himself to be attacked without counter-response, McMahan is willing to say that the non-justified victim of an attack, although not justified, is nevertheless *excused* if he exercises self-defense in the face of a justified attack.[35] Thus although the law of war and the domestic law of self-defense may on the deepest normative level display the same logic of moral justification, the law of self-defense as currently structured fails to reflect the law of war, and hence in practice, though perhaps not in theory, the law of war and the domestic law of violence come apart. On either account, the right to kill in war is conceived of as isolated from the rest of the law on the use of force in our personal morality and in our domestic legal provisions.

Let us put aside for the moment the debate about the moral equality thesis, both as it appears in war and in criminal law, and consider instead the role of self-defense in an argument appealing to just war theory. Although just war theory essentially depends on a *status*

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[34] McMahan, p. ___.

[35] McMahan, p. ___. While I would agree with McMahan, that the domestic criminal law echoes just war theory, I see both as committed to the moral equality of combatants, whereas he argues against the thesis in both contexts. As I have pointed out above, however, maintaining the correspondence of justification in war and justification in domestic defenses is acknowledged by McMahan to be at least a somewhat revisionary project on the criminal law side. If we are engaged in normative reconstruction of actual practices, then, it seems it may be more defensible to side with the theory that better captures the norms of current justificatory practice in the criminal law.

justification—that of belligerency—it is nevertheless clear that combatants, like everyone else, retain ordinary rights such as those pertaining to the defense of the person. They are the bearers, in short, of at least a *personal* right to self-defense. This implies that when they kill in war, the primary justification for their conduct is likely to be their status, but a secondary justification of exercise of a right to self-defense might operate in this context as well. This latter justification, by contrast with the law of war, permits killing on the basis of *acts*, not *status*; the actual and immediate danger an aggressor poses to one's security as opposed to the general category of individuals identified by their structural position relative to hostilities. In situations in which just war theory, in whatever form it takes, fails to provide an adequate justification for the right to kill, a combatant may always rely on his own right of self-defense where the defense applies, as well as other defenses, particularly justifications, that he would possess as a private person. What is noteworthy about standard criminal law justifications in this context is that although the right to kill in just war theory is considerably broader than the right to self-defense and other standard criminal law justifications, the latter set of reasons to kill provides in another respect a more *expansive* entitlement than just war theory.

For example, the right to kill in war is limited to combatants, even if on standard accounts at least, it is an "expansive" right in the sense that even combatants whose cause is lacking in moral justice can avail themselves of the entitlement. For this reason, it is a violation of the laws and morality of war to kill an enemy combatant if the soldier is aware of a substantial risk he will kill a non-combatant civilian in the process. But on a self-defense theory this concern is less pressing. If a terrorist threatens to throw a bomb at you, and he is standing next to his wife, who is unaware of his aggressive plot to deprive you of your life, you are entitled to throw a bomb pre-emptively at him in order to save your life, despite the fact that you will almost certainly kill

the innocent wife in the process. In cases in which the justification for killing in war depends on the private, individual right of self-defense of an individual combatant, therefore, it may not be as constrained with respect to lives of bystanders as it is under the parameters of just war theory. This is a curious result for the right to kill in war. It is perhaps for this reason that commentators on the laws of war see the private right to self-defense of soldiers as absorbed into the rights of enemy combatants.[36] To allow such defenses to exist side-by-side appears to threaten the coherence of the laws of war, since as "combatant" the soldier may not target enemy combatants where to do so would threaten the life of a bystander. If the basis for the justification for killing relies on an individual's private right to self-defense, although the contexts in which the right may be invoked will be narrower, the application of that theory will be substantially broader. The exercise of the right to self-defense, at least when it is private, will reduce the need for the combatant to concern himself with collateral damage. Where *both* rationales for killing in war co-exist, we may encounter significant moral and legal unclarity, since the two defenses produce rationales of killing with quite different scopes.

If an individual satisfies the criteria for belligerency, he is no longer treated as an attenuated threat to National Security; he is viewed as an immediate threat, and he is then open to being killed by virtue of his status, provided that the killing is done in a way that respects other independent boundaries, such as the restriction on causing disproportionate collateral damage or excessively harming the lives of civilians. If, on the other hand, an individual poses a non-immediate threat to National Security, writ large, but he poses an immediate risk of death to one's own person, one is then again entitled to target him and kill him, because he now poses a threat that is justifiably answered by actions that fall under the "self-defense" heading. Self-

[36] Need Cite.

defense, in this instance, knows no limitations based on the identity of the person threatened, and therefore it does not matter whether the use of force by way of response is initiated by military personnel, CIA agents, or others. But, I shall argue, when the perception that an individual poses a threat to National Security interests that is non-imminent, or with respect to which it is not immediately necessary to respond with force, and when the person of the responder is not personally threatened with an imminent use of force (or that it is immediately necessary to use force by way of response), the permission to use targeted killing fails.

In the previous Section we saw that killing in war according to the belligerency rationale may fail to justify the practice of targeted killing, and this is for two reasons: First, the practice pre-names individuals to be assassinated, a practice that goes significantly beyond the military practice of killing in battle and the level of "targeting" it involves. Second, as actually practice, targeted killing does not restrict the "kill list" to those who would traditionally be considered belligerents. On the list may appear people whose relation to active hostilities is somewhat attenuated, at least sufficiently so that they cannot be targeted as belligerents under the traditional laws of war. On the other hand, the personal defenses that remain a source of justification for killing in war, in particular self-defense, are highly likely to fail with respect to those on a named kill list, because the threat they pose is clearly going to be regarded as non-imminent. If just war theory and self-defense both fail to explain the legitimacy of killing according to a named target list, is there any other justification for the practice that *would* help to justify it?

IV. Pre-Emptive Killing in War

In this Section, I shall argue that there is a justification for the use of force that falls into a middle tier category between the status-dependent law of war and what amount to agent-relative justifications for the use of force. The kind of justification I have in mind is most clearly demonstrated by certain domestic law enforcement circumstances. I shall refer to such cases as instances of "pre-emptive" force. In these cases, I argue, despite the fact that neither of the standard justifications of *killing the enemy combatant under the laws of war,* or *self-defense against an imminent or immediate threat of serious bodily injury or death* is applicable, yet I shall claim that the use of targeted killing as an instance of pre-emptive force renders the practice justifiable, subject to certain more restrictive conditions having to do with the apprehension of suspects and avoidance of collateral damage. Thus the concept of "pre-emptive force" may explain why it is sometimes permissible to kill non-belligerents who are not posing an imminent threat to one's own or another's security. At the same time, however, it is crucial to understand that the entitlement to kill that falls under this rationale will be of a more limited sort than the justifications that stem from the entitlements that flank it—the killing of belligerents in an armed conflict, justified under traditional laws of war, on the one hand, and the killing of those posing an imminent threat to one's person or the person of another, justified by the traditional self-defense defense, on the other.

I shall approach the topic of pre-emptive force in war by focusing at first on a closely related topic, the topic of *preventive* force. Preventive force is primarily force exercised in self-defense or defense of others. It will be helpful to approach the topic from this direction, since there has been a great deal of confusion in recent years about the limits of preventive force. Since that concept is very often equated with self-defense (a mistake), it will be important to explain the privilege to kill in prevention, and to distinguish it from the more specific and

slightly different concept of self-defense. We will then return to the laws of war to compare the right to pre-emptive force with the offensive entitlement to kill fellow belligerents in an appropriately identified armed conflict.

It is sometimes permissible to use more force to prevent harm than it is to punish instances of that same harm. In many cases, for example, the victim of an assault may use deadly force to defend herself against a harm that could not be permissibly punished with death. It is even permissible in many jurisdictions to use deadly force in defense of habitation, but no jurisdiction has ever authorized the death penalty for intrusions into one's home alone. Finally, the police may use lethal force to pursue a fleeing suspect who is resisting arrest, as long as they suspect him of having committed a felony, believe he poses a risk of future felonious activity, and have warned him of their intent to use force if he does not submit to custody. In most such cases, however, the felony for which the use of lethal force is authorized is not murder, and hence would not merit the death penalty as punishment. These examples permit a generalization about the relation between preventive and retributive force, namely that *the extent of permissible preventive force is broader than the extent of permissible retributive force*. Thus if targeted killing is conceived as a form of punishment for prior terroristic activities, or as a method of deterring other terrorists (one of the standard functions of punishment), its scope will be narrower than if it is conceived as a method of preventive law enforcement.

While the foregoing states an oft-made point, scholars of domestic criminal law tend neither to opine about the source of this curious dichotomy, nor to trace its implications for other aspects of the criminal law. Discovering the philosophical foundation of a doctrine will often shed light on the scope of its implications. While I cannot undertake a full analysis of preventive force and its relation to retributive force in the current context, I do wish to focus on one

particularly helpful aspect of this dichotomy: Suppose one subscribes to a deterrence theory of punishment, according to which one seeks to both explain the current structure of criminal sanctions and prescribe modifications in that structure according to a theory of adequate general deterrence, then the preventive privilege cannot be explained in deterrence terms as well. The reason should be clear: if the amount of punishment generally prescribed by way of retribution is thought roughly adequate for deterring rational prospective criminals, relative to a desired baseline reduction in the societal levels of crime, then the amount of force authorized by way of *prevention* would represent *overdeterrence* relative to that same baseline. In short, if it is not necessary to use the death penalty to deter assault, then the preventive permission to kill in order to avoid being assaulted cannot be required for deterrence purposes, and must be explained according to some non-deterrence-based logic.

What sort of logic would that be? The authorization to use preventive force in self or other defense, or even to prevent to commission of a variety of offenses that are not against the person, must be explained according to one of the available alternatives to deterrence theory: preventive force may be permissible because it involves the exercise of a *right*, meaning that it stems from some set of deontological norms, or it may be permissible because it represents the expression in some sense of our non-negotiable rational agency. Such would be the case on a social contract picture of preventive rights. The implications of the comparably more expansive authority to use preventive force, as compared with retributive punishment, would then point in either of two directions: instances of social prevention would either be explicable as an expression of a set of societal deontological rights, or as an implicit global covenant for self-protection based on mutual advantage. I tend to the latter view. And out of this will develop a way of reconciling the right to kill in war: the traditional laws of war contain, at their core, a set

of rational restrictions on the offensive right to kill. These limitations are based on mutual advantage: countries who observe the restrictions on aggression contained in the laws of war fare better than countries that do not, as long as the forbearance from unbridled aggression in a conflict with the enemy is mutually observed. Where it is not mutually observed, war degenerates into "total war," a Hobbesian State of nature in which "every man is enemy to every man," and there is no justice, no law, no keeping of covenants.

In keeping with the foregoing observations from domestic criminal law, I shall elaborate a distinction between two kinds of preventive killing: the first I shall call simply "preventive" killing, and the second I shall refer to instead as "pre-emptive" killing: preventive killing, when justified, is dependent on the need to physically put a stop to the use of force on the part of another. Pre-emptive killing, by contrast, bears a more attenuated relation to the harm it is designed to forestall; its permissibility follows from the use of rational techniques legitimately employed to dissuade a potential aggressor from following through with his course of action. In particular, it often depends on the fact that it is sometimes permissible to threaten to inflict a harm in order to deter another from the use of violence. In such a case, when deterrence fails and when the threat was a legitimate response to the fear of force on the part of another, it may be permissible to follow through on a threat it was morally permissible to issue, despite the fact that the threatened action would not have been permissible as straightforward preventive action. Such is the case, I claim, with law enforcement action, and this provides the best model of the practice of targeted killing, or at least a model that situates the practice correctly relative to its own ambitions, and allows it to be normatively justified as well.

In what follows, I shall suggest that targeted killing is permissible when it falls squarely into the category of justified pre-emptive killing. It is rarely, if ever, justified as a form of

preventive action. This places certain constraints on the legitimate reach of targeted killing that would not be present if the action could be considered purely preventive. Among other things, targeting must be preceded by a threat to use force, along with an attempt to apprehend the source of the threat. As we shall see, considering targeted killing a form of pre-emptive killing also has ramifications for the crucial questions of who may be targeted, the extent to which bystanders may be endangered, and other policy aspects of the current debate over targeted killing.

[INCOMPLETE]