Can Targeted Killing Work as a Neutral Principle?

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1. Introduction

Suppose we are convinced by arguments (moral and pragmatic) in favour of a norm permitting targeted killing of civilians under certain conditions. Should we then be happy with the promulgation of that norm as a norm of national or international law?

One of the things that happens when a norm, N, becomes law is that people who argued in favour of it (informally at gatherings like this or in some more formal setting such as a legislature or a convention setting the terms of a treaty) lose control of it. It goes out now into the world and becomes the common possession of all, to be used by all-comers in ways they think fit. We are not responsible for all uses that may be made of N but, especially if N is to be part of the law of armed conflict, we ought to consider for starters whether we are comfortable with N in the hands of our enemies. So, for instance, if the norm in question is something like

> N_1: Named civilians may be targeted with deadly force if either (a) they are guilty of past terrorist atrocities or (b) they are involved in planning terrorist atrocities (or are likely to be involved in carrying them out) in the future.

then we should consider whether we are comfortable with N_1 in the hands of Al Qaida or Hamas or some state that supports terrorism.

Our discomfort at this prospect is not of course legislatively decisive. But we should reflect on the sources of the discomfort and consider whether they should make any difference to the kind of N we argue for or the kinds of arguments we bring forward in its favour. We should not make the case for such a norm based on the vanishingly improbable supposition that only fine people like us will be involved in its administration. We should make the case for it (if we can) having in mind both historical and recent experience of how principles like N_1 have actually been used in the kinds of situations that make politicians want to authorize extrajudicial killings (war, insurgency, and other destabilizing events). We should have in mind too our best guess about how N_1 is likely to be used if it is unleashed in the world. That is the subject of this paper, and it will be addressed directly in section 4.

In the last part of the paper (in sections 8-10), I shall make the case that the risk of abuse of norms like N_1 is not just an instance of the general liability of *any* legal norm to abuse. It is connected also with its content, for N_1 represents a relaxation of one of the most important norms we have—the norm against murder[2]—and the justifications adduced for N_1

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[2] No apologies for the use of this term. "Homicide" is no doubt calmer. Other terms, besides "targeted killing," might be "extrajudicial killing," "assassination," and "the use of death squads."

or for similar principles represent a significant modification of our usual way of arguing about murder—a modification (I shall argue) in the direction of moral opportunism via unreliable analogy.

2. Herbert Wechsler and Gerald Dworkin

[this section can be skipped; section 3 begins on p. 4]

I have chosen to approach these issues using the idea of "neutral principles." Can a norm such as N_1 operate as a neutral principle or does our support for N_1 depend crucially on the assumption that it will not be used by anyone who is very much less scrupulous than we would be in administering its terms? Can it operate as a neutral principle as between people who differ in good faith about how to use and apply the terms it contains? I mean the evaluative terms, especially, but at any rate the controversial factual judgements that its application may depend on: I have in mind the use of "terrorist" in N_1, for example. Or, again, does our support for N_1 depend on its being applied and the appropriate judgements being made by people like us?

The phrase "neutral principles" needs explanation. It was introduced into American constitutional jurisprudence by Herbert Wechsler, and into political philosophy by Gerald Dworkin in an article published in 1974.[3] My use of it is slightly different from theirs, and Wechsler and Dworkin have differences too in their respective uses of the idea. Let me very briefly indicate the concerns they raised under this heading.

As a constitutional scholar concerned with the rule of law, Wechsler worried in his 1959 Holmes Lectures about the principles that legal scholars and legal activists were using to mapping the text of the constitution onto problematic situations like school desegregation. When we say that the 14th Amendment requires the desegregation of schools (even though the Amendment makes no reference to education), we presumably have in mind some mediating principles (e.g. principles of interpretation) which explain what "equal protection" means in this (or any context). No doubt the intermediate principles we invoke will be appealing to us and our supporters. But are they just principles that we have tailored to generate the particular outcome that we are looking for? Or are they principles that we think everyone has reason to apply in constitutional cases, and that we would be willing to follow even when they led to less politically palatable outcomes in other cases? The demand for neutral principles is a demand for mediating principles that we can commit ourselves to following (or allowing others to follow), once our immediate interest in them—for the bearing they have on this case—has evaporated.[4]

Gerald Dworkin's concern was slightly different. Dworkin was interested in the bearing of something like moral universalization on the practical principles we adopt. We tend to adopt the principles that suit us. But, says Dworkin, "[t]here must be consistency in conduct, a refusal to make special pleas in one's own behalf or to consider oneself an

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[3] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harvard Law Review* 1 (1959); Gerald Dworkin, "Non-Neutral Principles," *Journal of Philosophy* 71 (1974), 491.

[4] Note that Wechsler was not looking, as some have thought, for a neutral version of the 14th Amendment. He was looking for neutral principles to help us apply the 14th Amendment; the Amendment itself of course conveys certain non-neutral values and commitments.

exception to general principles." One way of testing this he said is to contemplate a clear case of something that might (at a stretch) be regarded (by some) as an application of our principle but which we would certainly not approve of, and to consider what the relevant difference might be between that action and the one we are justifying with our principle:

> Thus those who defend the civil disobedience of Martin Luther King are asked to specify a relevant difference between his actions and those of George Wallace. … There are obviously a number of ways of defending oneself against such charges of inconsistency, as against charges of unprincipled behavior in general. I want to focus in this essay on one particular way of meeting the accusation of inconsistency. … In the case of civil disobedience the defense is that the laws that King broke were unjust while those Wallace violated were just.[5]

Dworkin says that it is characteristic of this sort of response to the charge of inconsistency that the application of the ancillary principle to particular cases is a matter of controversy for the parties whose conduct they are supposed to regulate. After all, Governor Wallace would not have accepted that the laws he was breaking were just. Dworkin calls a principle "non-neutral" if its application is controversial in this way. Of course, it is not non-neutral in the crude sense that one endorses only one's own applications of it (as such) and not those of others. Usually what happens is that one endorses the "*true*" applications of it—which of course one believes, in all humility, one's own applications to be—and one condemns false or incorrect applications (by others). One says:

> I did not say that one is justified in breaking the law if one believes it to be unjust. The action is justifiable only if the law *is* unjust. Governor Wallace was quite wrong in thinking the law he was opposing was unjust.[6]

Though he accepted that this was a fair distinction: Dworkin was interested in the circumstances in which this manoeuvre might be inappropriate or the circumstances in which is required to test his principles not just against the prospect of what he judges to be their correct application but also against the prospect of their attempted application in the world that we know by the fallible and quarrelsome beings that we share it with.

Gerald Dworkin's interest is close to mine. He believes that in constructive moral theory (like indirect utilitarianism or Rawlsian contractarianism) one has to consider proposed principles in the light of what will happen when people (as they are) *try* to apply them, not just in the light of their ideal or correct application. So, for example, an excessively complicated principle might have to be rejected if the bad consequences of its incompetent application outweigh the benefits of its correct application. And equally a principle that uses terms like "just" or "unjust" as the condition of an action needs to be considered in light of the consequences of its being applied by people who have the wrong view of justice as well as the consequences of its being applied by people who have the right view.

If this is true of constructive moral principles, it is certainly true of law. When we make something the law, we deliver it up into the hands of large variety of law-appliers,

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[5] Dworkin, "Non-Neutral Principles," 491-2.

[6] Ibid., __. (This is extracted from a dialogue that Dworkin imagines.)

ranging from ordinary people who undertake what jurists call its self-application[7] all the way through to officials and judges whose job it is review other people's applications of the norm. A norm like N_1, which uses terms like "terrorist atrocities," must be evaluated in light of the judgements that are likely to be made about the application of that phrase by all of those to whom N_1 is presented as the law, not just in light of the judgements that are likely to be made by those who apply it correctly.

I have spent this brief time in the company of Gerald Dworkin and Herbert Wechsler mostly to give readers a taste of how the idea of neutral versus non-neutral principles has been used in the past, and to indicate—in a ball-park sort of way—my misgivings about norms like N_1. Now it is time to turn directly to those misgivings. But before I do….

3. The neutrality of *ius in bello*

There is a slightly different sense of neutrality that I am not interested in (in this paper). As they are organized at present, the laws regarding the actual conduct of war (*ius in bello*) are even-handed as between aggressors and defenders, as between those go to war unjustly and those who are engaged in just war. Soldiers of both the unjust aggressive side and the just defending side are equally liable to deadly force at the hands of the other side's combatants; soldiers of either side are entitled to quarter and other protections; forbidden munitions such as poisonous gas are forbidden alike to attackers and defenders; civilians may not be attacked whether they belong an aggressor county or not; and so on. In other words, the application of *ius in bello* works independently of the application of *ius ad bellum*. Being a violator of *ius ad bellum* confers no greater liability to attack than complying with it, nor does it leave combatants with fewer rights. In this sense *ius in bello* is neutral.

This decoupling of *ius in bello* from *ius ad bellum* is controversial.[8] Recently some philosophers—Jeff McMahan, for example—have suggested that it should be adjusted to reflect the moral realities of warfare, so that combatants in an aggressive or other unjust cause should lose the privilege of using deadly force against their opponents and so that civilians responsible for aggressive or other unjust war-making should be liable to attack. Or at least McMahan and others have suggested that this is what morality requires, whether or not it can be made legally viable.[9]

I have my doubts about McMahan's suggestions (some of which I have explored in another paper) but it is not my concern here.[10] It is not this sense of neutrality I am interested in, and in this paper I do not want to criticize N_1 for its possible recoupling of some aspects of *ius in bello* to *ius ad bellum*. So, for example, one natural application of N_1 will be in what we call "the war on terror"; the war on terror is (let us say) a just response to the perpetration of terrorist atrocities and the threat of more. So those who are liable to be killed under N_1 are so liable because of their violation of *ius ad bellum*. They are unlawful aggressors and that is

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[7] For the idea of self-application, see Henry M. Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge and Philip P. Frickey eds., 1994) at 120.

[8] There is a good discussion in Walzer, *Just and Unjust Wars*, pp. ____.

[9] Jeffrey McMahan, "The Ethics of Killing in War," *Ethics*, 114 (2004), 693.

[10] See Waldron, "Civilians, Terrorism and Deadly Serious Conventions", in *Torture, Terror and Trade-offs: Philosophy for the White House* (OUP 2010), pp. 82-90.

why they may be killed. On the other hand, one can imagine applications of N_1 that do not depend on *ius ad bellum* status in this way. In a conventional war, people on either side might commit terrorist atrocities (or atrocities analogous to terrorist atrocities) and might therefore be liable for deadly force under N_1 whether they were unjustly responsible for initiating the wider war or not.

Either way, then, what I am interested in is the prospect of N_1's being administered and applied by people who do not necessarily use the phrase "terrorist atrocities" appropriately. To drive this point home, we might adopt something like McMahan's approach *arguendo*. Suppose we adopt a norm of targeted killing that makes its connection with *ius ad bellum* crystal clear:

> N_2: Named civilians may be targeted with deadly force in a war if they are guilty (even along with others) of unjustly initiating current hostilities or of unjustly prolonging the unjust war that they or others have initiated.

My question today is not about the wisdom or justifiability of tying *ius in bello* (who is liable to be killed) to *ius ad bellum* (who was the initial aggressor) in the way that N_2 does. My question is about our comfort or discomfort at having N_2 administered and applied by all those to whom it would have to be presented as law. For even if our targeted-killing norm is directed only at those who unjustly initiated hostilities, we cannot confine *its administration* to those who are engaged in what we think is a just war. We have to imagine N_2 being administered by people who have different views than we do about who unjustly initiated hostilities (or what it means to initiate hostilities unjustly).

4. In whose hands?

With this in mind, let's go now to what I think is the central difficulty. When we defend N_2, we imagine it being used to the world's benefit against Hitler or Saddam Hussein (in the First Gulf War), or when we defend N_1 we imagine its being used against Osama bin Laden or some high operative in Hamas. In recent discussions about targeted killing, I have heard people say that there has to be a principle that allows us to "take out" Colonel Gaddafi.[11] We think of the worst, most badly behaved civilian leaders of either aggressor nations or terrorist organizations or repressive regimes that we can imagine, and we contemplate making arrangements to have them killed, through the use of assassins or predator drones or "surgical" air-strikes.

But what should we make of German claims in 1939-40 that its killing of Polish politicians was a legitimate response acts of terrorism and aggression that they were fomenting? What should we make of the claim by Osama bin Laden that killing Americans is an appropriate response to terroristic incursions into sacred Arab lands by "crusaders"? Or Gaddafi's preposterous claim that he is entitled to kill the Western-sponsored "gangsters" who have been sent to commit atrocities against the people of Libya? That these claims are false goes without saying. That they are made in bad faith goes without saying. But that they

[11] Just to date the Libya reference: I am writing this on March 1-4, 2011 as civil war rages in Libya and as Colonel Gaddafi continues to turn his regime's guns on his own people.

might be used in public "justifications" of targeted killings (of Polish leaders by the Germans or of American politicians by Al Qaeda or of Libyan insurgent leaders by forces loyal to Gaddafi) is also beyond doubt, at least in an environment in which N_1 and N_2 are the law.

Please don't misunderstand me. People sometimes get very indignant about what they call "moral equivalence" if anyone ever draws any sort of comparison or analogy between the conduct of (say) British or American governments, on the one hand, and conduct of real bad guys, on the other hand. For the record, I am not claiming "moral equivalence" between Adolf Hitler and David Cameron or between Osama bin Laden and those who control the American predator drones currently searching for him in the Afghan/Pakistani highlands. I am just reflecting on the ways—the outrageous ways, no doubt—in which these norms might be used by those we rightly regard as our enemies. I believe that there is a difference between (a) an environment in which it is accepted that targeted killing of civilians under any circumstances is impermissible and (b) an environment in which targeted killings are licensed by principles such as N_1 and N_2. The difference with (b) is not just that the principles are deployed according to their terms and that as a result bad people like Hitler, bin Laden, and Gaddafi are killed. The difference is also that N_1 and N_2 are now there, as law, in the world to be abused.

Of course no one on our side would accept these "justifications" for a moment, and I shall turn shortly (in section 5) to the question of how we might control or regulate the application of norms permitting targeted killing. But first let us consider another range of possible applications, which we cannot dismiss so easily.

I have said that if we defend norms like N_1 and N_2 we should consider their use in the hands of our enemies. In addition we should also think about the use of N_1 and N_2 in the hands of the people *on <u>our</u> side*. I mean people, like the Presidents of the United States, France, and South Africa, for example, and the Prime Ministers of the United Kingdom, India, and Israel—people who are likely in fact to have authority or power to order actual killings on this basis. (I mean also the decision-makers under their authority—in the United States, the Secretary of Defense, the leaders of the Central Intelligence Agency, and military commanders in Iraq and Afghanistan.) In the case of the United States and Israel, we may think about the way in which targeted killing, without the authorization of international law, is being used at the moment. But we must also think about how legal principles permitting it are likely to be used by our side in the future.

Of course this involves speculation. More reliable examples are found by considering ways in which occupants of these offices have used terms like those used in N_1 (terrorism) in the past, and also by reflecting on who they might have wanted killed if only they had had these principles in their legal armoury. The history of both successful and inept American conspiracies to assassinate foreign leaders is well-known: exploding cigars etc. Less well-known are the hundreds or (depending who you believe) thousands of assassinations of communist-inclined village-level officials by American and South Vietnamese forces in the 1960s and 70s under the auspices of "the Phoenix Program."[12] We know the South African

[12] For rival accounts, see Dale Andrade, *Ashes to Ashes: The Phoenix Program and the Vietnam War* (Lexington Books, 1990) and Douglas Valentine, *The Phoenix Program* (William Morrow, 1990). Valentine's figure is 25,000 assassinations; Andrade's view is that the number of assassinations was much, much lower than that.

government condemned ANC leaders as terrorists and succeeded in assassinating some of them. (Others they only injured: in 1988 Albie Sachs, now retired as a justice of the South African constitutional court, lost an arm and an eye in one of these attempted targeted killings.) The British experience is particularly sobering. As it clung to the remnants of empire, Britain faced insurgencies in Palestine, Cyprus, Aden, India, Kenya, Malaya, and elsewhere. At one time or another, the British government denounced as terrorists those who emerged to become leaders of these countries: Kenyatta and Makarios are two well-known examples. The temptation to respond to insurgency by targeting people who could be described as terrorists (convincingly, plausibly, or conveniently) would no doubt be irresistible if it were not for the presence of strong legal norms prohibiting assassination. Or think of the use that might have been made of such principles in the conflict in Northern Ireland. We know the British government was comfortable framing and imprisoning innocent people in the struggle against terrorism and would no doubt have been comfortable hanging them, had hanging been available. It is impossible to imagine that if a principle like N_1 had been on the books in the 1970s it would not have been used to "take out" IRA and Sinn Fein leaders, including some who are currently Stormont and Westminster politicians.

In most of these cases, the governments were no doubt responding to something like targeted killing organized by the very people that they would have been tempted to target. This was true, for example, of IRA activity (of Irish insurgency from the days of Michael Collins to the assassination of Mountbatten in 1979), of Irgun activity in Palestine in the 1930s and 1940s, of Mau-Mau activity in Kenya, and of NLF activity in South Vietnam. Terrorist and insurgent organizations have often presented themselves as following some version of these principles (sometimes embodied in their published "rules of engagement"). No doubt such presentations are often disingenuous. The question for us is whether we would expect the use of such norms to be any less disingenuous in the hands of (say) the British government had the British been willing to adopt death squad tactics in their wars against terrorism and insurgency. No doubt abuses by a government will be somewhat different in character from abuses by terrorists or insurgents. But do they afford any less reason for hesitation when we contemplate making these principles (and the mentality that accompanies them) rules of law?

5. Preventing abuses.

Isn't every legal principle liable to abuse? Surely—some will say—it is a fallacy to discredit candidate principles like N_1 or N_2 simply on the ground that our opponents or our predecessors might be inclined to claim the benefit of them to cover their crimes or simply on the ground that someone might apply the principles in a mistaken or self-serving fashion. After all, one could say the same about many principles (governing the use of force) that we undoubtedly recognize and need, such as the elementary principle of self-defense.

Indeed, let us pause and consider the self-defense principle for a moment. That principle permits a person who faces an immediate deadly threat to use deadly force against the person attacking him. But people certainly have claimed the benefit of this principle to "justify" killings that were in fact not justified or to attempt to legitimize their own homicidal activity; or they have used it on the basis of reckless, negligent or mistaken assessments of the threats that were in fact facing them. Such abuses are unfortunately part of the life of any

legal principle. And surely it would be wrong to say that there should be no such principle of law for decent people to rely on simply because other people might be inclined to abuse it. (Notice by the way that this is not just an analogy: defences of principles like N_1 and N_2 are often presented as extensions or extended applications of the principle of self-defense.) The point about acknowledging the potential for abuse as part of the life of any legal principle is a good one, as far as it goes.

And here is where it goes. In the case of self-defense, we don't just acknowledge the point and then shrug off any concern with abuse. Instead we make arrangements within our system of law for very careful checks on each and every purported exercise of the principle. In a well-functioning legal system, *every single action using deadly force on this ground* is subject to intense, immediate and sustained investigation by the police, and charges are brought in a great many such cases where there is serious doubt about whether the criteria for self-defense have been properly applied. If there is disagreement about it, it is settled by a court. It is unthinkable that we would have and recognize and uphold anything like the self-defense principle (let alone its cousin, the license to use deadly force in defense of others) at the level of municipal law without the safeguard of such investigations.

What safeguards are envisaged for N_1 or N_2? One thing we know is that the governments into whose hands the use of these principles would fall in the first instance (governments like ours) are not the kinds of governments that have typically shown themselves to be scrupulous in this regard. In section 4, I suggested that history gives us every indication that if they had such powers these governments would abuse them. And now I am saying that our experience of such governments (again, *our* governments) over the past 50 years or so also suggests they will do *everything in their power* to prevent or obstruct retail investigation[13] by the courts and the police of the targeted killings that might be authorized under these principles. They will certainly do so if there is any genuine prospect that real abuses by them or their operatives might be exposed and prosecuted. *We have no experience to the contrary on this point.*

Of course there are good reasons for not having the sort of investigations we routinely conduct into cases of self-defense in the case of targeted killings. Intelligence sources might be compromised; legal procedures would obstruct military and counter-terrorist activity; and so on. Those are good reasons for not having investigations of this kind (which can be added to the bad reasons of political advantage, reputation, secrecy for its own sake, and a desire to cover-up abuses). The lack of any prospect of investigations analogous to those we conduct in criminal law is therefore understandable. Quite so. But this means that any argument for N_1 and N_2 proceeds on the basis not only that they are evidently prone to abuse but also on the basis that there cannot be any institutionalized safeguards to prevent such abuses.

Might there be other kinds of safeguards? I have focused mainly on *ex post* investigations analogous to those we use in ordinary cases of self-defense. In such cases there is no time for laborious deliberation in advance. Immediacy is key. But those who defend targeted killings as an extension of the principle of self-defense often jettison the immediacy

[13] By retail investigation, I mean investigation case-by-case of every such incident (analogous to what is now routinely done in ordinary cases where someone who has killed another person claims the benefit of self-defense). I don't just mean an occasional (wholesale) investigation of targeted killing as a general policy.

requirement. Once this happens then—even if the threat referred to in clause (b) of N_1, say, can be called imminent in some other sense—there might be time and space for *ex ante* review. A terrorist target is identified and convincing evidence is adduced that within a week he will be planting a bomb if he is not stopped in the next few days. Those next few days might give the authorities, both inside and outside the defense and military establishments, an opportunity to review the evidence and decide if the evidence supports targeting him. I believe that in the past, the IDF has sometimes proceeded on this basis; maybe it does so still.

However such an *ex ante* process might still be seen as flawed. The point is that we need to ensure, not just that there is some process or other in place, but that it is morally as well as legally effective. Given the kind of abuse likely to be endemic to the administration of these principles, we should be looking for a process actually capable of preventing misuses of the principles and prosecuting those who propose abusive exercises. That after all, in the *post facto* case is what we have for self-defense.

Legal scholars should be very careful than about offering up the moral basis of the principles that are used in criminal law for principle-building in environments that differ radically from the administration of criminal law. Everything we do in criminal law—even when the principles we use and the reasons supporting them seem to be at their most philosophical—is done under the auspices of a well-worked out and fairly reliable system of investigation, procedure and administration. Without that, our principles would be naked and precarious. What distinguishes the contribution that legal scholars can make to public debate on an issue like this is not that they can say, along with the denizens of the saloon bar, "Well it's self-defense, innit?" Anyone can propose death squads or assassination on that basis. The proper contribution that legal scholars can make is to remind the public how much our acceptance of certain principles in law (including self-defense) is bound up with legal process and how reluctant we should be to deploy principles authorizing homicide in an environment from which *we know* legal process will be largely banished.

6. Why not non-neutral principles?

I have proceeded in this paper on the basis that defenders of norms like N_1 and N_2 must contemplate how these norms will be abused if they are promulgated as laws of war. I have considered them as neutral principles. But why should norms be assessed in this way?

One possibility is that N_1 and N_2 might be proposed, not as legal norms, but simply as bases for moral assessment. The idea is that they may express conditions for the actual moral justifiability of certain acts of targeted killing. On this account, they are supposed to help us think through the issue of whether all such killings are wrong and they are supposed to help us focus on the factors which, in moral reality, might tend to make such killings permissible. This might be part of what Jeff McMahan has called "the deep morality of war."[14] McMahan acknowledges that deep morality may have no direct consequences for law reform, because so much else needs to be taken into account in the realm of legal administration. Indeed he has toyed with the idea that the deep morality of war might have to be "self-effacing"[15]—a

[14] McMahan, op. cit., 730-3.

[15] Ibid., p. 732. McMahan gives careful and inconclusive consideration to this prospect. I am not saying he embraces it.

firewall might have to be built between philosophy and practice to prevent the premature extrapolation of practical conclusions from deep morality. The delicacy of this relation on McMahan's account does not necessarily discredit deep morality, because it may have uses apart from law reform: "[I]f nothing else, the deep morality of war is a guide to individual conscience" for those who happen to stumble upon these principles in their own moral thinking.[16]

So: with this firewall in place, there is no reason why N_1 and N_2 should not be considered in the sort of non-neutral spirit that we saw Gerald Dworkin imagining in section 2.[17] For N_1, we would insist that there is a distinction between true imputations of "terrorist atrocity" and false (because mistaken or self-serving or exaggerated) imputations of that kind; and the claim that N_1 summed up the real requirements of deep morality in this area would be a claim about a connection between actual terrorist atrocities" (things properly described in those terms) and actually permissible killings. And similarly for N_2.

Of course this would not conclude the matter. It is no part of the case I am presenting that the neutral principles difficulty is the only problem with targeted killing or even that all problems with targeted killing are problems with its possible status as law. There are other objections, to which I hope other participants in this conference will do justice.

7. Assassins, poisoners, and so-called snipers

Though it has little to do with neutral principles, I want to mention one of these further objections. In the part of *The Metaphysics of Morals* (1797) devoted to the right of nations, Immanuel Kant, who was highly suspicious of the whole idea of laws of war, wrote:

> A state against which war is being waged is permitted to use any means of defense except those that would make its subjects unfit to be citizens…. Means of defense that are not permitted include using its own subjects as …assassins or poisoners (among whom so-called snipers, who lie in wait to ambush individuals, might well be classed)….[18]

Some of the reasons Kant adduces for this position have to do with the longer term prospects for peace. In his earlier essay on "Perpetual Peace," in what he called "The Sixth Preliminary Article for Perpetual Peace among States," Kant said: "No nation at war with another shall permit such acts of war as shall make mutual trust impossible during some future time of peace," and he cited "the use of Assassins (*percussores*) [and] Poisoners (*venefici*)" as examples.[19] I think we should take seriously what he says in the version from *The Metaphysics of Morals*. Such stratagems make murderers of our citizens, and whether the philosopher can make sense of it or not—whether with his analytic tool-kit he can plumb the depths of ethos, honor, and tradition that underpin this distinction—being a murderer in this

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[16] Ibid., 733.

[17] See text accompanying note 6, above.

[18] Immanuel Kant, §57 of "The Doctrine of Right" (6: 347) in *The Metaphysics of Morals* (1797), trans. Mary Gregor (Cambridge University Press, 1991), p. 154

[19] Immanuel Kant, *Perpetual Peace (1795) and Other Essays*, trans. Ted Humphrey (Hackett Publishing, 1983), pp. 109-10 (8: 346).

sense is not just a fact about killing someone (like being a soldier on active service). It is something vicious one becomes, a dishonourable character that one takes on, one that cannot then be sloughed off just as soon as the circumstances that call for targeted killing have passed. And this is not simply a fact about the administration of principles like N_1 and N_2. It is a consideration—I suppose from virtue theory[20]—about the deep morality of targeted killing. If anything it is exacerbated, not mitigated, by the secrecy with which the deep moral justification (if there is one) of this practice is likely to be shrouded.

8. The default position on murder

In general, whether we are working in deep morality or law, we must always have an eye to our moral point of orientation when we are considering principles along the lines of N_1 or N_2.

Our point of orientation is that these are principles that purport to authorize what would otherwise be murder. So our default position, the starting point of any moral analysis in this area—what our justificatory considerations, if they are to succeed, have to move us away from—is the proposition that there is to be *no* deliberate killing of anyone. None whatever.[21]

Now, if this is our starting point, then how did we ever end up with laws of war? After all, war involves killings and the laws regulating war authorize some of them. Well, the answer goes like this. In order to *regulate* war, rather than simply—and in a futile way—to ban it, our laws (both national and international) and our positive morality (to the extent that we have a positive morality) have taken up a distinction between types of killing: the killing of combatants and the killing of civilians.

> N_0: In the conduct of armed operations, only combatants may be targeted deliberately. Civilians may not be targeted deliberately.

We apply N_0 to war rather than the simple default—"Thou shalt not kill"—because we know the default moral principle is not viable in this arena. Our laws and our morality are not driven to embrace N_0 by any independent array of moral reasons that might support the one kind of killing but not the other. Instead, they have proceeded on the basis of moral sociology, discerning the possibility of a viable norm in this area. What they have taken up in N_0 is a strand of viable normativity that has emerged from centuries of ghastly conflict: a kind of rule that combatants have shown themselves willing to abide by, which seeks to confine approval of the killing that is endemic to war to the killing of designated and identifiable combatants by other combatants and which continues to condemn as murder the deliberate killing of civilians. To repeat: our laws and our morality have associated themselves with N_0 not because good reasons can be identified for allowing combatants to be killed, but largely because it looks as though this offers one line of constraint that can be held in the midst of an activity that is otherwise comprehensively murderous.

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[20] Perhaps see also Fernando R. Tesón, "Is Targeted Killing Ever Justified?" (abstract circulated for this conference): "[L]iberal governments should behave in accordance with the civic virtues that inform the civil society they represent. Assassination seems hardly compatible with political virtue."

[21] See the discussion in Waldron, "Civilians, Terrorism and Deadly Serious Conventions", in *Torture, Terror and Trade-offs: Philosophy for the White House* (OUP 2010), pp. 106 ff.

N_0 seems to have proved roughly sustainable and administrable. It seems capable of being inculcated as a matter of ethos, discipline, and professionalism among soldiers. We cling to it not because we thinking the killing of combatants is OK but because we are doubtful of our ability to hold any other line. And even this one comes under mighty pressure, not just from anger and heat of battle, but from awareness of the advantages that might accrue if only we would allow a few violations. Still, pressure or no pressure, it is not entirely unrealistic to think that this line can be held. N_0 has proved capable of anchoring itself in habit, ethos, and discipline in the midst of the conduct of war.

Understanding this background helps us understand the caution that must be brought to any attempt to change the laws of war, for example by adding N_1 and N_2 to N_0 as exceptions. To change N_0—to revise it or reformulate it—involves considerable risk. Changing or revising the laws of war means letting go of one strand of proven normativity (in an otherwise normative-free zone) in which over the centuries an awful lot has been invested and seeking to invent or impose another in the hope that the reasons that motivated *us* to propose the change will also be sufficient motivation for men in the heat of battle (or politicians in the sweat of crisis) to adapt their postures, expectations, tactics, training, peer relations, and discipline to the newly formulated version.

Awareness of this should persuade us of the inadequacy of the usual methodology of moral philosophy in this area. For many philosophers, the appropriate way to review and criticize the laws of armed conflict is something like the following. (1) Figure out the reasons that support the content of the existing norm, N_0. And then, (2), consider what analogies those reasons might support or what modified norm might be rigged up to conform more perfectly to the force of those reasons. Or, (3), forget N_0 and the reasons underlying it altogether and go back instead to moral fundamentals (like some sort of enlightened utilitarianism) to come up with one's own version of a rule permitting some (but not all) killings in war. In my view, these are all reckless ways to proceed, because they fail to come to terms with the conditions (set out in the last few paragraphs) under which viable anchored norms are possible for an activity of this sort.

Not only that, but the philosopher's critique of N_0 and its current administration is like shooting fish in a barrel. Of course the existing laws of war are imperfect by moral standards. They seem to turn on such trivialities: "A moral principle that turns on the wearing of uniforms? Really!" And of course the reasons adduced to support the killing of combatants can easily be adduced analogically to support the killing of civilians under certain circumstances. But this philosophical impatience is often also thoughtless. People say, "Well at least we ought to be able to kill the civilians who are effectively in command of a war effort." Does it make a difference to them—do the philosophers remember—that the principle of *civilian control of the military* is one of the most important constitutional principles we have, so that whenever any constitutional democracy goes to war, you are always going to be able to find a civilian commander to kill, whether it is George Bush or Winston Churchill? By the standards of moral philosophy, this constitutional principle leads to an untidy situation when we interrogate N_0. We say, "N_2 would be tidier, and let's forget the constitutional principle (or pretend we have never heard of it)." But in the context of trying to secure *some* order, *some* normativity, in this otherwise murderous situation, an untidy norm is better than no viable norm at all. If the use of moral analogy forces us to

choose between these possibilities, it may be the use of moral analogy that has to be abandoned.

9. Murder and moral opportunism

I said that the default position is a general norm prohibiting murder, and one of the reasons for not being so free in our use of analogy is that a norm regarding homicide needs deeper underpinnings than simply acceptance of the balance of reason that supports it. We sometimes say there is a taboo against killing, by which we mean not only that the reasons for not killing are very, very serious but that the kinds of situations where killing might be attractive are situations fraught with such passion and temptations that something more than mere reasoning is required. This is certainly true of the heat of battle: there we have had to try to hold a different moral line, represented by N_0, in order to secure anchorage for any effective norm at all. And it may be true for political decision-making also—that is, the kind of decision-making that is likely to be involved in the administration of N_1 and N_2.

As in war, so too in politics and the pursuit of national security, the stakes sometimes seem to be very high. The viability of national policy may be at stake or innocent lives or the survival in office of not-so-innocent politicians. True, we are not talking now about the heat of battle; politicians have opportunities that soldiers generally lack to ponder the advantages of various killing strategies at their leisure. But when lives are at stake (even if it is not the lives of the decision-makers) the temptation to approach the possibility of murder in a calculative spirit is still very strong. Politicians have to deal with things like insurgencies. An insurgency, whether justified or unjustified, may surely pose what seems to be a grave threat to values like public order and innocent lives. And it may seem that sometimes it would be better to simply "eliminate" some of those who are leading the insurgency—posing this threat to the life of the nation—than to continue risking the values that the government stands for. Such a tactic may seem less costly and more decisive than whatever can be achieved through the scrupulous but uncertain and protracted procedures of law-enforcement or less costly. And it may also seem more decisive than what can purchased in the uncertain currency of compromise, negotiation, the addressing of grievances, and so on. Assassinating one's enemies (or those who can be designated "enemies of society") always has been one of the standing temptations of politics and government. If it has been held at bay in the practice of some advanced democracies over the past hundred years, it has been held at bay only partially and uncertainly, as the incidents alluded to in section 4 of this paper indicate. And that work has been done by legal and moral norms that have something like the entrenched and anchored character of the norm, N_0, described in section 8—a norm that is secured (albeit imperfectly) as a taboo by moorings that are only partially a function of the moral reasons that can be articulated in its support.

And now it is proposed that we should unmoor N_0—which inhibits us form killing some of our enemies—and replace it with another norm, with a narrower application, which, it is said, will be more responsive to the balance of underlying reasons regarding justifiable killing. Now it is proposed that we should abandon N_0 and proceed to establish new licenses to kill, along the lines of N_1 and N_2, defended by moral analogy with reasons we associate with the license already embodied in the norm about killing of combatants, even bearing in

mind that *that* license was established not because reason demanded it but because unless some such concession was made there might be no hope of regulating killing in warfare at all.

To be clear: what is proposed is the unravelling of the background taboo against homicide or the reduction of it to the balance of reasons that from time to time can be adduced in its favor. Suddenly killing is to be assessed as a matter of the balance of social advantage. I don't pretend the advantages are not real—peace, political stability and the protection of innocent lives. Nor do I doubt that colleagues who argue for N_1 and N_2 are arguing in good faith: they are moved to counsel the pursuit of these advantages through killing in the circumstances of instability and insecurity that characterize modern politics, because they think of us as already being committed to a certain number of killings anyway. But none of us should be surprised to find comprehensive abuse taking place, once politicians are informed by their moral advisors that after all it is not inappropriate to begin thinking in this way. "Bring 'em on" very quickly becomes "Take him out."

That's what I have tried to establish in sections 8 and 9: the liability of norms like N_1 and N_2 to be abused is not just an instance of the general liability of *any* legal norm to abuse. It is connected also with their content, for N_1 and N_2 represent a more general relaxation of one of our most important norms—the norm against murder—and the justifications adduced for N_1 and N_2 represent a significant modification of our usual way of arguing about murder, a modification in the direction of unreliable analogy and moral opportunism.

10. Once more: in whose hands?

I began this paper by asking us to imagine norms of targeted killing in the hands of our enemies. I went on to remind us of the actual practice of those who have been in the recent past not our enemies but our representatives; and I asked us to consider how such people would likely have used the norms of targeted killing that are currently being contemplated. Now I think I have just about circled back to *us,* our scrupulous selves. Instead of asking "What would bin Laden do with N_2?" or "What would Kissinger do with N_1?" we ask: "How will these new norms fare in our hands?"

I worry about the attitude towards killing revealed in the reasoning we use. It seems that our first instinct is to search for areas where killing is already "alright"—killing in self-defence (which we considered in section 5) or killing of combatants in wartime (which we considered in section 8)—and then to see if we can concoct analogies between whatever moral reasons we can associate with such licenses and the new areas of homicide we want to explore. In my view, *that is how a norm against murder unravels*. And it unravels in our moral repertoire largely because we have forgotten how deeply such a norm must be anchored in light of the temptations it faces and how grudging, cautious, and conservative we need to be—in order to secure that anchorage—with such existing licenses to kill as we have already issued.

In the end, then, the real objection is not simply that these principles are liable to abuse, so that they cannot be defended as neutral principles. In the end, what is objectionable is the inherently abusive character of the attitude towards killing revealed by reasoning that says: "We are allowed to kill some people by principles we already have; surely, by the same reasoning, there must be other people we are also allowed to kill."