

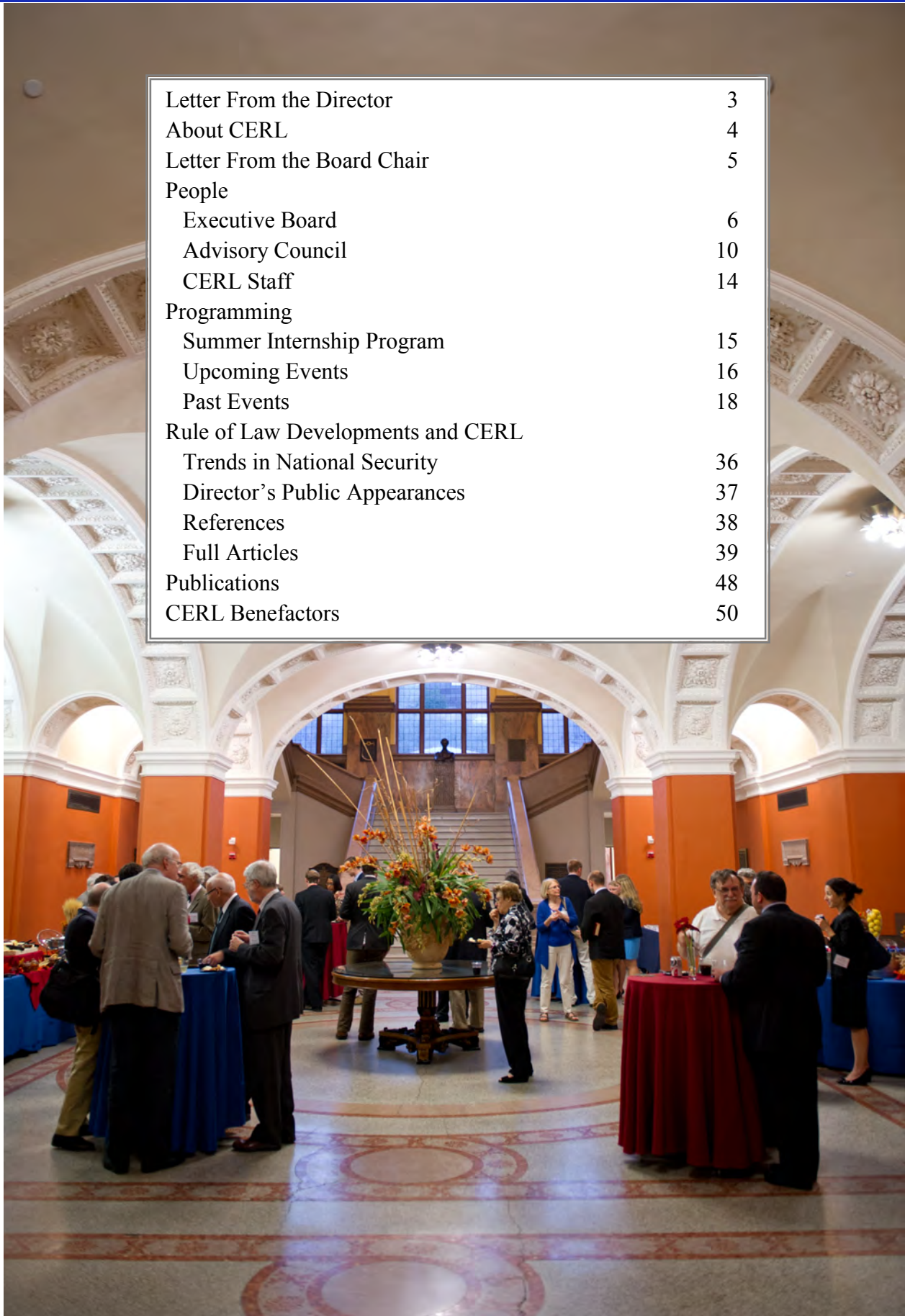
Center for Ethics and the Rule of Law

Biennial Report 2012-2014



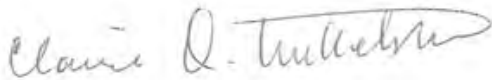
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LETTER FROM THE DIRECTOR

On July 1, 2012, with the generous support of Dean Michael Fitts and Pamela and William Craven, I founded the Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania Law School. My purpose in starting CERL was to focus attention on challenges to maintaining the rule of law in a society facing severe threats to its national security. CERL was conceived as a collaboration between academics from a number of different disciplines and professionals involved in national security and military ethics at the highest levels. After two years of intense work holding conferences, producing publications, engaging in outreach to representatives from government, the private sector, the military, the legal profession, journalists, medical and psychiatric professionals, business men and women, as well as a wide array of leaders in the academic community, I am delighted to report that CERL has already had a significant impact on the conversation about national security and its relationship to ethical and legal norms. With the expertise of the members of our Executive Board and Advisory Council, we have also sought to exemplify the interdisciplinary and inter-professional collaboration we hope to foster. We have begun and will continue to develop a highly professional and nuanced dialogue between professionals and academics involved in thinking through rule of law values in the context of national security. CERL now sets its sights on the coming years thanks to backing from Penn Law Interim Dean Wendell E. Pritchett and Executive Board member Paul G. Haaga, Jr. We look forward to taking on the challenges ahead, and hope to have the support and engagement of many of you as we continue the conversation.



Claire Finkelstein

Center for Ethics & the Rule of Law, Director
Algernon Biddle Professor of Law & Professor of Philosophy
University of Pennsylvania

ABOUT CERL

Mission Statement

CERL is a non-partisan interdisciplinary institute dedicated to the preservation and promotion of the rule of law in twenty-first century warfare and national security. The only center of its kind housed within a law school, CERL draws from the study of law, philosophy, and ethics to answer the difficult questions that arise in times of war and contemporary transnational conflicts. It represents the vision of its founder and director, Professor Claire Finkelstein, in uniting scholars and policymakers from various fields in a multi-disciplinary conversation on some of the most challenging issues of our time.

How CERL is Unique

Embracing the need for legal scholarship that addresses issues of national security while providing moral justification for legal positions, CERL stands out as a leader in a small community by dedicating events and scholarship solely to national security and its relationship to the rule of law. While some institutes have significantly contributed to research on rule of law issues, they focus on the criminal justice system. Other centers specialize in areas of national security, but do not put a strong emphasis on the pressing ethical issues relating to national security. CERL is unique in bringing together research regarding rule of law *and* national security issues to one world renowned university.

In order to encourage interdisciplinary scholarship, the Center's approach to ethics and legal theory does not appeal to any particular doctrine or locate itself within any single field of study. Rather, CERL embraces diversity in thought and seeks the experience of professionals and scholars from a variety of backgrounds. CERL's commitment to practical moral questions requires that no matter what school of ethics or legal theory one adheres, they must be able to bridge theory and practice. More than a forum for only legal scholars and philosophers, CERL events create an open and pluralistic environment for intellectual exchange and career development across many disciplines at a time when informed understanding and societal improvement is more critical than ever before.

CERL's Impact

CERL is well positioned to have a positive impact on policy at the national level. With an Executive Board comprised of top academics and practitioners at the highest echelons, CERL increasingly engages policy-makers involved in cutting edge decisions in both government and the private sector. CERL events regularly attract military leaders, both domestic and foreign, prominent practitioners from the intelligence community, as well as military and civilian lawyers who have served or are currently serving the Administration in a variety of roles.

Beyond maintaining relationships with active practitioners, CERL solicits the expertise of scholars in a variety of academic fields, such as philosophy, political science, psychology, medicine, and engineering, among others. Additionally, CERL collaborates with actors in the private sector to understand the challenges faced by executives in the global defense industry.

Establishing, maintaining, and expanding its network of relationships across many fields is the key to CERL's success.

LETTER FROM THE BOARD CHAIR



Technology has accelerated the pace and nature of warfare as never before. This era of ubiquitous, and some would say uncontrolled, internet communications, has allowed groups of people to communicate and to coordinate hostile actions, and that has posed grave dangers to national security. It has created a new class of well organized non-state adversaries and raises a wide range of issues around the concepts of both sovereignty and privacy. Standoff and unmanned weapons have created a new set of questions about the morality and legality of using certain capabilities under various circumstances. Over two years ago, Pamela and I were delighted to learn of the interest in these and other matters of crucial importance to national security on the part of CERL's Founder and Director, Professor Claire Finkelstein. We were impressed by her efforts to engage not only noted scholars and academics, but national security policy makers and defense decision makers in a dialogue. We envisioned CERL as an organization that could help the United States chart a course through the maze of questions created by new

technologies, some of which we have personally been involved in developing. In addition, we wanted to encourage addressing such matters in a thoughtful and considered fashion, and in collaboration with the entire range of policy makers and scholars. We are delighted that CERL has undertaken this mission and are delighted with CERL's progress in the past two years. Pamela and I would also like to extend our thanks to Penn Law Interim Dean Wendell Pritchett (pictured below) for his enthusiasm and support as CERL moves forward. We are proud to have been able to provide initial funding to set CERL on a path which we hope will contribute to intelligent and principled reflection on national security and the rule of law in the United States and abroad.

William Craven,
CERL Board Chair



EXECUTIVE BOARD

Mr. William Craven, Chair



Bill Craven was the founder/CEO of Overwatch Systems, a software company serving the Intelligence segment of the Defense industry. Overwatch was built through a series of six acquisitions which were integrated to provide the US intelligence community with a single, collaborative set of intelligence analysis tools. The company was sold to Textron (TXT:NYSE) in December of 2006.

Prior to forming Overwatch, Craven had been the CEO of Paravant, a public company (PVAT:NASDAQ) serving the defense community with rugged and high speed computing solutions for Battlefield and Intelligence applications. Bill together with Rick McNeight had taken the company public in 1996. Paravant then successfully acquired and integrated four defense companies serving both the tactical and intelligence segments.

Prior to Paravant, Craven had been President of the Seiko Mead Company, a joint venture between the Mead Corp. of Dayton, Ohio and the Seiko Group of Japan. He served Mead in a variety of technical Product Development and Marketing roles.

Professor Claire Finkelstein, Founder and Director



Claire Finkelstein writes at the intersection of philosophy and law. She has published extensively in the areas of criminal law theory, moral and political philosophy, philosophy of law, and rational choice theory, and has recently begun writing on the law of war and war crimes. One of her distinctive contributions is bringing philosophical rational choice theory to bear on legal theory, and she is particularly interested in tracing the implications of Hobbes' political theory for substantive legal questions. She has held fellowships at the

American Academy in Berlin, the Princeton Institute for Human Values, and the Social and Political Theory Group at the Australian National University. She is currently finishing a book entitled *Contractarian Legal Theory*, and she is the editor, (with Jens Ohlin and Andrew Altman), of an edited volume entitled *Targeted Killings: Law & Mortality in an Asymmetrical World* (Oxford University Press, forthcoming 2012), and of *Hobbes on Law* (Ashgate, 2005). She is also the Algernon Biddle Professor of Law and Professor of Philosophy at the University of Pennsylvania Law School.

Professor Finkelstein graduated from Harvard College, *magna cum laude* and continued her studies at the University of Paris where she earned a "Maitrise" (Masters) in philosophy. She received a J.D. from Yale Law School and served on the Yale Law Journal. Professor Finkelstein earned a Ph.D. from the University of Pittsburgh Department of Philosophy.

Professor Kevin H. Govern



Kevin Govern is an Associate Professor of Law at Ave Maria School of Law. He has also served as an Assistant Professor of Law at the United States Military Academy and has taught at California University of Pennsylvania and at John Jay College. Professor Govern began his legal career as an Army Judge Advocate, serving 20 years at every echelon during peacetime and war in worldwide assignments involving every legal discipline. He has published widely and spoken frequently on international and comparative law, national security and homeland security law, military operations, and professional ethics. His honors include: Institute for National Security Studies (INSS) Research Grant Award (for research into Islamic Attitudes toward legitimacy of international law and international agreements) (2007); Phi Kappa Phi International Honor's Society; Legion of Merit (twice awarded for exceptionally meritorious conduct in the performance of outstanding services and achievements); and Most Outstanding Legal Professional in United States Special Operations Command.

Mr. Paul G. Haaga, Jr.



Paul G. Haaga Jr. is retired Chairman of the Board of Capital Research and Management Company.

Prior to joining Capital in 1985, Paul was a Partner in the law firm of Dechert Price & Rhoads in Washington, D.C. From 1974 to 1977, he was a Senior Attorney for the U.S. Securities and Exchange Commission.

He recently served as acting President and CEO of National Public Radio from September 2013-July 2014. He has served on the NPR Board of Directors since 2011, previously as Vice Chair of the Board and Chair of its Finance Committee. He also serves as Chairman of the Board of the Los Angeles County Museum of Natural History, and Trustee of the Huntington Library, Museum and Gardens in San Marino.

In addition, Paul is a Trustee for Princeton University, a member of the Board of Overseers of the University of Pennsylvania Law School (Chairman 2007-2013), a Trustee of Georgetown Preparatory School, a member of the National Council of the American Enterprise Institute, a member of the Board of Overseers of Hoover Institution at Stanford University, and a member of the Policy Circle at Pardee-Rand Graduate School.

Paul earned a bachelor's degree in economics from Princeton University, an M.B.A. from the Wharton School, and a J.D. from University of Pennsylvania Law School. Paul and his wife Heather have two children, Paul III and Blythe, and four grandchildren, Sienna Baye, Paul Grayson, Lucas Miles, and Alexander Sturt Haaga. Paul resides in La Cañada, California

EXECUTIVE BOARD

Professor Duncan MacIntosh



Duncan MacIntosh BA (Queen's '79), MA (Waterloo '81), PhD (Toronto, '86) is Professor and Chair, Philosophy Department, Dalhousie University, Halifax, Nova Scotia, Canada. His work has appeared in *The Journal of Philosophy*, *Australasian Journal of Philosophy*, *Philosophical Studies*, *Analysis*, *The British Journal for the Philosophy of Science* and elsewhere on such topics as intransitive preferences and procrastination, needs as bases of moral entitlements, self-ownership in Libertarianism, the reasons of rational persons, the structure of ideal moral codes, scientific realism, the rational evaluation of preferences and the relationship between rationality and morality. Most recently, he has been studying the implications of practical and moral paradoxes like the Prisoner's Dilemma and the Deterrence Paradox for the structure of agency, commitment and value.

Professor Larry May



Larry May is a political philosopher who has written on conceptual issues in collective and shared responsibility, as well as normative issues in international criminal law. An authority on Just War theory, legal ethics, and international law, Professor May has advised the U.S. State Department, the CIA, the National Institutes of Health, and the International Committee of the Red Cross, and been quoted in international court decisions.

He is currently W. Alton Jones Professor of Philosophy, Professor of Law, and Professor of Political Science at Vanderbilt University. He is also Strategic Research Professor at the Centre for Applied Philosophy and Public Ethics, Charles Sturt University as well as Visiting Fellow at the Australian National University.

Professor Christopher W. Morris



Christopher W. Morris is Professor of Philosophy at the University of Maryland, College Park. His interests are in moral, political, and legal philosophy, and the theory of practical rationality. Some of his current research develops the implications of his book *An Essay on the Modern State* for international affairs and world order and, in particular, legitimacy. Other topics include justice and reasons for action and a number of questions about moral standing.

Before joining the University of Maryland in the spring of 2002, Morris was Professor of Philosophy at Bowling Green State University and Senior Research Fellow at the Social Philosophy and Policy Center.

Professor Jens Ohlin



Jens Ohlin is Professor of Law at Cornell University. Professor Ohlin specializes in international law and all aspects of criminal law, including domestic, comparative, and international criminal law. His latest work concentrates on the legal implications of remotely piloted drone strikes, and he is a co-editor of a collected volume entitled *Targeted Killings: Law and Morality in an Asymmetrical World* (2012).

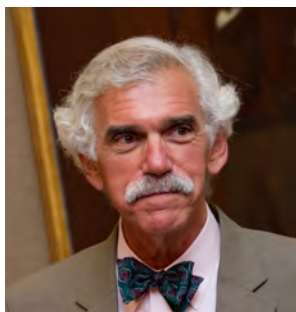
He also is the author, with George Fletcher, of *Defending Humanity: When Force is Justified and Why* (Oxford University Press, 2008), which offers a new account of international self-defense through a comparative analysis of the rules of self-defense in criminal law.

Professor Connie Rosati



Connie Rosati is Associate Professor of Philosophy at the University of Arizona. Professor Rosati received a Ph.D. in Philosophy from the University of Michigan and a J.D. from Harvard Law School. She is currently a member of the faculty at the University of Arizona in Tucson, but has previously taught at Rutgers, Northwestern, the University of Michigan, the University of California, Davis, the University of Pennsylvania Law School, and the University of San Diego Law School. Over the years, she has taught a variety of courses in ethics, political philosophy, law, and the philosophy of law. Her research interests lie principally in the foundations of ethics and in jurisprudential questions about constitutional interpretation and the objectivity of law.

Professor Harvey Rubin



Harvey Rubin received his PhD in Molecular Biology from the University of Pennsylvania in 1974 and his MD from Columbia University in 1976. He was a House Officer in Medicine at The Peter Bent Brigham Hospital in Boston and did his fellowship in infectious diseases at Harvard and the Brigham. Dr. Rubin joined the faculty at the University of Pennsylvania in 1983 and became Professor of Medicine in 1998. Dr. Rubin holds secondary appointments as Professor in the Department of Microbiology, School of Medicine and as Professor of Computer and Information Sciences at the University of Pennsylvania School of Engineering and Applied Sciences. At the present time Dr. Rubin serves as a member of the School of Medicine Curriculum Committee. He won the Donald B Martin, MD Teaching Service Award in 1996. He also serves as the course director for the Wilderness Medicine elective. He is the Director of the Institute for Strategic Threat Analysis and Response (ISTAR) at the University of Pennsylvania.

Brigadier General (Ret.) Stephen Xenakis, M.D.



Stephen Xenakis is a retired brigadier general and Army medical corps officer with 28 years of active service. He has been a senior adviser to the Department of Defense on neurobehavioral conditions and medical management.

Having spent cumulatively nearly three months at Guantánamo Naval Base, Dr. Xenakis has interviewed multiple detainees at Guantánamo and advised attorneys on their respective cases. He currently provides consultation and expert testimony as needed on approximately seven current or former detainees. Dr. Xenakis has reviewed medical, intelligence, and military files of nearly 50 detainees and accused terrorists as a consultant to attorneys, government authorities, and human rights organizations. The individuals have included high-value detainees, convicted belligerents, and others awaiting release and return to their homes.

Jules Zacher, Esq.



Jules Zacher has practiced law since 1974 representing persons who have contracted Legionnaire's disease and medical providers who have not been reimbursed by insurance companies for care rendered to their patients. He received his law degree in 1974 and his Master of Arts degree in 1970 from Temple University. He received his undergraduate training at the University of Pittsburg. Mr. Zacher was a member of the board of the Council for Livable World, an arms control group based in Cambridge and Washington DC. He has represented the Council in litigation involving the Federal Advisory Committee Act against the Robb-Silverman Commission (WMD

Commission), and the Freedom of Information Act against the Missile Defense Agency and the National Nuclear Security Administration.

ADVISORY COUNCIL

Professor Anita Allen



Anita L. Allen is an expert on privacy law, bioethics, and contemporary values, and is recognized for her scholarship about legal philosophy, women's rights, and race relations. In 2013, Allen was appointed The university of Pennsylvania's Vice Provost for Faculty. In 2010 she was appointed by President Obama to the Presidential Commission for the Study of Bioethical Issues. Allen, who has written more than a 100 scholarly articles and numerous books, has also contributed to popular magazines and blogs, and has frequently appeared on nationally broadcast television and radio programs. Allen has served on numerous editorial and advisory boards, and on the boards of a number of local and national non-profits and professional associations including the Hastings Center, EPIC and the Bazelon Center.

Ambassador Dell L. Dailey



Dell L. Dailey is the President of a family owned consultant company. Dell Dailey and Family spans both Department of Defense and Department of State programs, numerous product focused companies, private equity, small arms company, think tank efforts and international operations. Prior to his current efforts in the private sector, he served as the Coordinator for Counterterrorism for The Department of State, charged with coordinating and supporting the development and implementation of U.S. Government policies and programs aimed at countering terrorism overseas. Ambassador Dailey served over 36 years on active duty in the United States Army. He reached the rank of Lieutenant General as the Director of the Center for Special Operations (CSO), U.S. Special Operations Command, at MacDill Air Force Base, Florida.

Professor Emeritus David Gauthier



From 1958 to 1980, David Gauthier was a member of the Department of Philosophy at the University of Toronto, serving as Chairman from 1974 to 1979. Since 1980, he has been a member of the Department of Philosophy at the University of Pittsburgh, where he is now Professor Emeritus. He served as Chairman from 1983 to 1987, and was appointed a Distinguished Service Professor in 1986. He has held visiting appointments at UCLA, UC Berkeley, Princeton, UC Irvine, and the University of Waterloo. Gauthier is the author of numerous articles, some of the most important of which are collected in *Moral Dealing*, and several books including *Practical Reasoning*, *The Logic of Leviathan*, *Morals by Agreement*, and *Rousseau: The Social and the Solitary*. In addition to work in moral theory, Gauthier's main philosophical interests are in the history of political philosophy, with special attention to Hobbes and Rousseau, and in the theory of practical rationality, where he begins from an attempt to understand economic rationality, rather than from Kantian or Aristotelian antecedents.

Professor Martin Lederman



Martin Lederman was Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel from 2009 to 2010, and an Attorney Advisor in OLC from 1994-2002. From 1988 to 2004, he was an attorney at Bredhoff & Kaiser, where his practice consisted principally of federal litigation, including appeals, on behalf of labor unions, employees and pension funds. Prior to rejoining the Department of Justice, he was a regular contributor to several blogs and web sites, including Balkinization, SCOTUSblog, Opinio Juris, and Slate, writing principally on issues relating to separation of powers, war powers, torture, detention, interrogation, international law, treaties, executive branch lawyering, statutory interpretation and the First Amendment.

ADVISORY COUNCIL

Professor Sharon Lloyd



Professor of Philosophy, Law, and Political Science Sharon Lloyd works in the history of political philosophy, with special attention to the moral and political theory of philosopher Thomas Hobbes. Trained and mentored by John Rawls, one of the most influential political philosophers of the 20th century, Lloyd's scholarly interests in political philosophy and its history, contemporary liberalism and liberal feminist philosophy reflect that tutelage. She has particular interest in the moral and political theories of Machiavelli, Mill, Hobbes, Marx, and Rawls.

Lloyd's work in philosophy has attracted the interest of legal scholars and is often published in law reviews. Lloyd is regarded as an important voice in the current generation of liberal feminists. Lloyd enjoys teaching in USC's honors program and general education on such topics as self-identity and moral responsibility, political obligation, and social ethics for earthlings and others through science fiction.

Professor Jeff McMahan



Jeff McMahan began his doctoral work at Oxford University under the supervision of Jonathan Glover and Derek Parfit, then completed the PhD at Cambridge University under the supervision of Bernard Williams. He is the author of *The Ethics of Killing: Problems at the Margins of Life* (Oxford University Press, 2002) and *Killing in War* (Oxford University Press, 2009). He has several other books forthcoming from Oxford University Press, including a collection of essays called *The Values of Lives*, a book on war intended for both academic and nonacademic readers called *The Right Way to Fight*, and a sequel to his 2002 book

called *The Ethics of Killing: Self-Defense, War, and Punishment*.

Lieutenant General (Ret.) Paul E. Menoher, Jr.



Paul Menoher served over 35 years on active duty in the US Army, retiring on 28 February 1997, as the Army's Senior Intelligence Officer, the Deputy Chief of Staff for Intelligence (DCSINT). He assumed the position of DCSINT on 10 February 1995. Before that he served as Commanding General (CG) of the US Army Intelligence and Security Command (INSCOM); CG of the US Army Intelligence Center and Fort Huachuca, Arizona; CG of the US Army Intelligence Agency; and Director of the Army Intelligence Master Plan.

His awards include two awards of the Distinguished Service Medal; three awards of the Legion of Merit; two awards of the Bronze Star; four awards of the Meritorious Service Medal; the Joint Service and Army Commendation Medals, and the Expert Infantryman's Badge. He has been inducted into the Military Intelligence Hall of Fame; given the Director of Central Intelligence's National Intelligence Distinguished Service Medal; and presented the Association of Old Crows "Gold" Award for lifetime accomplishments.

Professor Mary Ellen O’Connell



Mary Ellen O’Connell is the Robert and Marion Short Professor of Law and is Research Professor of International Dispute Resolution—Kroc Institute, University of Notre Dame. O’Connell’s research is in the areas of international law on the use of force and international legal theory and is the author or editor of numerous books on these subjects.

O’Connell has been named a Senior Law Fellow at the Center for Theological Inquiry in Princeton for the 2014-2015 academic year.

O’Connell was a vice president of the American Society of International Law from 2010-2012; she chaired the Use of Force Committee of the International Law Association from 2005 to 2010. Before joining the faculty at Notre Dame, she was a faculty member at The Ohio State University, the Johns Hopkins University Nitze School of Advanced International Studies Bologna Center, and Indiana University. From 1995 to 1998, she was a professional military educator for the U.S. Department of Defense in Garmisch-Partenkirchen, Germany. Prior to joining the academy, she practiced law with the Washington, D.C.-based international law firm, Covington & Burling.

Professor Rogers Smith



Rogers Smith is the Christopher H. Browne Distinguished Professor of Political Science, University of Pennsylvania and the Chair of the Penn Program on Democracy, Citizenship, and Constitutionalism.

Professor Smith centers his research on constitutional law, American political thought, and modern legal and political theory, with special interests in questions of citizenship, race, ethnicity and gender. He was elected as an American Academy of Arts and Sciences Fellow in 2004.

Professor William Burke-White



William Burke-White, an expert on international law and global governance, served in the Obama Administration from 2009-2011 on Secretary Clinton’s Policy Planning Staff, providing the Secretary direct policy advice on multilateral diplomacy and international institutions. He was principal drafter of the Quadrennial Diplomacy and Development Review (QDDR), Secretary Clinton’s hallmark foreign policy and institutional reform effort. Burke-White has written extensively in the fields of international law and institutions, with focus on international criminal and international economic law. His work has addressed issues of post-conflict justice; the International Criminal Court; international

human rights, and international arbitration. His current research explores gaps in the global governance system and the challenges of international legal regulation in a world of rising powers and divergent interests. In 2008 he received the A. Leo Levin Award and in 2007 the Robert A. Gorman award for Excellence in Teaching.

CERL STAFF

Mr. Ilya Rudyak – Director of Research



Ilya Rudyak is the Director of Research and CERL's inaugural Fellow in National Security and Ethics. Prior to joining the Center, he practiced law as a litigation attorney, worked as an educator at Yad Vashem, the World Center for Holocaust Research, and served aboard the Israeli Navy Dolphin Class submarines as the Head of Weapons Department. Ilya holds a joint LL.B. degree in law and psychology from the Hebrew University of Jerusalem, an LL.M. with distinction (valedictorian) from the University of Pennsylvania Law School, and is currently the 2013-2015 Fox Fellow and a doctoral candidate at the University of Pennsylvania Law School S.J.D. program. At CERL, Ilya works closely with Professor Finkelstein in designing the Center's short and long term strategies, policies and programming. He also develops the research agenda for conferences and position papers, as well as provides analytical support for the fundraising, website design and communication functions of the Center. In addition, Ilya oversees the Center's daily operations and supervises the work of CERL's fellows and interns.

Ms. Ashling Gallagher – Research Fellow



Ashling Gallagher's work at the Center focuses on war and national security, with particular attention paid to the psychology of combatants, intelligence, and ethics. As a Fellow, Ashling is tasked with conducting academic and institutional research, tracking developments in areas of national security law and policy, engaging donors, and increasing public awareness to CERL's mission and programming.

Ashling graduated *cum laude* from the University of Pennsylvania in 2012 with a Bachelor of Arts degree in political science.

Ms. Gay Walling – Grant Developer



Gay Walling has over eight years of experience in the Philadelphia nonprofit community with a focus on development and communication. At CERL she coordinates efforts with University Foundation and Corporate Relations to identify and communicate with potential donors and works to increase awareness of CERL's programming. Ms. Walling graduated *cum laude* from the University of Pennsylvania and received a Master of Arts degree in Museum Education with honors.

SUMMER INTERNSHIP PROGRAM

The CERL Summer Internship Program aims to increase students' theoretical and practical understanding of complex nature of the preservation of rule of law values in the face of the changing nature of warfare. Interns in the program work as a team under the supervision of Professor Finkelstein and Mr. Rudyak, and participate in CERL activities to the greatest extent possible. They, *inter alia*, research issues of national security law and policy, attend meetings to discuss developments in war and national security, assist in planning and organization of CERL conferences, and update CERL's website to include news articles relevant to the interests of the Center.

The Summer Internship Program embodies CERL's commitment to ensuring the development of the next generation of ethical and legal scholars. Summer Interns receive academic credit or a modest stipend for their full attendance during the program and successful completion of the program's requirements. Students may also receive supervision on a paper relevant to CERL's mission or interests. In addition, CERL holds weekly lunches for the students to discuss work in progress for those writing academic papers, as well as recent developments in national security law.

2014 Summer Interns

Paul Eberwine, Yale University

Sam Fullhart, University of Pennsylvania Law School

Ashling Gallagher, University of Pennsylvania

2013 Summer Interns

Matthew Cantania, Ave Maria School of Law

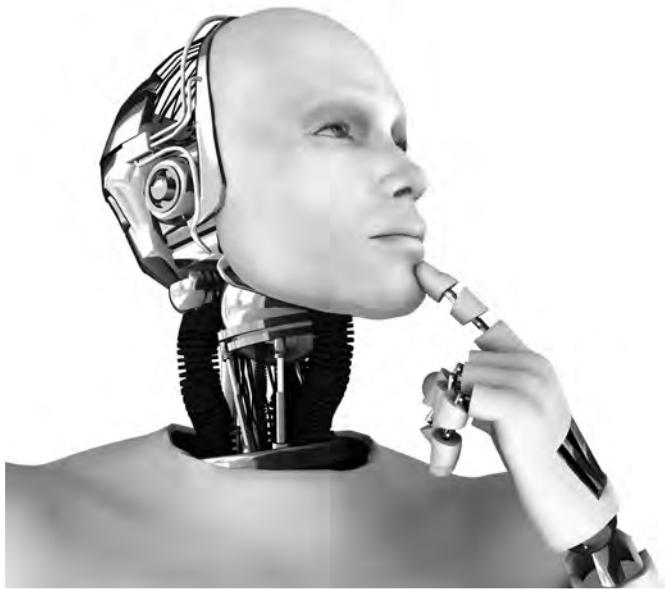
Kelsey Schindler, Ave Maria School of Law

UPCOMING EVENTS

The Ethics of Autonomous Weapons Systems

November 21-22, 2014

Autonomous Weapons Systems (AWS), as defined by the U.S. Department of Defense, are weapon systems that, once activated, can select and engage targets “without further intervention by a human operator.” Many have voiced ethical concerns about developing AWS, on the grounds that machines will never be able to replicate human moral reasoning. But what is the distinguishing characteristic of human rationality? On some theories, it is just the ability to



select ends and reason instrumentally towards the attainment of such ends. On this view, it would be possible for AWS technology to replace human reasoning on the battlefield. On another view of practical reasoning, however, moral decision-making by human beings involves an intuitive, non-algorithmic capacity that is not likely to be captured by even the most sophisticated of computers. If this is true, would the development of AWS be morally problematic? The development of AWS technology on a broad scale has the potential to

transform the nature of war in a way that is qualitatively different from previous technological innovations in the defense industry. It is up to those involved in the study of military ethics, however, to decide whether pursuing such a transformation is ethically desirable.

The purpose of this timely conference is to inspire two days of constructive dialogue pertaining to the issues that arise concurrently with the development and deployment of AWS. By bringing together distinguished scholars and practitioners from various fields to engage in discussion and exploration of the moral and legal challenges posed by Autonomous Weapons Systems, CERL will expand existing knowledge and inspire new ideas on the use of AWS technology. Discussions will be sparked by the carefully selected background readings as well as original papers from conference participants.

Ethical Dilemmas in the Global Defense Industry

February 6, 2015

To maintain global repute for integrity, industry leaders must be able to: keenly understand the operating environment in which they operate; recognize legal obligations, cultural expectations and ethical dilemmas pertaining to such environment; and develop strategies for engagement and negotiation with foreign partners in a legal and ethical manner. This conference will consider past and present law and policy, as well as the moral and ethical strictures involved with the acquisition of goods and services from external sources. CERL will evaluate current legislation, regulations, directives, actions, and attitudes for preserving the integrity of Federal procurement assuring the fair treatment of bidders and contractors.

Planned Events for the 2015/2016 Academic Year

Declassification, Freedom of Information, and the Rule of Law

In this participatory democracy that is the United States, it is a foundational right that citizens shall have their voices heard by their legislators. This, however, becomes difficult when citizens are unaware of the actions the government takes on their behalf. The need for accurate and open information from our government is a constant, but not always satisfied. President Obama, in his first few days in Office, revoked and replaced the controversial George W. Bush Executive Order 13233, which limited access to Presidential records and either delayed or prevented entirely the release of such records. Further, President Obama issued a memorandum declaring his Administration's commitment to an open and transparent government. While the Obama Administration's vision for transparency is encouraging, the disclosures of NSA surveillance have shown us that there is still much we do not know of our government's actions. This conference will examine the essential relationship between accountability, freedom of information, government action, and the rule of law.

Post Traumatic Stress Injury and the Ethics of War

Post traumatic stress injury (PTSI) is gaining considerable attention as the wars in Iraq and Afghanistan come to an end. Recent studies have shown that the incidence of PTSI can reach levels of twenty to thirty percent of returning vets who served in units that experienced heavy combat. This raises a number of ethical, legal, and practical questions. For example, should soldiers be desensitized to the horrors of war prior to entering combat zones? Would such desensitization training create soldiers who are less able to make sound moral judgments? Does the best course of PTSI treatment involve intensive intervention or counseling over an extended period of time? How does traumatic brain injury (TBI) relate to PTSI? Should we take into consideration the psychological trauma invariably incurred by both combatants and civilians as part of a *jus ad bellum* or *jus in bello* proportionality assessment? What are the implications of such considerations on the means and methods on contemporary warfare? This conference will look beyond the common discourse on PTSI and will explore the complicated relationship between these questions and the ethics of war.

PAST EVENTS

Since its inception in 2012, CERL has brought together experts from the academic, public, and private sectors to produce conferences and panel discussions, which have in turn resulted in volumes of written work and research investigating foundational issues in national security and ethics. CERL's events embrace the need for non-partisan scholarship that addresses pressing issues of national security while maintaining a commitment to provide sound moral justification for legal positions. Descriptions of past conferences are found on the following pages.



Conference attendees at the cocktail reception following the *On the Very Idea of Secret Laws: Transparency and Publicity in Deliberative Democracy* keynote speech delivered by John "Chris" Inglis, former Deputy Director of the National Security Agency, November 22, 2013.



Clockwise from top: Mr. Ilya Rudyak, Director of Research at CERL; Pictured from left Board Member Professor Larry May, Professor Emeritus Yoram Dinstein of Tel Aviv Univ., and Dr. Jesse Fitzpatrick Post-Doctoral Fellow, U.S. Naval Academy; Advisory Council member Professor Sharon Lloyd and Maj. Ian Fishback, U.S. Military Academy West Point; and Mr. Jonathan Todd, former CERL Research Fellow. All photos were taken during the *Weighing of Lives in War* conference, April 2014.

PAST EVENTS

The Weighing of Lives in War: Combatants and Civilians in the Jus in Bello April 11-12, 2014

The principle of distinction maintains that combatants can be targeted and killed by enemy forces at any time during an armed conflict but that civilians are immune to attack. This principle, however, does not tell us how to weigh the lives of combatants relative to the lives of civilians. How many soldiers should be “sacrificed” to protect a single civilian, and how should we compare the worth of enemy versus domestic civilians? Are soldiers required to take risks in order to safeguard enemy combatants? Do terrorists who are non-state actors confuse the traditional distinction between combatants and civilians? Does having an intermediate category of “unlawful combatant” provide a solution to these problems or compound them?

The weight assigned to combatants’ lives has further implications beyond the battlefield. For example, the more risk on the battlefield soldiers are expected to bear, arguably the greater the national obligation to compensate and care for wounded warriors. An argument for minimizing combatant exposure, on the other hand, would have implications for the technologies we should be willing to use in order to minimize combatant casualties, even if some such technologies pose an increased risk of collateral damage. CERL’s roundtable discussion fostered an interdisciplinary discussion on these and related topics, drawing together academics and practitioners to discuss the concept of combatancy and its implications for policy decisions.



Professor Cherif Bassiouni, President Emeritus of the International Human Rights Law Institute, delivers a keynote speech to an attentive audience.

The Center for Ethics and the Rule of Law

presents

THE WEIGHING OF LIVES IN WAR: COMBATANTS AND CIVILIANS IN THE JUS IN BELLO



APRIL 11-12, 2014

University of Pennsylvania Law School | 3501 Sansom Street | Philadelphia, PA 19104

The principle of distinction maintains that combatants can be targeted and killed by enemy forces at any time during an armed conflict but that civilians are immune to attack. The principle does not tell us, however, how to weigh the lives of combatants relative to the lives of civilians. How many soldiers should be “sacrificed” to protect a single civilian, and how should we compare the worth of enemy versus domestic civilians? Are soldiers required to take risks in order to safeguard enemy combatants? Do terrorists who are non-state actors confuse the traditional distinction between combatants and civilians? Does having an intermediate category of “unlawful combatants” provide a solution to these problems or compound them? This roundtable will foster an interdisciplinary discussion on the nature of combatancy, drawing together academics and practitioners to work towards principled solutions to the most challenging issues of contemporary warfare.

For more information please contact fssevents@law.upenn.edu or (215) 573-9931
www.law.upenn.edu/institutes/cerl/



PAST EVENTS

On the Very Idea of Secret Laws: Transparency and Publicity in Deliberative Democracy November 22-23, 2013

This conference considered the topic of private laws in light of the controversy over secrecy, surveillance, and national security. Of particular interest were the debates surrounding the conduct of Edward Snowden and the policies of the National Security Agency (NSA). The conference considered the secret orders of the Foreign Intelligence Surveillance Court, as well as the secret memoranda authored by lawyers in the Office of Legal Counsel during the Bush and Obama Administrations, and compared different methods of maintaining secrecy and their impact on individual privacy rights and on rule of law values more generally.

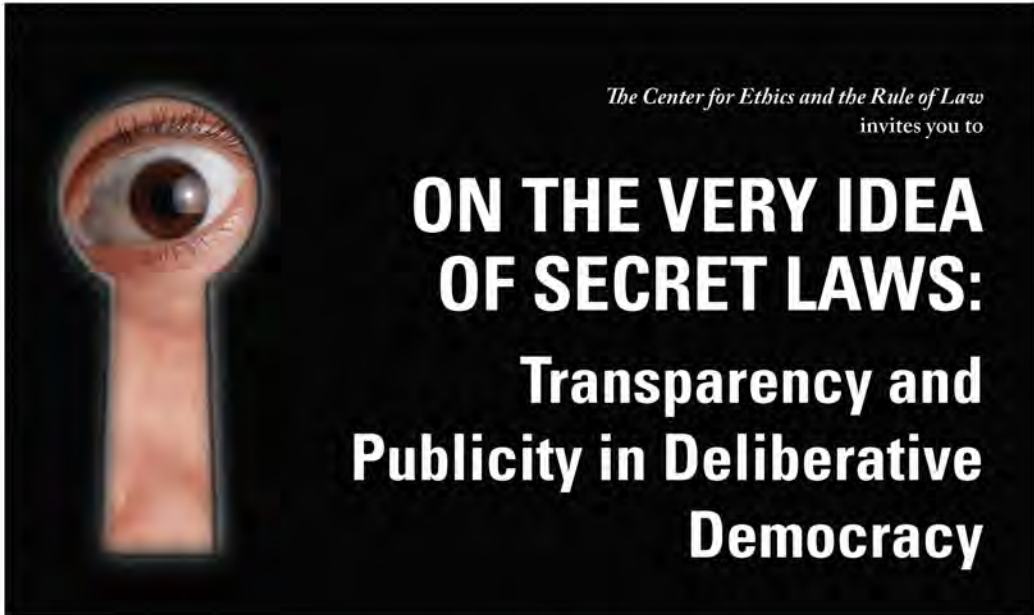


Mr. John "Chris" Inglis, former Deputy Director of the National Security Agency, at the round-table conference (left) and with Professor Finkelstein and Mr. Steven Aftergood, Director of the Federation of American Scientists Project on Government Secrecy (right).



Professor Claire Finkelstein introduces the keynote speaker, Chris Inglis, to a packed audience in the Fitts Auditorium at Penn Law School (above). Mr. Inglis clarifies a complex issue (right).





The Center for Ethics and the Rule of Law
invites you to

ON THE VERY IDEA OF SECRET LAWS: Transparency and Publicity in Deliberative Democracy

November 22-23, 2013

University of Pennsylvania Law School | Silverman 147
3501 Sansom Street | Philadelphia, PA 19104

In *Philosophical Investigations*, the philosopher Ludwig Wittgenstein famously suggested that language is a public, shared phenomenon, and accordingly, that there is no such thing as a “private language.” A similar doubt might be raised about the possibility of a “private law”: Is a law that is not publicly shared a conceptual contradiction, in the way a private language might be? What are the publicity conditions on the concept of law?

The conference will consider the topic of private laws in light of the recent controversy over secrecy, surveillance, and national security. Of recent interest are the debates surrounding the conduct of Edward Snowden and the policies of the National Security Agency (NSA). We will also consider the secret orders of the Foreign Intelligence Surveillance Court, as well as the secret memos authored by lawyers in the Office of Legal Counsel during the Bush and Obama Administrations, and will compare different methods of maintaining secrecy and their impact on individual privacy rights and on rule of law values more generally.

For more information contact Bailey White at baileywh@law.upenn.edu or (215) 573-7297



PAST EVENTS

Professional Ethics in National Security Law and Policy October 4, 2013

Conflicts between the norms by which professionals in a given profession are governed and needs of national security are currently widespread across a number of disciplines. Journalists may feel obligated to divulge information they regard as vital for a fully informed public, yet in doing so must weigh the benefits of disclosing such information against the need for national security. Lawyers, doctors, and psychologists have been asked to help implement policies that conflict with standards of conduct in their professions. Researchers seeking to publish research findings are often pressured to withhold information that could have a dual military use. This conference explored conflicts between professional and national security norms as they arise in six different areas: journalism, law, medicine, mental health, sciences, and business.



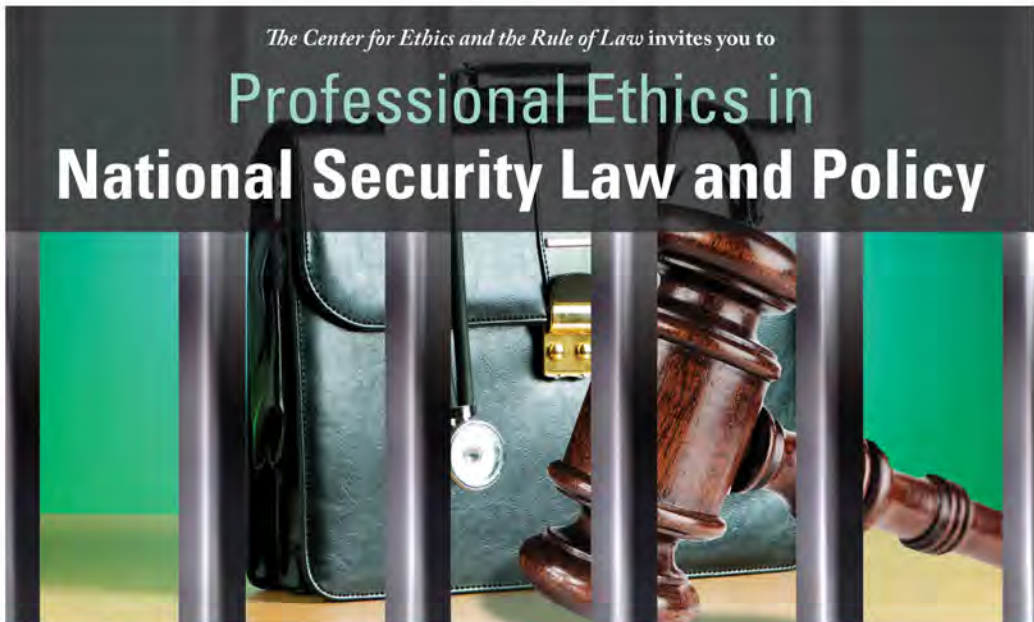
Conference panelists pictured from left: Professor George Brenkert, Georgetown University; Advisory Council Member, Ambassador Dell Dailey; Dr. Leo Mackay, Vice President of the Office of Ethics & Sustainability at Lockheed Martin Corp.; and panel moderator Professor Amy Sepinwall, University of Pennsylvania.

Dr. Terry C. Wallace Jr., Principal Associate Director for Science, Technology, and Engineering at Los Alamos National Laboratory (left); and Dr. Vijay Kumar, UPS Foundation Professor in the School of Engineering and Applied Science at the University of Pennsylvania (right).



The Center for Ethics and the Rule of Law invites you to

Professional Ethics in National Security Law and Policy



October 4, 2013

Michael A. Fitts Auditorium
University of Pennsylvania Law School
3501 Sansom Street
Philadelphia, PA 19104

Conflicts between the norms by which professionals are governed and more general national security norms are currently widespread in professional life. Journalists may feel obligated to divulge information they regard as vital for a fully informed public, yet the norms of national security bar disclosure. Lawyers, doctors and psychologists have been asked to help implement policies that conflict with standards of conduct in their professions. Medical researchers seeking to publish research findings are often pressured to withhold information that could have a dual military use. This conference will explore conflicts between professional and national security norms as they arise in six different professions: journalism, law, medicine, mental health, sciences, and business.

This program has been approved for 7 hours of ethics credit for Pennsylvania lawyers. CLE credit may be available in other jurisdictions as well. Attendees seeking CLE should bring separate payment (\$70 fee, or \$35 fee for public interest/non-profit attorneys) - cash or check - made payable to "The Trustees of the University of Pennsylvania." If you are not attending the entire conference and are seeking CLE credit, the fee is \$15 per credit hour.

For more information contact Bailey White at baileywh@law.upenn.edu

www.law.upenn.edu/institutes/cerl/



Schedule

All panels held in Fitts Auditorium

9:00 – 10:00 a.m.

Panel 1: Journalists and National Security Reporting: The Ethics of Leaks

Moderator: Professor Jeffrey Rosen

Professor Jane Kirtley, Professor Kevin Smith, Dr. Stephen Ward

10:00 – 10:15 a.m.

Break

10:15 – 11:15 a.m.

Panel 2: Medical Ethics and the Problem of Dual Use

Moderator: Professor Kevin Govern

Professor Jonathan Marks, Dr. Harvey Rubin, Professor John Winn

11:15 – 11:30 a.m.

Break

11:30 a.m. – 12:30 p.m.

Panel 3: Government Lawyers: Advocates or Ethical Watchdogs?

Moderator: Professor David Luban

Ms. Catherine Gibson, Professor Marty Lederman,
Mr. Alberto Mora, Professor W. Bradley Wendel

12:30 – 1:30 p.m.

Lunch

1:30 – 2:30 p.m.

Panel 4: Mental Health Professionals and Their Role in the "War on Terror"

Moderator: Professor Claire Finkelstein

Dr. Gregg Bloche, Dr. Marc Sageman, Dr. Stephen Xenakis

2:30 – 2:45 p.m.

Break

2:45 – 3:45 p.m.

Panel 5: National Security Dilemmas in the Corporate World

Moderator: Professor Amy Sepinwall

Professor George Brenkert, Mr. Bill Craven,
Ambassador Dell Dailey, Dr. Leo Mackay

3:45 – 4:00 p.m.

Break

4:00 – 5:00 p.m.

Panel 6: The Role of Scientists and Engineers in National Security Technology

Moderator: Professor Michael Weisberg

Professor Martha Farah, Professor Vijay Kumar,
Mr. Michael Langman, Dr. Terry Wallace

5:00 – 6:00 p.m.

Keynote Address

David Luban

Professor of Law and Philosophy, Georgetown University

6:00 p.m.

Cocktail Reception

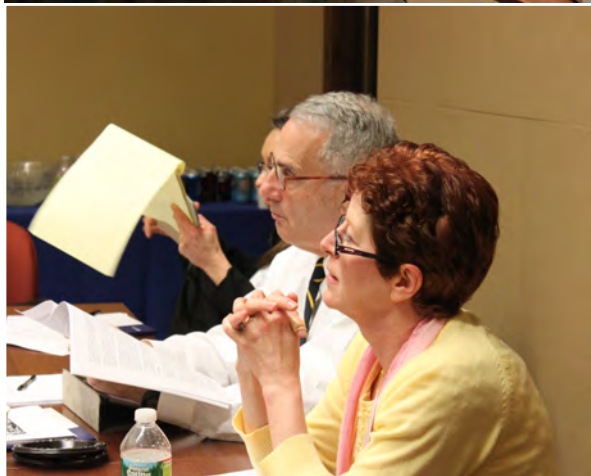
PAST EVENTS

Sovereignty and the New Executive Authority April 19-20, 2013

The primary question of this conference explored the nature of national sovereignty in the age of transnational terrorism. Typically, we think that the national sovereignty of a country ought to be respected until war is explicitly declared. Yet, some of the most significant threats around the globe come not from unfriendly states, but non-state actors such as organized terrorist groups. In regions where states are unable or unwilling to address such threats, what options are available to countries that have legitimate grievances against non-state aggressors? Under what conditions (if any) can a state override the national sovereignty of another state to pursue violent non-governmental organizations? Does the use of drones violate sovereignty to a greater or lesser degree than the deployment of troops on the ground? If a particular state gives secret clearance for a foreign power to enter their country, can the foreign power rightfully enter without the popular support or knowledge of that country's citizens? This conference discussed the requirements of respect for national sovereignty and what limitations shall be placed on security forces in their efforts to fight international terrorism.



Participants at the round table panel of the *Sovereignty* conference (left). Professor Finkelstein in an exchange with Duncan MacIntosh, Board Member and Professor and Chair of the Philosophy Department, Dalhousie University (below right). Board Member Mr. Jules Zacher with Professor Susan Dimock, York University (below left).



SOVEREIGNTY AND THE NEW EXECUTIVE AUTHORITY



April 19 & 20, 2013

Shuster Room, Silverman 147

University of Pennsylvania Law School | 3501 Sansom Street | Philadelphia, PA 19104

Increased challenges to national security have resulted in a dramatic expansion of executive power since 9/11. The Bush Administration's argument for the legitimacy of enhanced interrogation techniques was explicitly premised on it, as is the Obama Administration's defense of targeted killing. The revised conception of executive authority is meeting with increased approval among a group of scholars, constitutional lawyers, and policy-makers. Others express alarm at the newly capacious approach to executive power. The time is ripe to revive the traditional debate about the nature of sovereignty. Since the historical notion provides the theoretical foundation for the modern understanding of executive authority, re-examining traditional conceptions of sovereignty may shed light on the contemporary controversy.

Sovereignty and the New Executive Authority will assess the legitimacy of the newly capacious concept executive authority along a number of dimensions: the extent of Commander-in-Chief powers, the scope of secrecy in government, and the suspension of traditional legal principles during times of national emergency, among others. In all of these domains, increased executive discretion presents a challenge to the rule of law. The conference is intended to foster an interdisciplinary discussion among scholars, policymakers and professionals in an effort to identify appropriate boundaries on executive authority, especially as it relates to new developments in the law and ethics of the war on terror.



For more information contact Bailey White
at baileywb@law.upenn.edu or (215) 573-7297
www.law.upenn.edu/institutes/cerl/

The Logic of Deterrence and the Changing Face of Warfare November 16-17, 2012

Discussions of the logic of deterrence, both theoretical and practical, dominated the literature on just war theory during the Cold War. Despite diminished attention, the topic remains of vital importance to current national security concerns, playing a central role in debates over Cyberwarfare and the use of non-conventional weapons or strategies. This Roundtable sought to revive traditional discussions about the logic of deterrence, placing this topic in a contemporary setting. Many of the former questions at the intersection of rational choice theory and ethics apply with renewed force in a post-Cold War world: Is it permissible to threaten to do something it would not otherwise be permissible to do? Does precommitment to an otherwise impermissible course of action render it permissible, given that it is accompanied by advance warning? Does deterrence require public notice to constitute a legitimate public policy? These older theoretical questions prove particularly challenging in an age of highly advanced technologies of war. How does deterrence work if the threatened attack cannot be traced back to the state that launched it? How should deterrence theory handle enemies whose actions are highly unpredictable and decentralized, and where the primary actors might not be interested in sparing civilian lives or even avoiding their own death? Is it legitimate to issue threats of kinetic action to deter a Cyber attack? Given the complexities of modern warfare and counter terrorism operations, the challenges of deterrent theory are now ripe for reexamination.



Mr. William Craven, CERL Board Chair.

THE LOGIC OF DETERRENCE AND THE CHANGING FACE OF WARFARE



NOVEMBER 16 & 17, 2012

Shuster Room, Silverman 147

University of Pennsylvania Law School | 3501 Sansom Street | Philadelphia, PA 19104

Discussions of the logic of deterrence, both theoretical and practical, dominated the literature on just war theory during the Cold War. Despite diminished attention, the topic remains of vital importance to our current national security concerns, playing a central role in debates over Cyberwarfare and the use of non-conventional weapons or strategies. This Roundtable seeks to revive traditional discussions about the logic of deterrence, but to place this topic in a contemporary setting. Many of the former questions at the intersection of rational choice theory and ethics apply with renewed force in a post-Cold War world: Is it permissible to threaten to do something it would not otherwise be permissible to do? Does precommitment to an otherwise impermissible course of action render it permissible, given that it is accompanied by advance warning? Does deterrence require public notice to constitute a legitimate public policy? These older theoretical questions prove particularly challenging in an age of highly advanced technologies of war. How does deterrence work if the threatened attack cannot be traced back to the state that launched it? How should deterrence theory handle enemies whose actions are highly unpredictable and decentralized, and where the primary actors might not be interested in sparing civilian lives or even avoiding their own death? Is it legitimate to issue threats of kinetic action to deter a Cyber attack? Given the complexities of modern warfare and counter terrorism operations, the challenges of deterrent theory are now ripe for reexamination.



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www.law.upenn.edu/institutes/ceer/

PAST EVENTS

Cyberwar and the Rule of Law

October 15, 2012

This conference was organized to explore questions about the degree to which engaging in war using the techniques of cyber technology is compatible with rule of law values. Simply put, is cyberwar consistent with the idea that there are deep moral and legal principles, adherence to which successfully limits the permissibility of war to cases where those principles are observed? Can we both accept the legitimacy of cyberwar and maintain that war is fundamentally a constrained activity, one that can be justified according to a set of moral principles? Or does an acceptance of cyberwar, insofar as it requires us to relinquish our attachment to so many of the doctrines of just war theory, mean that we have given up on the idea of limited warfare altogether, in favor of a more Clausewitzian vision that anything goes? If one does allow that the use of techniques of cyberwar are compatible with the traditional laws of war, and hence with rule of law values, there are further and more refined decisions to be made. For example, one might ask whether the laws of war, such as those typically applied to kinetic war, must be understood as structured in parallel fashion when applied to cyberwar in lieu of conventional techniques of war. Do the laws of armed conflict apply to cyberspace in the same way we have conceived of those laws as applying to traditional warfare?



General (Ret.) James Cartwright (left) and Board Member Mr. Jules Zacher (right) address conference participants at the *Cyberwar and the Rule of Law* conference.



CYBERWAR AND THE RULE OF LAW

OCTOBER 15, 2012

Shuster Court Room, Silverman 147
University of Pennsylvania Law School | 3501 Sansom Street | Philadelphia, PA 19104

Cyberweapons are emerging as the most dangerous innovation of this century and are now considered by the FBI to constitute the number one threat to U.S. security.

Cyberweapons bring peril to economic, political, and military systems by a single act, or by multifaceted orders of effect, creating a dreadful new total war potentiality in every dimension. The ethical and legal status of the necessary means for guarding against cyber threats, however, is unclear. Unlike past forms of warfare circumscribed by centuries of just war tradition and law of armed conflict prescriptions, cyberwarfare brings new areas of ambiguity, including threats to national sovereignty, the status of non-state actors, and the identity of cyber attacks as acts of war. These legal ambiguities, in the void of moral perspective, make adherence to the rule of law where cyberwar is concerned more challenging than in any other domain of warfare.

KEYNOTE SPEAKERS

General (Retired) James Cartwright

General (Retired) James Cartwright is a retired United States Marine Corps four-star general who last served as the eighth Vice Chairman of the Joint Chiefs of Staff from August 31, 2007 to August 3, 2011. General (Retired) Cartwright currently serves as the inaugural holder of the Harold Brown Chair in Defense Policy Studies for the Center for Strategic and International Studies.

Major General John Davis

Major General John Davis is the Deputy Commander, Joint Task Force-Global Network Operations, providing direct support to United States Strategic Command (USSTRATCOM) for operation and defense of the DoD Information Network. During his tenure at the Department of Defense he has dramatically improved the department's information security system.



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www.law.upenn.edu/institutes/cerl/

PAST EVENTS


Inaugural Panel on Foundational Questions in National Security September 11, 2012

Since 9/11, increasing pressures on national security, together with global changes in the nature of war, have posed serious threats to the preservation of rule of law values in American society. The United States has struggled continuously with the ethical and legal posture of detention and interrogation, the permissibility of kill or capture raids on suspected terrorists, the legitimate scope of secrecy in the exercise of executive privilege, the acceptable extent of state investigation into the lives of private citizens, the authority of international law relative to U.S. sovereign authority, and now the expansion of the tools of war to include novel methods such as Cyber attacks. The Center for Ethics and the Rule of Law is a new institute at Penn Law devoted to the preservation of rule of law values in the face of the foregoing types of challenges.



Foundational Questions in National Security panelists pictured from left: Ambassador Peter Galbraith, Mr. David Sanger, Professor Claire Finkelstein, Professor Nadine Strossen, and Ambassador Thomas Graham.

Targeted Killing: Law and Morality in an Asymmetric World *Book Celebration*
April 30, 2012



TARGETED KILLINGS:
LAW AND MORALITY IN AN
ASYMMETRICAL WORLD
OXFORD UNIVERSITY PRESS (2012)

BOOK CELEBRATION

MONDAY, APRIL 30, 2012
5:30 P.M.

SILVERMAN 245A/LEVY CONFERENCE CENTER
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 SANSOM STREET | PHILADELPHIA, PA 19104

KEYNOTE SPEAKER
REAR ADMIRAL JOHN HUTSON, JAGC USN (RET)
DEAN EMERITUS UNIVERSITY OF NEW HAMPSHIRE
SCHOOL OF LAW

COCKTAIL RECEPTION TO FOLLOW

RSVP TO MAGGY KEEGAN AT
MKEEGAN@LAW.UPENN.EDU OR (215) 573-7297

THIS PROGRAM HAS BEEN APPROVED FOR 1.5 HOURS
OF SUBSTANTIVE LAW CREDIT AND 0 HOURS OF ETHICS CREDIT
FOR PENNSYLVANIA LAWYERS

PAST EVENTS

The Ethics of Secrecy and the Rule of Law

May 18 - 19, 2012

Excessive governmental secrecy has gained attention in national news outlets over the past few years and enhanced the scrutiny of classification practices. During the Bush Administration, for example, a series of secret legal memoranda authorized the use of enhanced interrogation techniques against terror suspects. These formed a key component of the Bush Administration's counterterrorism strategy. With the Obama Administration, clandestine legal memoranda have sought to justify the use of targeted killing, and one particularly controversial memorandum authorized the killing of an American citizen, Anwar al-Alawki. Even the criteria by which a target is placed on the targeted killing list (the "Joint Prioritized Effects List" (JPEL)) remain confidential.

With the pressures of the ongoing War on Terror, major policies and legal questions of national importance have become less and less open to public view. The increase in secrecy is not without costs, as there appears to be a tradeoff between the need for effective security and the value of transparency. On the one hand, as Immanuel Kant wrote, "every claim to right must have this capacity for publicity." John Rawls has echoed this same sentiment in requiring publicity as a condition of the social contract. On the other hand, effective national security crucially depends on the State's ability to control the flow of information. This Roundtable considered whether the expanding use of secrecy in governmental practices is desirable, and, most crucially, whether it is consistent with rule of law values.



Mr. Jameel Jaffer, Esq. of the American Civil Liberties Union (left) and one of the panels at the round-table conference (below).



THE ETHICS OF SECRECY AND THE RULE OF LAW



MAY 18-19, 2012

Institute for Law and Philosophy

University of Pennsylvania Law School | 3400 Chestnut Street | Philadelphia, PA 19104

Recent events have put governmental secrecy in the news and enhanced the scrutiny of classification practices. During the Bush Administration, for example, a series of secret legal memoranda authorized the use of enhanced interrogation techniques against terror suspects. These formed a key component of the Bush administration's counterterrorism strategy. With the Obama Administration, clandestine legal memoranda have sought to justify the use of targeted killing, and one particularly controversial memo authorized the killing of an American citizen, Anwar al-Alawki. The contents of the latter have not been made public, though pressure is mounting for its release. Even the criteria by which a target is placed on the targeted killing list (the "Joint Prioritized Effects List" (JPEL)) remain confidential.

With the pressures of the ongoing War on Terror, major policies and legal questions of national importance have become less and less open to public view. The increase in secrecy is not without costs, as there appears to be a tradeoff between the need for effective security and the value of transparency. On the one hand, as Immanuel Kant wrote, "every claim to right must have this capacity for publicity." John Rawls has echoed this same sentiment in requiring publicity as a condition of the social contract. On the other hand, effective national security crucially depends on the State's ability to control the flow of information. This Roundtable will consider whether the expanding use of secrecy in governmental practices is desirable, and, most crucially, whether it is consistent with rule of law values.



For more information contact Maggy Keegan
at mkeegan@law.upenn.edu or (215) 573-7297

TRENDS IN NATIONAL SECURITY

Due to the efforts of people sharing CERL's commitment to rule of law values, who serve at the highest echelons of the armed forces, government, civil society and academia, we have recently seen a growing awareness and dedication to defending rule of law values in the areas of national security and military policy. While there is still much work to be done, the events outlined below appear to indicate such tendencies and constitute grounds for cautious optimism. Nevertheless, CERL will continue to track and critically evaluate such developments, and advocate for further emphasis on the rule of law.

Targeted Killing

On May 23, 2013 President Obama delivered a speech at the National Defense University (NDU) that has been hailed as a major shift in the Administration's thinking on the use of drone warfare and targeted killing. President Obama asserted in his speech that such targeted strikes cannot be the standard of operation. Instead, President Obama articulated his "Preference for Capture" principle and codified it in the Presidential Policy Guidance the day prior to his visit to NDU. Further, President Obama added constraints to the use of lethal force and tasked senior national security officials with ensuring the legality of the use of force. President Obama announced in this speech that from then on the Administration would "review proposals to extend oversight of lethal actions outside warzones that go beyond our reporting to Congress."

Declassification and Government Secrecy

The U.S. Court of Appeals for the Second Circuit in New York released in June of 2014 parts of a previously classified government memorandum outlining the legal rationale for the targeted killing of a U.S. citizen, Anwar al-Awlaki. Claiming he was an operational and organizational leader of al-Qaeda, the Administration unequivocally asserted its authority in al-Awlaki's 2011 killing. The legal analysis of such authority, however, remained classified and unknown to the general public. The partial release of this memorandum and other documents since declassified and made available to the public appears to be a step towards greater governmental transparency.

Government Surveillance

Thirteen years after the 9/11 attacks, and the subsequent expansion of government surveillance, in January of 2014 President Obama placed significant constraints on the government's ability to conduct surveillance on individuals residing in the United States ("U.S. Persons"). The new initiative prevents the National Security Agency (NSA), and indeed any government agency, from amassing vast databases of U.S. Persons' phone records. Additional restrictions mandate that a particularized court order must be obtained for each individual before private companies will furnish to a government agency the calling records of that individual. This marked a major change in the way the NSA collects information, which had been amassing the metadata of each user from every major telephone carrier in the country.

DIRECTOR'S PUBLIC APPEARANCES

- ◆ [Speaks with Marty Moss-Coane on *Radio Times* about the use of drones and targeted killings abroad, March 5, 2014](#)
- ◆ [Panelist at the Inaugural *Coffee & Conversation Series*, “Drones and Your Privacy”, National Constitution Center, September 17, 2013](#)
- ◆ [Speaks about Targeted Killing, and the Authorization for Use of Military Force \(AUMF\), *Voice of Russia Radio*, May 24, 2013](#)
- ◆ Panelist, *Targeted Killing and the War on Terror*, at Penn Law Washington Alumni gathering, National Press Club, Washington DC, May 16, 2013
- ◆ Invited speaker for Debate on Drone Warfare with Charles Dunlap, retired General and Law Professor, at the Alexander Hamilton Society, Annenberg Center, April, 2013
- ◆ [Invited speaker for annual endowed lecture at Applied Ethics Day, West Virginia University, “Secrecy, Targeted Killing and Discretion”, March 7, 2013](#)
- ◆ [Discusses a memo allowing for drone attacks to be launched to kill U.S. citizens working abroad as terrorists, *Wall Street Journal Live*, February 5, 2013](#)



Professor Finkelstein (center) and Professor Michael Lewis (left) of The Ohio Northern University Pettit College of Law speak with Marty Moss-Coane (right) on *Radio Times*, March 2014. (Photo courtesy of *Radio Times*)

REFERENCES

- ◆ [“NSA Deputy Director Dispels Agency Myths”, by Samuel Byers, *Penn Law Journal*, Summer 2014](#)
- ◆ [“Dueling NSA Rulings Highlight Shifting Law in Digital Age”, by Chris Mondics, *Philadelphia Inquirer*, January 11, 2014](#)
- ◆ [“NSA Deputy Director Skeptical on Sharing Data With FBI and Others”, by Spencer Ackerman, *The Guardian*, November 23, 2013](#)
- ◆ [“The Perils of Push Button War”, by Rick Schmitt, *Penn Law Journal*, Summer 2013](#)
- ◆ [“Drones Debate Alive on Campus”, by Fiona Glisson, *The Daily Pennsylvanian*, February 11, 2013](#)
- ◆ [Book review of CERL’s volume *Targeted Killings: Law and Morality in an Asymmetrical World*, by Steven J. Barela, *Journal of International Criminal Justice*, 2012, 1 of 6 \(PDF\)](#)
- ◆ [“Penn Law Unveils Center for Ethics and the Rule of Law”, by Heather Bromfield, *The Daily Pennsylvanian*, September 11, 2012](#)
- ◆ [“Penn Center for Ethics and the Rule of Law Will Examine the Ethics of National Security”, by Karen Sloan, *The National Law Journal*, September 4, 2012](#)



Pictured from right at the *Drones and your Privacy* event, National Constitution Center, September 17, 2013: Professor Finkelstein; Jeffrey Rosen, President and CEO of the National Constitution Center; and Carrie Cordero, Director of National Security Studies, Georgetown University Law Center. (Photo courtesy of the National Constitution Center)

Penn Law Journal, Summer 2013

DRAWING ON AN ARRAY OF PERSPECTIVES, A NEW PENN LAW CENTER CONFRONTS THE ULTIMATE WARTIME QUESTION: HOW CAN WE COMBAT TERRORISM WITHOUT SUFFERING ETHICAL CASUALTIES?

THE PERILS OF PUSH BUTTON WAR



BY RICK SCHMITT

As a tool of warfare in the 12th Century, the crossbow stretched the established limits of armed conflict.

Devastatingly effective even at long distances, it could pierce the body armor of a knight at 200 yards, and compared with the English long bow, was easy to operate. Untrained soldiers and even peasants could master the craft in days or weeks.

In the stratified world of Medieval Europe, however, noblemen and the church saw the weapon as a threat. Pope Innocent II banned Christian-on-Christian use of the crossbow, calling it “the deadly art, hated by God.” A clause banishing “foreign crossbowmen” from England was included in the Magna Carta.

Today, technology continues to change the face of warfare, again testing legal and ethical boundaries.

Unmanned aerial drones have become central to the Obama Administration’s anti-terrorism policy. A new kind of Cold War has erupted in cyberspace, accounting for daily attacks on private and public networks around the globe, not to mention a story line in the latest James Bond thriller. Serious people are studying “human enhancement” technologies that use drugs and implantable devices to increase soldier performance.

But what are the legal and ethical considerations of conducting a war where the combatant is sitting at a desk in an office half a world from the battlefield? Is a safe and sterile war necessarily a just and ethical one?

Illustration © Michael Reganah

PENN LAW JOURNAL SUMMER 2013 21



THE PERILS OF PUSH BUTTON WAR

What are the legal and ethical considerations of conducting a war where the combatant is sitting at a desk in an office half a world from the battlefield?

When does a cyber attack constitute an act of war? Is it legal and ethical to respond with lethal force if the damage inflicted by such an attack is only economic?

When should the law of war, with its permission to kill, rather than capture, cede to the civil law that favors arrest and due process?

Such questions are all the more complex in a world where conventional ideas about the identity of the enemy and the contours of the battlefield have broken down.

A new institute at Penn Law School, the *Center for Ethics and the Rule of Law*, or CERL, seeks to address such questions with a novel interdisciplinary approach that brings legal academics together with philosophers, political scientists, economists, as well as practitioners such as military lawyers, journalists, members of the defense and intelligence communities, and public policy analysts.

Its director, Claire Finkelstein, Algernon Biddle Professor of Law and Professor of Philosophy, first conceived the new center while attending a 2010 legal conference at West Point, where she was struck by the diversity of opinion on anti-terror policies between civilian and military lawyers. She proposed a conference at Penn on the legal and ethical implications of the then-nascent idea of targeted killings.

That timely April 2011 conference—followed in a few short weeks by the successful operation targeting Osama bin Laden—led to a well-received book that Finkelstein co-edited and ultimately to the creation of CERL. Additional conferences on the topics of governmental secrecy, cyber war, the logic of deterrence, and the scope of executive privilege soon followed.

Today CERL is attracting attention as a unique endeavor among law schools: Its mission, Finkelstein explains, is “to promote rule of law values in the face of the changing nature of national security.” Such changes, including the rise of non-governmental combatants and new precision technologies, are posing new legal and ethical challenges and exposing gaps in the old rules of warfare.

CERL has attracted some influential and enthusiastic supporters, including William Craven, a Morristown, N.J., defense contractor who has worked on weapons and intelligence systems for the military, and his wife, Pam Craven L’77, the chief administrative officer of Avaya Corp., and member of the Penn Law board of overseers.

Craven said he has long seen a need for a top-rank institute that focused on the ethical and legal consequences of defense system advances.

While hardly oblivious to ethical and legal concerns, he said, contractors tend to focus on performance issues and protecting the warfighter. “At the end of the day, you have questions of ethics in the back of your mind, but quite frankly, you go about doing your job and assume others are worrying about these things,” Craven said, adding that “it was refreshing to find an academic who was talking to people in the field who were experiencing the fear and terror of war to understand their perspectives.”

While such debates have been around for about as long as there have been weapons systems, history suggests there are no easy solutions.

“Look at the development of nuclear weapons. It took us most of the late ‘40s, all the ‘50s, into the late 60s to develop Mutual Assured Destruction,” said James Cartwright, retired Vice Chairman of the Joint Chiefs of Staff, and former commander of the U.S. nuclear force, alluding to the doctrine that governed Cold War relations between the U.S. and the Soviet Union. “We ended up using them in Japan for what we thought was a morally appropriate purpose and even today the debate on what is acceptable and what is not and when would we use such a weapon is still going on.”

“We find ourselves in this quandary as we often do with disruptive technologies. ‘Where is this going? How would I start to set norms?’” said Cartwright, who was a featured speaker at the CERL roundtable on cyber war last fall. “My sense is that we are trying to figure out what is technically possible, and what is culturally and morally appropriate. The art of what is possible is still in the very early stages.”

One controversial trend has been the expanding role of executive discretion in the pursuit of national security goals, which Finkelstein sees as one of the most enduring post-9/11 challenges to the rule of law. Enhanced interrogation policies developed in the George W. Bush administration that declared both the Geneva Conventions and federal statutes obsolete as a limiting force on executive authority have also been offered by

the Obama Administration to justify targeted killing. The legal underpinnings of these policies have been developed in classified memoranda that find their way to the public through leaks, if at all.

“The reluctance of the executive branch to allow elected leaders, members of the judiciary, and ultimately the public, to subject war-related policies and their legal justifications to public scrutiny, represents a significant alteration of the terms of political engagement around military matters,” Finkelstein said. “It also signals a shift in the traditional conception of the balance of powers among the three branches of government. These trends are forcing academics and policy makers alike to return to fundamental questions about the value of transparency and public accountability in democratic politics.”

Finkelstein points out, however, that as a weapons system, there’s a lot to like about drones. They are more precise than traditional aerial bombs, better able to pinpoint targets, and therefore have the potential to dramatically reduce civilian casualties. Remotely operated drones also minimize U.S. casualties. A CBS News Poll found that 70 percent of Americans support using drones to kill suspected terrorists in foreign countries.

“You can loiter around for hours and hours whereas an F-16 cannot do that. It gives you more time to ensure that you have the intelligence right. You are more certain that what you have in the cross hairs is a bad guy,” said U.S. Army Brigadier General Tom Ayres L’91, the commander and chief judge of the U.S. Army Court of Criminal Appeals. “You often have better

awareness on the part of the person who is going to make a decision.”

Ayres pointed out that the deployment of drones and the command decision to fire on a target are subject to rigorous standards. While the word drone might connote something that is making decisions without human input – the military prefers the term unmanned aerial vehicle – Ayres said the process is overseen by “someone trained in the law of war whose decisions are subject to review and ultimately to investigation if something goes wrong.”

Still, the growing use of technologies that increasingly remove humans from the battlefield is concerning to some experts. Finkelstein cites the story, popularized in a recent book, of a young Jewish orphan about to be shot by a Latvian SS unit during World War II who is pulled out of line and spared by a sympathetic Nazi commander after asking for a piece of bread. “The more distance, the less interaction; the less interaction, the weaker the tug of humanity that can, on occasion, lead to spontaneous acts of mercy,” Finkelstein said, noting that the use of drones preempt such opportunities.

Even more controversial is how the technology is being deployed, such as in the case of Anwar al-Awlaki, a senior operative of al Qaeda in the Arabian Peninsula (AQAP) who was targeted and killed in a U.S. drone attack in southeast Yemen in September 2011.

Al-Awlaki was an American citizen who, while dubbed the “bin Laden of the Internet,” was not believed to be involved



© AP Photo/Steve Haber

A Navy X-47B drone is launched off the nuclear powered aircraft carrier USS George H. W. Bush off the coast of Virginia. The plane isn’t intended for operational use, but it will be used to help develop other unmanned, carrier-based aircraft.

THE PERILS OF PUSH BUTTON WAR

in an imminent attack against the U.S. He was also killed in a country that is considered outside the “zone of hostilities.”

“Here we have an American citizen, killed by our government without the opportunity for trial, in a country that, while certainly sympathetic with our enemies, was not part of the war zone,” Thomas Graham, retired U.S. diplomat and veteran arms-control negotiator, observed at the 2011 targeted-killings conference. “Is Yemen all that much different than Canada? Suppose it had been done there? ... There has to be some deference paid to the fact that we do have a Constitution.”

The legal and ethical landscape for cyber attacks is even more uncharted than that for targeted killings.

Jens Ohlin, a law professor at Cornell, and a member of CERL’s advisory board, said that the presence of an al Qaeda branch in Yemen with an avowed intent of engag-

ing Americans more than justified the invocation of war powers there.

He said it has never been the case that American citizens taking up arms against the U.S. get special treatment on the battlefield. Nazis with dual American and German citizenship were killed fighting in World War II, he said, and every Confederate soldier in the U.S. Civil War was “a prima facie American citizen” because the Union had never recognized the southern secession as legitimate.

Another board member, Kevin Govern, law professor at Ave Maria Law School, and a former Army Judge Advocate, said that al-Awlaki might be compared to Nazi propaganda chief Joseph Goebbels. “There is ... precedent in the U.S. under national security law ... that propagandists are continually contributing to the combat function,” extending wars by sending false signals and messages or through other acts of sedition, said Govern.

The legal and ethical landscape for cyber attacks is even more uncharted than that for targeted killing, even as they are becoming more ubiquitous. Earlier this year, the intelligence community ranked cyber at the forefront of global threats, ahead of terrorism, transnational organized crime and WMD proliferation.

The Pentagon now has an official cyber command, and is developing offensive and defensive cyber capabilities, using computer programs in ways previously reserved for bombs and

other conventional weapons. In a celebrated case, President Obama, in his first months in office, accelerated a program begun during the Bush Administration of using a series of bugs to attack control systems for Iran’s nuclear program.

The military is also in the process of revising its official Rules of Engagement for when U.S. forces may deploy cyber force. But setting specific ground rules – such as deciding what kinds of attacks justify retaliation and against whom—will be hard.

While the economic costs of cyber attacks are huge – some \$100 billion a year – no one so far has died from one. Knowing the enemy is also tough: adversaries are no longer strictly defined by their manufacturing heft and bomb-making prowess.

Some experts believe cyber weapons may be most effective as a tool to head off war. Historically, so-called soft-power tools, such as economic or trade sanctions, often take too long to have an impact. A cyber weapon, by contrast, could shut down a power grid or banking system in an instant.

“It is really that ability to undermine confidence which plays well into your ability to convince an adversary, ‘You do not want to go down this path,’” Cartwright said, adding that the preemptive nature of cyber is one of its “key opportunities.”

Some acceptable norms of behavior are starting to be identified. George Lucas, professor of philosophy and public policy at the Naval Postgraduate School, Monterey, Calif., has written that a cyber attack is morally justified when the underlying issue in conflict is so grave that war is justified, only military assets are targeted, and every effort short of war has been made to resolve the dispute.

“We have always been challenged by new developments—be it the crossbow or the drone—to do what lawyers and philosophers do, which is to extrapolate from the known to the unknown, to take what we know, to develop appropriate metaphors and similes that try to capture the essence of the new challenges and relate them to the things we know how to do,” Lucas said on a panel with Finkelstein at the University of Utah Law School in February on the ethics of technological warfare. “We are in the midst of that transformation with our new technologies. They do pose challenges to a state-centric system of law, to our conventional ways of thinking about combat, but they do not completely transform them and make it impossible for us to reason reasonably about them.”

RICK SCHMITT HAS COVERED LEGAL AFFAIRS FOR THE WALL STREET JOURNAL AND THE LOS ANGELES TIMES. HE IS CURRENTLY A FREELANCE WRITER LIVING IN MARYLAND.

NSA Deputy Director Dispels Agency Myths

BY SAMUEL BYERS



John Inglis, National Security Administration Deputy Director.

"IF ANYONE HASN'T TURNED OFF THEIR CELL PHONE YET, hold up your hand and I'll do it for you." The audience laughed nervously.

Naturally, National Security Administration Deputy Director John Inglis couldn't really control the cell phones and laptops of audience members sitting in Fitts Auditorium at the Penn Law School last November. But in the wake of revelations brought

to light in the last year by former NSA contractor Edward Snowden, there has been no shortage of myths surrounding the agency's power in popular culture.

Inglis dedicated a significant portion of his 45-minute lecture — and the hour-long question-and-answer session that followed — to dispelling myths and misconceptions about the agency that have pervaded in the media since Snowden began leaking classified documents pertaining to the NSA's domestic and international information-gathering programs earlier this year.

Inglis was brought to Penn Law as the keynote speaker for a conference called "On the Very Idea of Secret Laws: Transparency and Publicity in Deliberative Democracy," organized by professor Claire Finkelstein of the Law School's Center for Ethics and the Rule of Law. The crowd he addressed was made up mostly of academics and professionals attending the conference, as well as a handful of Penn Law students.

One of the key misconceptions that Inglis addressed was the complicated, interconnected nature of the personal, geographical and digital domains in which the NSA conducts its work.

According to Inglis, the NSA follows a set of very specific rules to determine whether or not they have the authority to collect data on a certain individual and where they are allowed to



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collect that data. However, he said, "cyberspace doesn't play by the same rules [of geography]" as traditional legal jurisdictions, which can invite some complications.

Inglis went on to describe how news media sources have mischaracterized certain NSA-led investigations as "invasions of privacy." For example, one leaked internal compliance report, drafted by the NSA, describes these invasions as occasions in which a subject the NSA was authorized to monitor moved from a territory in which they had jurisdiction into one in which they did not, without the agency's knowledge.

Moreover, he attributed most public hostility against the agency to a general misunderstanding of its goals, methods and oversight procedures. He also affirmed both his and his agency's commitment to the protections enshrined in the Constitution that he swore to uphold.

Inglis used an analogy of a railroad car to describe how civil liberties and public safety must both be held in great esteem for the agency to effectively fulfill its mission.

If both aren't strong, firmly grounded and running parallel to one another, "it isn't going to work," he said.

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9/11 marks Law center opening

Center for Ethics and the Rule of Law to focus on national security issues

BY HEATHER BROMFIELD
Staff Writer

As Penn marked the 11th anniversary of Sept. 11, the Law School launched a forum to foster discussion about national security issues.

Yesterday, Penn Law's new Center for Ethics and the Rule of Law officially opened with a panel discussion about ethics and modern warfare.

According to the Center Director Claire Finkelstein, the Center is "all about reconciling the need for strong national security in the wake of the 9/11 attacks with the idea of the rule of law—that the United States is a society governed by law, not men."

"It's about promoting both aims, not about limiting either one of them," she added.

Finkelstein, a Penn Law professor, previously worked with issues of ethics and national security within Penn Law's Institute of Law and Philosophy, where she had served as co-director. In that position, however, she said she saw a need for an independent center that would specifically cover national security issues.

Finkelstein said the Center is committed to respecting the ethical standards that have become part of the country's cultural tradition and legal history. These standards are quickly being challenged because of evolving technology and the radically changing environment of warfare.

"These changes strain our understanding of the rule of law to the breaking point," Finkelstein said.

The Center will grapple with issues such as how to cope with enemies who are non-state actors, how to justify the lack of symmetrical risk in warfare in an age when precision weapons are becoming more common and how to tackle cyber threats.

The provider of seed funding for the Center's first three years, Bill Craven, is also a member of the advisory board. He is the founder of Federal Systems, a private investment company which serves the intelligence and defense industries.

Craven said that as a practitioner in these industries, "You harbor certain questions in your mind. 'Is this legal? Is this ethical? What's the morality here?' Many people in the community here struggle with questions of ethics and the rule of law."

Several people who are personally involved with the Center commented on its distinctive nature as a non-partisan and interdisciplinary forum.

Kevin Govern, an advisory board member and a professor of law at Ave Maria School of Law in Florida, said that these two qualities make the Center "unlike any other organization." He noted that think tanks tend to have a partisan affiliation or will have a spon-



Andrew Dierkes/Staff Photographer

An inaugural panel marked the official opening of the Center for Ethics and Rule of Law on Tuesday. The panel discussed ethics and modern warfare.

sor with a particular viewpoint, while interest groups are often comprised of members from the same type of occupational background.

Craven agreed that the interdisciplinary nature of the Center will help it achieve recognition from policy makers.

"I saw that Claire was reaching out into the military community.... She actually went up to West Point and held a meeting up there to talk to future officers," he said. "To me, there was a great air of practicality to it."

The Center aims to involve

not only law students, but also graduate and undergraduate students studying philosophy and political science. For example, Chris Melenovsky, a doctoral student in the Philosophy Department and the academic administrator of the Center, became interested in legal philosophy early in his doctoral program.

Melenovsky was enthused by the Center's future prospects and relevance to current national discussions.

"We'll pick an issue that seems like people might start talking about it, and by the time

the conference happens, the issue has kind of become a big issue," he said.

While the Center is currently only focused on national security, it may later broaden its scope to include other areas where ethics and the law are concerned, such as in medical ethics. In the meantime, the center will attempt to build up its funds as well as its reputation.

"I'm positive that we can do just that because of the success that we've seen with our previous conferences," Melenovsky said.

The Daily Pennsylvanian,
September 12, 2011

Professor Finkelstein introduces panelists at CERL's inaugural event. Pictured from left are Ambassador Peter Galbraith, Mr. David Sanger, Professor Nadine Strossen, and Ambassador Thomas Graham (below).



The Guardian, November 23, 2013

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NSA

NSA deputy director skeptical on sharing data with FBI and others

John Inglis appears at University of Pennsylvania to argue legality of bulk surveillance and indicates stance on Feinstein bill

Spencer Ackerman in Philadelphia

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The deputy director of the National Security Agency on Friday sounded skeptical about permitting the [FBI](#), [DEA](#) or other law enforcement agencies to directly search through the NSA's vast data troves, as a new bill would appear to permit.

[A bill recently approved by the Senate intelligence committee on a 13-4 vote](#) blesses the ability of law enforcement agencies to directly conduct "queries of data" from NSA databases of foreign-derived communications content "for law enforcement purposes".

John C Inglis, the top civilian at the NSA, said he was unfamiliar with the proposed legislation during a late-afternoon dialogue at the University of Pennsylvania Law School – a forum that allowed for occasionally blunt questioning of a senior [NSA](#) official.

"The FBI is a customer of mine," Inglis said in response to a question from the Guardian. "But I don't provide domestic intelligence for the FBI, I essentially provide foreign intelligence inside, something that might cross the seam, and give them a tip as to how to spend their precious domestic resources to prosecute terrorism, counterintelligence, things of that sort.

"So I can imagine situations where I, on their behalf, am querying my databases, foreign intelligence databases, to inform those instruments of power. I'm not yet in a place where I understand how I might give them direct access to those databases for their authorities. That I think would be problematic."

Inglis said he would have to see the legislation to get a better understanding of how it would work.

But in the six months since the Guardian, the Washington Post and others began publishing material [derived from provided by a former NSA contractor, Edward Snowden](#), Inglis' statement is the clearest yet that the FBI and other law

enforcement agencies cannot search through the NSA's data troves directly. Recently declassified and heavily redacted opinions of the special [US Foreign Intelligence Surveillance Court, known as the Fisa court](#), have not made clear to what extent law enforcement agencies have unmediated access to NSA databases.

The Senate intelligence committee's bill, called the Fisa Improvements Act, is one of several legislative answers to the unfolding controversy over the breadth of the NSA's powers. It competes directly with a bill emerging from the Senate judiciary committee that would end bulk data collection from Americans without individual warrants.

In recent weeks the NSA has sought to build support for its surveillance powers. It was to that purpose that Inglis addressed the University of Pennsylvania Law School for two hours on Friday.

Inglis argued that NSA bulk surveillance was manifestly legal, well supervised by Congress and the [Fisa court](#), and necessary to protect the US from terrorist attacks. While his remarks substantively echoed those he and colleagues have given to congressional committees, his appearance outside NSA headquarters at Fort Meade or Capitol Hill was a rare recent instance of the NSA taking its case directly to the public.

Whatever disagreements exist about the proper scope of NSA's surveillance, Inglis argued, "we all have a common objective, which is to figure this out, to sort this out."

Pressed by University of Pennsylvania professor Claire Finkelstein, Inglis strongly decried Snowden's leaks as illegal and morally illegitimate, but conceded that they have provided NSA with an opportunity "not only to restore trust in a system or a system of practices, but to go forward such that we strengthen the bonds of trust" with the public.

Not every attendee was convinced. Jack Regenbogen, a representative of the Penn Law chapter of the National Lawyers Guild, told Inglis the scope of NSA surveillance was "truly terrifying", and on behalf of the organization demanded it stop. Inglis sought at length to refute Regenbogen's factual and interpretive presentation of NSA activities but thanked him for making them, saying "They influence me."

"I mean this seriously," Inglis said. "If you're looking for a job in another year and a half, come influence us from the inside."

After the talk, the second-year law student said he was "flattered" by Inglis' offer, but expressed reservations about the deputy NSA director's defense of bulk surveillance.

"Given the NSA's past history of misleading the public, it's hard to take his word at value," Regenbogen said. "I appreciate him putting himself out there."

PUBLICATIONS

Targeted Killings: Law and Morality in an Asymmetrical World

Edited by: Claire Finkelstein, Jens David Ohlin, and Andrew Altman
Published by: Oxford University Press, 2012

Drawing on the study of law, philosophy, and applied ethics, *Targeted Killings* is an innovative analysis of one of the most controversial topics in international law and moral theory. This book addresses, *inter alia*, the use of unmanned aerial vehicles to target and kill suspected terrorists across international borders. The volume employs a multidisciplinary approach, which draws from scholarly debate in a number of fields and provides the reader with a full overview of a complex issue.

Targeted Killings grew from CERL's April 2011 conference "Using Targeted Killing to Fight the War on Terror: Philosophical, Moral and Legal Challenges", in which conference participants were asked to write original works to discuss at the gathering. The original works presented at the conference make up this collection of essays.

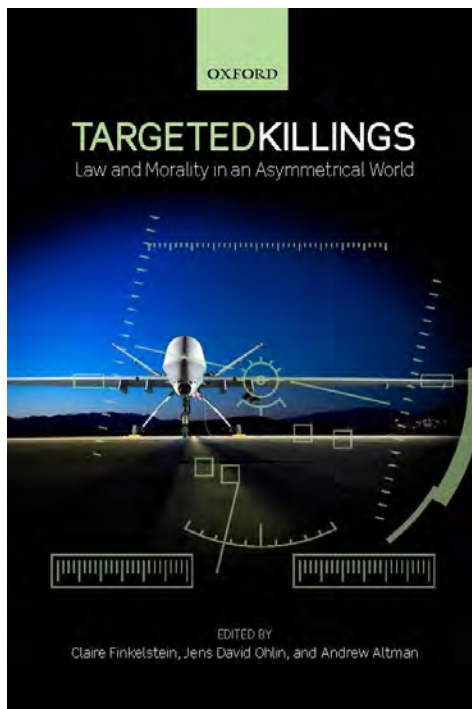
Reviews

"This edited volume exploring the legal and moral contours of a new technology, as well as more conventional forms of targeted killing, is a timely and welcome addition to the expanding scholarship on the evolving means of state-sponsored killing."

Steven J. Barela, *Journal of International Criminal Justice*, 2012

"*Targeted Killings: Law and Morality in an Asymmetrical World* is a thought-provoking contribution that takes a refreshingly broad and timely approach in addressing the legal, ethical, and strategic-political dimension of the contemporary debate over targeted killings."

Robin Geiß, *European Journal of International Law*, 2013



Professor Finkelstein and Board Member Mr. Jules Zacher discuss the newly-released *Targeted Killings* volume in the Penn Law Courtyard (right).



FORTHCOMING PUBLICATIONS

The Law of Cyberwar: Digital Conflict, Kinetic Results

Edited by: Jens David Ohlin, Kevin Govern, and Claire Finkelstein
Forthcoming by: Oxford University Press, April 2015

This volume will explore questions about the degree to which engaging in war using the techniques of cyber technology is compatible with rule of law values. Simply put, is cyberwar consistent with the idea that there are deep moral and legal principles, adherence to which successfully limits the permissibility of war to cases where those principles are observed? Can we both accept the legitimacy of cyberwar and maintain that war is fundamentally a constrained activity, one that can be justified according to a set of moral principles? Or does an acceptance of cyberwar, insofar as it requires us to relinquish our attachment to so many of the doctrines of just war theory, mean that we have given up on the idea of limited warfare altogether, in favor of a more Clausewitzian vision that anything goes? If one does allow that the use of techniques of cyberwar are compatible with the traditional laws of war, and hence with rule of law values, there are further and more refined decisions to be made. For example, one might ask whether the laws of war, such as those typically applied to kinetic war, must be understood as structured in parallel fashion when applied to cyberwar in lieu of conventional techniques of war. Do the laws of armed conflict apply to cyberspace in the same way we have conceived of those laws as applying to traditional warfare?

Anticipated Volumes

Sovereignty and the New Executive Authority

Edited by: Claire Finkelstein and Sharon Lloyd

Sovereignty and the New Executive Authority will address the expanding powers of executive authority and its implications for democracy in a time of increased national security concerns and terroristic activity. In contemporary politics, where concerns about national security are prominent in public policy debate, attempts to revitalize the stronger, absolutist view of both internal and external conceptions of state sovereignty are ubiquitous. For example, the expansion of executive authority in times of emergency was a central theme in the Bush Administration's defense of the use of certain interrogation techniques. This very theme, however, has been an important component in arguments for the legitimacy of drone strikes under the Obama Administration. It has also been echoed by the judicial branch in its deference to the executive's ever-broadening discretion over matters of war.

The Weighing of Lives in War: Combatants and Civilians in the Jus in Bello

Edited by: Larry May, Jens David Ohlin, and Claire Finkelstein

The Weighing of Lives in War: Combatants and Civilians in the Jus in Bello will explore the ethical and legal challenges that face our commanders, policy makers, and combatants in times of war. The weight assigned to combatants' lives has implications beyond the battlefield. For example, the more risk on the battlefield soldiers are expected to bear, arguably the greater the national obligation to compensate and care for wounded warriors. An argument for minimizing combatant exposure, on the other hand, would have implications for the technologies we should be willing to use in order to minimize combatant casualties, even if some such technologies pose an increased risk of collateral damage. This volume will include the works of academics and practitioners to address the concept of combatancy and its policy implications.

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