## 1AC Coast Round 4

### Plan

#### The United States federal government should limit the President's war powers authority to assert, on behalf of the United States, immunity from judicial review by establishing a cause of action allowing civil suits brought against the United States by those unlawfully injured by targeted killing operations, their heirs, or their estates in security cleared legal proceedings.

### Advantage is Norms

#### Drone prolif is inevitable but only external verification of US compliance with legal limits shapes norms that delegitimize abusive practices globally---voluntary constraint fails

Philip Alston 11, John Norton Pomeroy Professor of Law at the NYU School of Law, former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, “The CIA and Targeted Killings Beyond Borders,” 2011, 2 Harv. Nat'l Sec. J. 283, lexis

Because the United States inevitably contributes disproportionately to the shaping of global regime rules, and because it is making more extensive overt use of targeted killings than other states, its approach will heavily influence emerging global norms. This is of particular relevance in relation to the use of drones. There are strong reasons to believe that a permissive policy on drone-fired targeted killings will come back to haunt the United States in a wide range of potential situations in the not too distant future.¶ In 2011, a senior official noted that while for the past two decades the United States and its allies had enjoyed "relatively exclusive access to sophisticated precision-strike technologies," that monopoly will soon come to an end. n605 In fact, in the case of drones, some 40 countries already possess the basic technology. Many of them, including Israel, Russia, Turkey, China, India, Iran, the United Kingdom, and France either have or are seeking drones that also have the capability to shoot laser-guided missiles. Overall, the United States accounts for less than one-third of worldwide investment in UAVs. n606 On "Defense Industry Day," August 22, 2010, the Iranian President unveiled a new drone with a range of 1,000 kilometers (620 miles) and capable of carrying four cruise missiles. n607 He referred to the drones as a "messenger of honor and human generosity and a saviour of mankind," but warned ominously that it can also be "a messenger of death for enemies of mankind." n608¶ To date, the United States has opted to maintain a relatively flexible and open-ended legal regime in relation to drones, in large part to [\*442] avoid setting precedents and restricting its own freedom of action. n609 But this policy seems to assume that other states will not acquire lethal drone technology, will not use it, or will not be able to rely upon the justifications invoked by the United States. These assumptions seem questionable. American commentators favoring a permissive approach to targeted killings abroad are generally very careful to add that such killings would under no circumstances be permitted within the United States. n610¶ Thus when the United States argues that targeted killings are legitimate when used in response to a transnational campaign of terror directed at it, it needs to bear in mind that other states can also claim to be so afflicted, even if the breadth of the respective terrorist threats is not comparable. Take Russia, for example, in relation to terrorists from the Caucasus. It has characterized its military operations in Chechnya since 1999 as a counter-terrorism operation and has deployed "seek and destroy" groups of army commandoes to "hunt down groups of insurgents." n611 It has been argued that the targeted killings that have resulted are justified because they are necessary to Russia's fight against terrorism. n612 Although [\*443] there are credible reports of targeted killings conducted outside of Chechnya, Russia has refused to acknowledge responsibility for, or otherwise justify, such killings. It has also refused to cooperate with any investigation or prosecution. n613¶ In 2006, the Russian Parliament passed a law permitting the Federal Security Service (FSB) to kill alleged terrorists overseas, if authorized to do so by the President. n614 The law defines terrorism and terrorist activity extremely broadly, including "practices of influencing the decisions of government, local self-government or international organizations by terrorizing the population or through other forms of illegal violent action," and also any "ideology of violence." n615¶ Under the law, there appears to be no restriction on the use of military force "to suppress international terrorist activity outside the Russian Federation." n616 The law requires the President to seek the endorsement of the Federation Council to use regular armed forces outside Russia, but the President may deploy FSB security forces at his own discretion. According to press accounts, at the time of the law's passage, "Russian legislators stressed that the law was designed to target terrorists hiding in failed States and that in other situations the security services would work with foreign intelligence services to pursue their goals." n617 There is no publicly available information about any procedural safeguards to ensure Russian targeted killings are lawful, the criteria for those who may be targeted, or accountability mechanisms for review of targeting operations. In adopting the legislation, Russian parliamentarians claimed that, "they were emulating Israeli and US actions in adopting a law [\*444] allowing the use of military and special forces outside the country's borders against external threats." n618¶ China is another case in point. It has consistently characterized unrest among its Uighur population as being driven by terrorist separatists. But Uighur activists living outside China are not so classified by other states. That means that China could invoke American policies on targeted killing to carry out a lethal attack against a Uighur activist living in Europe or the United States. The Chinese Foreign Ministry welcomed the killing of Osama bin Laden as "a milestone and a positive development for the international anti-terrorism efforts," adding ominously in reference to the Uighur situation that, "China has also been a victim of terrorism." n619 When a journalist asked how American practice in Pakistan compared to possible Chinese external action against a Uighur to a senior United States counter-terrorism official, the latter distinguished the situations from one another on the unconvincing grounds of Pakistan's special relationship with the United States. n620¶ A more realistic note was struck by Anne-Marie Slaughter after bin Laden's killing when she observed that "having a list of leaders that you are going to take out is very troubling morally, legally and in terms of precedent. If other countries decide to apply that principle to us, we're in trouble." n621 The conclusion to be drawn is that the United States might, in the not too distant future, need to rely on international legal norms to delegitimize the behavior of other states using lethal drone strikes. For that reason alone, it would seem prudent today to be contributing to the construction of a regime that strictly limits the circumstances in which one state can seek to kill an individual in another state without the latter's consent and without complying with the applicable rules of international [\*445] law. To the extent that the United States genuinely believes it is currently acting within the scope of those rules it needs to provide the evidence.

#### Credible external oversight is key---leads to international modeling and allows the US to effectively crack down on other abusive practices

Omar S. Bashir 12, is a Ph.D. candidate in the Department of Politics at Princeton University and a graduate of the Department of Aeronautics and Astronautics at MIT, September 24th, 2012, "Who Watches the Drones?" Foreign Affairs,www.foreignaffairs.com/articles/138141/omar-s-bashir/who-watches-the-drones

Further, the U.S. counterterrorism chief John Brennan has noted that the administration is "establishing precedents that other nations may follow." But, for now, other countries have no reason to believe that the United States carries out its own targeted killing operations responsibly. Without a credible oversight program, those negative perceptions of U.S. behavior will fill the vacuum, and an anything-goes standard might be the result. U.S. denunciations of other countries' programs could come to ring hollow. ¶ If the United States did adopt an oversight system, those denunciations would carry more weight. So, too, would U.S. pressure on other states to adopt similar systems: just as suspicions grow when countries refuse nuclear inspection, foreign governments that turned down invitations to apply a proven system of oversight to their own drone campaigns would reveal their disregard for humanitarian concerns.

#### All eyes are on the US---only US norms contain drone use that prevent accidental wars

Alan W. Dowd 13, senior fellow at the Sagamore Institute for Policy Research, the American Security Council Foundation and the Fraser Institute, adjunct professor at Butler University, “Drone Wars: Risks and Warnings,” Parameters 42(4)/43(1) Winter-Spring 2013, http://www.strategicstudiesinstitute.army.mil/pubs/parameters/Issues/WinterSpring\_2013/1\_Article\_Dowd.pdf

Given their record and growing capabilities, it seems unlikely that UCAVs will ever be renounced entirely; however, perhaps the use of drones for lethal purposes can be curtailed or at least contained. It is important to recall that the United States has circumscribed its own military power in the past by drawing the line at certain technologies. The United States halted development of the neutron bomb in the 1970s and dismantled its neutron arsenal in the 2000s; agreed to forswear chemical weapons; and renounced biological warfare “for the sake of all mankind.”44¶ That brings us back to The New York Times’ portrait of the drone war. Washington must be mindful that the world is watching. This is not an argument in defense of international watchdogs tying America down. The UN secretariat may refuse to recognize America’s special role, but by turning to Washington whenever civil war breaks out, or nuclear weapons sprout up, or sea lanes are threatened, or natural disas- ters wreak havoc, or genocide is let loose, it is tacitly conceding that the United States is, well, special. Washington has every right to kill those who are trying to kill Americans. However, the brewing international backlash against the drone war reminds us that means and methods matter as much as ends. ¶ Error War¶ If these geo-political consequences of remote-control war do not get our attention, then the looming geo-strategic consequences should. If we make the argument that UCAV pilots are in the battlespace, then we are effectively saying that the battlespace is the entire earth. If that is the case, the unintended consequences could be dramatic.¶ First, if the battlespace is the entire earth, the enemy would seem to have the right to wage war on those places where UCAV operators are based. That’s a sobering thought, one few policymakers have contemplated.¶ Second, power-projecting nations are following America’s lead and developing their own drones to target their distant enemies by remote. An estimated 75 countries have drone programs underway.45 Many of these nations are less discriminating in employing military force than the United States—and less skillful. Indeed, drones may usher in a new age of accidental wars. If the best drones deployed by the best military crash more than any other aircraft in America’s fleet, imagine the accident rate for mediocre drones deployed by mediocre militaries. And then imagine the international incidents this could trigger between, say, India and Pakistan; North and South Korea; Russia and the Baltics or Poland or Georgia; China and any number of its wary neighbors.

#### Now is key and only the US can lead---lack of rules undermines all other norms on violence

James Whibley 13, received a M.A. in International Relations from Victoria University of Wellington, New Zealand, February 6th, 2013 "The Proliferation of Drone Warfare: The Weakening of Norms and International Precedent," Georgetown Journal of International Affairs,journal.georgetown.edu/2013/02/06/the-proliferation-of-drone-warfare-the-weakening-of-norms-and-international-precedent-by-james-whibley/

While drone advocates such as Max Boot argue that other countries are unlikely to follow any precedents about drone use established by America, power has an undeniable effect in establishing which norms are respected or enforced. America used its power in the international system after World War 2 to embed norms about human rights and liberal political organization, not only in allies, but in former adversaries and the international system as a whole. Likewise, the literature on rule-oriented constructivism presents a powerful case that norms have set precedents on the appropriate war-fighting and deterrence policies when using weapons of mass destruction and the practices of colonialism and human intervention. Therefore, drones advocates must consider the possible **unintended consequences of** lending legitimacy **to the** unrestricted use of drones. However, with the Obama administration only now beginning to formulate rules about using drones and seemingly uninterested in restraining its current practices, the US may miss an opportunity to entrench international norms about drone operations.¶ If countries begin to follow the precedent set by the US, there is also the risk of weakening pre-existing international norms about the use of violence. In the summer 2000 issue of International Security, Ward Thomas warned that, while the long-standing norm against assassination has always been less applicable to terrorist groups, the targeting of terrorists is, “likely to undermine the norm as a whole and erode the barriers to the use of assassination in other circumstances.” Such an occurrence would represent a deleterious unintended consequence to an already inhumane international system, justifying greater scrutiny of the drone program.¶ Realism cautions scholars not to expect ethical behaviour in international politics. Yet, the widespread use of drones by recent administrations with little accountability and the lack of any normative framework about their deployment on the battlefield could come to be seen as a serious strategic error and moral failing. If the Obama administration was nervous about leaving an amorphous drone policy to a possible Romney Presidency, then surely China or Russia possessing such a program would be terrifying.

#### That prevents erosion of deterrent relationships---causes nuclear war

Michael J Boyle 13, Assistant Professor of Political Science at La Salle University, former Lecturer in International Relations and Research Fellow at the Centre for the Study of Terrorism and Political Violence at the University of St Andrews, PhD from Cambridge University, January 2013, “The costs and consequences of drone warfare,” International Affairs 89: 1 (2013) 1–29, http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2013/89\_1/89\_1Boyle.pdf

A second consequence of the spread of drones is that many of the traditional concepts which have underwritten stability in the international system will be radically reshaped by drone technology. For example, much of the stability among the Great Powers in the international system is driven by deterrence, specifically nuclear deterrence.135 Deterrence operates with informal rules of the game and tacit bargains that govern what states, particularly those holding nuclear weapons, may and may not do to one another.136 While it is widely understood that nuclear-capable states will conduct aerial surveillance and spy on one another, overt military confrontations between nuclear powers are rare because they are assumed to be costly and prone to escalation. One open question is whether these states will exercise the same level of restraint with drone surveillance, which is unmanned, low cost, and possibly deniable. States may be more willing to engage in drone overflights which test the resolve of their rivals, or engage in ‘salami tactics’ to see what kind of drone-led incursion, if any, will motivate a response.137 This may have been Hezbollah’s logic in sending a drone into Israeli airspace in October 2012, possibly to relay information on Israel’s nuclear capabilities.138 After the incursion, both Hezbollah and Iran boasted that the drone incident demonstrated their military capabilities.139 One could imagine two rival states—for example, India and Pakistan—deploying drones to test each other’s capability and resolve, with untold consequences if such a probe were misinterpreted by the other as an attack. As drones get physically smaller and more precise, and as they develop a greater flying range, the temptation to use them to spy on a rival’s nuclear programme or military installations might prove too strong to resist. If this were to happen, drones might gradually erode the deterrent relationships that exist between nuclear powers, thus magnifying the risks of a spiral of conflict between them.

#### And causes great power war because leaders are tempted to use drones too often---traditional checks on conflict don’t apply

Eric Posner 13, a professor at the University of Chicago Law School, May 15th, 2013, "The Killer Robot War is Coming," Slate, www.slate.com/articles/news\_and\_politics/view\_from\_chicago/2013/05/drone\_warfare\_and\_spying\_we\_need\_new\_laws.html

Drones have existed for decades, but in recent years they have become ubiquitous. Some people celebrate drones as an effective and humane weapon because they can be used with precision to slay enemies and spare civilians, and argue that they pose no special risks that cannot be handled by existing law. Indeed, drones, far more than any other weapon, enable governments to comply with international humanitarian law by avoiding civilian casualties when attacking enemies. Drone defenders also mocked Rand Paul for demanding that the Obama administration declare whether it believed that it could kill people with drones on American territory. Existing law permits the police to shoot criminals who pose an imminent threat to others; if police can gun down hostage takers and rampaging shooters, why can’t they drone them down too?¶ While there is much to be said in favor of these arguments, drone technology poses a paradox that its defenders have not confronted. Because drones are cheap, effective, riskless for their operators, and adept at minimizing civilian casualties, governments may be tempted to use them too frequently.¶ Indeed, a panic has already arisen that the government will use drones to place the public under surveillance. Many municipalities have passed laws prohibiting such spying even though it has not yet taken place. Why can’t we just assume that existing privacy laws and constitutional rights are sufficient to prevent abuses?¶ To see why, consider U.S. v. Jones, a 2012 case in which the Supreme Court held that the police must get a search warrant before attaching a GPS tracking device to a car, because the physical attachment of the device trespassed on property rights. Justice Samuel Alito argued that this protection was insufficient, because the government could still spy on people from the air. While piloted aircraft are too expensive to use routinely, drones are not, or will not be. One might argue that if the police can observe and follow you in public without obtaining a search warrant, they should be able to do the same thing with drones. But when the cost of surveillance declines, more surveillance takes place. If police face manpower limits, then they will spy only when strong suspicions justify the intrusion on targets’ privacy. If police can launch limitless drones, then we may fear that police will be tempted to shadow ordinary people without good reason.¶ Similarly, we may be comfortable with giving the president authority to use military force on his own when he must put soldiers into harm’s way, knowing that he will not risk lives lightly. Presidents have learned through hard experience that the public will not tolerate even a handful of casualties if it does not believe that the mission is justified. But when drones eliminate the risk of casualties, the president is more likely to launch wars too often.¶ The same problem arises internationally. The international laws that predate drones assume that military intervention across borders risks significant casualties. Since that check normally kept the peace, international law could give a lot of leeway for using military force to chase down terrorists. But if the risk of casualties disappears, then nations might too eagerly attack, resulting in blowback and retaliation. Ironically, the reduced threat to civilians in tactical operations could wind up destabilizing relationships between countries, including even major powers like the United States and China, making the long-term threat to human life much greater.¶ These three scenarios illustrate the same lesson: that law and technology work in tandem. When technological barriers limit the risk of government abuse, legal restrictions on governmental action can be looser. When those technological barriers fall, legal restrictions may need to be tightened.

#### Independently, US justifications for targeted killing will spill over to erode legal restraints on all violence and legitimize preemptive war

Craig Martin 11, Associate Professor of Law at Washburn University School of Law, “Going Medieval: Targeted Killing, Self-Defence, and the Jus Ad Bellum Regime,” Ch 8 in TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD, p. 223, available at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1956141

IV. The potential impact of the targeted killing policy on international law

The United States has been engaging in this practice of using drone-mounted missile systems to kill targeted individuals since at least 2002.98 An increasing number of countries have employed different methods of targeted killing that constitute a use of force under jus ad bellum.99 The evidence suggests that the United States intends to continue and indeed expand the program, and there is a growing body of scholarly literature that either defends the policy’s legality, or advocates adjustment in international law to permit such action. There is, therefore, a real prospect that the practice could become more widespread, and that customary international law could begin to shift to reflect the principles implicit in the U.S. justification and in accordance with the rationales developed to support it.¶ Some of the implications of such an adjustment in the jus ad bellum regime are obvious from the foregoing analysis. As discussed, there would be a rejection of the narrow principle of self-defense in favor of something much closer to the Grotian concept of defensive war, encompassing punitive measures in response to past attacks and preventative uses of force to halt the development of future threats. The current conditions for a legitimate use of force in self-defense, namely the occurrence or imminence of an armed attack, necessity, and proportionality, would be significantly diluted or abandoned. Not only the doctrine of self-defense, but other aspects of the collective security system would be relaxed as well. Harkening back to Grotian notions of law enforcement constituting a just cause for war, the adjusted jus ad bellum regime would potentially permit the unilateral use of force against and within states for the purpose of attacking NSAs as such, in effect to enforce international law in jurisdictions that were incapable of doing so themselves.100 This would not only further undermine the concept of self-defense, but would undermine the exclusive jurisdiction that the U.N. Security Council currently has to authorize the use of force for purposes of “law enforcement” under Chapter VII of the Charter. Thus, both of the exceptions to the Article 2(4) prohibition on the use of force would be expanded.¶ In addition, however, the targeted killing policy threatens to create other holes in the jus ad bellum regime. This less obvious injury would arise from changes that would be similarly required of the IHL regime, and the resulting modifications to the fundamental relationship between the two regimes. These changes could lead to a complete severance of the remaining connection between the two regimes. Indeed, Ken Anderson, a scholar who has testified more than once on this subject before the U.S. Congress,101 has advocated just such a position, suggesting that the United States should assert that its use of force against other states in the process of targeted killings, while justified by the right to self-defense, does not rise to such a level that it would trigger the existence of an international armed conflict or the operation of IHL principles.102 If customary international law evolved along such lines, reverting to gradations in the types of use of force the change would destroy the unity of the system comprised of the jus ad bellum and IHL regimes, and there would be legal “black holes” in which states could use force without being subject to the limitations and conditions imposed by the IHL regime.¶ The structure of Harold Koh’s two-pronged justification similarly implies a severance of this relationship between jus ad bellum and IHL, albeit in a different and even more troubling way. His policy justification consists of two apparently independent and alternative arguments—that the United States is in an armed conflict with Al Qaeda and associated groups; and that the actions are justified as an exercise of self-defense. The suggestion seems to be that the United States is entitled on either basis to use armed force not just against the individuals targeted, but also against states in which the terrorist members are located. In other words, the first prong of the argument is that the use of force against another sovereign state, for the purposes of targeting Al Qaeda members, is justified by the existence of an armed conflict with Al Qaeda. If this is indeed what is intended by the policy justification, it represents an extraordinary move, not just because it purports to create a new category of armed conflict (that is, a “transnational” armed conflict without geographic limitation),103 but because it also suggests that there need be no jus ad bellum justification at all for a use of force against another state. Rather, the implication of Koh’s rationale is that the existence of an armed conflict under IHL can by itself provide grounds for exemption from the prohibition against the threat or use of force under the jus ad bellum regime.¶ This interpretation of the justifications cannot be pressed too far on the basis of the language of Mr. Koh’s speech alone, which he hastened to explain at the time was not a legal opinion.104 The two justifications could be explained as being supplementary rather than independent and alternative in nature. But the conduct of the United States in the prosecution of the policy would appear to confirm that it is based on these two independent justifications.105 The strikes against groups and states unrelated to the 9/11 attacks could be explained in part by the novel idea that force can be used against NSAs as such, wherever they may be situated. But even assuming some sort of strict liability for states in which guilty NSAs are found, that explanation still does not entirely account for the failure to tie the use of force against the different groups to specific armed attacks launched by each such group. This suggests that the United States is also relying quite independently on the argument that it is engaged in an armed conflict with all of these groups, and that the existence of such an armed conflict provides an independent justification for the use of force against the states in which the groups may be operating.¶ While the initial use of force in jus ad bellum terms is currently understood to bring into existence an international armed conflict and trigger the operation of IHL, the changes suggested by the policy would turn this on its head, by permitting the alleged existence of a “transnational” armed conflict to justify the initial use of force against third states. Whereas the two regimes currently operate as two components of an overall legal system relating to war, with one regime governing the use of force and the other the conduct of hostilities in the resulting armed conflict, the move attempted by the U.S. policy would terminate these independent but inter-related roles within a single system, and expand the role and scope of IHL to essentially replace aspects of the jus ad bellum regime. This would not only radically erode the jus ad bellum regime’s control over the state use of force, but it could potentially undermine the core idea that war, or in more modern terms the use of force and armed conflict, constitutes a legal state that triggers the operation of special laws that govern the various aspects of the phenomenon. There is a risk of return to a pre-Grotian perspective in which “war” was simply a term used to describe certain kinds of organized violence, rather than constituting a legal institution characterized by a coherent system of laws designed to govern and constrain all aspects of its operation.¶ There is a tendency in the U.S. approach to the so-called “global war on terror” to cherry-pick principles of the laws of war and to apply them in ways and in circumstances that are inconsistent with the very criteria within that legal system that determine when and how it is to operate. This reflects a certain disdain for the idea that the laws of war constitute an internally coherent system of law.106 In short, the advocated changes to the jus ad bellum regime and to the relationship between it and the IHL regime, and thus to the laws of war system as a whole,107 would constitute marked departures from the trajectory the system has been on during its development over the past century, and would be a repudiation of deliberate decisions that were made in creating the U.N. system after the Second World War.108¶ The premise of my argument is not that any return to past principles is inherently regressive. A rejection of recent innovations in favor of certain past practices might be attractive to some in the face of new transnational threats. The argument here is not even to deny the idea that the international law system may have to adapt to respond to the transnational terrorist threat. The point, rather, is that the kinds of changes to the international law system that are implicit in the targeted killing policy, and which are advocated by its supporters, would serve to radically reduce the limitations and constraints on the use of force by states against states. The modern principles that are being abandoned were created for the purpose of limiting the use of force and thus reducing the incidence of armed conflict among nations. The rejection of those ideas and a return to older concepts relating to the law of war would restore aspects of a system in which war was a legitimate tool of statecraft, and international armed conflict was thus far more frequent and widespread.109¶ The entire debate on targeted killing is so narrowly focused on the particular problems posed by transnational terrorist threats, and how to manipulate the legal limitations that tend to frustrate some of the desired policy choices, that there is insufficient reflection on the broader context, and the consequences that proposed changes to the legal constraints would have on the wider legal system of which they are a part. It may serve the immediate requirements of the American government, in order to legitimize the killing of AQAP members in Yemen, to expand the concept of self-defense, and to suggest that states can use force on the basis of a putative “transnational” armed conflict with NSAs. The problem is that the jus ad bellum regime applies to all state use of force, and it is not being adjusted in some tailored way to deal with terrorism alone. If the doctrine of self-defense is expanded to include preventative and punitive elements, it will be so expanded for all jus ad bellum purposes. The expanded doctrine of self-defense will not only justify the use of force to kill individual terrorists alleged to be plotting future attacks, but to strike the military facilities of states suspected of preparing for future aggression. If the threshold for use of force against states “harboring” NSAs is significantly reduced, the gap between state responsibility and the criteria for use of force will be reduced for all purposes. If the relationship between jus ad bellum and IHL is severed or altered, so as to create justifications for the use of force that are entirely independent of the jus ad bellum regime, then states will be entitled to use force against other states under the pretext of self-proclaimed armed conflict with NSAs generally.¶ We may think about each of these innovations as being related specifically to operations against terrorist groups that have been responsible for heinous attacks, and applied to states that have proven uniquely unwilling or unable to take the actions necessary to deal with the terrorists operating within their territory. But no clear criteria or qualifications are in fact tied to the modifications that are being advanced by the targeted killing policy. Relaxing the current legal constraints on the use of force and introducing new but poorly defined standards, will open up opportunities for states to use force against other states for reasons that have nothing to do with anti-terrorist objectives. Along the lines that Jeremy Waldron argues in chapter 4 in this volume,110 more careful thought ought to be given to the general norms that we are at risk of developing in the interest of justifying the very specific targeted killing policy. Ultimately, war between nations is a far greater threat, and is a potential source of so much more human suffering than the danger posed by transnational terrorism. This is not to trivialize the risks that terrorism represents, particularly in an age when Al Qaeda and others have sought nuclear weapons. But we must be careful not to undermine the system designed to constrain the use of force and reduce the incidence of international armed conflict, in order to address a threat that is much less serious in the grand scheme of things.

#### Robust norms restricting the use of force empirically prevent conflict escalation among great powers

John Vasquez 9, Thomas B. Mackie Scholar of International Relations and Professor of Political Science at the University of Illinois at Urbana-Champaign, PhD in Poli Sci from Syracuse University, “Peace,” Chapter 8 in The War Puzzle Revisited, p 298-299, google books

Wallensteen’s examination of the characteristics of particularist periods provides significant additional evidence that the steps-to-war analysis is on the right track. Realist practices are associated with war, and peaceful systems are associated with an emphasis on other practices. Peaceful systems are exemplified by the use of practices like buffer states, compensation, and concerts of power that bring major states together to form a network of institutions that provide governance for the system. The creation of rules of the game that can handle certain kinds of issues – territorial and ideological questions – and/or keep them off the agenda seems to be a crucial variable in producing peace.¶ Additional evidence on the import of rules and norms is provided in a series of studies by Kegley and Raymond (1982, 1984, 1986, 1990) that are operationally more precise than Wallensteen’s (1984) analysis. Kegley and Raymond provide evidence that when states accept norms, the incidence of war and military confrontation is reduced. They find that peace is associated with periods in which alliance norms are considered binding and the unilateral abrogation of commitments and treaties illegitimate. The rules imposed by the global political culture in these periods result in fewer militarized disputes and wars between major states. In addition, the wars that occur are kept at lower levels of severity, magnitude, and duration (i.e. they are limited wars).¶ Kegley and Raymond attempt to measure the extent to which global cultural norms restrain major states by looking at whether international law and commentary on it sees treaties and alliances as binding. They note that there have been two traditions in international law – pacta sunt servanda, which maintains that agreements are binding, and clausa rebus sic stantibus, which says that treaties are signed “as matters stand” and that any change in circumstances since the treaty was signed permits a party to withdraw unilaterally. One of the advantages the Kegley-Raymond studies have over Wallensteen (1984) is that they are able to develop reliable measures of the extent to which in any given half-decade that tradition in international law emphasizes the rebus or pacta sunt servanda tradition. This indicator is important not only because it focuses in on the question of unilateral actions, but because it can serve as an indicator of how well the peace system is working. The pacta sunt servanda tradition implies a more constraining political system and robust institutional context which should provide an alternative to war.¶ Kegley and Raymond (1982: 586) find that in half-decades (from 1820 to 1914) when treaties are considered non-binding (rebus), wars between major states occur in every half-decade (100 percent), but when treaties are considered binding (pacta sunt servanda), wars between major states occur in only 50 percent of the half-decades. The Cramer’s V for this relationship is .66. When the sample is expanded to include all states in the central system, Cramer’s V is 0.44, indicating that global norms have more impact on preventing war between major states. Nevertheless, among central system states between 1820 and 1939, war occurred in 93 percent of the half-decades where the rebus tradition dominated and in only 60 percent of the half-decades where the pacta sunt sevanda tradition dominated.¶ In a subsequent analysis of militarized disputes from 1820 to 1914, Kegley and Raymond (1984: 207-11) find that there is a negative relationship between binding norms and the frequency and scope of disputes short of war. In periods when the global culture accepts the pacta sunt servanda tradition as the norm, the number of military disputes goes down and the number of major states involved in a dispute decreases. Although the relationship is of moderate strength, it is not eliminated by other variables, namely alliance flexibility. As Kegley and Raymond (1984: 213) point out, this means “that in periods when the opportunistic renunciation of commitments” is condoned, militarized disputes are more likely to occur and to spread. The finding that norms can reduce the frequency and scope of disputes is significant evidence that rules can permit actors to successfully control and manage disputes so that they are not contagious and they do not escalate to war. These findings are consistent with Wallensteen’s (1984) and suggest that one of the ways rules help prevent war is by reducing, limiting, and managing disputes short of war.

#### Specifically, executive discretion over the legitimacy of targets will eviscerate legal restrictions on self-defense

Rosa Brooks 13, Professor of Law at the Georgetown University Law Center, Bernard L. Schwartz Senior Fellow at the New America Foundation, “The Constitutional and Counterterrorism Implications of Targeted Killing,” http://www.judiciary.senate.gov/pdf/04-23-13BrooksTestimony.pdf

5. Setting Troubling International Precedents ¶ Here is an additional reason to worry about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in “targeted killings” of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the US currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice. ¶ Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. We should use this window to advance a robust legal and normative framework that will help protect against abuses by those states whose leaders can rarely be trusted. Unfortunately, we are doing the exact opposite: Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and –literally -- get away with murder. ¶ Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.42 In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,43 or in self-defense "in the event of an armed attack." ¶ The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular. ¶ It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will consent to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will not consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem. ¶ This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the U.N. Charter.44 If the US is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, if the US executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill- defined war, why shouldn’t other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

#### Now is key---US targeted killing is driving a global shift in strategic doctrines---results in nuclear war

Kerstin Fisk 13, visiting assistant professor in the Department of Political Science at Loyola Marymount University, PhD in Political Science from Claremont Graduate University, and Jennifer M. Ramos, Assistant Professor of Political Science at Loyola Marymount University, PhD in Political Science from UC Davis, April 15 2013, “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm,” International Studies Perspectives, http://onlinelibrary.wiley.com.turing.library.northwestern.edu/doi/10.1111/insp.12013/full

Preventive self-defense entails waging a war or an attack by choice, in order to prevent a suspected enemy from changing the status quo in an unfavorable direction. Prevention is acting in anticipation of a suspected latent threat that might fully emerge someday. One might rightfully point out that preventive strikes are nothing new—the Iraq War is simply a more recent example in a long history of the preventive use of force. The strategic theorist Colin Gray (2007:27), for example, argues that “far from being a rare and awful crime against an historical norm, preventive war is, and has always been, so common, that its occurrence seems remarkable only to those who do not know their history.” Prevention may be common throughout history, but this does not change the fact that it became increasingly difficult to justify after World War II, as the international community developed a core set of normative principles to guide state behavior, including war as a last resort. The threshold for war was set high, imposing a stringent standard for states acting in self-defense. Gray concedes that there has been a “slow and erratic, but nevertheless genuine, growth of a global norm that regards the resort to war as an extraordinary and even desperate measure” and that the Iraq war set a “dangerous precedent” (44). Although our cases do not provide a definitive answer for whether a preventive self-defense norm is diffusing, they do provide some initial evidence that states are re-orienting their military and strategic doctrines toward offense. In addition, these states have all either acquired or developed unmanned aerial vehicles for the purposes of reconnaissance, surveillance, and/or precision targeting.¶ Thus, the results of our plausibility probe provide some evidence that the global norm regarding the use of force as a last resort is waning, and that a preventive self-defense norm is emerging and cascading following the example set by the United States. At the same time, there is variation among our cases in the extent to which they apply the strategy of self-defense. China, for example, has limited their adaption of this strategy to targeted killings, while Russia has declared their strategy to include the possibility of a preventive nuclear war. Yet, the preventive self-defense strategy is not just for powerful actors. Lesser powers may choose to adopt it as well, though perhaps only implementing the strategy against actors with equal or lesser power. Research in this vein would compliment our analyses herein.¶ With the proliferation of technology in a globalized world, it seems only a matter of time before countries that do not have drone technology are in the minority. While preventive self-defense strategies and drones are not inherently linked, current rhetoric and practice do tie them together. Though it is likely far into the future, it is all the more important to consider the final stage of norm evolution—internalization—for this particular norm. While scholars tend to think of norms as “good,” this one is not so clear-cut. If the preventive self-defense norm is taken for granted, integrated into practice without further consideration, it inherently changes the functioning of international relations. And unmanned aerial vehicles, by reducing the costs of war, make claims of preventive self-defense more palatable to the public. Yet a global norm of preventive self-defense is likely to be destabilizing, leading to more war in the international system, not less. It clearly violates notions of just war principles—jus ad bellum. The United States has set a dangerous precedent, and by continuing its preventive strike policy it continues to provide other states with the justification to do the same.

#### Credible external oversight is key to solve---the alternative is an anything-goes standard

Omar S. Bashir 12, is a Ph.D. candidate in the Department of Politics at Princeton University and a graduate of the Department of Aeronautics and Astronautics at MIT, September 24th, 2012, "Who Watches the Drones?" Foreign Affairs,www.foreignaffairs.com/articles/138141/omar-s-bashir/who-watches-the-drones

Further, the U.S. counterterrorism chief John Brennan has noted that the administration is "establishing precedents that other nations may follow." But, for now, other countries have no reason to believe that the United States carries out its own targeted killing operations responsibly. Without a credible oversight program, those negative perceptions of U.S. behavior will fill the vacuum, and an anything-goes standard might be the result. U.S. denunciations of other countries' programs could come to ring hollow. ¶ If the United States did adopt an oversight system, those denunciations would carry more weight. So, too, would U.S. pressure on other states to adopt similar systems: just as suspicions grow when countries refuse nuclear inspection, foreign governments that turned down invitations to apply a proven system of oversight to their own drone campaigns would reveal their disregard for humanitarian concerns.

#### A norm of preventive war pushes regional conflicts over the brink---causes multiple scenarios for nuclear war

James B. Steinberg 2, senior fellow and vice president and director of Foreign Policy Studies at the Brookings Institution, Michael O’Hanlon, Director of Research for the 21st Century Defense Initiative at Brookings, Ph.D. from Princeton in public and international affairs, and Susan Rice, senior fellow in Foreign Policy at Brookings, “The New National Security Strategy and Preemption,” http://www.brookings.edu/research/papers/2002/12/terrorism-ohanlon

A final concern relates to the impact of the precedent set by the United States legitimating action that others might emulate, at the same time reducing its leverage to convince such countries not to use force. This concern is theoretical at one level, since it relates to stated doctrine as opposed to actual U.S. actions. But it is very real at another level. Today's international system is characterized by a relative infrequency of interstate war. Developing doctrines that lower the threshold for preemptive action could put that accomplishment at risk, and exacerbate regional crises already on the brink of open conflict.¶ Of course, no country will embark suddenly on a war of aggression simply because the United States provides it with a quasi-legal justification to do so. But countries already on the brink of war, and leaning strongly towards war, might use the doctrine to justify an action they already wished to take, and the effect of the U.S. posture may make it harder for the international community in general, and the U.S. in particular, to counsel delay and diplomacy.¶ Potential examples abound, ranging from Ethiopia and Eritrea, to China and Taiwan, to the Middle East. But perhaps the clearest case is the India-Pakistan crisis. Last spring, India was poised to attack Pakistan, given Pakistan's suspected complicity in assisting Islamic extremist terrorists who went from Pakistan into the disputed territory of Kashmir. A combination of U.S. pressure on both countries, with some last-minute caution by the leaders of Pakistan and India, narrowly averted a war that had the potential to escalate to the nuclear level once it began. Although India might have intended to limit its action to eliminating terrorist bases in Pakistan-held Kashmir and perhaps some bases inside Pakistan, nuclear-armed Pakistan might well have believed that India's intentions were to overthrow the regime in Islamabad or to eliminate its nuclear weapons capability. That situation would have further exacerbated the risks of escalation. Unfortunately, the terrorist infiltrations from Pakistan to Kashmir that did much to spark the earlier crisis appear to be resuming. Kashmir's status remains contentious, meaning that the risk of conflict remains.¶ Should the crisis resume, a U.S. policy of preemption may provide hawks in India the added ammunition they need to justify a strike against Pakistan in the eyes of their fellow Indian decision-makers. Recently, India Finance Minister (and former Foreign Minister) Jaswant Singh welcomed the administration's new emphasis on the legitimacy of preemption.

#### Legitimizing preventive war causes a Chinese attack on US missile defense

Stephen Walt 4, Robert and Renee Belfer Professor of International Affairs at Harvard, PhD in Political Science from UC Berkeley, October 1 2004, “The Strategic Environment,” Panel Discussion at “Preemptive Use of Force: A Reassessment,” Conference held by the Fletcher Forum on International Affairs, <http://www.brookings.edu/views/papers/daalder/daalder_fletcher.pdf>

Finally, as Ivo has already noted, there is this precedent problem. By declaring that preventive war is an effective policy option for us, we make it easier for others to see it as an effective policy option for them. Why can’t India attack Pakistan before it develops more nuclear weapons? Why can’t Turkey attack Iraqi Kurdistan to prevent the emergence of an independent state there? Why was it wrong for Serbia to take preventive action against the Kosovars, given that there was a guerilla army attacking Serbs in Kosovo, and given that the Serbs could see a long term threat to their national security if the Kosovar-Albanians got more and more politically organized and tried to secede? Why couldn’t a stronger China decide that America’s national missile defense program was a direct threat to their nuclear deterrent capability, and therefore decide to order a preventive commando strike against American radar sites in Alaska? Now this sounds wildly far-fetched, of course, but imagine the situation being reversed. Imagine if another country threatened our second strike capability, wouldn’t we have looked for some way to prevent that from happening? Of course we would. So again, we’re creating a precedent here.

#### That goes nuclear

John W. Lewis 12, William Haas Professor of Chinese Politics, emeritus, at Stanford University, PhD from UCLA, and Xue Litai, research scholar at the Project on Peace and Cooperation in the Asian-Pacific Region at Stanford University’s Center for International Security and Cooperation, “Making China’s nuclear war plan,” Bulletin of the Atomic Scientists September/October 2012 vol. 68 no. 5 45-65, http://bos.sagepub.com/content/68/5/45.full

If the CMC authorizes a missile base to launch preemptive conventional attacks on an enemy, however, the enemy and its allies could not immediately distinguish whether the missiles fired were conventional or nuclear. From their perspective, the enemy forces could justifiably launch on warning and retaliate against all the command-and-control systems and missile assets of the Chinese missile launch base and even the overall command-and-control system of the central Second Artillery headquarters. In the worst case, a self-defensive first strike by Chinese conventional missiles could end in the retaliatory destruction of many Chinese nuclear missiles and their related command-and-control systems. That disastrous outcome would force the much smaller surviving and highly vulnerable Chinese nuclear missile units to fire their remaining missiles against the enemy’s homeland. In this quite foreseeable action-reaction cycle, escalation to nuclear war could become accelerated and unavoidable. This means that the double policies could unexpectedly cause, rather than deter, a nuclear exchange.

### Solvency

#### The plan establishes legal norms and ensures compliance with the laws of war

Jonathan Hafetz 13, Associate Prof of Law at Seton Hall University Law School, former Senior Staff Attorney at the ACLU, served on legal teams in multiple Supreme Court cases regarding national security, “Reviewing Drones,” 3/8/2013, http://www.huffingtonpost.com/jonathan-hafetz/reviewing-drones\_b\_2815671.html

The better course is to ensure meaningful review after the fact. To this end, Congress should authorize federal damages suits by the immediate family members of individuals killed in drone strikes.¶ Such ex post review would serve two main functions: providing judicial scrutiny of the underlying legal basis for targeted killings and affording victims a remedy. It would also give judges more leeway to evaluate the facts without fear that an error on their part might leave a dangerous terrorist at large.¶ For review to be meaningful, judges must not be restricted to deciding whether there is enough evidence in a particular case, as they would likely be under a FISA model. They must also be able to examine the government's legal arguments and, to paraphrase the great Supreme Court chief justice John Marshall, "to say what the law is" on targeted killings.¶ Judicial review through a civil action can achieve that goal. It can thus help resolve the difficult questions raised by the Justice Department white paper, including the permissible scope of the armed conflict with al Qaeda and the legality of the government's broad definition of an "imminent" threat.¶ Judges must also be able to afford a remedy to victims. Mistakes happen and, as a recent report by Columbia Law School and the Center for Civilians in Conflict suggests, they happen more than the U.S. government wants to acknowledge.¶ Errors are not merely devastating for family members and their communities. They also increase radicalization in the affected region and beyond. Drone strikes -- if unchecked -- could ultimately create more terrorists than they eliminate.¶ Courts should thus be able to review lethal strikes to determine whether they are consistent with the Constitution and with the 2001 Authorization for Use of Military Force, which requires that such uses of force be consistent with the international laws of war. If a drone strike satisfies these requirements, the suit should be dismissed.

#### Cause of action creates a deterrent effect that makes officials think twice about drones---drawbacks of judicial review don’t apply

Stephen I. Vladeck 13, Professor of Law and Associate Dean for Scholarship at American University Washington College of Law, senior editor of the peer-reviewed Journal of National Security Law and Policy, Supreme Court Fellow at the Constitution Project, and fellow at the Center on National Security at Fordham University School of Law, JD from Yale Law School, Feb 27 2013, “DRONES AND THE WAR ON TERROR: WHEN CAN THE U.S.TARGET ALLEGED AMERICAN TERRORISTS OVERSEAS?” Hearing Before the House Committee on the Judiciary, http://www.lawfareblog.com/wp-content/uploads/2013/02/Vladeck-02272013.pdf

At first blush, it may seem like many of these issues would be equally salient in the context of after-the-fact damages suits. But as long as such a regime was designed carefully and conscientiously, I believe that virtually all of these concerns could be mitigated. ¶ For starters, retrospective review doesn’t raise anywhere near the same concerns with regard to adversity or judicial competence. With respect to adversity, presumably those who are targeted in an individual strike could be represented as plaintiffs in a post-hoc proceeding, whether through their next friend or their heirs. And as long as they could state a viable claim for relief, it’s difficult to see any pure Article III problem with such a suit for retrospective relief.¶ As for competence, judges routinely review whether government officers acted in lawful self-defense under exigent circumstances (this is exactly what the Supreme Court’s 1985 decision in Tennessee v. Garner20 contemplates, after all). And if the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda or one of its affiliates), but to do so using highly classified information in a manner that balances—albeit not always ideally—the government’s interest in secrecy with the detainee’s ability to contest the evidence against him.21 Just as Guantánamo detainees are represented in their habeas proceedings by security-cleared counsel who must comply with court-imposed protective orders and security procedures,22 so too, the subjects of targeted killing operations could have their estates represented by security-cleared counsel, who would be in a far better position to challenge the government’s evidence and to offer potentially exculpatory evidence / arguments of their own. And although the Guantánamo procedures have been developed by courts on an ad hoc basis (a process that has itself been criticized by some jurists), 23 Congress might also look to provisions it enacted in 1996 in creating the little-known Alien Terrorist Removal Court, especially 8 U.S.C. § 1534,24 as a model for such proceedings. ¶ More to the point, it should also follow that courts would be far more able as a practical matter to review the relevant questions in these cases after the fact. Although the pure membership question can probably be decided in the abstract, it should stand to reason that the imminence and infeasibility-of-capture issues will be much easier to assess in hindsight—removed from the pressures of the moment and with the benefit of the dispassionate distance that judicial review provides. To similar effect, whether the government used excessive force in relation to the object of the attack is also something that can only reasonably be assessed post hoc.¶ In addition to the substantive questions, it will also be much easier for courts to review the government’s own internal procedures after they are employed, especially if the government itself is already conducting after-action reviews that could be made part of the (classified) record in such cases. Indeed, the government’s own analysis could, in many cases, go a long way toward proving the lawfulness vel non of an individual strike.¶ As I mentioned before, there would still be a host of legal doctrines that would likely get in the way of such suits. Just to name a few, there is the present (albeit, in my view, unjustified) hostility to judicially inferred causes of actions under Bivens; the state secrets privilege;and sovereign and official immunity doctrines. But I am a firm believer that, except where the President himself is concerned (where there’s a stronger argument that immunity is constitutionally grounded),25 each of these concerns can be overcome by statute—as at least some of them arguably have been in the context of the express damages actions provided for under FISA. 26 So long as Congress creates an express cause of action for nominal damages, and so long as the statute both (1) expressly overrides state secrets and immunity doctrines; and (2) replaces them with carefully considered procedures for balancing the secrecy concerns that would arise in many—if not most—of these cases, these legal issues would be vitiated. Moreover, any concerns about exposing to liability government officers who acted in good faith and within the scope of their employment can be ameliorated by following the model of the Westfall Act, and substituting the United States as the proper defendant in any suit arising out of such an operation.27¶ Perhaps counterintuitively, I also believe that after-the-fact judicial review wouldn’t raise anywhere near the same prudential concerns as those noted above. Leaving aside how much less pressure judges would be under in such cases, it’s also generally true that damages regimes don’t have nearly the same validating effect on government action that ex ante approval does. Otherwise, one would expect to have seen a dramatic upsurge in lethal actions by law enforcement officers after each judicial decision refusing to impose individual liability arising out of a prior use of deadly force. So far as I know, no such evidence exists.¶ Of course, damages actions aren’t a perfect solution here. It’s obvious, but should be said anyway, that in a case in which the government does act unlawfully, no amount of damages will make the victim (or his heirs) whole. It’s also inevitable that, like much of the Guantánamo litigation, most of these suits would be resolved under extraordinary secrecy, and so there would be far less public accountability for targeted killings than, ideally, we might want. Some might also object to this proposal as being unnecessary—that, given existing criminal laws and executive orders, there is already a sufficiently clear prohibition on unlawful strikes to render any such damages regime unnecessarily superfluous. ¶ At least as to this last objection, it bears emphasizing that the existing laws depend entirely upon the beneficence of the Executive Branch, since they assume both that the government will (1) willfully disclose details of unlawful operations rather than cover them up; and (2) prosecute its own in cases in which they cross the line. Given both prior practice and unconfirmed contemporary reports of targeted killing operations that appear to raise serious legality issues, such as “signature strikes,” it doesn’t seem too much of a stretch to doubt that these remedies will prove sufficient.¶ In addition, there are two enormous upsides to damages actions that, in my mind, make them a least-worst solution—even if they are deeply, fundamentally flawed:¶ First, if nothing else, the specter of damages, even nominal damages, should have a deterrent effect on future government officers, such that, if a targeted killing operation ever was carried out in a way that violated the relevant legal rules, there would be liability—and, as importantly, precedent—such that the next government official in a similar context might think twice, and might make sure that he’s that much more convinced that the individual in question is who the government claims, and that there’s no alternative to the use of lethal force. Second, at least where the targets of such force are U.S. citizens, I believe that there is a non-frivolous argument that the Constitution may even compel at least some form of judicial process. 28 Compared to the alternatives, nominal damages actions litigated under carefully circumscribed rules of secrecy may be the only way to balance all of the relevant private, government, and legal interests at stake in such cases.¶ \* \* \*¶ In his concurrence in the Supreme Court’s famous decision in the Steel Seizure case, Justice Frankfurter suggested that “The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”¶ 29 It seems to me, Mr. Chairman, that targeted killing operations by the Executive Branch present the legislature with two realistic choices: Congress could accept with minimal scrutiny the Executive Branch’s claims that these operations are carried out lawfully and with every relevant procedural safeguard to maximize their accuracy—and thereby open the door to the “unchecked disregard” of which Justice Frankfurter warned. Or Congress could require the government to defend those assertions in individual cases before a neutral magistrate invested with the independence guaranteed by the Constitution’s salary and tenure protections. So long as the government’s interests in secrecy are adequately protected in such proceedings, and so long as these operations really are consistent with the Constitution and laws of the United States, what does the government have to hide?

#### Ex post review creates a credible signal of compliance that restrains future executives

Kwame Holman 13, congressional correspondent for PBS NewsHour; citing Rosa Brooks, Prof of Law at Georgetown University Law Center, former Counselor to the Under Secretary of Defense for Policy, former senior advisor at the US Dept of State, “Congress Begins to Weigh In On Drone Strikes Policy,” http://www.pbs.org/newshour/rundown/2013/04/congress-begins-to-weigh-in-on-drone-strikes-policy.html

While some experts have argued for court oversight of drone strikes before they're carried out, Brooks sides with those who say that would be unwieldy and unworkable.¶ Brooks says however an administration that knows its strikes could face court review after the fact -- with possible damages assessed -- would be more responsible and careful about who it strikes and why.¶ "If Congress were to create a statutory cause of action for damages for those who had been killed in abusive or mistaken drone strikes, you would have a court that would review such strikes after the fact. [That would] create a pretty good mechanism that would frankly keep the executive branch as honest as we hope it is already and as we hope it will continue to be into administrations to come," Brooks said.¶ "It would be one of the approaches that would go a very long way toward reassuring both U.S. citizens and the world more generally that our policies are in compliance with rule of law norms."

#### Only judicial oversight can credibly verify compliance with the laws of war

Avery Plaw 7, Associate Prof of Political Science at the University of Massachusetts at Dartmouth, PhD in Political Science from McGill University, “Terminating Terror: The Legality, Ethics and Effectiveness of Targeting Terrorists,” Theoria: A Journal of Social and Political Theory, No. 114, War and Terror (December 2007), pp. 1-27

To summarize, the general policy of targeting terrorists appears to be defensible in principle in terms of legality, morality and effectiveness. However, some specific targetings have been indefensible and should be prevented from recurring. Critics focus on the indefensible cases and insist that these are best prevented by condemning the general policy. States which target terrorists and their defenders have insisted that self-defense provides a blanket justification for targeting operations. The result has been a stalemate over terrorist targeting harmful to both the prosecution of the war on terror and the credibility of international law. Yet neither advocates nor critics of targeting appear to have a viable strategy for resolving the impasse. A final issue which urgently demands attention, therefore, is whether there are any plausible prospects for a coherent and principled political compromise over the issue of targeting terrorists.¶ Conclusion: the Possibility of Principled Compromise ¶ This final section offers a brief case that there is room for a principled compromise between critics and advocates of targeting terrorists. The argument is by example—a short illustration of one promising possibility. It will not satisfy everyone, but I suggest that it has the potential to resolve the most compelling concerns on both sides.¶ The most telling issues raised by critics of targeting fall into three categories: (1) the imperative need to establish that targets are combatants; (2) the need in attacking combatants to respect the established laws of war; and (3) the overwhelming imperative to avoid civilian casualties. The first issue seems to demand an authoritative judicial determination that could only be answered by a competent court. The second issue requires the openly avowed and consistent implementation of targeting according to standards accepted in international law—a requirement whose fulfillment would best be assured through judicial oversight. The third issue calls for independent evaluation of operations to assure that standards of civilian protection are robustly upheld, a role that could be effectively performed by a court.

#### Simulated national security law debates preserve agency and enhance decision-making---avoids cooption

Laura K. Donohue 13, Associate Professor of Law, Georgetown Law, 4/11, “National Security Law Pedagogy and the Role of Simulations”, http://jnslp.com/wp-content/uploads/2013/04/National-Security-Law-Pedagogy-and-the-Role-of-Simulations.pdf

The concept of simulations as an aspect of higher education, or in the law school environment, is not new.164 Moot court, after all, is a form of simulation and one of the oldest teaching devices in the law. What is new, however, is the idea of designing a civilian national security course that takes advantage of the doctrinal and experiential components of law school education and integrates the experience through a multi-day simulation. In 2009, I taught the first module based on this design at Stanford Law, which I developed the following year into a full course at Georgetown Law. It has since gone through multiple iterations. The initial concept followed on the federal full-scale Top Official (“TopOff”) exercises, used to train government officials to respond to domestic crises.165 It adapted a Tabletop Exercise, designed with the help of exercise officials at DHS and FEMA, to the law school environment. The Tabletop used one storyline to push on specific legal questions, as students, assigned roles in the discussion, sat around a table and for six hours engaged with the material. The problem with the Tabletop Exercise was that it was too static, and the rigidity of the format left little room, or time, for student agency. Unlike the government’s TopOff exercises, which gave officials the opportunity to fully engage with the many different concerns that arise in the course of a national security crisis as well as the chance to deal with externalities, the Tabletop focused on specific legal issues, even as it controlled for external chaos. The opportunity to provide a more full experience for the students came with the creation of first a one-day, and then a multi-day simulation. The course design and simulation continues to evolve. It offers a model for achieving the pedagogical goals outlined above, in the process developing a rigorous training ground for the next generation of national security lawyers.166 A. Course Design The central idea in structuring the NSL Sim 2.0 course was to bridge the gap between theory and practice by conveying doctrinal material and creating an alternative reality in which students would be forced to act upon legal concerns.167 The exercise itself is a form of problem-based learning, wherein students are given both agency and responsibility for the results. Towards this end, the structure must be at once bounded (directed and focused on certain areas of the law and legal education) and flexible (responsive to student input and decisionmaking). Perhaps the most significant weakness in the use of any constructed universe is the problem of authenticity. Efforts to replicate reality will inevitably fall short. There is simply too much uncertainty, randomness, and complexity in the real world. One way to address this shortcoming, however, is through design and agency. The scenarios with which students grapple and the structural design of the simulation must reflect the national security realm, even as students themselves must make choices that carry consequences. Indeed, to some extent, student decisions themselves must drive the evolution of events within the simulation.168 Additionally, while authenticity matters, it is worth noting that at some level the fact that the incident does not take place in a real-world setting can be a great advantage. That is, the simulation creates an environment where students can make mistakes and learn from these mistakes – without what might otherwise be devastating consequences. It also allows instructors to develop multiple points of feedback to enrich student learning in a way that would be much more difficult to do in a regular practice setting. NSL Sim 2.0 takes as its starting point the national security pedagogical goals discussed above. It works backwards to then engineer a classroom, cyber, and physical/simulation experience to delve into each of these areas. As a substantive matter, the course focuses on the constitutional, statutory, and regulatory authorities in national security law, placing particular focus on the interstices between black letter law and areas where the field is either unsettled or in flux. A key aspect of the course design is that it retains both the doctrinal and experiential components of legal education. Divorcing simulations from the doctrinal environment risks falling short on the first and third national security pedagogical goals: (1) analytical skills and substantive knowledge, and (3) critical thought. A certain amount of both can be learned in the course of a simulation; however, the national security crisis environment is not well-suited to the more thoughtful and careful analytical discussion. What I am thus proposing is a course design in which doctrine is paired with the type of experiential learning more common in a clinical realm. The former precedes the latter, giving students the opportunity to develop depth and breadth prior to the exercise. In order to capture problems related to adaptation and evolution, addressing goal [1(d)], the simulation itself takes place over a multi-day period. Because of the intensity involved in national security matters (and conflicting demands on student time), the model makes use of a multi-user virtual environment. The use of such technology is critical to creating more powerful, immersive simulations.169 It also allows for continual interaction between the players. Multi-user virtual environments have the further advantage of helping to transform the traditional teaching culture, predominantly concerned with manipulating textual and symbolic knowledge, into a culture where students learn and can then be assessed on the basis of their participation in changing practices.170 I thus worked with the Information Technology group at Georgetown Law to build the cyber portal used for NSL Sim 2.0. The twin goals of adaptation and evolution require that students be given a significant amount of agency and responsibility for decisions taken in the course of the simulation. To further this aim, I constituted a Control Team, with six professors, four attorneys from practice, a media expert, six to eight former simulation students, and a number of technology experts. Four of the professors specialize in different areas of national security law and assume roles in the course of the exercise, with the aim of pushing students towards a deeper doctrinal understanding of shifting national security law authorities. One professor plays the role of President of the United States. The sixth professor focuses on questions of professional responsibility. The attorneys from practice help to build the simulation and then, along with all the professors, assume active roles during the simulation itself. Returning students assist in the execution of the play, further developing their understanding of national security law. Throughout the simulation, the Control Team is constantly reacting to student choices. When unexpected decisions are made, professors may choose to pursue the evolution of the story to accomplish the pedagogical aims, or they may choose to cut off play in that area (there are various devices for doing so, such as denying requests, sending materials to labs to be analyzed, drawing the players back into the main storylines, and leaking information to the media). A total immersion simulation involves a number of scenarios, as well as systemic noise, to give students experience in dealing with the second pedagogical goal: factual chaos and information overload. The driving aim here is to teach students how to manage information more effectively. Five to six storylines are thus developed, each with its own arc and evolution. To this are added multiple alterations of the situation, relating to background noise. Thus, unlike hypotheticals, doctrinal problems, single-experience exercises, or even Tabletop exercises, the goal is not to eliminate external conditions, but to embrace them as part of the challenge facing national security lawyers. The simulation itself is problem-based, giving players agency in driving the evolution of the experience – thus addressing goal [2(c)]. This requires a realtime response from the professor(s) overseeing the simulation, pairing bounded storylines with flexibility to emphasize different areas of the law and the students’ practical skills. Indeed, each storyline is based on a problem facing the government, to which players must then respond, generating in turn a set of new issues that must be addressed. The written and oral components of the simulation conform to the fourth pedagogical goal – the types of situations in which national security lawyers will find themselves. Particular emphasis is placed on nontraditional modes of communication, such as legal documents in advance of the crisis itself, meetings in the midst of breaking national security concerns, multiple informal interactions, media exchanges, telephone calls, Congressional testimony, and formal briefings to senior level officials in the course of the simulation as well as during the last class session. These oral components are paired with the preparation of formal legal instruments, such as applications to the Foreign Intelligence Surveillance Court, legal memos, applications for search warrants under Title III, and administrative subpoenas for NSLs. In addition, students are required to prepare a paper outlining their legal authorities prior to the simulation – and to deliver a 90 second oral briefing after the session. To replicate the high-stakes political environment at issue in goals (1) and (5), students are divided into political and legal roles and assigned to different (and competing) institutions: the White House, DoD, DHS, HHS, DOJ, DOS, Congress, state offices, nongovernmental organizations, and the media. This requires students to acknowledge and work within the broader Washington context, even as they are cognizant of the policy implications of their decisions. They must get used to working with policymakers and to representing one of many different considerations that decisionmakers take into account in the national security domain. Scenarios are selected with high consequence events in mind, to ensure that students recognize both the domestic and international dimensions of national security law. Further alterations to the simulation provide for the broader political context – for instance, whether it is an election year, which parties control different branches, and state and local issues in related but distinct areas. The media is given a particularly prominent role. One member of the Control Team runs an AP wire service, while two student players represent print and broadcast media, respectively. The Virtual News Network (“VNN”), which performs in the second capacity, runs continuously during the exercise, in the course of which players may at times be required to appear before the camera. This media component helps to emphasize the broader political context within which national security law is practiced. Both anticipated and unanticipated decisions give rise to ethical questions and matters related to the fifth goal: professional responsibility. The way in which such issues arise stems from simulation design as well as spontaneous interjections from both the Control Team and the participants in the simulation itself. As aforementioned, professors on the Control Team, and practicing attorneys who have previously gone through a simulation, focus on raising decision points that encourage students to consider ethical and professional considerations. Throughout the simulation good judgment and leadership play a key role, determining the players’ effectiveness, with the exercise itself hitting the aim of the integration of the various pedagogical goals. Finally, there are multiple layers of feedback that players receive prior to, during, and following the simulation to help them to gauge their effectiveness. The Socratic method in the course of doctrinal studies provides immediate assessment of the students’ grasp of the law. Written assignments focused on the contours of individual players’ authorities give professors an opportunity to assess students’ level of understanding prior to the simulation. And the simulation itself provides real-time feedback from both peers and professors. The Control Team provides data points for player reflection – for instance, the Control Team member playing President may make decisions based on player input, giving students an immediate impression of their level of persuasiveness, while another Control Team member may reject a FISC application as insufficient. The simulation goes beyond this, however, focusing on teaching students how to develop (6) opportunities for learning in the future. Student meetings with mentors in the field, which take place before the simulation, allow students to work out the institutional and political relationships and the manner in which law operates in practice, even as they learn how to develop mentoring relationships. (Prior to these meetings we have a class discussion about mentoring, professionalism, and feedback). Students, assigned to simulation teams about one quarter of the way through the course, receive peer feedback in the lead-up to the simulation and during the exercise itself. Following the simulation the Control Team and observers provide comments. Judges, who are senior members of the bar in the field of national security law, observe player interactions and provide additional debriefing. The simulation, moreover, is recorded through both the cyber portal and through VNN, allowing students to go back to assess their performance. Individual meetings with the professors teaching the course similarly follow the event. Finally, students end the course with a paper reflecting on their performance and the issues that arose in the course of the simulation, develop frameworks for analyzing uncertainty, tension with colleagues, mistakes, and successes in the future. B. Substantive Areas: Interstices and Threats As a substantive matter, NSL Sim 2.0 is designed to take account of areas of the law central to national security. It focuses on specific authorities that may be brought to bear in the course of a crisis. The decision of which areas to explore is made well in advance of the course. It is particularly helpful here to think about national security authorities on a continuum, as a way to impress upon students that there are shifting standards depending upon the type of threat faced. One course, for instance, might center on the interstices between crime, drugs, terrorism and war. Another might address the intersection of pandemic disease and biological weapons. A third could examine cybercrime and cyberterrorism. This is the most important determination, because the substance of the doctrinal portion of the course and the simulation follows from this decision. For a course focused on the interstices between pandemic disease and biological weapons, for instance, preliminary inquiry would lay out which authorities apply, where the courts have weighed in on the question, and what matters are unsettled. Relevant areas might include public health law, biological weapons provisions, federal quarantine and isolation authorities, habeas corpus and due process, military enforcement and posse comitatus, eminent domain and appropriation of land/property, takings, contact tracing, thermal imaging and surveillance, electronic tagging, vaccination, and intelligence-gathering. The critical areas can then be divided according to the dominant constitutional authority, statutory authorities, regulations, key cases, general rules, and constitutional questions. This, then, becomes a guide for the doctrinal part of the course, as well as the grounds on which the specific scenarios developed for the simulation are based. The authorities, simultaneously, are included in an electronic resource library and embedded in the cyber portal (the Digital Archives) to act as a closed universe of the legal authorities needed by the students in the course of the simulation. Professional responsibility in the national security realm and the institutional relationships of those tasked with responding to biological weapons and pandemic disease also come within the doctrinal part of the course. The simulation itself is based on five to six storylines reflecting the interstices between different areas of the law. The storylines are used to present a coherent, non-linear scenario that can adapt to student responses. Each scenario is mapped out in a three to seven page document, which is then checked with scientists, government officials, and area experts for consistency with how the scenario would likely unfold in real life. For the biological weapons and pandemic disease emphasis, for example, one narrative might relate to the presentation of a patient suspected of carrying yersinia pestis at a hospital in the United States. The document would map out a daily progression of the disease consistent with epidemiological patterns and the central actors in the story: perhaps a U.S. citizen, potential connections to an international terrorist organization, intelligence on the individual’s actions overseas, etc. The scenario would be designed specifically to stress the intersection of public health and counterterrorism/biological weapons threats, and the associated (shifting) authorities, thus requiring the disease initially to look like an innocent presentation (for example, by someone who has traveled from overseas), but then for the storyline to move into the second realm (awareness that this was in fact a concerted attack). A second storyline might relate to a different disease outbreak in another part of the country, with the aim of introducing the Stafford Act/Insurrection Act line and raising federalism concerns. The role of the military here and Title 10/Title 32 questions would similarly arise – with the storyline designed to raise these questions. A third storyline might simply be well developed noise in the system: reports of suspicious activity potentially linked to radioactive material, with the actors linked to nuclear material. A fourth storyline would focus perhaps on container security concerns overseas, progressing through newspaper reports, about containers showing up in local police precincts. State politics would constitute the fifth storyline, raising question of the political pressures on the state officials in the exercise. Here, ethnic concerns, student issues, economic conditions, and community policing concerns might become the focus. The sixth storyline could be further noise in the system – loosely based on current events at the time. In addition to the storylines, a certain amount of noise is injected into the system through press releases, weather updates, private communications, and the like. The five to six storylines, prepared by the Control Team in consultation with experts, become the basis for the preparation of scenario “injects:” i.e., newspaper articles, VNN broadcasts, reports from NGOs, private communications between officials, classified information, government leaks, etc., which, when put together, constitute a linear progression. These are all written and/or filmed prior to the exercise. The progression is then mapped in an hourly chart for the unfolding events over a multi-day period. All six scenarios are placed on the same chart, in six columns, giving the Control Team a birds-eye view of the progression. C. How It Works As for the nuts and bolts of the simulation itself, it traditionally begins outside of class, in the evening, on the grounds that national security crises often occur at inconvenient times and may well involve limited sleep and competing demands.171 Typically, a phone call from a Control Team member posing in a role integral to one of the main storylines, initiates play. Students at this point have been assigned dedicated simulation email addresses and provided access to the cyber portal. The portal itself gives each team the opportunity to converse in a “classified” domain with other team members, as well as access to a public AP wire and broadcast channel, carrying the latest news and on which press releases or (for the media roles) news stories can be posted. The complete universe of legal authorities required for the simulation is located on the cyber portal in the Digital Archives, as are forms required for some of the legal instruments (saving students the time of developing these from scratch in the course of play). Additional “classified” material – both general and SCI – has been provided to the relevant student teams. The Control Team has access to the complete site. For the next two (or three) days, outside of student initiatives (which, at their prompting, may include face-to-face meetings between the players), the entire simulation takes place through the cyber portal. The Control Team, immediately active, begins responding to player decisions as they become public (and occasionally, through monitoring the “classified” communications, before they are released). This time period provides a ramp-up to the third (or fourth) day of play, allowing for the adjustment of any substantive, student, or technology concerns, while setting the stage for the breaking crisis. The third (or fourth) day of play takes place entirely at Georgetown Law. A special room is constructed for meetings between the President and principals, in the form of either the National Security Council or the Homeland Security Council, with breakout rooms assigned to each of the agencies involved in the NSC process. Congress is provided with its own physical space, in which meetings, committee hearings and legislative drafting can take place. State government officials are allotted their own area, separate from the federal domain, with the Media placed between the three major interests. The Control Team is sequestered in a different area, to which students are not admitted. At each of the major areas, the cyber portal is publicly displayed on large flat panel screens, allowing for the streaming of video updates from the media, AP wire injects, articles from the students assigned to represent leading newspapers, and press releases. Students use their own laptop computers for team decisions and communication. As the storylines unfold, the Control Team takes on a variety of roles, such as that of the President, Vice President, President’s chief of staff, governor of a state, public health officials, and foreign dignitaries. Some of the roles are adopted on the fly, depending upon player responses and queries as the storylines progress. Judges, given full access to each player domain, determine how effectively the students accomplish the national security goals. The judges are themselves well-experienced in the practice of national security law, as well as in legal education. They thus can offer a unique perspective on the scenarios confronted by the students, the manner in which the simulation unfolded, and how the students performed in their various capacities. At the end of the day, the exercise terminates and an immediate hotwash is held, in which players are first debriefed on what occurred during the simulation. Because of the players’ divergent experiences and the different roles assigned to them, the students at this point are often unaware of the complete picture. The judges and formal observers then offer reflections on the simulation and determine which teams performed most effectively. Over the next few classes, more details about the simulation emerge, as students discuss it in more depth and consider limitations created by their knowledge or institutional position, questions that arose in regard to their grasp of the law, the types of decision-making processes that occurred, and the effectiveness of their – and other students’ – performances. Reflection papers, paired with oral briefings, focus on the substantive issues raised by the simulation and introduce the opportunity for students to reflect on how to create opportunities for learning in the future. The course then formally ends.172 Learning, however, continues beyond the temporal confines of the semester. Students who perform well and who would like to continue to participate in the simulations are invited back as members of the control team, giving them a chance to deepen their understanding of national security law. Following graduation, a few students who go in to the field are then invited to continue their affiliation as National Security Law fellows, becoming increasingly involved in the evolution of the exercise itself. This system of vertical integration helps to build a mentoring environment for the students while they are enrolled in law school and to create opportunities for learning and mentorship post-graduation. It helps to keep the exercise current and reflective of emerging national security concerns. And it builds a strong community of individuals with common interests. CONCLUSION The legal academy has, of late, been swept up in concern about the economic conditions that affect the placement of law school graduates. The image being conveyed, however, does not resonate in every legal field. It is particularly inapposite to the burgeoning opportunities presented to students in national security. That the conversation about legal education is taking place now should come as little surprise. Quite apart from economic concern is the traditional introspection that follows American military engagement. It makes sense: law overlaps substantially with political power, being at once both the expression of government authority and the effort to limit the same. The one-size fits all approach currently dominating the conversation in legal education, however, appears ill-suited to address the concerns raised in the current conversation. Instead of looking at law across the board, greater insight can be gleaned by looking at the specific demands of the different fields themselves. This does not mean that the goals identified will be exclusive to, for instance, national security law, but it does suggest there will be greater nuance in the discussion of the adequacy of the current pedagogical approach. With this approach in mind, I have here suggested six pedagogical goals for national security. For following graduation, students must be able to perform in each of the areas identified – (1) understanding the law as applied, (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating continued opportunities for self-learning. They also must learn how to integrate these different skills into one experience, to ensure that they will be most effective when they enter the field. The problem with the current structures in legal education is that they fall short, in important ways, from helping students to meet these goals. Doctrinal courses may incorporate a range of experiential learning components, such as hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, and tabletop exercises. These are important classroom devices. The amount of time required for each varies, as does the object of the exercise itself. But where they fall short is in providing a more holistic approach to national security law which will allow for the maximum conveyance of required skills. Total immersion simulations, which have not yet been addressed in the secondary literature for civilian education in national security law, may provide an important way forward. Such simulations also cure shortcomings in other areas of experiential education, such as clinics and moot court. It is in an effort to address these concerns that I developed the simulation model above. NSL Sim 2.0 certainly is not the only solution, but it does provide a starting point for moving forward. The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within a course. It makes use of technology and physical space to engage students in a multi-day exercise, in which they are given agency and responsibility for their decision making, resulting in a steep learning curve. While further adaptation of this model is undoubtedly necessary, it suggests one potential direction for the years to come.

#### Exec power has increased because of perceived public indifference and lack of comprehension about security issues

Aziz Rana 12, Assistant Professor of Law, Cornell University Law School; A.B., Harvard College; J.D., Yale Law School; PhD., Harvard University, Connecticut Law Review July, 2012, 44 Conn. L. Rev. 1417, “COMMENTARY: NATIONAL SECURITY: LEAD ARTICLE: Who Decides on Security?” lexis nexis

Despite over six decades of reform initiatives, the overwhelming drift of security arrangements in the United States has been toward greater-not less-executive centralization and discretion. This Article explores why efforts to curb presidential prerogative have failed so consistently. It argues that while constitutional scholars have overwhelmingly focused their attention on procedural solutions, the underlying reason for the growth of emergency powers is ultimately political rather than purely legal. In particular, scholars have ignored how the basic meaning of "security" has itself shifted dramatically since World War II and the beginning of the Cold War in line with changing ideas about popular competence. Paying special attention to the decisive role of actors such as Supreme Court Justice Felix Frankfurter and Pendleton Herring, co-author of 1947's National Security Act, this Article details how emerging judgments about the limits of popular knowledge and mass deliberation fundamentally altered the basic structure of security practices. Countering the pervasive wisdom at the founding and throughout the nineteenth century, this contemporary shift has recast war and external threat as matters too complex and specialized for ordinary Americans to comprehend. Today, the dominant conceptual approach to security presumes that insulated decision-makers in the executive branch (armed with the military's professional expertise) are best equipped to make sense of complicated and often conflicting information about safety and self- defense. The result is that the other branches-let alone the public writ large-face a profound legitimacy deficit whenever they call for transparency or seek to challenge coercive security programs. Not surprisingly, the tendency of legalistic reform efforts has been to place greater decision-making power in the other branches and then to watch those branches delegate such power back to the executive.

#### Academic, institutions-based debate regarding drones can reverse excessive presidential authority---college students are important

Kelly Michael Young 13, Associate Professor of Communication and Director of Forensics at Wayne State University, "Why Should We Debate About Restriction of Presidential War Powers", 9/4, public.cedadebate.org/node/13

Beyond its obviously timeliness, we believed debating about presidential war powers was important because of the stakes involved in the controversy. Since the Korean War, scholars and pundits have grown increasingly alarmed by the growing scope and techniques of presidential war making. In 1973, in the wake of Vietnam, Congress passed the joint War Powers Resolution (WPR) to increase Congress’s role in foreign policy and war making by requiring executive consultation with Congress prior to the use of military force, reporting within 48 hours after the start of hostiles, and requiring the close of military operations after 60 days unless Congress has authorized the use of force. Although the WPR was a significant legislative feat, 30 years since its passage, presidents have frequently ignores the WPR requirements and the changing nature of conflict does not fit neatly into these regulations. After the terrorist attacks on 9-11, many experts worry that executive war powers have expanded far beyond healthy limits. Consequently, there is a fear that continued expansion of these powers will undermine the constitutional system of checks and balances that maintain the democratic foundation of this country and risk constant and unlimited military actions, particularly in what Stephen Griffin refers to as a “long war” period like the War on Terror (http://www.hup.harvard.edu/catalog.php?isbn=9780674058286). In comparison, pro-presidential powers advocates contend that new restrictions undermine flexibility and timely decision-making necessary to effectively counter contemporary national security risks. Thus, a debate about presidential wars powers is important to investigate a number of issues that have serious consequences on the status of democratic checks and national security of the United States.¶ Lastly, debating presidential war powers is important because we the people have an important role in affecting the use of presidential war powers. As many legal scholars contend, regardless of the status of legal structures to check the presidency, an important political restrain on presidential war powers is the presence of a well-informed and educated public. As Justice Potter Stewart explains, “the only effective restraint upon executive policy and power…may lie in an enlightened citizenry – in an informed and critical public opinion which alone can protect the values of a democratic government” (http://www.law.cornell.edu/supct/html/historics/USSC\_CR\_0403\_0713\_ZC3.html). As a result, this is not simply an academic debate about institutions and powers that that do not affect us. As the numerous recent foreign policy scandals make clear, anyone who uses a cell-phone or the internet is potential affected by unchecked presidential war powers. Even if we agree that these powers are justified, it is important that today’s college students understand and appreciate the scope and consequences of presidential war powers, as these students’ opinions will stand as an important potential check on the presidency.

## 2AC

### Case

#### Obama’s drone policy institutionalizes the Bush-Cheney doctrine of global war that posits the world as a global battlefield for the US to play---only external restrictions prevent this

Glenn Greenwald 13, J.D. from NYU, award-winning journalist, February 5th, 2013, "Chilling legal memo from Obama DOJ justifies assassination of US citizens," [www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo](http://www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo)

The most extremist power any political leader can assert is the power to target his own citizens for execution without any charges or due process, far from any battlefield. The Obama administration has not only asserted exactly that power in theory, but has exercised it in practice. In September 2011, it killed US citizen Anwar Awlaki in a drone strike in Yemen, along with US citizen Samir Khan, and then, in circumstances that are still unexplained, two weeks later killed Awlaki's 16-year-old American son Abdulrahman with a separate drone strike in Yemen.¶ Since then, senior Obama officials including Attorney General Eric Holder and John Brennan, Obama's top terrorism adviser and his current nominee to lead the CIA, have explicitly argued that the president is and should be vested with this power. Meanwhile, a Washington Post article from October reported that the administration is formally institutionalizing this president's power to decide who dies under the Orwellian title "disposition matrix".¶ When the New York Times back in April, 2010 first confirmed the existence of Obama's hit list, it made clear just what an extremist power this is, noting: "It is extremely rare, if not unprecedented, for an American to be approved for targeted killing." The NYT quoted a Bush intelligence official as saying "he did not know of any American who was approved for targeted killing under the former president". When the existence of Obama's hit list was first reported several months earlier by the Washington Post's Dana Priest, she wrote that the "list includes three Americans".¶ What has made these actions all the more radical is the absolute secrecy with which Obama has draped all of this. Not only is the entire process carried out solely within the Executive branch - with no checks or oversight of any kind - but there is zero transparency and zero accountability. The president's underlings compile their proposed lists of who should be executed, and the president - at a charming weekly event dubbed by White House aides as "Terror Tuesday" - then chooses from "baseball cards" and decrees in total secrecy who should die. The power of accuser, prosecutor, judge, jury, and executioner are all consolidated in this one man, and those powers are exercised in the dark.¶ In fact, The Most Transparent Administration Ever™ has been so fixated on secrecy that they have refused even to disclose the legal memoranda prepared by Obama lawyers setting forth their legal rationale for why the president has this power. During the Bush years, when Bush refused to disclose the memoranda from his Office of Legal Counsel (OLC) that legally authorized torture, rendition, warrantless eavesdropping and the like, leading Democratic lawyers such as Dawn Johnsen (Obama's first choice to lead the OLC) vehemently denounced this practice as a grave threat, warning that "the Bush Administration's excessive reliance on 'secret law' threatens the effective functioning of American democracy" and "the withholding from Congress and the public of legal interpretations by the [OLC] upsets the system of checks and balances between the executive and legislative branches of government."¶ But when it comes to Obama's assassination power, this is exactly what his administration has done. It has repeatedly refused to disclose the principal legal memoranda prepared by Obama OLC lawyers that justified his kill list. It is, right now, vigorously resisting lawsuits from the New York Times and the ACLU to obtain that OLC memorandum. In sum, Obama not only claims he has the power to order US citizens killed with no transparency, but that even the documents explaining the legal rationale for this power are to be concealed. He's maintaining secret law on the most extremist power he can assert.¶ Last night, NBC News' Michael Isikoff released a 16-page "white paper" prepared by the Obama DOJ that purports to justify Obama's power to target even Americans for assassination without due process (the memo is embedded in full below). This is not the primary OLC memo justifying Obama's kill list - that is still concealed - but it appears to track the reasoning of that memo as anonymously described to the New York Times in October 2011.¶ This new memo is entitled: "Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force". It claims its conclusion is "reached with recognition of the extraordinary seriousness of a lethal operation by the United States against a US citizen". Yet it is every bit as chilling as the Bush OLC torture memos in how its clinical, legalistic tone completely sanitizes the radical and dangerous power it purports to authorize.¶ I've written many times at length about why the Obama assassination program is such an extreme and radical threat - see here for one of the most comprehensive discussions, with documentation of how completely all of this violates Obama and Holder's statements before obtaining power - and won't repeat those arguments here. Instead, there are numerous points that should be emphasized about the fundamentally misleading nature of this new memo:¶ 1. Equating government accusations with guilt¶ The core distortion of the War on Terror under both Bush and Obama is the Orwellian practice of equating government accusations of terrorism with proof of guilt. One constantly hears US government defenders referring to "terrorists" when what they actually mean is: those accused by the government of terrorism. This entire memo is grounded in this deceit.¶ Time and again, it emphasizes that the authorized assassinations are carried out "against a senior operational leader of al-Qaida or its associated forces who poses an imminent threat of violent attack against the United States." Undoubtedly fearing that this document would one day be public, Obama lawyers made certain to incorporate this deceit into the title itself: "Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of al-Qaida or An Associated Force."¶ This ensures that huge numbers of citizens - those who spend little time thinking about such things and/or authoritarians who assume all government claims are true - will instinctively justify what is being done here on the ground that we must kill the Terrorists or joining al-Qaida means you should be killed. That's the "reasoning" process that has driven the War on Terror since it commenced: if the US government simply asserts without evidence or trial that someone is a terrorist, then they are assumed to be, and they can then be punished as such - with indefinite imprisonment or death.¶ But of course, when this memo refers to "a Senior Operational Leader of al-Qaida", what it actually means is this: someone whom the President - in total secrecy and with no due process - has accused of being that. Indeed, the memo itself makes this clear, as it baldly states that presidential assassinations are justified when "an informed, high-level official of the US government has determined that the targeted individual poses an imminent threat of violent attack against the US".¶ This is the crucial point: the memo isn't justifying the due-process-free execution of senior al-Qaida leaders who pose an imminent threat to the US. It is justifying the due-process-free execution of people secretly accused by the president and his underlings, with no due process, of being that. The distinction between (a) government accusations and (b) proof of guilt is central to every free society, by definition, yet this memo - and those who defend Obama's assassination power - willfully ignore it.¶ Those who justify all of this by arguing that Obama can and should kill al-Qaida leaders who are trying to kill Americans are engaged in supreme question-begging. Without any due process, transparency or oversight, there is no way to know who is a "senior al-Qaida leader" and who is posing an "imminent threat" to Americans. All that can be known is who Obama, in total secrecy, accuses of this.¶ (Indeed, membership in al-Qaida is not even required to be assassinated, as one can be a member of a group deemed to be an "associated force" of al-Qaida, whatever that might mean: a formulation so broad and ill-defined that, as Law Professor Kevin Jon Heller argues, it means the memo "authorizes the use of lethal force against individuals whose targeting is, without more, prohibited by international law".)¶ The definition of an extreme authoritarian is one who is willing blindly to assume that government accusations are true without any evidence presented or opportunity to contest those accusations. This memo - and the entire theory justifying Obama's kill list - centrally relies on this authoritarian conflation of government accusations and valid proof of guilt.¶ They are not the same and never have been. Political leaders who decree guilt in secret and with no oversight inevitably succumb to error and/or abuse of power. Such unchecked accusatory decrees are inherently untrustworthy (indeed, Yemen experts have vehemently contested the claim that Awlaki himself was a senior al-Qaida leader posing an imminent threat to the US). That's why due process is guaranteed in the Constitution and why judicial review of government accusations has been a staple of western justice since the Magna Carta: because leaders can't be trusted to decree guilt and punish citizens without evidence and an adversarial process. That is the age-old basic right on which this memo, and the Obama presidency, is waging war.¶ 2. Creating a ceiling, not a floor¶ The most vital fact to note about this memorandum is that it is not purporting to impose requirements on the president's power to assassinate US citizens. When it concludes that the president has the authority to assassinate "a Senior Operational Leader of al-Qaida" who "poses an imminent threat of violent attack against the US" where capture is "infeasible", it is not concluding that assassinations are permissible only in those circumstances.¶ To the contrary, the memo expressly makes clear that presidential assassinations may be permitted even when none of those circumstances prevail: "This paper does not attempt to determine the minimum requirements necessary to render such an operation lawful." Instead, as the last line of the memo states: "it concludes only that the stated conditions would be sufficient to make lawful a lethal operation" - not that such conditions are necessary to find these assassinations legal. The memo explicitly leaves open the possibility that presidential assassinations of US citizens may be permissible even when the target is not a senior al-Qaida leader posing an imminent threat and/or when capture is feasible.¶ Critically, the rationale of the memo - that the US is engaged in a global war against al-Qaida and "associated forces" - can be easily used to justify presidential assassinations of US citizens in circumstances far beyond the ones described in this memo. If you believe the president has the power to execute US citizens based on the accusation that the citizen has joined al-Qaida, what possible limiting principle can you cite as to why that shouldn't apply to a low-level al-Qaida member, including ones found in places where capture may be feasible (including US soil)? The purported limitations on this power set forth in this memo, aside from being incredibly vague, can be easily discarded once the central theory of presidential power is embraced.¶ 3. Relies on the core Bush/Cheney theory of a global battlefield¶ The primary theory embraced by the Bush administration to justify its War on Terror policies was that the "battlefield" is no longer confined to identifiable geographical areas, but instead, the entire globe is now one big, unlimited "battlefield". That theory is both radical and dangerous because a president's powers are basically omnipotent on a "battlefield". There, state power is shielded from law, from courts, from constitutional guarantees, from all forms of accountability: anyone on a battlefield can be killed or imprisoned without charges. Thus, to posit the world as a battlefield is, by definition, to create an imperial, omnipotent presidency. That is the radical theory that unleashed all the rest of the controversial and lawless Bush/Cheney policies.¶ This "world-is-a-battlefield" theory was once highly controversial among Democrats. John Kerry famously denounced it when running for president, arguing instead that the effort against terrorism is "primarily an intelligence and law enforcement operation that requires cooperation around the world".¶ But this global-war theory is exactly what lies at heart of the Obama approach to Terrorism generally and this memo specifically. It is impossible to defend Obama's assassination powers without embracing it (which is why key Obama officials have consistently done so). That's because these assassinations are taking place in countries far from any war zone, such as Yemen and Somalia. You can't defend the application of "war powers" in these countries without embracing the once-very-controversial Bush/Cheney view that the whole is now a "battlefield" and the president's war powers thus exist without geographic limits.¶ This new memo makes clear that this Bush/Cheney worldview is at the heart of the Obama presidency. The president, it claims, "retains authority to use force against al-Qaida and associated forces outside the area of active hostilities". In other words: there are, subject to the entirely optional "feasibility of capture" element, no geographic limits to the president's authority to kill anyone he wants. This power applies not only to war zones, but everywhere in the world that he claims a member of al-Qaida is found. This memo embraces and institutionalizes the core Bush/Cheney theory that justified the entire panoply of policies Democrats back then pretended to find so objectionable.

#### Death reps cause an empathic shift – especially true in simulating policy – there’s no compassion fatigue or trade-off with action

Recuber 11 Timothy Recuber is a doctoral candidate in sociology at the Graduate Center of the City. University of New York. He has taught at Hunter College in Manhattan "CONSUMING CATASTROPHE: AUTHENTICITY AND EMOTION IN MASS-MEDIATED DISASTER" gradworks.umi.com/3477831.pdf

Perhaps, then, what distant consumers express when they sit glued to the television watching a disaster replayed over and over, when they buy t-shirts or snow globes, when they mail teddy bears to a memorial, or when they tour a disaster site, is a deep, maybe subconscious, longing for those age-old forms of community and real human compassion that emerge in a place when disaster has struck. It is a longing in some ways so alien to the world we currently live in that it requires catastrophe to call it forth, even in our imaginations. Nevertheless, the actions of unadulterated goodwill that become commonplace in harrowing conditions represent the truly authentic form of humanity that all of us, to one degree or another, chase after in contemporary consumer culture every day. And while it is certainly a bit foolhardy to seek authentic humanity through disaster-related media and culture, **the sheer strength of that desire has been evident in the public’s response to all the disasters**, crises and catastrophes to hit the United States in the past decade. The millions of television viewers who cried on September 11, or during Hurricane Katrina and the Virginia Tech shootings, and the thousands upon thousands who volunteered their time, labor, money, and even their blood, as well as the countless others who created art, contributed to memorials, or adorned their cars or bodies with disaster-related paraphernalia— despite the fact that many knew no one who had been personally affected by any of these disasters—all attest to a desire for real human community and compassion that is woefully unfulfilled by American life under normal conditions today. ¶ In the end, the consumption of disaster doesn’t make us unable or unwilling to engage with disasters on a communal level, or towards progressive political ends—it makes us feel as if we already have, simply by consuming. It is ultimately less a form of political anesthesia than a simulation of politics, a Potemkin village of communal sentiment, that fills our longing for a more just and humane world with disparate acts of cathartic consumption. Still, the positive political potential underlying such consumption—the desire for real forms of connection and community—remains the most redeeming feature of disaster consumerism. Though that desire is frequently warped when various media lenses refract it, diffuse it, or reframe it to fit a political agenda, its overwhelming strength should nonetheless serve notice that people want a different world than the one in which we currently live, with a different way of understanding and responding to disasters. They want a world where risk is not leveraged for profit or political gain, but sensibly planned for with the needs of all socio-economic groups in mind. **They want a world where preemptive strategies are used to anticipate the real threats posed by global climate change and global inequality, rather than to invent fears of ethnic others and justify unnecessary wars**. They want a world where people can come together not simply as a market, but as a public, to exert real agency over the policies made in the name of their safety and security. And, when disaster does strike, they want a world where the goodwill and compassion shown by their neighbors, by strangers in their communities, and even by distant spectators and consumers, will be matched by their own government. Though this vision of the world is utopian, it is not unreasonable, and if contemporary American culture is ever to give us more than just an illusion of safety, or empathy, or authenticity, then it is this vision that we must advocate on a daily basis, not only when disaster strikes.

#### Life has intrinsic and objective value achieved through subjective pleasures---its preservation should be an a priori goal

Kacou 8 – Amien Kacou “WHY EVEN MIND? On The A Priori Value Of “Life””, Cosmos and History: The Journal of Natural and Social Philosophy, Vol 4, No 1-2 (2008) cosmosandhistory.org/index.php/journal/article/view/92/184

Furthermore, that manner of finding things good that is in pleasure can certainly not exist in any world without consciousness (i.e., without “life,” as we now understand the word)—slight analogies put aside. In fact, we can begin to develop a more sophisticated definition of the concept of “pleasure,” in the broadest possible sense of the word, as follows: it is the common psychological element in all psychological experience of goodness (be it in joy, admiration, or whatever else). In this sense, pleasure can always be pictured to “mediate” all awareness or perception or judgment of goodness: there is pleasure in all consciousness of things good; pleasure is the common element of all conscious satisfaction. In short, it is simply the very experience of liking things, or the liking of experience, in general. In this sense, pleasure is, not only uniquely characteristic of life but also, the core expression of goodness in life—the most general sign or phenomenon for favorable conscious valuation, in other words. This does not mean that “good” is absolutely synonymous with “pleasant”—what we value may well go beyond pleasure. (The fact that we value things needs not be reduced to the experience of liking things.) However, what we value beyond pleasure remains a matter of speculation or theory. Moreover, we note that a variety of things that may seem otherwise unrelated are correlated with pleasure—some more strongly than others. In other words, there are many things the experience of which we like. For example: the admiration of others; sex; or rock-paper-scissors. But, again, what they are is irrelevant in an inquiry on a priori value—what gives us pleasure is a matter for empirical investigation. Thus, we can see now that, in general, something primitively valuable is attainable in living—that is, pleasure itself. And it seems equally clear that we have a priori logical reason to pay attention to the world in any world where pleasure exists. Moreover, we can now also articulate a foundation for a security interest in our life: since the good of pleasure can be found in living (to the extent pleasure remains attainable),[17] and only in living, therefore, a priori, life ought to be continuously (and indefinitely) pursued at least for the sake of preserving the possibility of finding that good. However, this platitude about the value that can be found in life turns out to be, at this point, insufficient for our purposes. It seems to amount to very little more than recognizing that our subjective desire for life in and of itself shows that life has some objective value. For what difference is there between saying, “living is unique in benefiting something I value (namely, my pleasure); therefore, I should desire to go on living,” and saying, “I have a unique desire to go on living; therefore I should have a desire to go on living,” whereas the latter proposition immediately seems senseless? In other words, “life gives me pleasure,” says little more than, “I like life.” Thus, we seem to have arrived at the conclusion that the fact that we already have some (subjective) desire for life shows life to have some (objective) value. But, if that is the most we can say, then it seems our enterprise of justification was quite superficial, and the subjective/objective distinction was useless—for all we have really done is highlight the correspondence between value and desire. Perhaps, our inquiry should be a bit more complex.

#### This is true at a fundamental and ontological level

Paterson 3 Craig, Department of Philosophy, Providence College, Rhode Island “A Life Not Worth Living?”, Studies in Christian Ethics, <http://sce.sagepub.com>

Contrary to those accounts, I would argue that it is death per se that is really the objective evil for us, not because it deprives us of a prospective future of overall good judged better than the alter- native of non-being. It cannot be about harm to a former person who has ceased to exist, for no person actually suffers from the sub-sequent non-participation. Rather, death in itself is an evil to us because it ontologically destroys the current existent subject — it is the ultimate in metaphysical lightening strikes.80 The evil of death is truly an ontological evil borne by the person who already exists, independently of calculations about better or worse possible lives. Such an evil need not be consciously experienced in order to be an evil for the kind of being a human person is. Death is an evil because of the change in kind it brings about, a change that is destructive of the type of entity that we essentially are. Anything, whether caused naturally or caused by human intervention (intentional or unintentional) that drastically interferes in the process of maintaining the person in existence is an objective evil for the person. What is crucially at stake here, and is dialectically supportive of the self-evidency of the basic good of human life, is that death is a radical interference with the current life process of the kind of being that we are. In consequence, death itself can be credibly thought of as a ‘primitive evil’ for all persons, regardless of the extent to which they are currently or prospectively capable of participating in a full array of the goods of life.81

In conclusion, concerning willed human actions, it is justifiable to state that any intentional rejection of human life itself cannot therefore be warranted since it is an expression of an ultimate disvalue for the subject, namely, the destruction of the present person; a radical ontological good that we cannot begin to weigh objectively against the travails of life in a rational manner. To deal with the sources of disvalue (pain, suffering, etc.) we should not seek to irrationally destroy the person, the very source and condition of all human possibility.82

#### Death drive is nonsense

Horney and Paris 2K (Karen, Psychiatrist, and Bernard, Prof. English – U. Florida and Dir. Institute for Psychological Study of the Arts, “The unknown Karen Horney: essays on gender, culture, and psychoanalysis”, p. 186, Google Print)

What I find questionable is Freud's derivation of these destructive drives from the death instinct. The assertion of a death instinct would, grossly simplified, mean that as we find in all organic matter the biological rhythm of creation and destruction, anabolism and catabolism, and a cycle of life, growth, and death, so also we could find corresponding processes in drives which could be designated as life-and-death instincts, or as Eros and Destruction. Freud himself concedes that the arguments for such a state of affairs were not convincing. No matter how ingeniously the material derived from biology is used, it does not lend itself very well to analogies. Even the psychological arguments are not convincing as supportive evidence for the phenomena of "repetition compulsion" and "primary masochism," which could be interpreted differently and are in themselves problematic. Furthermore, the death instinct can neither be explained, as Freud himself states, nor in any way be discovered in isolation, but "works silently within the organism toward its disintegration." Freud thinks that "the more productive idea is this one, that a component of the instinct is directed outward and then manifests itself as the drive to aggression and destruction." We must carefully examine the meaning of this sentence. Although the claim of a death instinct in itself may belong in the realm of speculation, nevertheless his idea may furnish us with a useful working hypothesis. The meaning of this statement is no more and no less than this, that "man possesses an innate tendency to evil, aggression, destruction, and ultimately to inhumanity." Freud is correct in adding that none of us cares to hear things of this nature. However, our aversion does not constitute evidence to the contrary. What should really concern us is whether this statement can or cannot be corroborated by the available psychological data. One fact stands out in the foreground: the widespread occurrences throughout history of ruthless attitudes and behavior have no bearing at all on this assertion, since the question of the innate nature of such tendencies is left open, or at least the value of such observations cannot be gauged without a careful investigation into the nature of the psychological and social pressures which might perhaps have produced them.

#### No impact to capitalist accumulation

Larrivee 10— PF ECONOMICS AT MOUNT ST MARY’S UNIVERSITY – MASTERS FROM THE HARVARD KENNEDY SCHOOL AND PHD IN ECONOMICS FROM WISCONSIN, 10 [JOHN, A FRAMEWORK FOR THE MORAL ANALYSIS OF MARKETS, 10/1, <http://www.teacheconomicfreedom.org/files/larrivee-paper-1.pdf>]

The Second Focal Point: Moral, Social, and Cultural Issues of Capitalism Logical errors abound in critical commentary on capitalism. Some critics observe a problem and conclude: “I see X in our society. We have a capitalist economy. Therefore capitalism causes X.” They draw their conclusion by looking at a phenomenon as it appears only in one system. Others merely follow a host of popular theories according to which capitalism is particularly bad. 6 The solution to such flawed reasoning is to be comprehensive, to look at the good and bad, in market and non-market systems. Thus the following section considers a number of issues—greed, selfishness and human relationships, honesty and truth, alienation and work satisfaction, moral decay, and religious participation—that have often been associated with capitalism, but have also been problematic in other systems and usually in more extreme form. I conclude with some evidence for the view that markets foster (at least some) virtues rather than undermining them. My purpose is not to smear communism or to make the simplistic argument that “capitalism isn’t so bad because other systems have problems too.” The critical point is that certain people thought various social ills resulted from capitalism, and on this basis they took action to establish alternative economic systems to solve the problems they had identified. That they failed to solve the problems, and in fact exacerbated them while also creating new problems, implies that capitalism itself wasn’t the cause of the problems in the first place, at least not to the degree theorized.

**Arendt’s conception of the political’s necessary to develop the care for the world necessary to avert extinction --- the alt’s regression into the aesthetic cult of the self devastates the cultivation of this ethic**

**Biskowski 95** Lawrence J, Professor of political theory and political economy at the University of Georgia, Politics versus Aesthetics: Arendt's Critiques of Nietzsche and Heidegger, The Review of Politics, Vol. 57, No. 1 (Winter), pp. 59-89

One lesson Arendt gleaned from the Nazi experience and its aftermath was how easily the basic morality of a people could be reversed under the conditions of modernity-with no more difficulty than would be required "to change their table manners."94 Arendt came to the conclusion, as Canovan points out,95 that neither tradition, religion, or authority, nor metaphysics, nor even common-sense morality, could be counted on to provide effective bulwarks against such monstrosities. The perpetual flux of values possible in and sometimes characteristic of modernity means, as Max Weber suggests,96 that the **irrational reality of life** and the content of its possible meanings are **inexhaustible**. As a result, Arendt says, the groundwork of the world has begun to shift, to change and transform itself with ever-increasing rapidity from one shape into another, as though we were living and struggling with a Protean universe where everything at any moment can become almost anything else.97

Fortunately, this does not necessarily entail "the loss of the human capacity for building, preserving, and car**ing for a world that can survive us** and remain a fit place **to live** in for those who come after us."98 **To care for the world** in this way is in large part **the task of politics,** at least for Arendt. This can be seen most clearly in her descriptions of the act of political founding, through which a kind of **shelter for freedom and plurality** may be created.99 In a sense, however, **all genuinely political action partakes in some measure of this love of freedom** and hence also in **care for the world which makes such freedom possible**.100

Arendt attempts to find a way out of the various dilemmas of modernity, including moral solipsism, instrumental rationality, and the process-imperatives of progress and economic production. But she attempts to do so while still avoiding the seductions of the **aesthetic cult of the self-**its ultimate self-referentiality, its abjuration of morality and moral interpretation, its turning away from the world, and its

resulting **political disorientation**. Her success in confronting the problems of the modern condition is, of course, highly debatable; the question of her advocacy of a postmodern, aestheticized politics radically adverse to morality and moral interpretation seems much less so.

#### Zero support for the critique

Francis J. **Mootz 2k** II, Visiting Professor of Law, Pennsylvania State University, Dickinson School of Law; Professor of Law, Western New England College School of Law, Yale Journal of the Law & Humanities, 12 Yale J.L. & Human. 299, p. 319-320

Freudian psychoanalysis increasingly is the target of blistering criticism from a wide variety of commentators. **54** In a recent review, Frederick Crews reports that   independent studies have begun to converge toward a verdict... that **there is literally nothing to be said, scientifically or therapeutically, to the advantage of the entire Freudian system or any of its component dogmas** Analysis as a whole remains powerless... and understandably so, because a thoroughgoing epistemological critique, based on **commonly acknowledged standards of evidence and logic** decertifies **every distinctively psychoanalytic proposition**. **55** The most telling criticism of Freud's psychoanalytic theory is that it has proven no more effective in producing therapeutic benefits than have other forms of psychotherapy. 56 Critics draw the obvious conclusion that the benefits (if any) of psychotherapy are neither explained nor facilitated by psychoanalytic theories. Although Freudian psychoanalytic theory purports to provide a truthful account of the operations of the psyche and the causes for mental disturbances, critics argue that psychoanalytic theory may prove in the end to be nothing more than fancy verbiage that tends to obscure whatever healing effects psychotherapeutic dialogue may have. **57** ¶ Freudian psychoanalysis failed because it **could not make good on its claim to be a rigorous and empirical science**. Although Freud's mystique is premised on a widespread belief that psychoanalysis was a profound innovation made possible by his genius, Freud claimed only that he was extending the scientific research of his day within the organizing context of a biological model of the human mind. **58** [\*320] Freud's adherents created the embarrassing cult of personality and the myth of a self-validating psychoanalytic method only after **Freud's empirical claims could not withstand critical scrutiny** in accordance with the **scientific methodology** demanded by his metapsychology. **59** The record is clear that Freud believed that psychoanalysis would take its place among the sciences and that his clinical work provided empirical confirmation of his theories. This belief now appears to be **completely unfounded and indefensible.**¶Freud's quest for a scientifically grounded psychotherapy was not amateurish or naive. Although Freud viewed his "metapsychology as a set of directives for constructing a scientific psychology," n60 Patricia Kitcher makes a persuasive case that he was not a blind dogmatist who refused to adjust his metapsychology in the face of contradictory evidence. n61 Freud's commitment to the scientific method, coupled with his creative vision, led him to construct a comprehensive and integrative metapsychology that drew from a number of scientific disciplines in an impressive and persuasive manner. n62 However, the natural and social sciences upon which he built his derivative and interdisciplinary approach developed too rapidly and unpredictably for him to respond. n63 As **developments in biology quickly undermined Freud's theory**, he "began to look to linguistics and especially to anthropology as more hopeful sources of support," n64 but this strategy later in his career proved equally [\*321] unsuccessful. n65 The scientific justification claimed by Freud literally eroded when **the knowledge base underlying his theory collapsed**, leaving his disciples with the impossible task of defending a theory whose presuppositions no longer were plausible according to their own criteria of validation. n66

#### Threats real---threat inflation would get our authors fired

Earl C. Ravenal 9, distinguished senior fellow in foreign policy studies @ Cato, is professor emeritus of the Georgetown University School of Foreign Service. He is an expert on NATO, defense strategy, and the defense budget. He is the author of *Designing Defense for a New World Order.*What's Empire Got to Do with It? The Derivation of America's Foreign Policy.” *Critical Review: An Interdisciplinary Journal of Politics and Society* 21.1 (2009) 21-75

The underlying notion of “the security bureaucracies . . . looking for new enemies” is a threadbare concept that has somehow taken hold across the political spectrum, from the radical left (viz. Michael Klare [1981], who refers to a “threat bank”), to the liberal center (viz. Robert H. Johnson [1997], who dismisses most alleged “threats” as “improbable dangers”), to libertarians (viz. Ted Galen Carpenter [1992], Vice President for Foreign and Defense Policy of the Cato Institute, who wrote a book entitled A Search for Enemies). What is missing from most analysts’ claims of “threat inflation,” however, is a convincing theory of why, say, the American government significantly(not merely in excusable rhetoric) might magnify and even invent threats (and, more seriously, act on such inflated threat estimates). In a few places, Eland (2004, 185) suggests that such behavior might stem from military or national security bureaucrats’ attempts to enhance their personal status and organizational budgets, or even from the influence and dominance of “the military-industrial complex”; viz.: “Maintaining the empire and retaliating for the blowback from that empire keeps what President Eisenhower called the military-industrial complex fat and happy.” Or, in the same section:¶ In the nation’s capital, vested interests, such as the law enforcement bureaucracies . . . routinely take advantage of “crises”to satisfy parochial desires. Similarly, many corporations use crises to get pet projects— a.k.a. pork—funded by the government. And national security crises, because of people’s fears, are especially ripe opportunities to grab largesse. (Ibid., 182)¶ Thus, “bureaucratic-politics” theory, which once made several reputa- tions (such as those of Richard Neustadt, Morton Halperin, and Graham Allison) in defense-intellectual circles, and spawned an entire sub-industry within the field of international relations,5 is put into the service of dismissing putative security threats as imaginary. So, too, can a surprisingly cognate theory, “public choice,”6 which can be considered the right-wing analog of the “bureaucratic-politics” model, and is a preferred interpretation of governmental decision- making among libertarian observers. As Eland (2004, 203) summarizes:¶ Public-choice theory argues [that] the government itself can develop sepa- rate interests from its citizens. The government reflects the interests of powerful pressure groups and the interests of the bureaucracies and the bureaucrats in them. Although this problem occurs in both foreign and domestic policy, it may be more severe in foreign policy because citizens pay less attention to policies that affect them less directly.¶ There is, in this statement of public-choice theory, a certain ambiguity, and a certain degree of contradiction: Bureaucrats are supposedly, at the same time, subservient to societal interest groups and autonomous from society in general.¶ This journal has pioneered the argument that state autonomy is a likely consequence of the public’s ignorance of most areas of state activity (e.g., Somin 1998; DeCanio 2000a, 2000b, 2006, 2007; Ravenal 2000a). But state autonomy does not necessarily mean that bureaucrats substitute their own interests for those of what could be called the “national society” that they ostensibly serve. I have argued (Ravenal 2000a) that, precisely because of the public-ignorance and elite-expertise factors, and especially because the opportunities—at least for bureaucrats (a few notable post-government lobbyist cases nonwithstanding)—for lucrative self-dealing are stringently fewer in the defense and diplomatic areas of government than they are in some of the contract-dispensing and more under-the-radar-screen agencies of government, the “public-choice” imputation of self-dealing, rather than working toward the national interest (which, however may not be synonymous with the interests, perceived or expressed, of citizens!) is less likely to hold. In short, state autonomy is likely to mean, in the derivation of foreign policy, that “state elites” are using rational judgment, in insulation from self-promoting interest groups—about what strategies, forces, and weapons are required for national defense.¶ Ironically, “public choice”—not even a species of economics, but rather a kind of political interpretation—is not even about “public” choice, since, like the bureaucratic-politics model, it repudiates the very notion that bureaucrats make truly “public” choices; rather, they are held, axiomatically, to exhibit “rent-seeking” behavior, wherein they abuse their public positions in order to amass private gains, or at least to build personal empires within their ostensibly official niches. Such sub- rational models actually explain very little of what they purport to observe. Of course, there is some truth in them, regarding the “behavior” of some people, at some times, in some circumstances, under some conditions of incentive and motivation. But the factors that they posit operate mostly as constraints on the otherwise rational optimization of objectives that, if for no other reason than the playing out of official roles, transcends merely personal or parochial imperatives.¶ My treatment of “role” differs from that of the bureaucratic-politics theorists, whose model of the derivation of foreign policy depends heavily, and acknowledgedly, on a narrow and specific identification of the role- playing of organizationally situated individuals in a partly conflictual “pulling and hauling” process that “results in” some policy outcome. Even here, bureaucratic-politics theorists Graham Allison and Philip Zelikow (1999, 311) allow that “some players are not able to articulate [sic] the governmental politics game because their conception of their job does not legitimate such activity.” This is a crucial admission, and one that points— empirically—to the need for a broader and generic treatment of role.¶ Roles (all theorists state) give rise to “expectations” of performance. My point is that virtually every governmental role, and especially national-security roles, and particularly the roles of the uniformed mili- tary, embody expectations of devotion to the “national interest”; rational- ity in the derivation of policy at every functional level; and objectivity in the treatment of parameters, especially external parameters such as “threats” and the power and capabilities of other nations.¶ Sub-rational models (such as “public choice”) fail to take into account even a partial dedication to the “national” interest (or even the possibility that the national interest may be honestly misconceived in more paro- chial terms). In contrast, an official’s role connects the individual to the (state-level) process, and moderates the (perhaps otherwise) self-seeking impulses of the individual. Role-derived behavior tends to be formalized and codified; relatively transparent and at least peer-reviewed, so as to be consistent with expectations; surviving the particular individual and trans- mitted to successors and ancillaries; measured against a standard and thus corrigible; defined in terms of the performed function and therefore derived from the state function; and uncorrrupt, because personal cheating and even egregious aggrandizement are conspicuously discouraged.¶ My own direct observation suggests that defense decision-makers attempt to “frame” the structure of the problems that they try to solve on the basis of the most accurate intelligence. They make it their business to know where the threats come from. Thus, threats are not “socially constructed” (even though, of course, some values are).¶ A major reason for the rationality, and the objectivity, of the process is that much security planning is done, not in vaguely undefined circum- stances that offer scope for idiosyncratic, subjective behavior, but rather in structured and reviewed organizational frameworks. Non-rationalities (which are bad for understanding and prediction) tend to get filtered out. People are fired for presenting skewed analysis and for making bad predictions. This is because something important is riding on the causal analysis and the contingent prediction. For these reasons, “public choice” does not have the “feel” of reality to many critics who have participated in the structure of defense decision-making. In that structure, obvious, and even not-so-obvious,“rent-seeking” would not only be shameful; it would present a severe risk of career termination. And, as mentioned, the defense bureaucracy is hardly a productive place for truly talented rent-seekers to operatecompared to opportunities for personal profit in the commercial world. A bureaucrat’s very self-placement in these reaches of government testi- fies either to a sincere commitment to the national interest or to a lack of sufficient imagination to exploit opportunities for personal profit.

#### Multiple incentives to comply

Richard H. Pildes 12, Sudler Family Professor of Constitutional Law at NYU School of Law and Co-Director of the NYU Center on Law and Security, April 2012, “Law and the President,” NYU School of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 12-13, http://ssrn.com/abstract=2012024

But as Levinson’s work helps to show, even on its own terms, Posner and Vermeule’s approach offers an incomplete account of the role of law. Levinson’s work, for example, is devoted to showing why constitutional law will be followed, even by disappointed political majorities, for purely instrumental reasons, even if those majorities do not experience any internal sense of duty to obey. He identifies at least six rational-choice mechanisms that will lead rational actors to adhere to constitutional law decisions of the Supreme Court: coordination, reputation, repeat-play, reciprocity, asset- specific investment, and positive political feedback mechanisms.76 No obvious reason exists to explain why all or some of these mechanisms would fail to lead presidents similarly to calculate that compliance with the law is usually important to a range of important presidential objectives. At the very least, for example, the executive branch is an enormous organization, and for internal organizational efficacy, as well as effective cooperation with other parts of the government, law serves an essential coordination function that presidents and their advisors typically have an interest in respecting. There is a reason executive branch departments are staffed with hundreds of lawyers: while Posner and Vermeule might cynically speculate that the reason is to figure out how to circumvent the law artfully, the truth, surely, is that law enables these institutions to function effectively, both internally and in conjunction with other institutions, and that lawyers are there to facilitate that role. In contrast to Posner and Vermeule, who argue that law does not constrain, and who then search for substitute constraints, scholars like Levinson establish that rational-choice theory helps explain why law does constrain. Indeed, as Posner and Vermeule surely know, there is a significant literature within the rational-choice framework that explains why powerful political actors would agree to accept and sustain legal constraints on their power, including the institution of judicial review.77¶ That Posner and Vermeule miss the role of legal compliance as a powerful signal, perhaps the most powerful signal, in maintaining a President’s critical credibility as a well-motivated user of discretionary power is all the more surprising in light of the central role executive self-binding constraints play in their theory. After asserting that “one of the greatest constraints on [presidential] aggrandizement” is “the president’s own interest in maintaining his credibility” (p. 133), they define their project as seeking to discover the “social-scientific microfoundations” (p. 123) of presidential credibility: the ways in which presidents establish and maintain credibility. One of the most crucial and effective mechanisms, in their view, is executive self-binding, “whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors” (p. 137). As they also put it, “a well-motivated president can distinguish himself from an ill-motivated president by binding himself to a policy position that an ill-motivated president would reject” (p. 135). ¶ By complying with these constraints, presidents signal their good faith and accrue more trust to take further action. Most importantly from within Posner and Vermeule’s theory, these constraints, many self-generated through executive self-binding, substitute for the constraints of law. Law does not, or cannot, or should not constrain presidents, in their view, but rational-actor presidents recognize that complying with constraints is in their own self-interest; presidents therefore substitute or accept other constraints.¶ Thus, Posner and Vermeule recognize the importance of “enabling constraints”78 in effective mobilization and maintenance of political power; that is, they recognize that what appear to be short-term constraints on the immediate preferences of actors like presidents might actually enable longterm marshaling of effective presidential power. Yet they somehow miss that law, too, can work as an enabling constraint; when it comes to law, Posner and Vermeule seem to see nothing but constraint. Indeed, this failing runs even deeper. For if presidents must signal submission to various constraints to maintain and enhance their credibility — as Posner and Vermeule insist they must — Posner and Vermeule miss the fact that the single most powerful signal of that willingness to be constrained, particularly in American political culture, is probably the President’s willingness to comply with law. ¶ In theoretical terms, then, Posner and Vermeule emerge as inconsistent or incomplete consequentialists. Even if law does not bind presidents purely for normative reasons, presidents will have powerful incentives to comply with law — even more powerful than the incentives Posner and Vermeule rightly recognize presidents will have to comply with other constraints on their otherwise naked power. To the extent that Posner and Vermeule mean to acknowledge this point but argue that it means presidents are not “really” complying with the law and are only bowing to these other incentives, they are drawing a semantic distinction that seems of limited pragmatic significance, as the next Part shows.

#### Officials will be deterred even if the Prez is not

Walter Dellinger 6, Douglas B. Maggs Professor of Law at Duke University, former head of the Office of Legal Counsel, partner at O’Melveny & Myers in Washington, D.C., June 29 2006, “A Supreme Court Conversation,” http://www.slate.com/articles/life/the\_breakfast\_table/features/2006/a\_supreme\_court\_conversation/the\_most\_important\_decision\_on\_presidential\_power\_ever.html

I will expand upon this later tonight. But first, I must deal with your unwarranted fear that President Bush's administration might simply refuse to comply with the court's determinations, either openly or covertly. First of all, no one in this administration has ever suggested that the president would ever decline to obey Supreme Court decisions. But there is an even more practical restraint on noncompliance. The law officers of the government will not let that happen.¶ Yes, I know, actions have been taken in secret—prisons, torture, wiretapping, God knows what else. But many? most? of those actions have—to the extent of our knowledge—been approved by legal opinions from the Department of Justice and the White House counsel. Those legal opinions have seemed to very many lawyers to be fundamentally wrong in their assertions of sweeping unilateral presidential power to act in defiance of clearly valid laws. But, right or wrong, those legal opinions, signed and sealed on official government stationery, were a reality that gave substantial legal protection to government officers and agents who acted in compliance with what the lawyers found to be valid presidential directives.¶ No more. A lot of those legal opinions are inoperative as of 10 a.m. this morning. And without the cover of the now-discredited theory of sweeping unilateral executive power, the criminal law of the United States again controls.¶ Today the court holds that common Article 3 of the Geneva Conventions applies to the conflict against al-Qaida. As Justice Kennedy expressly notes in his (controlling) concurring opinion, Section 2441 of the U.S. Criminal Code defines a "war crime" as including any conduct "which constitutes a violation of common Article 3 of the international conventions signed at Geneva." And the statute makes any "war crime"—when committed by any member of the U.S. Armed Forces, or against any member of the U.S. Armed Forces, or against a U.S. national—punishable by life imprisonment, or in certain cases, by death. Now that the fig leaf of untenable legal opinions has been stripped away, there will be great resistance by covered officials to complying with directives that may violate such a serious federal criminal statute.

### Nietzsche

**Desire for control doesn’t cause global war---lack of strategic goals does---aff reclaims the political**

David **Chandler 9**, Professor of International Relations at the Department of Politics and International Relations, University of Westminster, War Without End(s): Grounding the Discourse of `Global War', Security Dialogue 2009; 40; 243

Western governments appear to portray some of the distinctive characteristics that Schmitt attributed to ‘motorized partisans’, in that the shift from narrowly strategic concepts of security to more abstract concerns reflects the fact that Western states have tended to fight free-floating and non-strategic wars of aggression without real enemies at the same time as professing to have the highest values and the absolute enmity that accompanies these. The government policy documents and critical frameworks of ‘global war’ have been so accepted that it is assumed that it is the strategic interests of Western actors that lie behind the often irrational policy responses, with ‘global war’ thereby being understood as merely the extension of instrumental struggles for control. This perspective seems unable to contemplate the possibility that it is the lack of a strategic desire for control that drives and defines ‘global’ war today. ¶ Very few studies of the ‘war on terror’ start from a study of the Western actors themselves rather than from their declarations of intent with regard to the international sphere itself. This methodological framing inevitably makes assumptions about strategic interactions and grounded interests of domestic or international regulation and control, which are then revealed to explain the proliferation of enemies and the abstract and metaphysical discourse of the ‘war on terror’ (Chandler, 2009a). For its radical critics, the abstract, global discourse merely reveals the global intent of the hegemonizing designs of biopower or neoliberal empire, as critiques of liberal projections of power are ‘scaled up’ from the international to the global.¶ Radical critics working within a broadly Foucauldian problematic have no problem grounding global war in the needs of neoliberal or biopolitical governance or US hegemonic designs. These critics have produced numerous frameworks, which seek to assert that global war is somehow inevitable, based on their view of the needs of late capitalism, late modernity, neoliberalism or biopolitical frameworks of rule or domination. From the declarations of global war and practices of military intervention, rationality, instrumentality and strategic interests are read in a variety of ways (Chandler, 2007). Global war is taken very much on its own terms, with the declarations of Western governments explaining and giving power to radical abstract theories of the global power and regulatory might of the new global order of domination, hegemony or empire¶ The alternative reading of ‘global war’ rendered here seeks to clarify that the declarations of global war are a sign of the lack of political stakes and strategic structuring of the international sphere rather than frameworks for asserting global domination. We increasingly see Western diplomatic and military interventions presented as justified on the basis of value-based declarations, rather than in traditional terms of interest-based outcomes. This was as apparent in the wars of humanitarian intervention in Bosnia, Somalia and Kosovo – where there was no clarity of objectives and therefore little possibility of strategic planning in terms of the military intervention or the post-conflict political outcomes – as it is in the ‘war on terror’ campaigns, still ongoing, in Afghanistan and Iraq. ¶ There would appear to be a direct relationship between the lack of strategic clarity shaping and structuring interventions and the lack of political stakes involved in their outcome. In fact, the globalization of security discourses seems to reflect the lack of political stakes rather than the urgency of the security threat or of the intervention. Since the end of the Cold War, the central problematic could well be grasped as one of withdrawal and the emptying of contestation from the international sphere rather than as intervention and the contestation for control. The disengagement of the USA and Russia from sub-Saharan Africa and the Balkans forms the backdrop to the policy debates about sharing responsibility for stability and the management of failed or failing states (see, for example, Deng et al., 1996). It is the lack of political stakes in the international sphere that has meant that the latter has become more open to ad hoc and arbitrary interventions as states and international institutions use the lack of strategic imperatives to construct their own meaning through intervention. As Zaki Laïdi (1998: 95) explains:¶ war is not waged necessarily to achieve predefined objectives, and it is in waging war that the motivation needed to continue it is found. In these cases – of which there are very many – war is no longer a continuation of politics by other means, as in Clausewitz’s classic model – but sometimes the initial expression of forms of activity or organization in search of meaning. . . . War becomes not the ultimate means to achieve an objective, but the most ‘efficient’ way of finding one. ¶ The lack of political stakes in the international sphere would appear to be the precondition for the globalization of security discourses and the ad hoc and often arbitrary decisions to go to ‘war’. In this sense, global wars reflect the fact that the international sphere has been reduced to little more than a vanity mirror for globalized actors who are freed from strategic necessities and whose concerns are no longer structured in the form of political struggles against ‘real enemies’. The mainstream critical approaches to global wars, with their heavy reliance on recycling the work of Foucault, Schmitt and Agamben, appear to invert this reality, portraying the use of military firepower and the implosion of international law as a product of the high stakes involved in global struggle, rather than the lack of clear contestation involving the strategic accommodation of diverse powers and interests.

#### No prior questions

Molly Cochran 99, Assistant Professor of International Affairs at Georgia Institute for Technology, “Normative Theory in International Relations”, 1999, pg. 272

To conclude this chapter, while modernist and postmodernist debates continue, while we are still unsure as to what we can legitimately identify as a feminist ethical/political concern, while we still are unclear about the relationship between discourse and experience, it is particularly important for feminists that we proceed with analysis of both the material (institutional and structural) as well as the discursive. This holds not only for feminists, but for all theorists oriented towards the goal of extending further moral inclusion in the present social sciences climate of epistemological uncertainty. Important ethical/political concerns hang in the balance. We cannot afford to wait for the meta-theoretical questions to be conclusively answered. Those answers may be unavailable. Nor can we wait for a credible vision of an alternative institutional order to appear before an emancipatory agenda can be kicked into gear. Nor do we have before us a chicken and egg question of which comes first: sorting out the metatheoretical issues or working out which practices contribute to a credible institutional vision. The two questions can and should be pursued together, and can be via moral imagination. Imagination can help us think beyond discursive and material conditions which limit us, by pushing the boundaries of those limitations in thought and examining what yields. In this respect, I believe international ethics as pragmatic critique can be a useful ally to feminist and normative theorists generally.

#### The agon solves ressentiment and prevents aggressive lashout

Siemens 1 – Herman W. Siemens, Department of Philosophy, Nijmegen University, The Netherlands, Nietzsche’s Agon With Ressentiment, Continental Philosophy Review, Volume 34, Number 1 / March, 2001, 69–93

Agonal culture is not distinguished by the kinds of affect that animate it; it is rather to their organisation, the peculiar “**compromise” between powers**, that we should look. Hate, cruelty, lust, deceitfulness, vindictiveness, all those affects symbolised by Hesiod’s “evil Eris,” are the “fertile ground” of agonal deeds. These form the “latent meaning” of the Homeric dream world, accord- ing to Nietzsche;28 but they also form the latent meaning of Aquinas and the Apocalypse of St. John, the disciple of love (see GM I 15–16). The agon draws on affective powers no different from those which, although repressed, fill the subterranean workshops of Christian-Platonic values. The difference lies in the direction (goal, object) given these affective powers and their con- figuration with other powers. **They** are not repressed or internalisedin the agon, but **externalised** or discharged in deeds of mutual antagonism, governed by codes of disempowerment that limit the pathos of aggression. They are not condemned, but openly acknowledged as stimulants, provoking and empowering each antagonist to contest the other. The secret of the Greeks, Nietzsche writes, “was to worship even illness as a god, if only it had power.”29 The agonal dynamic of mutual empowerment-disempowerment controls and **limits** powerful, destructive affects for the purposes of exploitation; it is about “using” these “great sources of power, the wildwater of the soul, often so dangerous, overwhelming, explosive, and economising them” (KSA 13: 14[163]).

#### Seeking to change the world is a celebration of life not a negation

Todd May 5, prof @ Clemson. “To change the world, to celebrate life,” Philosophy & Social Criticism 2005 Vol 31 nos 5–6 pp. 517–531

And that is why, in the end, there can be no such thing as a sad revolutionary. To seek to change the world is to offer a new form of life-celebration. It is to articulate a fresh way of being, which is at once a way of seeing, thinking, acting, and being acted upon. It is to fold Being once again upon itself, this time at a new point, to see what that might yield. There is, as Foucault often reminds us, no guarantee that this fold will not itself turn out to contain the intolerable. In a complex world with which we are inescapably entwined, a world we cannot view from above or outside, there is no certainty about the results of our experiments. Our politics are constructed from the same vulnerability that is the stuff of our art and our daily practices. But to refuse to experiment is to resign oneself to the intolerable; it is to abandon both the struggle to change the world and the opportunity to celebrate living within it. And to seek one aspect without the other – life-celebration without world-changing, world-changing without life-celebration – is to refuse to acknowledge the chiasm of body and world that is the wellspring of both.

#### Chaos isn’t inevitable - pragmatic actions is good and key to avoid extinction

Kurasawa 4 (Professor of Sociology, York University of Toronto, Fuyuki, Constellations Volume 11, No 4, 2004).

Moreover, keeping in mind the sobering lessons of the past century cannot but make us wary about humankind’s supposedly unlimited ability for problemsolving or discovering solutions in time to avert calamities. In fact, the historical track-record of last-minute, technical ‘quick-fixes’ is hardly reassuring. What’s more, most of the serious perils that we face today (e.g., nuclear waste, climate change, global terrorism, genocide and civil war) demand complex, sustained, long-term strategies of planning, coordination, and execution. On the other hand, an examination of fatalism makes it readily apparent that the idea that humankind is doomed from the outset puts off any attempt to minimize risks for our successors, essentially condemning them to face cataclysms unprepared. An a priori pessimism is also unsustainable given the fact that long-term preventive action has had (and will continue to have) appreciable beneficial effects; the examples of medical research, the welfare state, international humanitarian law, as well as strict environmental regulations in some countries stand out among many others. The evaluative framework proposed above should not be restricted to the critique of misappropriations of farsightedness, since it can equally support public deliberation with a reconstructive intent, that is, democratic discussion and debate about a future that human beings would freely self-determine. Inverting Foucault’s Nietzschean metaphor, we can think of genealogies of the future that could perform a farsighted mapping out of the possible ways of organizing social life. They are, in other words, interventions into the present intended to facilitate global civil society’s participation in shaping the field of possibilities of what is to come. Once competing dystopian visions are filtered out on the basis of their analytical credibility, ethical commitments, and political underpinnings and consequences, groups and individuals can assess the remaining legitimate catastrophic scenarios through the lens of genealogical mappings of the future. Hence, our first duty consists in addressing the present-day causes of eventual perils, ensuring that the paths we decide upon do not contract the range of options available for our posterity.42 Just as importantly, the practice of genealogically inspired farsightedness nurtures the project of an autonomous future, one that is socially self-instituting. In so doing, we can acknowledge that the future is a human creation instead of the product of metaphysical and extra-social forces (god, nature, destiny, etc.), and begin to reflect upon and deliberate about the kind of legacy we want to leave for those who will follow us. Participants in global civil society can then take – and in many instances have already taken – a further step by committing themselves to socio-political struggles forging a world order that, aside from not jeopardizing human and environmental survival, is designed to rectify the sources of transnational injustice that will continue to inflict needless suffering upon future generations if left unchallenged.

### Simulation

#### Their information overload argument is wrong---high volume of information doesn’t render it meaningless, and information is not consumed uniformly by a mass society---it’s diffused, meaning individuals and social groups can accurately process and employ the information they consume for pragmatic political reforms

Turner 4 – Bryan S. Turner, Dean of Social Sciences at Deakin University, Australia, “Baudrillard for Sociologists,” in Forget Baudrillard?, 2004 edition, p. 80-83

While, as far as one can tell, Baudrillard was not influenced by Bell’s vision of the role of technology and the media in shaping postindustrialism, he was influenced by Marshall McLuhan’s analysis (Gane 1991b:48) of the impact of new media on the transformation of modern culture, especially in The Gutenberg Galaxy (McLuhan 1967). McLuhan was particularly sensitive to the idea that we live in a processed social world where human beings live in a complete technostructure. This technological environment is carried with us as extensions of our own bodies, but McLuhan did not adopt a pessimistic view of the age of anxiety, because his ‘technological humanism’ (Kroker et al. 1984) and Catholic values committed him to the idea of the immanence of reason and the hope of an escape from the labyrinth. Indeed, a global technological system could become the basis of a universalistic culture. Although he was fully aware of the sensory deprivation which he associated with the impact of the mass media, he none the less remained committed to the hope that these negative effects were not fatal. Baudrillard, who as we have noted was deeply influenced by McLuhan’s idea that the content of messages was relatively unimportant in relation to their form, has embraced a very nihilistic position with respect to our processed environment.

Baudrillard’s pessimistic view of the fissure in the historical development of the modern is based on his view of the masses. Baudrillard’s analysis of the masses is a product of the Situationist responses to the May events of 1968, when it became increasingly obvious that the critical social movements of modern society would not be dominated by Marxist theory or directed by a vanguard of the working class. The crisis of May 1968 had not been predicted by Marxism or by mainstream sociology, but they did validate the claims of Situationists like Guy Debord in the journal Internationale Situationiste. However, if the crisis had been unanticipated by conventional political analysis, then the sudden collapse of the students’ and workers’ movements of 1968 found no easy explanation in the framework of mainstream social sciences.

Baudrillard’s concept of the inexplicable nature of the mass depend a great deal on the unusual circumstances surrounding the May events. By 1973 with the publication of The Mirror of Production (Baudrillard 1975), Baudrillard was already moving away from an orthodox Marxist view of production, arguing that Marxism, far from being an external critique of capitalism, was merely a reflection or mirror of the principal economistic values of capitalism. Instead of engaging in the production of meaning, a subversive, oppositional movement would have to challenge the system from the point of view of meaninglessness. Subversion would have to rob the social system of significance. In taking this stand, Baudrillard followed the Situationist claim that whatever can be represented can be controlled (Plant 1992:137). The mass events of 1968 offered a promise of the nonrepresentational moment, the pure event of authenticity, which could not be explained, and therefore could not be manipulated. Baudrillard, in dismissing Marxist theory as a means of representing events, sought to replace the idea of a mode of production with a mode of disappearance.

In taking this attitude towards modern social movements, Baudrillard’s argument also rests on the various meanings of the word ‘mass’. Baudrillard is thus able to make allusions to the idea of physical substance, matter, the majority and the electrical meaning of earth. The translator’s note to In the Shadow of the Silent Majority points out that faire masse can mean to form a majority and to form an earth. Baudrillard argues by allusion that the mass absorbs the electrical charges of social and political movements; the mass thus neutralizes the electrical charge of society. This use of allusion, parody and irony is typical of Baudrillard’s mode of analysis, which is a type of sociological poetics, a style which is likely to make sociologists feel uncomfortable (Gane 199la:193). There is here also a continuity with the style of Dada and the Situationists. The poetic and striking character of Baudrillard’s style has no counterpart in professional social science, least of all in the British context.

Baudrillard’s ‘sociological fictions’ (1990a:15) are striking and challenging, but they are not ultimately convincing. Arguments which depend on allusion, allegory and similar rhetorical devices are decorative but they are not necessarily powerful. The notion of ‘mass society’ already has a clearly worked out sociological critique. The idea of ‘mass society’ might have been relevant in describing the new markets which were created in the post-war period with the advent of innovative technologies, which had the immediate effect of lowering prices and making commodities available to a mass audience. However, the trend of sociological analysis in the last two decades has been to assert that mass audiences have been broken down into more selectively constructed niches for more individualized products. It is controversial to argue that industrialization necessarily produces a mass society, characterized by a common culture, uniform sentiments or an integrated outlook. The idea of a mass society was often associated with the notion that the decline of individualism would produce a directionless mass as the modern equivalent of the eighteenthcentury mob. Critical theorists like Adorno and Marcuse associated the massification of society with authoritarianism and a potential for fascism. Of course, Baudrillard’s version of mass society is based on a particular view of the mass media creating a hyperreality in which the real has been absorbed by the hyperreal; meaning has imploded on itself. Although Baudrillard’s analysis of hyperreality is postcritical (Chen 1987), he does adopt in practice a critical position towards American civilization, which is the extreme example of massification. Rather like critical theorists, Baudrillard believes that the (bourgeois) individual has been sucked into the negative electrical mass of the media age. However, sociological research on mass audiences shows that there is no ground for believing that media messages are received, consumed or used in any standardized manner, and the majority of social scientists working on culture have attempted to argue that cultural objects in the age of the mass media are appropriated, transformed and consumed in diverse forms and according to various practices (de Certeau 1984). In fact, sociologists, largely inspired by the Situationists, have argued that everyday life is resistant to massification and that the concrete reality of everyday life-situations is the principal arena within which opposition to massification can be expected. Everyday life was regarded by both Guy Debord and Henri Lefebvre (1991) as the foundation of authenticity. Baudrillard, by arguing that criticism belongs to the period of modernism and not to the age of hyperreality, has ruled out opposition to the system, at least at the level of public debate and formal politics.

#### Their theory of illusion is overstated: we are not lost in a world of total illusion; instead, we understand that simulacra are produced by concrete and contestable institutions. Our approach recognizes that there are better and worse representations, particularly in the context of war.

Mitchell Hobbs 7, Lecturer and PhD Candidate (Sociology and Anthropology), The University of Newcastle, Australia, ‘REFLECTIONS ON THE REALITY OF THE IRAQ WARS: THE DEMISE OF BAUDRILLARD’S SEARCH FOR TRUTH?,” Fall, 2007, http://www.tasa.org.au/conferences/conferencepapers07/papers/379.pdf

As has been noted by Barry Smart (2000) (and others), Baudrillard’s theorising, which has its roots in neo-Marxism, eventually led him to the proposition that if current sociological critique was incapable of ascertaining truth because reality was being superseded by de-contextualised images (or, rather, signs), then a new system of social inquiry was needed, one capable of breaking out of the endless cycle of simulacra and the intellectual “inertia” brought about by the meta-physical dead end of capitalism. To this end, Baudrillard sought to employ a “fatal strategy” or “fatal theory”, where he could highlight the deceptions of “hyper-reality” by pushing them into a “more real than real situation”, to force them into a clear “over-existence which is incompatible with that of the real” (Baudrillard cited in Smart, 2000:464). Accordingly, by claiming that the Gulf War did not take place, Baudrillard was seeking to push our thinking of this event beyond the orthodox political economic approach, in order to draw attention to the “simulated” nature of the news media and to the antithetical consequences of this seemingly endless use and reproduction of images and simplistic narratives deprived of socio-historic contexts.

2.2 BRIDGING THE REALITY GULF: FROM BAUDRILLARD TO KELLNER

Although Baudrillard’s work on “simulation” and “simulacra” is valuable in highlighting the relationship between the mass media and reality, and, in particular, the ways in which media content (images and narratives) come to be de-contextualised, his theses are per se insufficient for the analysis of the contemporary mass media. For instance, as media theorist and researcher Douglas Kellner (2003:31) notes, beyond the level of media spectacle, Baudrillard does not help readers understand events such as the Gulf War, because he reduces the actions of actors and complex political issues to categories of “simulation” and “hyper-reality”, in a sense “erasing their concrete determinants”.

Kellner, who like Baudrillard, has written extensively on media spectacles, including the Gulf Wars, sees Baudrillard’s theory as being “one-dimensional”, “privilege[ing] the form of media technology over its content, meaning and…use” (Kellner, 1989:73). In this regard, Baudrillard does not account for the political economic dimensions of the news media, nor the cultural practices involved with the production of news (Kellner, 1989:73-74). Thus, he suffers from the same technologically deterministic essentialism that undermined the media theories of Marshall McLuhan, albeit in a different form (Kellner, 1989:73-74). Although Kellner (2003:32) believes that Baudrillard’s pre-1990s works on “the consumer society, on the political economy of the sign, simulation and simulacra, and the implosion of [social] phenomenon” are useful and can be deployed within critical social theory, he prefers to read Baudrillard’s later, more controversial and obscure, work as “science fiction which anticipates the future by exaggerating present tendencies”.

In order to understand war and its relationship with the media in the contemporary era it is, then, necessary to move beyond Baudrillard’s spectacular theory of media spectacle. For although our culture is resplendent with images, signs and narratives, circulating in a seemingly endless dance of mimicry (or, rather, simulacra), there are observable social institutions and practices producing this semiotic interplay. Although all that is solid might melt into air (Marx and Engles, 2002:223), appearances and illusions are not an end for sociological analysis, but are rather a seductive invitation to further social inquiry. As the research of Douglas Kellner (1992; 1995; 2005) has shown, when media spectacles are dissected by critical cultural analysis, re-contextualisation is possible. Images and narratives can be traced back to their sources: whether they lie in Hollywood fantasies or government ‘spin’. In short, by assessing the veracity of competing texts, war (as understood by media audiences) can be re-connected to its antecedents and consequences. Indeed, through wrestling with the ideological spectres of myth and narrative, and by searching widely for critically informed explanations of different events, the social sciences can acquire an understanding of the ‘truthfulness’ of media representations; of the ‘authentic’ in a realm bewildered by smoke and mirrors. As long as there are competing media voices on which to construct a juxtaposition of ‘truths’, sociologists can, to a certain extent, force the media to grapple with their own disparate reflections.

#### Probing beyond appearances is necessary for developing an effective response against suffering and oppression --- we need to reform the policymaking institutions that are behind the production of simulation

Steven Best 97, Assoc Professor and Chair of Philosophy at U-Texas, El Paso and Douglas Kellner, chair in the philosophy of education at UCLA, The Postmodern Turn, 1997, 112-113

Hence, we subscribe to Debord's Hegelian-Marxian distinction between appearance and reality and the need for critical thought to continue to probe behind appearances. Whereas Baudrillard surrenders to the surface of the simulacrum, Debord maintains a commitment to critical hermeneutics, attempting to get at the roots of human suffering and oppression through analysis of the capitalist mode of production and reproduction. Just as Marx discovered congealed human value in the commodity form, and from there identified the whole social basis of exploitation, Debord critically deciphers the congealed image object, the spectacle; penetrates its reified surface; and situates it within its context of social and historical relations. Although he maps out an advanced stage of reification, Debord argues that no object is fully opaque or inscrutable, standing outside of a social context that it cannot ultimately refer to, betray, and be interpreted against.

Where Debord's strategy reminds us of the ultimately antagonistic, con-flictual, and contradictory aspects of a social reality open to critique and transformation, Baudrillard's radical rejection of referentiality is premised upon a one-dimensional, No-Exit world of self-referring simulacra. Baudrillard is right: "Reality" has become increasingly difficult to identify in "the empire of signs." But however reified and self-referential postmodern semiotics is, signs do not simply move in their own signifying orbit. They are historically produced and circulated, and though they may not translucently refer to some originating world, they nonetheless can be sociohistorically contextualized, interpreted, and criticized. Thus, even Warhol's "Diamond Dust Shoes" and other paradigms of postmodern flatness, seemingly purely self-referential (see Jameson, 1991), ultimately refer to a whole world, one, in this case, of advanced commodification and of the assimilation of art to media culture and the market (see Chapter 4).

Through Debord's work, we can grasp a point of singular importance: Self-referentiality does not entail hyperreality. Signs, images, and objects are not inscrutable and hermetic simply because they no longer stand within a classical space of representation. It is not that one signifier brings us a "real" world and another doesn't but that one occludes a larger social context more than does another, that contextualization may be more difficult in one case than in another. However self-referential and abstract the signifiers, a critical hermeneutics can uncover their repressed or mystified social content and social relations.13

Moreover, in a sense, Baudrillard's hyperreality is itself an illusion, the projection of a realer-than-real, constructed by the powers that be to obscure the deprivations, ugliness, and oppressiveness of social reality. Critical hermeneutics can always uncover the constructedness of the hyperreal, which is, after all, nothing more than a construct and model of the real; the hyperreal can always be contextualized, deconstructed, and unmasked. Indeed, the hyperreal is a challenge to critical hermeneutics to see precisely what realities and interests lie behind it, how it is constructed, and what it is concealing and mystifying and why.

Debord is right then to insist that "the spectacle is not [just] a collection of images, but a social relation among people, mediated by images" (#4). While Debord did not provide as powerful an account of postmodern media and signification as did Baudrillard, he correctly insists that the spectacle is "the other side of money" (#34) and so of capitalist social relations. For Baudrillard, however, the sign develops according to its own autonomous logic, and his one-sided analysis is decontextualizing and depoliticizing, serving to exonerate the "captains of consciousness" and media moguls of the present.

While critical hermeneutics does not posit a Ding-an-sich discoverable beyond a historical horizon and unmediated by ideology or language, it rightly tries to recover the distinction between reality and illusion as the preliminary basis for a sociopolitical criticism. It is the work of the culture industry to erase this distinction, and it should be the task of radical criticism to recover it, requiring a reconstructed notion of "representation." Though Baudrillard cogently problematizes certain realist views of representation (e.g., those developed in the 17th century, which see language as the "mirror of nature"; see Foucault, 1973; Rorty, 1979) or the realist fictions of our present-day media, he wrongly rejects the illuminating potential of other forms of "representation," such as Jameson (1988, 1991) has attempted to develop in his notion of "cognitive mapping." And while Baudrillard illuminates recent mutations in the sign brought on by media and advertising (which Foucault has failed to consider; see Baudrillard, 1986), he mystifies media culture by severing its dynamics from political economy and current political struggles.

To pass from the collapse of the classical episteme to the thesis of radical simulation and implosion, from the fragmentation of meaning to the "end of meaning," is far too hasty a move and obscures the ways in which we still can and must configure our world, not in an act of pictured reflection but, rather, in a theoretical and critical analysis that attempts to grasp the constitutive relations of society and to decode their ideological operations. In a critical hermeneutics, the surface appearance of things is unmasked to reveal not the "real" itself, which remains a dialectically mediated category, but the social forces behind these appearances: the actors, groups, policy makers, spin doctors, and institutions still identifiable and subject to a critically informed resistance. This suggests that "simulation" can be critically deconstructed and resolved into "dissimulation," an activity that reveals simulation to be wholly constructed, serving the interests of specific social groups and hiding certain alternative realities.

#### Analysis and use of evidence from experts is good – prerequisite to change assumptions and sharpen analysis

**Mills 2003**, Gary, Major in the United States Air Force, August 2003, “The Role of Rhetorical Theory in Military Intelligence Analysis”, http://www.au.af.mil/au/awc/awcgate/au/mills.pdf , p. 5-6, MZ

As an integral part of the military’s new information age, you need to be aware of alternative sources available to enhance your communication and analytical skills. Recently retitled as intelligence operators, intelligence personnel must apply every available tool in order to support worldwide warfighter operations. As highlighted by the CIA Directorate of Intelligence, your **effective use of “outside experts** will yield useful information and insight, along with constructive **challenges to [your] working assumptions**, that can only **sharpen [your] analysis.”**1 In this study, Foucault’s discourse theories serve as the primary rhetorical workshop. As a result, there is a need to define the wide and essential scope of rhetorical theory, including a brief look at its history. The word rhetoric brings to mind many different meanings: “The practice of oratory [discourse or speech]; the study of strategies of effective oratory; the use of language, written or spoken [or electronic], to inform or persuade; the study of the persuasive effects of language; the study of the relation between language and knowledge; the classification and use of tropes and figures; and, of course, the use of empty promises and half-truths as a form of propaganda.”2 Intelligence officers interface with most of these overlapping meanings.3 You even study many influences and forms of propaganda. However, most importantly, you must understand that “rhetoric is an action” and that it affects communication and analytical perspectives.4 “In one sense, rhetoric is an action human beings perform, and in a second sense, it is a perspective humans take. As an action, rhetoric involves humans’ use of symbols for the purpose of communicating with one another. As a perspective humans take, rhetoric involves focusing on symbolic [and analytic] processes.”5 With some luck, this study will effectively communicate the strength of rhetoric’s influence on intelligence— ultimately changing and shaping your perspective on analysis.

## 1AR

#### This is true at a fundamental and ontological level

Paterson 3 Craig, Department of Philosophy, Providence College, Rhode Island “A Life Not Worth Living?”, Studies in Christian Ethics, <http://sce.sagepub.com>

Contrary to those accounts, I would argue that it is death per se that is really the objective evil for us, not because it deprives us of a prospective future of overall good judged better than the alter- native of non-being. It cannot be about harm to a former person who has ceased to exist, for no person actually suffers from the sub-sequent non-participation. Rather, death in itself is an evil to us because it ontologically destroys the current existent subject — it is the ultimate in metaphysical lightening strikes.80 The evil of death is truly an ontological evil borne by the person who already exists, independently of calculations about better or worse possible lives. Such an evil need not be consciously experienced in order to be an evil for the kind of being a human person is. Death is an evil because of the change in kind it brings about, a change that is destructive of the type of entity that we essentially are. Anything, whether caused naturally or caused by human intervention (intentional or unintentional) that drastically interferes in the process of maintaining the person in existence is an objective evil for the person. What is crucially at stake here, and is dialectically supportive of the self-evidency of the basic good of human life, is that death is a radical interference with the current life process of the kind of being that we are. In consequence, death itself can be credibly thought of as a ‘primitive evil’ for all persons, regardless of the extent to which they are currently or prospectively capable of participating in a full array of the goods of life.81

In conclusion, concerning willed human actions, it is justifiable to state that any intentional rejection of human life itself cannot therefore be warranted since it is an expression of an ultimate disvalue

**MARKED**

for the subject, namely, the destruction of the present person; a radical ontological good that we cannot begin to weigh objectively against the travails of life in a rational manner. To deal with the sources of disvalue (pain, suffering, etc.) we should not seek to irrationally destroy the person, the very source and condition of all human possibility.82

#### We don’t devalue death---death’s symbolic value does not deny the value of life---the option to continue living should always be available

Amien Kacou 8 WHY EVEN MIND?On The A Priori Value Of “Life” Cosmos and History: The Journal of Natural and Social Philosophy, Vol 4, No 1-2 (2008) cosmosandhistory.org/index.php/journal/article/view/92/184

I. What we mean (in more detail)

Regardless of whether or not we find that it is the “fundamental question” of philosophy,[8] we can see that judging whether life is or is not worth living is, in one sense at least, when understood with a general character, a fundamentally philosophical question. The question calls on the living individual to make a value judgment (which seems of the most serious extent) about the condition it most basically, most generally, and in a sense most intimately, “finds itself” in—and in this sense, the question must be seen as a “personal” one.[9] But the judgment called for only becomes especially interesting for philosophical exercise once we attempt to make it “objective,” so to speak.

On the one hand, from a “subjective” point of view, the question whether life is or is not worth living **reduces simply to the question whether** **or not**—or how—**we the living** already in fact, in our variable situations, **desire or not to live**. Its answer is a function of descriptions of motivational dispositions as they may vary from individual to individual and circumstance to circumstance. (For instance, some may find certain cases of euthanasia justified, or find certain forms of suicide honorable.) In other words, from a subjective point of view, the answer would simply be that life is worth living to the extent that, while we could have a different attitude, we just happen to want it (to be disposed towards it), perhaps in light of circumstantial considerations. And, thus, the question could be **quickly addressed** in some cases, without much need for philosophical inquiry—except perhaps on collateral issues. Similarly, typical answers referring simply to how “fun” or “beautiful” life is, or (perhaps the contemporary scientist’s favorite) how “fascinating” or “mysterious”—these answers are, as stated, inadequate for our purposes, to the extent that they are primitive (uncritical) generalizations expressing our preexisting desire for (or infatuation with) life.

On the other hand, from a point of view that purports to be “objective,” we must have a more complex approach. We must “problematize” the value of life in general. The question is not simply whether (or how, or even why in the broad sense of an explanation) we happen to desire or not to live, but rather whether (or why in the narrow sense of a justification) we should or should not ever desire to live in the first place.

a. The objective approach

In seeking a justification, we must look, beyond the mere “freedom” (or given-ness) of any primitive desire, for something like a final “authority” that we could show through some fact or logical inference[10] to make us “right” (i.e., as a matter of reasoning) to have such a desire. In other words, we must try to present life as being instrumental or not to some uncontested value (or purpose)—and, thus, as either “useful” or “futile.” In this sense, the word “meaningful” (pertaining to life) would be basically synonymous with the word “useful”—a relation between objects and moments, on the one hand, and how what we value can be served, on the other hand.

In addition, we do not look for conditions that would sustain or increase the value of a proposed venture; we look for a demonstration that the venture can have any value. Accordingly, in order to find the objective position, we must avoid in our picture of life or death any variable circumstance that could be taken to make either one of them arbitrarily more or less attractive or pursuable. Furthermore, any description of how we desire to live **may well entail conditions under which we would not prefer to live**. **But** even if such conditions exist**, it does not necessarily follow that life is without value when those conditions prevail**. Indeed, by analogy, that we would prefer ten dollars to five dollars if we could choose does not mean at all that the five dollars would then have no value. Other example: that we would happily accept an ice cream cone if it were free but refuse it if we had to pay for it does not mean at all that ice cream has no value to us. The distinction can be expressed as follows: the value of ice cream in light of its cost, we call its a posteriori value; the value of ice cream irrespective of its cost, we call its a priori value.

What we seek in this inquiry is the a priori value of life-as-such—**the value that subsists in, or is essential to, or is the initial value in,** any life**,** irrespective of its circumstances, including, to any extent possible, any explanation for its existence.[11] (The objective question calls for an a priori answer.) In contrast, we are not interested in questions such as whether seppuku is honorable or how end-of-life decisions should be made. (The subjective question, the question of circumstances and the a posteriori answer coincide.)

#### Life is a pre-requisite to death’s symbolic value---fearing death doesn’t preclude recognizing life’s finitude and its inevitability---we can still create provisional value in life---individuals should have the option to live

Cara Kalnow 9 A Thesis Submitted for the Degree of MPhil at the University of St. Andrews “WHY DEATH CAN BE BAD AND IMMORTALITY IS WORSE” https://research-repository.st-andrews.ac.uk/bitstream/10023/724/3/Cara%20Kalnow%20MPhil%20thesis.PDF

(PA) also provided us with good reason to reject the Epicurean claim that the finitude of life cannot be bad for us. With (PA), we saw that our lives could **accumulate value** through the **satisfaction of our desires** beyond the boundaries of the natural termination of life. But Chapter Four determined that the finitude of life is a necessary condition for the value of life as such and that many of our human values rely on the finite temporal structure of life. I therefore argued that an indefinite life cannot present a desirable alternative to our finite life, because life as such would not be recognized as valuable. In this chapter, I have argued that the finitude of life is instrumentally good as it provides the recognition that life itself is valuable. Although I ultimately agree with the Epicureans that the finitude of life cannot be an evil, this **conclusion was not reached from the Epicurean arguments against the badness of death**, and I maintain that (HA) and (EA) are insufficient to justify changing our attitudes towards our future deaths and the finitude of life. Nonetheless, the instrumental good of the finitude of life that we arrived at through the consideration of immortality should make us realize that the finitude of life cannot be an evil; it is a necessary condition for the recognition that life as such is valuable.

Although my arguments pertaining to the nature of death and its moral implications have yielded several of the Epicurean conclusions, my position still negotiates a middle ground between the Epicureans and Williams, as (PA) accounts for the intuition that it is rational to fear death and regard it as an evil to be avoided.

**MARKED**

I have therefore reached three of the Epicurean conclusions pertaining to the moral worth of the nature of death: (1) that the state of being dead is nothing to us, (2) death simpliciter is nothing to us, and (3) the finitude of life is a matter for contentment. But against the Epicureans, I have argued that we can rationally fear our future deaths, as categorical desires provide a disutility by which the prospect of death is rationally held as an evil to be avoided. Finally, I also claimed against the Epicureans, that the prospect of death can rationally be regarded as morally good for one if one no longer desires to continue living.

5.3 Conclusion

I began this thesis with the suggestion that in part, the Epicureans were right: death—when it occurs—is nothing to us. I went on to defend the Epicurean position against the objections raised by the deprivation theorists and Williams. I argued that the state of being dead, and death simpliciter, cannot be an evil of deprivation or prevention for the person who dies because (once dead), the person—and the grounds for any misfortune—cease to exist. I accounted for the anti-Epicurean intuition 115 that it is rational to fear death and to regard death as an evil to be avoided, **not because death** simpliciter **is bad**, but rather because the prospect of our deaths may be presented to us as bad for us **if our deaths would prevent the satisfaction of our categorical desires**. Though we have good reasons to rationally regard the prospect of our own death as an evil for us, the fact that life is finite cannot be an evil and is in fact instrumentally good, because **it takes the threat of losing life to** recognize that life as such is valuable. In this chapter, I concluded that even though death cannot be of any moral worth for us once it occurs, we can **attach two distinct values to death** while we are alive: we can attach a value of disutility (or utility) to the prospect of our own individual deaths, and we must attach an instrumentally good value to the fact of death as such. How to decide on the balance of those values is a matter for psychological judgment.

#### Value to life is inevitable and subjective

Schwartz 2 (Lisa, professional metaphysician, Medical Ethics: A case based approach, “The Value of Life: Who Decides and How?”, p. 112)

The second assertion made by supporters of the quality of life as a criterion for decision making is closely related to the first, but with an added dimension. This assertion suggests that the determination of the value of the quality of a given life is a subjective determination to be made by the person experiencing that life. The important addition here is that the decision is a personal one that, ideally, ought not to be made externally by another person but internally by the individual involved. Katherine Lewis made this decision for herself based on a comparison between two stages of her life. So did James Brady. Without this element, decisions based on quality of life criteria lack salient information and the patients concerned cannot give informed consent. Patients must be given the opportunity to decide for themselves whether they think their lives are worth living or not. To ignore or overlook patients’ judgment in this matter is to violate their autonomy and their freedom to decide for themselves on the basis of relevant information about their future, and comparative consideration of their past. As the deontological position puts it so well, to do so is to violate the imperative that we must treat persons as rational and as ends in themselves.

**Humanity will survive for between 5,000 and 8 billion years: 95% confidence interval**

Jason G. **Matheny**, **Research Associate at the Future of Human Institute at Oxford University**, **Ph.D. Candidate in Applied Economics** at Johns Hopkins University, holds a Master’s in Public Health from the Bloomberg School of Public Health at Johns Hopkins University and an M.B.A. from the Fuqua School of Business at Duke University, **2007** (“Reducing the Risk of Human Extinction,” *Risk Analysis*, Volume 27, Issue 5, October, Available Online at http://jgmatheny.org/matheny\_extinction\_risk.htm, Accessed 07-04-2011)

We have some influence over how long we can delay human extinction. Cosmology dictates the upper limit but leaves a large field of play. At its lower limit, humanity could be extinguished as soon as this century by succumbing to near-term extinction risks: nuclear detonations, asteroid or comet impacts, or volcanic eruptions could generate enough atmospheric debris to terminate food production; a nearby supernova or gamma ray burst could sterilize Earth with deadly radiation; greenhouse gas emissions could trigger a positive feedback loop, causing a radical change in climate; a genetically engineered microbe could be unleashed, causing a global plague; or a high-energy physics experiment could go awry, creating a "true vacuum" or strangelets that destroy the planet (Bostrom, 2002 ; Bostrom & Cirkovic, 2007 ; Leslie, 1996 ; Posner, 2004 ; Rees, 2003 ). Farther out in time are risks from technologies that remain theoretical but might be developed in the next century or centuries. For instance, self-replicating nanotechnologies could destroy the ecosystem; and cognitive enhancements or recursively self-improving computers could exceed normal human ingenuity to create uniquely powerful weapons (Bostrom, 2002 ; Bostrom & Cirkovic, 2007 ; Ikle, 2006 ; Joy, 2000 ; Leslie, 1996 ; Posner, 2004 ; Rees, 2003 ). Farthest out in time are astronomical risks. In one billion years, the sun will begin its red giant stage, increasing terrestrial temperatures above 1,000 degrees, boiling off our atmosphere, and eventually forming a planetary nebula, making Earth inhospitable to life (Sackmann, Boothroyd, & Kraemer, 1993 ; Ward & Brownlee, 2002 ). If we colonize other solar systems, we could survive longer than our sun, perhaps another 100 trillion years, when all stars begin burning out (Adams & Laughlin, 1997 ). We might survive even longer if we exploit nonstellar energy sources. But it is hard to imagine how humanity will survive beyond the decay of nuclear matter expected in 1032 to 1041 years (Adams & Laughlin, 1997 ).3 Physics seems to support Kafka's remark that "[t]here is infinite hope, but not for us." While it may be physically possible for humanity or its descendents to flourish for 1041 years, it seems unlikely that humanity will live so long. Homo sapiens have existed for 200,000 years. Our closest relative, homo erectus, existed for around 1.8 million years (Anton, 2003 ). The median duration of mammalian species is around 2.2 million years (Avise et al., 1998 ). A controversial approach to estimating humanity's life expectancy is to use observation selection theory. The number of homo sapiens who have ever lived is around 100 billion (Haub, 2002 ). Suppose the number of people who have ever or will ever live is 10 trillion. If I think of myself as a random sample drawn from the set of all human beings who have ever or will ever live, then the probability of my being among the first 100 billion of 10 trillion lives is only 1%. It is more probable that I am randomly drawn from a smaller number of lives. For instance, if only 200 billion people have ever or will ever live, the probability of my being among the first 100 billion lives is 50%. The reasoning behind this line of argument is controversial but has survived a number of theoretical challenges (Leslie, 1996 ). Using observation selection theory, Gott (1993) estimated that humanity would survive an additional 5,000 to 8 million years, with 95% confidence.