Targeted Killing in Morality and Law
Jeff McMahan, draft of 13 September 2011

In announcing that Osama bin Laden had been killed, Barack Obama declared that “justice has been done.” In saying this, he was implying, or perhaps even asserting, that the justification for the killing was a matter of retributive justice – that is, of punishment. The announcement was immediately followed by celebrations in the streets throughout the United States. These effusions were not expressions of relief at the passing of a grave danger but exultations over the achievement of vengeance against a hated enemy. This understanding of the justification for the killing was largely unchallenged in popular domestic discourse. About a week after the killing, when I suggested during an interview on Wisconsin Public Radio that the killing ought to have been regarded as an act of defense rather than punishment, the announcer remarked that “you may be the first person I’ve heard describe this as a defensive action, [to say] that we did this for defense.”

There have actually been attempts to defend the moral permissibility of targeted killing on the ground that it offers both vengeance, satisfying the desire of victims for revenge, and retribution, or the infliction of harm according to desert. It is obvious, though, that a policy of targeted killing – by which I mean not political assassination generally but the killing of suspected terrorists by agents of the state – cannot be justified by appeal to vengeance or retribution. Some philosophers argue that no one can deserve to be harmed. Others argue for the more limited claim that no one can deserve to die, or to be killed. But even if some wrongdoers deserve to be killed, the importance of giving them what they deserve is, on its own, insufficient to justify the risks that a policy of targeted killing imposes on innocent people – most notably, the risk of misidentifying the intended victim and the risk of harming or killing innocent bystanders as a side effect. This becomes particularly clear when one takes into account that retribution alone cannot justify the preventive killing of a person who will otherwise perpetrate an act of terrorism in the near future but has not yet harmed any innocent person. Retribution can justify the killing only of those who have already engaged in terrorism, and it might be thought do so even when killing them would do nothing to protect innocent people. If pure retribution were our goal, our means would therefore have to be to capture suspected terrorists and try them in court. Only then might we be justified in punishing those found guilty in accordance with their desert. Pure retribution is insufficiently important to justify other means that involve a higher risk of killing innocent people. Indeed, as opponents of capital punishment have plausibly argued, the importance of retribution may be insufficient to justify the risks involved in killing people even with the safeguards against mistake provided by a criminal trial.

That targeted killing can be justified, if at all, only on grounds of defense is compatible with its being a legitimate means of law enforcement. One might, indeed, argue that targeted killing can be justified as a form of punishment, on the assumption that the principal function of punishment is social defense. While many moral and legal theorists continue to conceive of punishment and defense as entirely distinct, others have recently sought to derive an account of permissible punishment from the principles that
govern the permissibility of self- and other-defense. And most people recognize that at least one legitimate function of punishment is to protect innocent people from those who have demonstrated through criminal action that they are potentially dangerous. Yet it would be a mistake to claim that targeted killing could itself constitute a morally or legally permissible form of punishment. That does not, however, exclude its having a legitimate role in law enforcement. I will return to these matters later.

In considering whether targeted killing can be justified, one must separate the question whether it can ever be morally permissible from the question whether it should be permitted in domestic and international law. These questions are interrelated in complex ways, but at least certain dimensions of each can be considered in isolation from the other. I will address the moral question first and then consider what the legal status of targeted killing ought to be.

**Morality**

There are two basic forms of moral justification that might apply to targeted killing. One appeals to the claim that the potential victim has made himself morally liable to be killed by virtue of his moral responsibility for wrongful harm, or a threat of wrongful harm, to others. This claim entails the further claim that he has forfeited his right not to be killed, at least for certain reasons and by certain persons. In this respect, being liable to be killed is like deserving to be killed. The main difference between liability and desert is that the reason given by liability is conditional on the act of killing’s being a means or unavoidable side effect of bringing about some good effect, usually the prevention or correction of a violation of rights. By contrast, the justification for the infliction of deserved harm is not conditional in this way.

The other basic form of moral justification that might apply to targeted killing is a necessity justification, according to which it can be morally justifiable to kill a person who is not liable to be killed if that is necessary to avoid harms to other innocent people that would be significantly worse. Such a person retains his right not to be killed but the right is, in the circumstances, overridden. Necessity justifications are divided between those that are impartial, or agent-neutral, and those that are agent-relative. The impartial form of necessity justification is often called a “lesser evil” justification and is the less controversial of the two. It asserts that the killing of an innocent person or persons can be morally justified when that is necessary to avert harms to other innocent people that would be substantially greater, impartially considered. Note that although such a necessity justification is concerned with consequences, it is not a consequentialist justification. It presupposes that there is a constraint against the killing of an innocent person and denies that it can be overridden whenever the overall consequences of doing so would be better. It requires instead that they be substantially better. It is usually held, moreover, that in order to justify the intentional killing of an innocent person, the harms that one would thereby avert must be even greater than those whose prevention would be necessary to justify the foreseen but unintended killing of the same innocent person.

The agent-relative form of necessity justification does not require the impartial evaluation of consequences but permits agents to take into account their relations to
others. Some philosophers argue that, if one person is related to another in an especially morally significant way – for example, if the one is the parent of the other – there can be a necessity justification for the parent to protect the child by inflicting a harm on another innocent person that is only slightly less than the harm that the child is thereby prevented from suffering. Indeed, some philosophers argue that the parent can have a necessity justification for inflicting a harm on an innocent bystander that is greater than that which the child would otherwise have suffered. Such views would have to be considered in any comprehensive discussion of targeted killing, as they suggest the possibility that an instance of targeted killing could be justified even if the harm it would prevent the members of one group from suffering would be less than the harm it would cause to the members of another group as a side effect. But I will not explore these complications here.

I will, indeed, say little even about the lesser evil form of necessity justification. This is because in those instances in which it is most plausible to suppose that targeted killing is morally justified, such as the killing of bin Laden, the justification seems to be a liability justification. By his own wrongful action, bin Laden had forfeited his right not to be killed if killing him was the best means of preventing innocent people from becoming victims of his terrorist activities. A liability justification is not, however, always decisive. It is possible that there were reasons not to kill bin Laden that made it morally wrong to kill him. But that the killing wronged him, or violated his rights, is not among them.

It is perhaps worth mentioning, if only parenthetically, that liability and necessity justifications are in principle combinable. Suppose, for example, that a person, P, has made himself liable to suffer harm up to amount \( x \) as a means of preventing an innocent person from suffering a different harm for which P is partly responsible. Yet to prevent this other harm it is necessary to inflict on P a harm greater than \( x \) – say, \( x + y \). If the harm that the innocent person would otherwise suffer is sufficiently serious, it could be justifiable to inflict a harm in the amount of \( x + y \) on P. The harm that P would suffer up to \( x \) would be justified as a matter of liability, while the additional harm, \( y \), would be justified on grounds of necessity. Even though P would be liable to be harmed, the infliction of harm beyond that to which he was liable would have to be justified by reference to the demanding standards that govern the harming of innocent people.

There is, however, a feature of targeted killing that would appear to make it difficult to justify on grounds on liability. This is that targeted killing is preventive – that is, it is done not when the victim is engaged in terrorist activity but when he is unthreatening. This is a defining rather than contingent feature of targeted killing. The killing of a terrorist while he is attempting to carry out a terrorist attack is not an instance of targeted killing but a straightforward instance of third party defense of innocent people and as such raises no special issues. Only an absolute pacifist might object to the killing of a terrorist as a necessary and proportionate means of thwarting an actual terrorist attack. But how can a person be liable to be killed as a matter of defense at a time when he does not pose a threat?
The answer is that a person can make himself liable to be killed if he acts in a way that increases the objective probability that he will wrongly kill an innocent person. For example, a person who plans and prepares for the murder of an innocent person thereby increases the potential victim’s risk of being murdered. If the only opportunity to prevent the murder occurs in advance of the time that the potential murderer plans to commit the murder, he can be liable to be killed at that time. For even at that time he has made it the case through his own wrongful action that either he must be killed or his intended victim must remain at high risk of being murdered by him. It is, of course, not certain at the time that, if he is not preventively killed, the potential murderer will later kill his intended victim. Perhaps he will change his mind. But unless the objective probability that he will kill his intended victim is so low that killing him defensively would be disproportionate, it would be unjust for his wholly innocent potential victim to have to bear a risk of being murdered by him in order that he should be spared.

The targeted killing of a person who is in fact a terrorist is morally – though not legally — quite similar to the killing of an “unjust combatant” (that is, a combatant fighting in a war that lacks a just cause) while he is asleep, which most people regard as permissible. A sleeping unjust combatant in a time of war has committed his will to the killing of opposing “just combatants” (who fight in a just war). He intends, or intends conditionally on receipt of an order, to kill them. The broad contours of his life are shaped and guided by this commitment: he has trained and planned and prepared for this. He is where he is, doing what he does day after day, in order to contribute to his state’s unjust war. Much the same is true of the terrorist: he is committed to and guided by the aim of killing innocent people. Both he and the unjust combatant have acted in ways that have raised the objective probability that people who are not liable to be killed (which in my view includes just combatants who fight by permissible means) will be wrongly killed. The main difference between a terrorist who is preparing for his mission or awaiting orders and a sleeping unjust combatant is that the latter keeps about him the visible indicators of his commitment to attack his adversaries, such as his uniform and weapons, while the terrorist seeks to conceal his intentions, preparations, and identity as a terrorist.

It does not matter to the sleeping unjust combatant’s liability to defensive killing whether he has killed in the past. The newly-arrived soldier who has not yet participated in combat is no less liable than the veteran of many campaigns sleeping next to him. The liability of each to defensive action is based on the threat he will pose when he wakes – or, in an extended sense, the threat he poses now – not on what he has done in the past. The same is true of the terrorist. Two people who are together planning for and preparing to carry out a terrorist attack may be equally liable to be preventively killed, even if one has conducted such attacks in the past while the other has not. Their liability to defensive action is based on their responsibility for the threat that the defensive action would be intended to prevent, not on their responsibility for unrelated threats from the past.

Whether a person has engaged in terrorism in the past is not, however, irrelevant to the justification for a particular instance of targeted killing. Its primary significance is evidential. If a person is known to have engaged in terrorist activity in the past, that provides some reinforcement for whatever other evidence there is that he is preparing to
do so again. There is in general, therefore, less moral risk involved in the targeted killing of a person who has a confirmed history of terrorist activity.

That a person has engaged in terrorism in the past is also relevant to the weight that it is reasonable to attribute to the possibility of mistake. Compare two targeted killings, each of which is based on a mistake. In the first case, there was no reason to believe that the person killed had engaged in terrorism in the past and in fact he had not. He was believed, however, to be preparing to engage in terrorism. But that belief was false: he was not and would never have been involved with terrorism in any way. In the second case, the person killed was correctly believed to have conducted terrorist attacks in the past. It was also believed that he was preparing for another attack, but in fact his career as a terrorist had ended. By the time he was killed he had become entirely harmless.

Neither of these people was liable to defensive killing, as neither posed a threat. Yet the wrong done to the second person, who had been guilty of terrorist action in the past, is less. Because of his history of terrorist action, he is morally responsible for appearing to pose a threat of wrongful harm to innocent people. If he had not killed people in the past, or had surrendered himself earlier, other people would not now be forced to choose between killing him and allowing him to live when they reasonably believe that the latter alternative would allow innocent people to remain at risk of being murdered by him. Through his past action, he has forfeited any claim to the benefit of the doubt. He has also, it seems, forfeited his right to kill in self-defense, despite the fact that he no longer poses a threat. He is, one might say, liable to be killed on the basis of a mistake that he is responsible for making it reasonable to make, even though he is not liable to be killed for defensive reasons. This is similar to the claim, which I also accept, that a person can be liable to be killed as a side effect of defensive action even when he is not liable to be killed intentionally as a means of defense.

Another possible reason why the erstwhile terrorist has been wronged to a lesser degree than the person who was innocent of any involvement with terrorism is that he may have deserved to suffer some degree of harm because of his past action. As I noted earlier, it may be doubtful that he deserved to be killed. But if he deserved to be harmed to some extent for the harms he inflicted on innocent people in the past, it seems that the undeserved harm he suffered in being killed must be less than that of the wholly innocent person. (There is disagreement about whether a person who deserves to be harmed gets what he deserves when he is harmed by natural causes or for reasons unrelated to his desert. Those who think he does not will join those who do not believe in desert in rejecting this second possible reason for thinking that the former terrorist suffers a lesser wrong in being killed than the innocent person does.)

In summary, although targeted killing is necessarily preventive, that does not exclude the possibility of there being a liability justification for it, since people can make themselves liable to be preventively killed. The conditions in which there might be a liability justification for the targeted killing of a terrorist are that, by intending, planning, or preparing to commit or contribute to an act of terrorism, this person is responsible for an increase in the objective probability that innocent people will be murdered; that killing him is the best means of averting the threat he poses (both because of the probability of
success and because of the expected effects that other options would have on innocent people, including innocent bystanders and anti-terrorist agents); and that killing him is proportionate in the sense that the expected saving of the lives of innocent people substantially outweighs any expected harms that the killing might cause to innocent bystanders as side effect.

**Law**

That targeted killing can in some cases be morally justified on grounds of liability does not entail that it ought to be legally permitted in those cases. Legal permissions and prohibitions cannot simply restate moral permissions and prohibitions. Although perfect congruence between criminal law and morality is perhaps the ideal, laws must be evaluated on the basis of their likely effects. This may be particularly true of laws governing the action of states, since the abuse of legal permissions by states can have unusually bad consequences. One question, therefore, is whether at least some instances of targeted killing ought to be legal under international law.

But a different and more urgent question is how targeted killing ought to be regarded in relation to the law as it is now. Targeted killing might be thought to come within the scope of either of two legal paradigms. One of these is the set of legal norms governing law enforcement, or police action. The other is the set of legal norms governing the conduct of war. If terrorists are criminals, or criminal suspects, their treatment ought to be governed by the norms of law enforcement. If they are combatants, their treatment ought to be governed by the laws of war. It cannot be the case that terrorists – that is, actual terrorists and not merely suspected terrorists – are neither criminals nor combatants; for if they are not combatants, they are definitely criminals. Yet there may be no determinate, objective truth about which they are as a matter of law. There is certainly no agreement, no consensus, on this matter. There is, it seems, some legitimate scope for choice. The relevant question may not be whether terrorists are criminals or combatants but whether it is better to classify them as criminals or as combatants.

Whether terrorists are best treated as criminals or combatants, and thus whether anti-terrorist activity is best understood as law enforcement or war, is highly relevant to the status of targeted killing in the law. In the law enforcement paradigm, those who are in fact criminals must be treated as criminal suspects prior to conviction. Their treatment is governed by a requirement of arrest: they must be arrested and tried in a court of law. They may not be hunted and killed, for that would constitute “extrajudicial execution” – a charge often made against targeted killing. If, therefore, terrorists are best regarded as criminals, targeted killing is in most cases illegal. There are exceptions, as I will indicate later, but targeted killing must be ruled out as a policy that substitutes for efforts to capture terrorists and place them on trial.

If, by contrast, terrorists are combatants, they may, like other combatants, be permissibly killed at any time during a state of war. The state of war is of course essential for the activation of the laws of war. There is no legal permission for soldiers in one state to kill soldiers in another if the two states are not at war. This is one reason
why it was important to members of the Bush administration to have a “war on terror.” They wanted to kill terrorists as well as to capture them for interrogation; hence they sought to bring their own anti-terrorist activities within the scope of the norms governing the practice of war by declaring terrorists to be enemy combatants at war with the United States.

Terrorists often conceive of themselves as combatants and wish to be regarded as such. This may have been part of the reason for Osama bin Laden’s fatuous attempt at a declaration of war against the U.S., an act that was merely an attempt because a private person does not have the legal power to declare war. Combatant status has at least two sources of appeal. One is that it confers a specious aura of legitimacy that terrorists sometimes covet. The other is that it might seem to entitle terrorists to the legal rights of prisoners of war when they are captured – rights that, however unrealistically, they sometimes demand. Yet it may actually be against their interests to be recognized as combatants. For that recognition provides their adversaries with a public justification for killing rather than capturing them. The Bush administration’s violations of rights of habeas corpus and its repellent torturing of detainees, along with the Obama administration’s pusillanimous unwillingness to conduct civilian trials of terrorist suspects, have made the practice of capturing and imprisoning suspected terrorists politically unpopular in U.S. The Obama administration greatly prefers to kill such people rather than capture them – as in the case of bin Laden himself.

One might argue that if terrorists are combatants, that gives them, among their other rights, a right of surrender, which they can use to compel their adversaries to capture rather than kill them. But this ignores two obvious points. First, the targeted killing of suspected terrorists is increasingly done with remotely controlled weapons, such as Predator drones. This denies the victims any option of surrender, which many members of the Obama administration no doubt regard as an advantage. Second, even when there are opportunities to capture terrorists rather than kill them, there may be little incentive for anti-terrorist agents or their leaders to avail themselves of those opportunities. It may well be that the right of surrender is, unlike some of the rights of prisoners of war, more than merely conventional. But the motivation to respect it often comes from an expectation of reciprocity. That is, persons on one side of a conflict will be willing to accept the burdens involved in holding prisoners only if they can expect that they and others on their side will, if the opportunity arises, be taken prisoner rather than killed. But terrorists are not in the business of taking prisoners. They “fight” against civilians, not anti-terrorist agents. They take only hostages, not prisoners. There is therefore no basis for an expectation of reciprocity, and thus little reason to expect that terrorist suspects will be offered an opportunity to surrender as long as killing them is politically more expedient.

Although the Bush administration claimed that terrorists are combatants, it was unwilling to accord them any of the rights that go with combatant status. It therefore declared them to be “unlawful combatants,” a category whose members supposedly have all the liabilities of combatant status, such as being liable to be killed at any time, but none of the corresponding rights or immunities, nor even any of the rights of criminal suspects. The notion of an unlawful combatant is, however, of disputed application. It
was originally invoked in the *Quirin* case during the Second World War to justification
the execution of a group of German military personnel who had entered the U.S.
clandestinely and were impersonating civilians in an effort to sabotage war-making
facilities on American soil. They were official agents of an enemy state who, disguised
as civilians, were carrying out military functions in a legally recognized war against the
U.S. The were not terrorists attempting to kill civilians.

Just as it is unclear what the criteria are for being an unlawful combatant, so it is
unclear what rights and liabilities unlawful combatants would have if they could be
reliably identified. Certainly their legal status is not what the Bush administration in
practice took it to be – that is, people who may be either hunted and killed or captured
and imprisoned indefinitely with no right to legal representation, no right to trial, no right
against torture, indeed no rights at all.

The idea that terrorists who are not members of any regular, legally recognized
military organization can have some form of combatant status is doubtfully coherent.
Combatant status is a legal artifact. The role of the combatant is defined by reference to
legal rights and duties and has been designed so that conferral of combatants status will
serve certain purposes – primarily the reduction of violence and harm in war through the
insulation of ordinary civilian life from the destructive and disruptive effects of war. The
granting of combatant status involves a tacit bargain. Those to whom it is granted are
thereby guaranteed immunity from legal prosecution for acts, such as killing and
maiming, that would ordinarily be criminal, even if the war in which they fight is unjust
and illegal. And they are also granted legal rights to humane treatment and release at the
end of the war if they are captured. In exchange for these rights and immunities, they
acquire certain duties: they must visually identify themselves as combatants and carry
their weapons openly. More importantly, combatants have a legal duty not to conduct
intentional attacks against civilians. Combatant status is conditional on reciprocity: one
is entitled to the benefits only if one fulfills the duties. Combatants who intentionally kill
civilians forfeit some of the privileges and immunities conferred by combatant status –
though they do not forfeit combatant status altogether, since even war criminals retain the
legal right to kill enemy combatants until they cease to be combatants, either when war
ends or they are rendered *hors de combat*. (It is one of the many implausible elements of
the law of war and the traditional theory of the just war that they permit all combatants,
including those fighting for unjust ends, to kill enemy combatants even when the latter
are trying to stop them from committing an atrocity.)

While combatant status is thus awarded in part to draw a sharp moral and legal line
between those who have it and those who do not, terrorism seeks to erase that line. It is a
defining characteristic of terrorism that its instrumental purpose is precisely to expose
ordinary civilian life to the violence characteristic of war. Terrorists also subvert the
purpose of distinguishing between combatants and noncombatants by concealing
themselves among ordinary people and carrying out their attacks without identifying
themselves as threateners, thereby limiting the ability of their opponents to distinguish
between those who threaten them and those who do not. It is thus the essence of
terrorism that terrorists do exactly what the legal category of the combatant has been
designed to prevent people from doing. Combatant status is, in effect, a reward offered
as an incentive not to do precisely what terrorists do. It would therefore be pointless to grant the rewards for refraining from engaging in terrorism to terrorists themselves.

Despite this argument, many people will remain convinced that terrorists must count as combatants because the dangers they pose often require a military response, as in the case of bin Laden, who had to be killed by a team of elite military commandos. But these people would do well to consider what this idea implies. It implies, for example, that if, on September 11, 2001, members of al Qaeda had had a jet of their own that was not intended to resemble a civilian jetliner, and if there had been no one on board other than themselves, their flying it into the Pentagon would have been a legitimate act of war. For the Pentagon is a military headquarters and is thus a legitimate target for enemy combatants during a state of war. One might object that there was no state of war between al Qaeda and the U.S. at that time, but the attack itself would have initiated such a state if the al Qaeda operatives had been combatants.

I should clarify that I do not deny that some terrorists can be combatants. But this is not because terrorists generally are combatants but because a combatant can become a terrorist by using terrorist means rather than legitimate military means in an effort to achieve his ends. During the Second World War, for example, political leaders, military commanders, and flight crews collaborated in the bombing of cities with the intention of killing their civilian inhabitants as a means of breaking the morale of their enemies and coercing the enemy government to surrender. These people were engaged in terrorism, which can be deployed in service of just as well as unjust ends. We do not, however, usually refer to such people as terrorists, partly for patriotic reasons if they were on our side, but also because we have another label for regular combatants who commit acts of terrorism: war criminals. Robert McNamara, who was involved in planning the bombings of Japanese cities, made the following observation during an interview conducted late in his life: “Was there a rule that said you shouldn’t bomb, kill, shouldn’t burn to death 100,000 civilians in a night? [General Curtis] LeMay said that if we’d lost the war, we’d all have been prosecuted as war criminals. And I think he’s right. He, and I’d say I, were behaving as war criminals.” He could with equal justice have confessed that they were acting as terrorists. I will not, however, discuss combatants who become war criminals by engaging in terrorism; rather, in what follows, I will use “terrorist” to refer only to those who engage in terrorism outside of any legally recognized role within a regular military organization. (Some writers tendentiously define “terrorism” so that it can be perpetrated only by “non-state actors.” That is not my suggestion. I am simply limiting the scope of this discussion.)

As I noted earlier, if terrorists are not combatants, they must be criminals. They are civilians who are engaged in an egregious form of criminal activity. Anti-terrorist action is therefore a form of law enforcement, and thus comes within the scope of the norms governing police action. If this is right, terrorists may not be hunted and killed but must instead be arrested and brought to trial.

Critics of this view sometimes object that if anti-terrorism is a form of law enforcement, its aim must be punishment, for the aim of law enforcement is criminal
justice – that is, the punishment of the guilty. But anti-terrorism does not aim at punishment; it is, as I claimed earlier, a form of defense.

These critics are right that it can be important to keep defense and punishment distinct, even though they are closely related. Although some of the classical just war theorists held that the sole just cause for war is the punishment of the guilty, almost no one holds that view now. Until quite recently, many just war theorists have held instead that the only just cause for war is national defense, either self-defense or third party defense of another state. Retribution, they have held, has no role in the justification of war. According to this view, the reason it is permissible to kill combatants is not that they are guilty and deserve punishment but because killing them is necessary to defend other people from the threat they pose. But if this is right, the idea that it was permissible to kill bin Laden because he was a combatant in the “war on terror” is doubtfully compatible with the idea that his having been killed meant that justice had been done, as Obama proclaimed. To claim both that he could be killed because he was a combatant and that killing him was just punishment is to conflate defense and retribution.

That said, it is important to note both that punishment is only one aim of law enforcement and that one of the functions of punishment is societal defense – that is, the removal of dangerous criminals from society for a period in part to protect the other members of the society from them. But law enforcement also has the protection of innocent people as an aim that is independent of punishment. It can be a legitimate police function to kill a violently dangerous person if he cannot be otherwise subdued for arrest, even if this person is known not to be responsible for his action and thus not someone who deserves to be punished as a matter of retribution.

Defense is an aim of law enforcement in both these ways. When the law aims at defense through punishment, the immediate danger from the criminal has usually passed. A crime has been committed. There is often a threat of further criminal action by the same person, but the need for defensive action may not be urgent. And in most cases of domestic criminal activity, it is normally just as effective and no riskier to law enforcement agents to seek to arrest the suspect than to kill him. Once he has been arrested and no longer poses an immediate threat, it is necessary to try him in court in order to ensure, to the greatest degree possible, not only that no harm is inflicted on an innocent person but also that any harm that is inflicted will be effectively defensive – which it will not be if an innocent person is punished by mistake, for in that case the real culprit is left free to cause further harm. The requirement of arrest is thus both a safeguard against mistake and an important element in the process of ensuring that defensive action is effective.

The second way in which law enforcement can be defensive is quite different. When a criminal suspect evades arrest and poses a clear danger to innocent people, the urgency of defensive action is considerable. Continued efforts to arrest him may leave innocent people – further intended victims, innocent bystanders, and police officers – exposed to a level of risk so high that the requirement of arrest must be suspended. The conditions in which the requirement is suspended resemble those in which private individuals are permitted to kill in self- or other-defense. In such conditions, police
officers may then permissibly kill the suspect. Granting law enforcement agents this permission involves significant risks: they may kill the wrong person, they may fail to see that there is an effective alternative to killing, their action may pose a threat to innocent bystanders that is at least as great as that posed by the suspect, and so on. But sometimes these risks are outweighed by the risks involved in failing to eliminate the threat posed by the suspect.

Because anti-terrorist action is generally preventive in character, there is normally less urgency than there is when a violent individual is on a rampage, and the risk of misidentification is significantly greater. In these conditions, it may be reasonable to subject defensive action to safeguards that are not possible, or would be unduly risky, in the case of more immediate threats posed by readily identifiable threateners. In general, therefore, anti-terrorist action should be constrained in the ways characteristic of law enforcement and the administration of criminal justice: there should be a requirement of arrest, a presumption of innocence, an insistence on proof of guilt beyond reasonable doubt, and so on. Observance of these restrictions may even yield an important benefit as side effect: namely, the divulging of information by the terrorist that facilitates the prevention of terrorist acts by others.

Yet there are various other features that characterize much anti-terrorist action that may make it morally necessary on certain occasions to suspend these requirements. Among these features are that terrorists often live, conspire, and train in a state other than the one that is the target of their terrorist action, and that they are often protected by the government of that state and sheltered by local supporters. When anti-terrorist agents can thus expect to be denied permission to make an arrest and to face resistance if they try, the probability of a successful arrest may be low while the risks involved in the attempt may be high. When an unusually dangerous terrorist is inaccessible to arrest at a reasonable level of risk for these or other reasons, conditions may be analogous to those that justify the suspension of the requirement of arrest in cases of domestic law enforcement. In these conditions, targeted killing may be justified for reasons similar to those that can justify the police in killing a rampaging gunman who resists arrest.

Many of these conditions obtained in the case of Osama bin Laden. He had proven himself to be a highly dangerous terrorist. There was no risk that, in killing him, anti-terrorist agents would be killing an innocent or unthreatening person. And there can be little doubt that he was being sheltered by certain individuals in the Pakistani government or military, or both. Any effort to secure the cooperation of the Pakistani government or military in arresting him would therefore almost certainly have resulted in his being alerted and allowed to escape. Finally, there was good reason to believe that he was heavily protected by armed guards. Yet in spite of all this, it turned out to have been possible to capture him alive at little or no more risk than was involved in killing him. The initial reports revealed that, before they shot bin Laden himself, the Seals incapacitated a woman who charged them as they entered bin Laden’s room by shooting her in the leg. That immediately raised the question why they could not have done the same with him. The Obama administration soon conceded that he was unarmed and, despite the administration’s assertion that the Seals were “prepared” to capture him if possible, The New Yorker has quoted “a special-operations office who is deeply familiar
with the bin Laden raid” as saying that “there was never any question of detaining or capturing him – it wasn’t a split-second decision. No one wanted detainees.”

It seems, then, that according to the view for which I have been arguing, it was wrong to kill bin Laden rather than capture him. The reason has nothing to do with the fact that he was defenseless. That is a distraction, a sentimental relic of medieval codes of chivalry. If killing bin Laden had been necessary to eliminate a significant threat for which he was responsible, even if he did not pose that threat at the time, it would have been unambiguously good that he was defenseless when the killing had to be done, so that no harm might be done to those acting justifiably to eliminate the threat. The reason is instead that killing him does not seem to have been necessary to avert any threat for which he was responsible.

Yet that might not be true. There are at least two reasons that may have motivated members of the Obama administration to order that he be killed rather than captured, either of which might provide a justification for the killing, despite the many reasons why it would have been desirable to capture him and place him on trial. One is that the administration may have decided in advance that it was not worth the loss of even one more American life to enable bin Laden to live to face trial rather than be killed. So the Seals may have been instructed simply to take no chances. The other is that the administration may have reasonably feared that if he had been taken captive, his followers would then have taken American hostages and begun killing them one by one in an effort, however futile, to coerce the U.S. to release him.* It is not unreasonable to suppose that the reasons favoring capture rather than killing may have been outweighed by that risk. (I would not include among those reasons that he had a right not to be killed. If killing him was necessary to avoid a significant risk that innocent people would be killed by his followers, then he was liable to be killed, as he would have borne some responsibility for the acts of his followers. This is the kind of case to which I referred in the previous paragraph.) The risk that hostages might be taken in an effort to secure his release could, however, have been minimized if the Obama administration had postponed the announcement of his capture long enough to have him placed in the custody of an international body, such the International Criminal Court in the Hague. But this option was of course politically impossible in the U.S., where the outrage and jeers of Republican politicians at the administration’s placing the U.S.’s greatest enemy under international jurisdiction would have converted the capture from a triumph to a humiliation. As recent experience demonstrates, Republican politicians can be counted on to obstruct the best solution to any problem.

There are various reasons why capture followed by trial is generally preferable to killing. Apart from the fact that a dead terrorist can provide no information about other terrorists or planned terrorist operations, most of the disadvantages of targeted killing have to do with the risks it involves that can be mitigated through the safeguards provided by the alternative of capture and trial. Perhaps the most obvious risk is that the victim may be misidentified. In one of the earliest instances of targeted killing, agents of Mossad, the Israeli intelligence and counter-terrorism agency, killed an innocent Moroccan waiter in Norway in 1973 in the mistaken belief that he was the leader of the Palestinian “Black September” group that had massacred Israeli athletes at the 1972
Munich Olympics. This case provoked an international scandal, but in general the incentives to exercise reasonable care in identifying and attacking foreign terrorists are weaker than those for exercising care in domestic police work. Governments naturally take greater precautions to avoid killing their own citizens by mistake. Another instance of misidentification occurred in London when British police killed a Brazilian man whom they mistook for a terrorist shortly after the terrorist bombings there in 2005.

In addition to the mistake of misidentification, there is also the possibility that killing someone known to have engaged in terrorist action in the past will serve no defensive purpose, perhaps because the person has altogether ceased to be involved in terrorist activity. As I noted earlier, however, the wrong done to the victim in this kind of case is significantly less than it would be if he had not been a terrorist and thus bore no responsibility for the reasonable belief of others that he continued to pose a threat of wrongful harm. For much the same reason, a lesser wrong is also done when a member of a terrorist organization is killed when his contribution to the organization’s action was, while sufficient for liability to a lesser form of harm, insufficiently significant to make him liable to be killed.

Another risk of targeted killing that might be lessened by pursuing the alternative of capture and trial is the harming of innocent people as a side effect. Because terrorists tend to live and move freely among ordinary people, it is difficult to attack them without killing or injuring innocent bystanders as well. This is particularly true when targeted killing is attempted using remotely controlled weapons. This problem is not, however, unique to targeted killing; it arises as well for defensive action taken in response to an actual terrorist attack and even for efforts to capture or arrest a terrorist suspect who can be expected to engage in violent resistance. In some cases, indeed, targeted killing can be carried out with almost no danger to innocent bystanders. The classic example is the killing of Hamas’s bomb maker, Yahya Ayyash, by agents of the Israeli security service, Shin Bet, who managed to transfer to him a cell phone rigged with explosives, which they then detonated when they confirmed that he was using it. More recently, the targeted killing of Osama bin Laden was accomplished without harm to any innocent bystanders.

In addition to the risk of mistake, there are also risks of abuse. Even in the case of a government that is scrupulous in limiting its use of targeted killing to cases of confirmed terrorists, subtle forms of abuse are likely to develop, such as carelessness about side effects if those involved believe that they can get away with it without adverse publicity. But the most serious form of abuse by a government that kills only confirmed terrorists is one that, as I mentioned earlier, characterizes the Obama administration’s policy of targeted killing. This is the use of targeted killing as a tactic of first rather than last resort, as a replacement for other forms of anti-terrorist action, such as capture and trial, that incorporate stronger safeguards against the inadvertent killing of innocent people.

The greatest danger from any legal recognition of the permissibility of targeted killing is, however, that unscrupulous regimes will exploit that legal permission in offering public justifications for the killing of political opponents who are not terrorists at
all but will be said to be by their killers. There is ample precedent for this – for example, the killing in 1982 of the anti-Apartheid activist Ruth First by the South African government through the use of a parcel bomb (which was also the Unabomber’s favored means of killing). The African National Congress had been declared a terrorist organization by the South African government so that anyone associated with it could conveniently be branded a terrorist.

The careful elaboration of this objection to targeted killing is the aim of Jeremy Waldron’s contribution to this volume and I will not endeavor to improve on his splendid exposition. It is worth remarking, however, that the objection is compatible with the recognition that targeted killing may in some instances be morally permissible, or even morally required. One might, therefore, accept the same view about targeted killing that I have argued is the right view of torture: namely, that while it can on some occasions be morally permissible, it ought to be categorically prohibited by law. Here is a passage in which I have summarized the case for this view of torture.

If we grant any legal permission to use torture, particularly one that attempts to capture the complex conditions of moral justification, it will be exploited by those whose aims are unjust and [will be] either abused or interpreted overly generously even by those whose aims are just. Throughout human history, torture has been very extensively employed, but the proportion of cases in which the use appears to have been morally justified seems almost negligible. … Any legal permission to use torture, however restricted, would make it easier for governments to use torture, and would therefore have terrible effects overall, including more extensive violations of fundamental human rights. The legal prohibition of torture must therefore be absolute. … We cannot proceed with torture the way we have with nuclear weapons – that is, by permitting it to ourselves while denying it to others by means of security guarantees, economic rewards, and other measures designed to make abstention in the interests of all. If we permit ourselves to use torture, we thereby forfeit any ability we might otherwise have to prevent its use by others. … Our only hope of being able to impose legal and other constraints on the use of torture in the service of unjust ends by vicious and cruel regimes is to deny the option to ourselves as well, even in cases in which we believe it would be permissible.\footnote{10}

There are, however, some reasons to believe that targeted killing is different from torture in certain relevant respects. Torture is rarely effective for defensive purposes, but targeted killing may often be effective in preventing or limiting terrorist action and could have significant deterrent efficacy.

**NB: THE REMAINDER OF THE PAPER IS VERY ROUGH.**

It may well be, however, that the viability of targeted killing as an option for people attempting to prevent wrongful terrorist attacks depends on the current asymmetry in capacity between Western democratic societies and authoritarian regimes that practice
terrorism – the asymmetry that is referred to in the phrase “asymmetrical conflict.” If al Qaeda, Hamas, and other terrorist groups had cruise missiles they could fire through a window of the White House, we would have to abandon a neutral norm that permitted targeted killing. Otherwise prominent opponents of unjust rulers or illegitimate regimes would have to live in hiding all the time, sleeping in a different place every night, as Julius Caesar did when Sulla sought to have him killed.

One concern about Waldron’s argument is that an objection similar to the one he makes applies even to the alternative to targeted killing – namely, capturing terrorists and prosecuting them. Repressive regimes can produce a simulacrum of this procedure that involves seizing their opponents, subjecting them to a sham or rigged trial, and then executing them, claiming that justice has been done. (It is perhaps important to note that this would not be as serious a problem for the U.S. if it did not have the practice of capital punishment. If the U.S. did not permit execution, it could seek to arrest prosecute, and punish terrorists without setting a precedent to which other regimes could appeal to justify executions.)

One could respond to this problem by insisting that the norms requiring arrest and trial must set standards of fairness and openness for trials. There would have to be transparency and public disclosure of the evidence against the suspect. This would require that the U.S. not have secret military tribunals or trials that grant fewer rights to defendants than it would demand that its adversaries grant to U.S. citizens in trials conducted by the U.S.’s adversaries.

But if one claims that there can be a neutral norm of arrest and trial provided that certain constraints are imposed on what counts as acceptable forms of arrest, trial, and punishment, then a parallel claim might be made on behalf of a neutral norm of targeted killing. Perhaps there could be a neutral norm that permits targeted killing provided that it set high standards of post facto justification, with requirements for disclosure of evidence, an explanation of why arrest was not possible, and so on.

Perhaps, in other words, targeted killing is more like killing in self-defense than Waldron concedes. There is ample scope for abuse of the justification of self-defense in domestic criminal law. If a woman has a husband with a known record of spousal abuse, she may be able to provoke him to hit her, then murder him in their home, and afterwards make a successful plea of self-defense at trial. We acknowledge this risk but seek to minimize the scope for abuse without prohibiting a justification of self-defense for homicide.

It may be tempting to argue that, whatever may be true about law, our adversaries cannot make it impermissible for us to engage in otherwise permissible action simply because that action would provoke them to act impermissibly, or provide a rationale for their doing so. One might say that if our justified use of targeted killing would prompt unjust regimes to engage in the unjustified use of targeted killing, their unjustified use is not attributable to our action and thus cannot make our action disproportionate or otherwise impermissible.
I think this view of the significance of intervening agency is mistaken. To the extent that the responsive action of unjust agents is predictable, we may have to regard it just the way we would regard a natural event that our action would trigger. If our action would precipitate an avalanche that would kill a certain number of people, that clearly counts against our action’s being proportionate. Similarly, if our action would prompt evil people to kill the same number of people, either intentionally or as a side effect of responsive action, that too counts in the same way against our action’s being proportionate.

Consider a simplified example. Suppose there are two equally important military targets but we can attack only one of them. If we attack one, the explosion will precipitate an avalanche that will kill 50 innocent bystanders. If we attack the other, our adversaries will kill 51 innocent bystanders they would otherwise not kill. In neither case do we directly kill the innocent bystanders. But in both cases our action precipitates and is a necessary condition of the event that this the proximate cause of their deaths. If we think that killings done by others cannot affect the proportionality of our action, we ought to attack the second target, so that 51 innocent bystanders will be killed. If we think that we ought to discount the weight that deaths caused through intervening agency have in the assessment of proportionality, we also ought to attack the second target. People will disagree about this, but my view is that we ought in these circumstances to do what will cause the fewest deaths of innocent bystanders.

Waldron expresses at least two worries. One is that targeted killing will be used by unjust regimes against innocent people as well as by regimes opposing wrongful terrorism. The other is that acceptance of targeted killing will erode the distinction between combatants and noncombatants as it functions in the war convention.

The convention of noncombatant immunity has evolved over a long period of time, has a variety of supporting rationales (it limits the violence of war, protects the rights of the innocent, and so on), and is generally believed, though perhaps mistakenly, to have deep foundations in basic, nonconventional morality, so that many people believe that to violate it is to be guilty of murder. Would the legal acceptance of targeted killing undermine this convention?

It is at least worth considering whether there could be a firewall between targeted killing against terrorists in peacetime and killing civilians in war. Even if it may be difficult to apply in some contexts, most people recognize the distinction between terrorists and ordinary civilians. Although many people assume that “civilian” and “noncombatant” are synonymous, they are not. In traditional just war theory, a “noncombatant” is defined as a person who does not pose a threat to others, just as “combatant” is defined as someone who does. (This is the basis of the claim that all combatants are liable to attack while no noncombatants are.) A civilian, by contrast, is someone who is not a member of military organization, including, perhaps, the police force. Terrorists, therefore, can be civilians without being noncombatants in the sense deemed relevant by traditional just war theory, for they do pose a threat to others.
Targeted killing is thus quite unlike intentionally killing civilians in war. Intentionally killing civilians in war is itself terrorism – that is, the killing of innocent or unthreatening people as a means of inducing induce fear and coercing compliance. But targeted killing could be defined for statutory purposes as counter-terrorism, in a way that would exclude its use as a form of terrorism.

Ideally we need cooperation among national law enforcement agencies. Failing that, we need a law of anti-terrorism that is intermediate between the norms of law enforcement and the laws of armed conflict.

In basic morality there is no distinction between police action and just war: both are governed by the same principles. Just war is, in effect, a form of police action. But in law we have distinct sets of norms for these two forms of action.

Terrorists are not combatants. But they are different from ordinary criminals. Their goals are political and they are supported by a network of others who share those goals and a commitment to the use of terrorism as a means of achieving them. They seek to kill a large number of innocent people, chosen at random from among a certain population. Because terrorists are thus intermediate between combatants and ordinary criminals, neither the conventional norms of war nor the norms of police action are well suited to the governance of anti-terrorist action. New norms intermediate between those governing war and those governing police action are necessary in law.

These norms might permit targeted killing under certain stringent constraints, such as the following.

(1) For targeted killing, there must be a requirement of public accountability, a demand for the presentation of evidence that the person killed posed a threat of wrongful harm, that attempting to capture him would have been less effective or significantly riskier, etc.

(2) Perhaps a further requirement that the person identified for targeted killing be outside the political jurisdiction or effective political control of anti-terrorist agents and in an area in which the political authorities and the local population would not cooperate in capturing him.

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1 The interview is accessible at [http://wpr.org/wcast/download-mp3-request.cfm?mp3file=dun110509e.mp3&iNoteID=97290](http://wpr.org/wcast/download-mp3-request.cfm?mp3file=dun110509e.mp3&iNoteID=97290).


4 For the view that defense and punishment are distinct, see George P. Fletcher, “Punishment and Self-Defense,” *Law and Philosophy* 8 (1989): 201-215, p. 201; also his


6 For further discussion, in which I suggest that even mental acts such as deliberate and the formation of an intention can in principle be a basis of liability to defensive harm, see Jeff McMahan, “The Conditions of Liability to Preventive Attack,” in Deen K. Chatterjee, ed., *Gathering Threats: The Ethics of Preventive War* (Cambridge: Cambridge University Press, 2011).


