

COMMENTS

WHEN TARGETED KILLING IS NOT PERMISSIBLE: AN EVALUATION OF TARGETED KILLING UNDER THE LAWS OF WAR AND MORALITY

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ABSTRACT

The purpose of this Comment is to provide a philosophical commentary on the morality of targeted killing under the laws of war, particularly when the United States turns its sights on its own citizens. Although the conclusions drawn are largely antithetical to current practices, they provide a further critique in the broader discussion of targeted killing. This Comment posits that due process can never be adequately satisfied when targeted killing is turned against one's own citizens. The moral implications associated with targeting one's own citizens should not be allowed; rather than defer to International Humanitarian Law, a human rights model as well as domestic law should be used in assessing the United States' targeted killing of American citizens, as these models allow for the utmost preservation of the lives of those being targeted.

TABLE OF CONTENTS

INTRODUCTION.....	922
I. BACKGROUND: JUST WAR THEORY AND THE CASE OF AL-AULAQI.....	925
II. STATUS: THE PRINCIPLE OF DISTINCTION BETWEEN COMBATANTS AND NON-COMBATANTS.....	927
A. Status in the War on Terror	927
B. Terrorists Are Combatants	928
1. Against Terrorists as Combatants?	929
2. The Morality Associated With Terrorists as Combatants	931
3. Terrorists, as Combatants, Are Liable to Be	

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Attacked Whether or Not They Are Just.....	931
C. Status as Applied to Americans	933
III. STATUS CONTINUED: THE PARTICIPATION OF THE CIA IN TARGETED KILLINGS PERPETRATED BY THE UNITED STATES .	934
IV. THE REQUIREMENTS OF IMMINENCE AND PROPORTIONALITY UNDER THE LAWS OF WAR	936
A. Imminence	937
B. Proportionality	940
V. THE IMPORTANCE OF CONFLICT CHARACTERIZATION	943
A. The War on Terror Is a Non-International Armed Conflict	944
B. Al-Qaeda in the Arabian Peninsula Is Not a Part of the Non-International Armed Conflict that Exists Under the AUMF	945
VI. THE RIGHTS OF AMERICAN CITIZENS: WHEN TARGETED KILLING IS TURNED ON OUR OWN	947
A. The History of Due Process Towards American Traitors	948
B. Due Process: The Rights of Americans To Not Be the Objects of Targeted Killing.....	949
1. Justifying the Targeted Killing of Americans: The Secret Office of Legal Counsel Memo	949
2. Counterarguments Against Due Process	952
3. Due Process for American Citizens.....	954
C. Morality and Law in the Targeting of American Citizens	956
1. Legal Framework	956
2. Morality as Legal Framework	957
VII. CONCLUSION.....	959

INTRODUCTION

Within the War on Terror, it is no secret that the United States is engaged in a practice known as targeted killing. Justifying its actions as part of an ongoing war with al-Qaeda, the United States employs drones, often remotely piloted by Central Intelligence Agency (“CIA”) officials, to kill those insurgents it deems a threat to the American people. Killing in such a remote manner simultaneously removes the target from the battlefield while

also “remov[ing] potentially messy questions of surrender.”¹ And whether or not there is an official CIA roster of those slated to be killed, this makes it no less than a hit list.

All killing in war is essentially a type of killing via target, as one’s arms are necessarily aimed at a specific enemy. Consequently, targeted killing for the purposes of this Comment will be defined as the “premeditated killing by a state of a specifically identified person not in its custody.”² Whereas proponents of targeted killing insist upon its legality when used against enemies in either self-defense or under the laws of war, its critics condemn it as “extrajudicial assassination.”³ However, whether or not targeted killing is lawful does not necessarily mean that it is a prudent mechanism with which to carry out a conflict.

This Comment examines the permissibility, under general principles of the laws of war and morality, of the Obama Administration’s recent use of the technique of targeted killings to fight the War on Terror. Specifically, when is it permissible to engage in targeted killing, and is it permissible for the United States to engage in the targeted killing of an American citizen under the general principles of the laws of war? This Comment argues that, under the laws of war, one’s citizenship does not always factor into the analysis of the use of targeted killing; in fact, under the laws of war, an enemy’s citizenship is irrelevant to the analysis of whether a country can use force against that enemy in a traditional war. If a person being targeted has not made himself open to attack under the laws of war, force is not warranted, regardless of his citizenship. But when the United States specifically targets its own citizens, no amount of due process is sufficient to justify circumventing an American citizen’s right to life. The practice of targeted killing by the United States against its own citizens should be strictly forbidden.

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- 1 Tara Mckelvey, *Inside the Killing Machine*, DAILY BEAST (Feb. 13, 2011, 10:00 AM), <http://www.thedailybeast.com/newsweek/2011/02/13/inside-the-killing-machine.html> (quoting Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346–400 (Benjamin Wittes ed., 2009)).
 - 2 Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 406 (2009). Note that in Murphy and Radsan’s definition, targeted killing is also defined as “extra-judicial.” This portion of their definition is not used in this Comment so as to avoid the negative connotations that “extra-judicial” would unnecessarily bring to the analysis of targeted killing. *Id.*
 - 3 Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1204 (2011). See also David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 173 (2005) (detailing that targeted killings by the United States and Israel “have been castigated by human rights NGOs, and some UN bodies as ‘extra-judicial executions’”).

To reach the aforementioned conclusions, this Comment analyzes the laws of war and morality in order to inform the legal context of targeted killing within the United States. As such, just war theory and International Humanitarian Law⁴ weigh heavily throughout the Comment's analysis. Inherent in the questions presented is the idea that targeted killing is sometimes justified against non-U.S. citizens. Though it is beyond the scope of this Comment to engage in a more in-depth, normative discussion of this conclusion, the following arguments will inform the subject of targeted killing in general.

To evaluate the controversial topic of targeted killing, Part I of this Comment provides a brief overview of just war theory and the case of Anwar al-Aulaqi, an American citizen executed via targeted killing. This serves as a background for more detailed arguments set forth in later portions of the Comment. Part II looks to the issue of status, specifically the combatant versus non-combatant distinction under just war theory, as well as the importance of uniforms in evaluating combatant status. The increasing introduction of non-traditional combatants in hostilities makes this distinction of utmost importance. Building on the analysis of status, Part III examines the manner in which the United States carries out targeted killing, specifically when the CIA plays a part. Part IV considers the imminence required by just war theory, in addition to the constraints of proportionality and military necessity. The distinction between traditional war and the War on Terror is explored in Part V, with an emphasis on conflict characterization in the War on Terror. It is asserted in these first sections that one's citizenship does not play a role in many calculations regarding targeted killing. Oftentimes targeted killing and even the use of force in general should not be used, as the person that is being targeted has not made himself liable to be attacked under the laws of war. There are times when targeted killing is warranted against no one. In terms of the United States targeting its own citizens, Part VI, the final section, asserts that no amount of due process can be implemented to circumvent an American citizen's right to life; targeted killing by the United States against American citizens is thereby prohibited. Moreover, the moral implications associated with targeting one's own citizens should not be allowed. Rather than defer to International Humanitarian Law, a human rights model as well as domestic law should be used in assessing the United States' targeted killing of American citizens, as these models allow for the utmost preservation of

4 The distinction between the laws of war and International Humanitarian Law is essentially obsolete due to their integration into the 1977 First Additional Protocol to the Geneva Conventions. Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 254 (2003).

the lives of those being targeted. Ultimately, the goal of this Comment is to provide a philosophical commentary on the morality of targeted killing under the laws of war, particularly when the United States turns its sights on its own citizens. Although the conclusions drawn are largely antithetical to current practices, they provide a further critique in the broader discussion of targeted killing.

I. BACKGROUND: JUST WAR THEORY AND THE CASE OF AL-AULAQI

In order to evaluate targeted killing under just war theory, the case of Anwar al-Aulaqi will be informative throughout this Comment. Born in New Mexico, al-Aulaqi was a Muslim cleric of dual U.S.-Yemeni citizenship.⁵ He was a propagandist for al-Qaeda in the Arabian Peninsula (“AQAP”) and was thought to have played a key part in recruiting Umar Farouk Abdulmutallab, the man who attempted an airline bombing in Detroit on December 25, 2009.⁶ Al-Aulaqi also e-mailed with Nidal Hasan six months prior to Hasan’s murder of thirteen men at Fort Hood in November 2009.⁷ And although he was never formally charged in either incident, al-Aulaqi was placed on the United States government’s kill or capture list in April of 2010, apparently with White House approval.⁸ On September 30, 2011, at the age of forty, al-Aulaqi was killed via a U.S. drone strike, along with Pakistani-American Samir Khan.⁹ Khan, who produced a magazine for AQAP promoting terrorism, was not on the targeted killing list, and was considered “collateral damage.”¹⁰ As for al-Aulaqi, officials alleged that his role went “beyond inspiration into operational planning of attacks,” but no proof of such planning has surfaced, and al-Aulaqi received no trial or judicial review.¹¹ One month later, al-Aulaqi’s son, sixteen-year-old Abdulrahman al-Aulaqi, also an American citizen, was killed on October 14, 2011 in another

5 John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 175 (2011).

6 Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1 [hereinafter Savage, *Secret U.S. Memo*]; Charlie Savage, *Nigerian Man Is Indicted in Attempted Plane Attack*, N.Y. TIMES, Jan. 7, 2010, at A14.

7 David Cole, *Killing Citizens in Secret*, NYRBLOG (Oct. 9, 2011, 11:15 PM), <http://www.nybooks.com/blogs/nyrblog/2011/oct/09/killing-citizens-secret>.

8 Dehn & Heller, *supra* note 5, at 175; Claire Finkelstein, *Targeted Killing as Preemptive Action*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 156, 160 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) (referring to the Joint Prioritized Effects List as a “kill or capture” list).

9 *Yemen: U.S. strike kills al Qaeda media chief*, CBS NEWS (Oct. 15, 2011), <http://www.cbsnews.com/stories/2011/10/15/501364/main20120883.shtml>.

10 Savage, *Secret U.S. Memo*, *supra* note 6, at A12.

11 Editorial, *Justifying the Killing of an American*, N.Y. TIMES, Oct. 12, 2011, at A22 [hereinafter *Justifying the Killing of an American*].

airstrike. Abdulrahman al-Aulaqi was never alleged to be a part of al-Qaeda, and was in fact collateral damage in the targeting of another man.¹²

Under just war theory, a distinction has historically been drawn between *jus ad bellum* and *jus in bello*. In general, the former deals with war itself, the responsibility of which is not attributed to soldiers but to a nation's leaders, and the latter deals with the conduct of war, the responsibility of which is indeed attributed to soldiers for their own activity.¹³ Traditional just war theory makes such a distinction so as to indemnify soldiers who take part in criminal wars through no fault of their own, for war is a relation between political entities; "the enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself."¹⁴ Just war theory, rooted in customary international law, is needed so as to reduce the suffering of war and to allow belligerent states to coexist even after a war.¹⁵ If it were not for such customs, war would be an unlimited battle to the death. As Prussian military theorist Karl von Clausewitz stated, "War is an act of force . . . which theoretically can have no limits."¹⁶ Enemy states under just war theory are treated with a sort of restraint and accommodation so as to ensure stability in the world order; this stability is dependent "upon mutual understandings" in "a world of shared values."¹⁷

Within the precepts of *jus in bello*, then, there are certain practices that must be followed by states on both sides of a war. The justness or unjustness of a war in terms of *jus ad bellum* plays no role, traditionally, in the *jus in bello* framework. That is, it is quite possible for an unjust war to be fought justly, in strict accordance with the laws of war, and for a just war to be fought unjustly.¹⁸ Even if a state is engaged in an unjust war, its soldiers still retain the right to wound and kill enemy soldiers who are fighting a just war,

¹² Craig Whitlock, *After Yemen attack, little comment*, WASH. POST., Oct. 23, 2011, at A3.

¹³ MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 38–39 (4th ed. 2006). As *jus ad bellum* and *jus in bello* are incredibly complex topics, for the purpose of this Comment, these definitions have been generalized somewhat.

¹⁴ *Id.* at 36. See also Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFF. 148, 152–53 (2005) (arguing that war is a form of "collective exculpation," granting "permission to do together what would be infamous crimes if done separately" (emphasis omitted)).

¹⁵ Ben-Naftali & Michaeli, *supra* note 4, at 255 (setting forth the underlying premise of just war theory).

¹⁶ WALZER, *supra* note 13, at 23.

¹⁷ *Id.* at 116. The United States, not only as part of the world order, but as a world leader, should follow the rules of just war theory. Moreover, as a signatory to the Geneva Conventions, it is obligated to do so. Note, however, that the United States has not ratified the Additional Protocols to the Geneva Conventions.

¹⁸ See *id.* at 110 (characterizing a just war as one that is morally urgent to win).

provided they respect the norms of proportionality and discrimination set forth under International Humanitarian Law.¹⁹

II. STATUS: THE PRINCIPLE OF DISTINCTION BETWEEN COMBATANTS AND NON-COMBATANTS

Though the distinction between just and unjust causes is important, the principle point of distinction between combatants and non-combatants is status. Whether or not one is a combatant plays a key role in just war theory. Non-combatants are not liable to be attacked under just war theory; only other combatants may be the aim of one's aggression.²⁰ Yet if non-combatants take part in hostilities, they in effect breach their duty not to do so, which "results in the loss of the special protection to which non-combatants are entitled."²¹ In terms of capture, combatants cannot be prosecuted once captured because they are entitled to fight; rather, they receive prisoner of war status if taken by the enemy.²² Conversely, non-combatants taking part in hostilities can indeed be prosecuted, as they are not entitled to fight by virtue of their non-combatant status.²³

A. *Status in the War on Terror*

However, such distinctions are not so easy to make when combatant status is blurred. "As ever more warfare involves stipulatively unprivileged combatants, the normative systems controlling war become more and more strained."²⁴ Whereas the Geneva Protocols only accord prisoner of war status to combatants wearing uniforms or who wear "a fixed, distinctive sign recognizable at a distance," it is now often the case that combatants do not wear unique markings to show their status.²⁵ And the problem is not just one that arises with our enemies. When CIA field operatives take part in hostilities, they too blur the line of combatant status: they serve out of uniform, without clear, outward evidence of their national affiliation. At issue is whether we can assess the legitimacy of the treatment of non-traditional combatants as they relate to the War on Terror.

¹⁹ Kutz, *supra* note 14, at 157.

²⁰ WALZER, *supra* note 13 at 135–37.

²¹ Ben-Naftali & Michaeli, *supra* note 4, at 265. See also JEFF MCMAHAN, KILLING IN WAR 12 (2009) ("If posing a threat is the criterion of liability to attack in war, then combatants are liable but noncombatants are not.").

²² Ben-Naftali & Michaeli, *supra* note 4, at 265. See also WALZER, *supra* note 13, at 46–47.

²³ Ben-Naftali & Michaeli, *supra* note 4, at 265.

²⁴ Kutz, *supra* note 14, at 155–56.

²⁵ *Id.* at 151. This illustration is derived from actual events and is meant as a mirror for what actually occurs. *Id.* at 148.

Although war is usually portrayed under just war theory as combat between combatants, it is necessary to assess whether those who take part in the War on Terror are combatants within the traditional sense, because it has bearing on whether they can be the objects of targeted killing. Indeed, “one of the primary reasons for distinguishing combatants from non-combatants is that only combatants are legitimate targets.”²⁶ Under International Humanitarian Law, the targeted killing of suspected terrorists may be lawful if they can be regarded as combatants.²⁷ Since the group al-Qaeda is not a member of a nation-state, the conflict between the United States and al-Qaeda is necessarily a non-international conflict.²⁸

Given this distinction of the War on Terror as a non-traditional conflict, it must be assessed whether al-Qaeda fighters are considered combatants or non-combatants. Under one view, terrorists do not even meet the conditions of the Geneva Conventions set forth to apply to militias or volunteer corps, and thus must be regarded as civilians.²⁹ As a result, terrorists would be classified as non-combatant civilians unless they are actively taking a direct part in hostilities. However, such a “‘revolving door’ theory” seems imprudent, as it allows terrorists to remain civilians most of the time, only sacrificing their status—and hence only being liable to be attacked—when they actually carry out terrorist activities.³⁰ Though the War on Terror is not a traditional war, this does not mean that the distinction between combatants and non-combatants should not be adhered to in a traditional sense.

B. Terrorists Are Combatants

The more sensible position, it would seem, would be to characterize terrorists as combatants. Though they have no nation-state to legitimize their status, they nevertheless are taking part in a conflict that looks much like war.³¹ Rather than allow them the ability to only be liable to be attacked while taking part in attacks, it seems more likely that characterizing them as combatants would not allow them to circumvent the corresponding liability to attack that accords with combatant status. Not allowing for combatant

²⁶ HELEN FROWE, *THE ETHICS OF WAR AND PEACE: AN INTRODUCTION* 103 (2011).

²⁷ Kretzmer, *supra* note 3, at 171.

²⁸ Whether this conflict is a non-international conflict, or more specifically, a non-international armed conflict will be evaluated in Part V of this Comment.

²⁹ Kretzmer, *supra* note 3, at 191–92. (explaining the arguments for treating al-Qaeda as non-citizens and citizens).

³⁰ *Id.* at 193.

³¹ See, e.g., Jens David Ohlin, *Targeting Co-belligerents*, in *TARGETED KILLINGS*, *supra* note 8, at 60, 82–83 (arguing that application of the continuous combat function standard to al-Qaeda suggests “that these terrorists are trained to continuously operate as terrorists with the goal of pursuing attacks against the United States and its allies”).

characterization allows terrorists to enjoy the best of both worlds—not being liable to be attacked when not taking part in hostilities, but also being able to unjustly circumvent civilian status for a brief period of time in order to fight.³²

Though the War on Terror is not a traditional war, terrorists should be characterized as combatants. They may not belong to a nation-state, but they still pose a danger in a manner similar to the danger posed by soldiers who attack as part of a country's forces. Al-Qaeda combatants would thereby be akin to the continuous combat function standard adopted by the International Commission of the Red Cross ("ICRC").³³ Whether labeled as mere combatants or given the label of a continuous combatant function, members of al-Qaeda are essentially continuously acting as terrorists, and hence opening themselves up to attack.

1. *Against Terrorists as Combatants?*

It nevertheless remains the case that some scholars argue that terrorists are indeed civilians. The First Additional Protocol to the Geneva Conventions considers civilians to be "all persons who are not members of the armed forces," but some scholars contend that in current conflicts "civilians do carry out various military related functions."³⁴ As civilians directly taking part in hostilities, terrorists would of course not be afforded the same protections as civilians that do not partake in fighting and pose no threat. They take part in combat unlawfully and "may be tried if captured."³⁵

³² See, e.g. Ben-Naftali & Michaeli, *supra* note 4, at 269 (arguing that if a terrorist is not a combatant, "once he ceases his participation in the fighting he no longer presents any danger for the adversary and, having resumed his civilian status, should receive the protection accorded to civilians and cannot be targeted for an attack" (internal citations omitted)); Robert Kogod Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 66–67 (1993) ("Consequently, all other persons not actively participating in the hostilities by intending to cause physical harm to enemy personnel or objects are considered part of the civilian population While taking a direct or active role in hostilities, these individuals forfeit their immunity from direct attack, but retain their status as civilians. Unlike combatants, once their participation ceases, these civilians may no longer be attacked, although they may be subject to trial and punishment by the adverse party for having assumed the role of a combatant."); INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1453 (Yves Sandoz et al. eds., 1987).

³³ Cf. Jens David Ohlin, *Targeting Co-belligerents*, in TARGETED KILLINGS, *supra* note 8, at 60, 82–85 (discussing the continuous combat function).

³⁴ Ben-Naftali & Michaeli, *supra* note 4, at 269; see also Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) art. 50, Jan. 23, 1979, 1125 U.N.T.S. 17512 [hereinafter First Additional Protocol].

³⁵ Ben-Naftali & Michaeli, *supra* note 4, at 269.

Allowing terrorists the status of civilians not only protects them in the sense of the “revolving door” theory,³⁶ but it also in a sense affords them fewer protections in that if they are captured they do not receive prisoner of war status.³⁷ Though perhaps this would be just in the sense that they have given up their right to not be prosecuted by violating their civilian status, it instead seems more reasonable to deduce that they have given up their civilian status completely for the purpose of becoming combatants.

Under the laws of war, to be lawfully targeted while not taking part in hostilities, the targeted individual must be a combatant. This places the United States policy of targeted killing under scrutiny: it seems that the United States does want its targets to be considered combatants when being targeted, as evidenced by the fact that often times targeted killing takes place when the target is not involved in hostilities. The implication is that the United States must consider them to be combatants, assuming the United States wants to be justified in these killings. This is also true in capture situations because the United States wants to detain those captured indefinitely as prisoners of war. What the United States wants, however, is not the object of this Comment. Rather, what just war theory and morality require is paramount, as the United States should act in a justified manner when taking part in targeted killing.

Nor should this analysis change due to the fact that terrorists do not wear uniforms. Uniforms, implemented in the post-Westphalian rise of sovereign nation-states, effectively serve as a “stamp of ownership” of a sovereign on his army.³⁸ On one interpretation, the lack of a uniform can mean that an individual is not part of a collective;³⁹ “[t]hat a group of soldiers wears uniforms might be external *evidence* of internal collective organization within a larger political community, and requirements of providing such evidence have clear instrumental value.”⁴⁰ But construing status in this manner contains a major flaw. Why may fighters only be able to assert a collective identity by wearing a uniform? Though it is true that uniforms serve as a type of external evidence to the collective organization of a group, does not the brandishing of arms do the same thing? Assuming

³⁶ See, e.g., Kretzmer, *supra* note 3, at 193 (defining the “revolving door” theory as when terrorists remain civilians most of the time and only sacrifice their civilian status while actually carrying out terrorist activities).

³⁷ See FROWE, *supra* note 26, at 101 (stating that there is a “great moral weight that rests upon the division between combatants and non-combatants” partially “because of the importance of according combatants prisoner of war (POW) status”).

³⁸ Kutz, *supra* note 14, at 160–61.

³⁹ Toni Pfanner, *Military uniforms and the law of war*, 86 INT’L REV. RED CROSS 93, 93–94 (2004) (“The absence of a military uniform usually indicates that a person is a civilian, is therefore not allowed to perform military functions and must not be attacked.”).

⁴⁰ Kutz, *supra* note 14, at 165.

that terrorists are indeed part of an organized group, taking part in hostilities should be enough to assert an outward demonstration of inclusion in this group. Combatant status should not be dependent upon a mere piece of fabric.⁴¹

2. *The Morality Associated With Terrorists as Combatants*

Furthermore, inherent in the combatant versus non-combatant distinction is the morality associated with these groups, as it is sensible to accord the same morality to terrorists as combatants. Terrorists, after all, are not members of a distinct nation-state and therefore are not compelled to fight for a country's standing army.⁴² Rather, terrorists make the conscious choice to fight. While there may be pressures within their society to participate, they are not brought into the ranks of terrorist organizations in an official manner like soldiers are brought to a country's army. Even if one made the argument that the War on Terror is a non-international conflict in which no prisoner of war status exists, and in which unlawful conduct has no bearing on status determinations, the organizational feature of terrorist groups may serve to confer combatant status and the associated morality that comes with this status.

It is imperative to hold terrorists accountable for their actions, both morally and legally, by making them liable to be attacked. Terrorists must be accorded combatant status so that they are liable to be killed; as members of an armed combatant group, they are legitimate targets. Members of al-Qaeda thereby are exculpated for their actions that accord with the rules of *jus in bello*,⁴³ while at the same time they are correspondingly subject to a type of "reverse inculpation" in that they can then be killed. In this analysis, making terrorists liable to be attacked seems to be the only way to truly hold them morally accountable for their actions. Doing so allows them to keep their actions within the framework of *jus in bello* while making them continuously subject to attack.

3. *Terrorists, as Combatants, Are Liable to Be Attacked Whether or Not They Are Just*

Setting forth the argument that members of al-Qaeda and the Taliban are combatants morally liable to be attacked does not finish the analysis,

⁴¹ See *id.* at 179 ("That she wears no uniform is irrelevant to the collective aspect of her individual action; and it is the collective aspect that underwrites her privilege. Assuming she has obeyed the laws of war, she ought to be impunable.").

⁴² See, e.g., FROWE, *supra* note 26, at 190 (describing terrorists as "non-state actors").

⁴³ See Kutz, *supra* note 14, at 152–53 (asserting that compliance with the laws of war exculpates only acts by combatants).

however. According to philosopher Jeff McMahan, al-Qaeda fighters should be considered truly unjust combatants, as they choose to go to war for an unjust cause. In his view, “the criterion of liability to attack in war is moral responsibility for an objectively unjustified threat of harm.”⁴⁴ Without the sovereignty of a nation-state, such groups seem to violate the rules of *jus ad bellum* while also violating the rules of *jus in bello* by disregarding certain norms through targeting civilians and ignoring the imminence and proportionality required by the laws of war. As a result, in McMahan’s view, just combatants are able to target unjust combatants (in this example, terrorists), whereas unjust combatants may not target just combatants.⁴⁵ In making this argument, McMahan essentially disregards the distinction between *jus in bello* and *jus ad bellum*; fewer wars will erupt, he believes, if there is no longer a distinction between *jus ad bellum* and *jus in bello* due to the proposition that more people will refuse to fight in unjust wars.⁴⁶

But the War on Terror seems to refute this conclusion. Since al-Qaeda is not part of a nation-state in the traditional war sense, it does not compel people to take up arms against its enemies in the manner that a state could institute a draft. Rather, al-Qaeda fighters choose to do so, as they have chosen to pick up their arms. War should at least be restricted to the types of rules to which combatants on both sides—both just and unjust—need to adhere. Given this example, it is arguably not within human nature to forego a cause in which someone believes simply because one may be taking part in a war that another side believes is unjust.⁴⁷ McMahan’s goal circumvented, we should attempt to restrain war as much as we can by allowing *jus in bello* rights to both just and unjust combatants.

Additionally, if only just combatants were morally allowed to take part in hostilities, this would leave unjust combatants open to attack with very limited *justified* means of protecting themselves. As a consequence, unjust combatants would then be incentivized to violate the *jus in bello* principles and protect themselves via unjustified means. Allowing *jus in bello* rights to unjust combatants gives them as much incentive as possible to exercise restraint and abide by just war principles. That is, we want them to adhere to principles of *jus in bello*.

44 MCMAHAN, *supra* note 21, at 35.

45 *Id.*

46 See Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 713–14 (2004); see also Richard V. Meyer, *The Privilege of Belligerency and Formal Declarations of War*, in TARGETED KILLINGS, *supra* note 8, at 183, 187–88 (discussing McMahan’s argument).

47 WALZER, *supra* note 13, at 39–40 (stating the underlying premise that while “[i]t might . . . be thought a matter of individual volition whether particular men join the army and participate in [a] war . . . [i]t takes courage to doubt” the justifications for the war, and “most men will be persuaded . . . to fight”).

This, however, is not promoted by McMahan's view, which in fact may lead to morally justified soldiers obliterating unjust combatants.⁴⁸ That is anything but morally just. The distinction, therefore, should be between combatants and non-combatants, regardless of the justness of their causes in a *jus ad bellum* framework. Terrorists should be given the right to assert combatant privileges—and to accept the corresponding risks—despite any injustice that accompanies their cause. Since they are not part of a nation-state, they are more likely unlawful combatants, but this does not change their rights in a *jus in bello* framework. They may not be just in starting hostilities, but once the hostilities start, combatant status is warranted, along with its associated privileges and dangers.

In terms of the United States and the practice of targeted killing in general, this analysis means that al-Qaeda terrorists may indeed be targeted under just war theory because they are combatants.⁴⁹ This is an important distinction because otherwise the use of targeted killing would be overly permissive. One must be a combatant to be subject to targeted killing.

C. Status as Applied to Americans

The question then remains whether an American citizen who becomes a part of a terrorist group and takes up arms against the United States is then liable to be eliminated by the United States via targeted killing. It is true that International Humanitarian Law does not take citizenship into account when distinguishing civilian and combatant status.⁵⁰ And it is also true that there was no duty to attempt to capture American citizens serving in the German army during World War II; having taken up arms against their country, they were liable to be attacked and hence killed.⁵¹ The Supreme Court unmistakably decided that an American citizen could be the subject of the laws of war when he takes up arms against the United States.⁵² Nor did the Court find that American citizenship provides exemption from actions

48 McMahan, *supra* note 21, at 6 (setting forth McMahan's novel argument "against the moral equality of combatants" via "the view that unjust combatants act permissibly when they fight within the constraints of the traditional rules of *jus in bello*").

49 See, e.g., Detention of Enemy Combatants Act, H.R. 1076, 109th Cong. (2005) ("To authorize the President to detain an enemy combatant who is . . . a member of al Qaeda or knowingly cooperated with members of al Qaeda . . ."); Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 127, 152 (2003); Jeff McMahan, *Targeted Killing: Murder, Combat, or Law Enforcement?*, in TARGETED KILLINGS, *supra* note 8, at 135, 143 ("[T]he Bush Administration claimed that terrorists are combatants . . .").

50 Radsan & Murphy, *supra* note 3, at 1238.

51 See *id.* ("In traditional conflicts, the United States has had citizens switch to the other side. Switched, they become targets just like foreign combatants.")

52 *Ex parte Quirin*, 317 U.S. 1, 45–46 (1942).

permitted by the laws of war.⁵³ Americans can therefore be considered combatants against the United States.

But it does not necessarily follow that because of this Americans may be the objects of targeted killing. With at least three Americans citizens reportedly on the United States' targeted killing list⁵⁴—not including, of course, the already targeted al-Aulaqi—such an issue is more important than ever. The final part of this Comment asserts that it is both immoral and illegal for the United States to take part in targeted killings against its own citizens, even if they are combatants. In the intervening parts, the manner in which the United States can use targeted killings against anyone, whether American or not, under the laws of war and morality will be further refined.

III. STATUS CONTINUED: THE PARTICIPATION OF THE CIA IN TARGETED KILLINGS PERPETRATED BY THE UNITED STATES

First and foremost, the manner in which the United States engages in targeted killing must be the subject of critique. If branches of the military were the sole perpetrators of targeted killing, there would be far fewer objections, as members of the armed forces are truly regarded as combatants under just war theory.⁵⁵ A problem arises, however, when targeted killing is perpetrated outside of the military, mainly by the CIA.

The use of CIA operatives began with a single strike in Pakistan in 2004, but has since increased.⁵⁶ During President Obama's tenure in office, he intensified the CIA's drone program, carrying out more missile strikes inside Pakistan's borders in his first year in office than George W. Bush authorized in his eight years as president.⁵⁷ This effectively amounts to civilian participation in combat, which is prohibited by the 1977 Additional Protocols to the Geneva Conventions.⁵⁸ In this view, CIA officers are not

53 See, e.g., *Juragua Iron Co., Ltd. v. United States*, 212 U.S. 297, 308–10 (1909) (“A neutral, or a citizen of the United States, domiciled in the enemy's country . . . is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation.”); *The Prize Cases*, 67 U.S. 635, 671, 674 (1862) (holding that citizens of the southern states during the Civil War could be blockaded or have their property confiscated according to the laws of war).

54 Dana Priest, *U.S. playing a key role in Yemen attacks*, WASH. POST, Jan. 27, 2010, at A1.

55 See, e.g., WALZER, *supra* note 13, at 36 (“Though there is no license [to kill] for war-makers, there is a license [to kill] for soldiers, and they hold it without regard to which side they are on; it is the first and most important of their war rights.”).

56 Radsan & Murphy, *supra* note 3, at 1215–16.

57 Nicholas Schmidle, *Getting Bin Laden*, NEW YORKER, Aug. 8, 2011, at 35, 37.

58 See First Additional Protocol, *supra* note 34, at arts. 43, 51 (providing that “[m]embers of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities” and “[c]ivilians shall enjoy . . . protection . . . unless and for such time as they take a direct part in hostilities”).

lawful combatants under just war theory because they: 1) are not part of a military chain of command; 2) do not wear uniforms; and 3) are not trained in the laws of war.⁵⁹ The question of distinction then becomes whether CIA agents who partake in targeted killing are granted combatant or civilian status.

To be certain, there is a degree of overlap between the CIA and the military.⁶⁰ Cooperation between the CIA and the Pentagon was particularly apparent in “Operation Neptune Spear,” the mission to kill Osama bin Laden.⁶¹ During the planning of this mission, the operation was essentially designed at CIA headquarters and authorized by the CIA; but the Navy conducted the mission itself.⁶² Regardless of this overlap, though, the CIA is not a formal part of the United States military. It is a separate government entity. In this sense, it must be recognized that CIA agents’ participation in the War on Terror is somewhat parallel to those they target in that they are not an official part of a higher military chain of command. Neither CIA agents nor the terrorists they target are members of a military force of a nation-state. In fact, it has been asserted by some that CIA agents are unlawful combatants.⁶³ However, unlike those they target, CIA agents are members of a country that does have the ability to field an army. As a result, can they really be all that similar?

Even the United States is at times careful to distinguish the boundaries of CIA involvement, as the Air Force is responsible for targeted killing within the clear war zones of Afghanistan and Iraq, whereas the CIA controls targeted killing operations in northwest Pakistan, Yemen, and Somalia.⁶⁴ This Comment argues that this distinction cannot be mere coincidence: government officials surely recognize that CIA agents are not part of the armed forces and thus are not accorded all of the privileges of combatant status.⁶⁵ If the CIA existed in a society where military command did not

While the United States is not a signatory to the 1977 Additional Protocols to the Geneva Conventions, the United States still considers the prohibition of civilian participation in combat as proscribed under customary international law, which is binding upon all nations. Gary Solis, *America’s unlawful combatants*, WASH. POST, Mar. 12, 2010, at A17.

⁵⁹ Radsan & Murphy, *supra* note 3, at 1206.

⁶⁰ This is evidenced by the fact that Leon E. Panetta, the former Director of the CIA, is now the Secretary of Defense. *Leon E. Panetta: Secretary of Defense*, U.S. DEP’T OF DEFENSE, <http://www.defense.gov/bios/biographydetail.aspx?biographyid=310> (last visited Oct. 2, 2012).

⁶¹ For a scholarly narrative of CIA involvement in the killing of Osama bin Laden, see Kevin H. Govern, *Operation Neptune Spear: Was Killing bin Laden a Legitimate Military Objective?*, in TARGETED KILLINGS, *supra* note 8, at 347, 352–53.

⁶² Schmidle, *supra* note 57, at 38.

⁶³ Solis, *supra* note 58, at A17.

⁶⁴ Radsan & Murphy, *supra* note 3, at 1202.

⁶⁵ David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 957, 1016 (2009) (setting forth the general premise, upon which the

exist, the result would be much different. Al-Qaeda does not have the ability to set forth an army in the sense that the United States does. So while al-Qaeda fighters are accorded combatant status—albeit unlawful combatant status—the CIA is not. The United States as a sovereign nation-state must be held to higher standards. The United States sets itself forward as a leading nation, one whose democratic ideals should be followed by other countries throughout the world. It must, then, hold itself to these high standards.

But in some ways this distinction may not even matter. Regardless of whether CIA agents are combatants or civilians, they open themselves up to attack. CIA agents take part in hostilities and as such render themselves lawful targets.⁶⁶ The importance of the distinction matters when taking into account the manner in which the CIA is permitted to take part in hostilities. Though the distinction may not be intuitive, it would seem the weight of evidence points towards their civilian status. It was asserted above that the lack of uniforms for terrorists does not mean that they are necessarily civilians. However, in the context of American involvement, the distinction may mean more since the United States actively chooses to allow a governmental entity aside from the military to take part in combat. The U.S. could choose for the Air Force to carry out all targeted killing, but it does not. Thus, not only does the United States decide to violate the laws of war by engaging the CIA, a branch that lacks uniforms or distinguishing insignia, in hostilities, but it also violates the laws of war by not allowing its distinct military branches to carry out these same hostilities. In order for the United States to conduct targeted killings in accordance with the laws of war—and in a manner consistent with heightened morality—the CIA should not be associated with targeted killings.

IV. THE REQUIREMENTS OF IMMINENCE AND PROPORTIONALITY UNDER THE LAWS OF WAR

In terms of just war theory, then, it is necessary to evaluate when the United States can in fact take part in targeted killing. Under International Humanitarian Law, use of force in self-defense by a victim state must conform to the requirements of imminence and proportionality—and hence military necessity—in order to be just.⁶⁷

author expands, that members of al-Qaeda can be legally targeted by the military, but that the CIA's role in targeting al-Qaeda "undermines the legality of these actions").

⁶⁶ Solis, *supra* note 58, at A17.

⁶⁷ See FROWE, *supra* note 26, at 36–37, 53–54 (asserting that "[a] state can be said to have a just cause for war . . . if it is about to suffer an appropriate wrong" and "[i]n order for a war to be just, it must be a proportionate response").

A. Imminence

The strict construction of imminence set forth by United States Secretary of State Daniel Webster in the nineteenth century may be a bit too constricting in that it requires that there be “a necessity of self-defence [that is] instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁶⁸ Rather than wait for the seconds before an attack occurs, imminence is satisfied in a looser sense if an attack is indeed planned and it will be carried out in a short period of time.⁶⁹ The United States need not wait until a terrorist is about to detonate a bomb in order to act. But, a terrorist must have a plan in mind and the ability to carry out an attack for his attack to be imminent and hence warrant a preemptive strike of self-defense by the United States. Moreover, a response by the United States must be necessary militarily in that use of force is “future-oriented, i.e., halting or repelling an attack”; for the United States’ response to be justified, another alternative option to force, such as capture, must not be available.⁷⁰

What this means in terms of targeted killing is perhaps not facially clear. Many terrorists that are the targets of drones are not actively involved in terrorist threats at the time they are killed. They are going about the ordinary, daily business of their lives when a CIA operative sitting at Langley Air Force Base in McLean, Virginia detonates a drone and thereby kills them.⁷¹ Assuming that the person that is targeted is actually a member of a terrorist group like al-Qaeda or the Taliban, he is, as discussed above, a combatant and can be the object of attack. But as to the imminence requirement, it seems that perhaps one cannot be targeted at any time whatsoever. To be subject to attack, it is not enough for a terrorist to participate; he must be involved in the planning or carrying out of specific attacks on his enemy. It is conceivable that one need not be on his way to detonate a bomb for the imminence requirement to be satisfied, but some

68 Kretzmer, *supra* note 3, at 179; *see also* WALZER, *supra* note 13, at 74 (citing Webster’s speech as to imminence in terms of pre-emptive violence).

69 WALZER, *supra* note 13, at 74.

70 Kretzmer, *supra* note 3, at 187–88; *see also* WALZER, *supra* note 13, at 74 (“Both individuals and states can rightfully defend themselves against violence that is imminent but not actual; they can fire the first shots if they know themselves about to be attacked.”); Dehn & Heller, *supra* note 5, at 177 (stating that al-Aulaqi’s father argued that “both the Constitution and international law prohibit targeted killing except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury” (quoting Complaint for Declaratory and Injunctive Relief at 2, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (Civil Action No. 10-1469))); Radsan & Murphy, *supra* note 3, at 1206 (asserting International Humanitarian Law “insists that *military necessity* justify all attacks: an attack should reasonably be expected to create a concrete and direct military advantage”).

71 Solis, *supra* note 58, at A17.

type of outward participation in the planning of future hostilities must occur for the imminence requirement to be met. This is true regardless of one's citizenship under just war theory.

The case becomes much more difficult when one has not taken up arms in a war, whether traditional or not. In a traditional war, a state's leader may potentially be the target of attack in that his existence makes further fighting abundantly more imminent.⁷² But what if one is merely the source of a cause's rhetoric? One's words can spur a soldier to fight, but can these words really be considered the source of imminence?⁷³ The difficulty of this question points towards a case-by-case assessment of one's role in whatever war is taking place. For instance, following this line of reasoning, if one is merely setting forth an argument for the superiority of one's faith and the duty of its followers to spread its word, then imminence arguably would not be satisfied. However, if one explicitly spurs someone to carry out acts of violent jihad, then imminence may indeed be satisfied. But even then imminence must be explicit. When one does not take up arms against an enemy and rather brandishes a pen, a significantly higher degree of imminence should be required to justify the targeting of an enemy.

According to the United States, the imminence criterion can be satisfied when a person is found to be "the leader of a group that [seeks] to attack the United States whenever" given the opportunity, regardless of whether or not the person was involved in an attack when targeted.⁷⁴ This is probably true. Since terrorists are, as argued above, given combatant status, its leaders, as combatants, may also be targeted. However, this criterion must actually be met. In the case of Anwar al-Aulaqi, this was arguably not satisfied, at least according to information now available. The United States deemed al-Aulaqi an imminent threat because he was a leader of AQAP.⁷⁵ All that has really been asserted, though, is that he was at most merely a propagandist and at the very least a Muslim cleric.⁷⁶ While it is true that al-Aulaqi was accused of playing more of "an operational role in [AQAP],"⁷⁷ there is no independent evidence of this other than the government's word;

⁷² See Geoffrey Robertson, *Is It Lawful to Kill Gaddafi?*, DAILY BEAST (Mar. 31, 2011, 5:04 AM), <http://www.thedailybeast.com/articles/2011/03/31/is-it-lawful-to-kill-gaddafi.html> (arguing that under just war theory an enemy leader may be killed if there is "military necessity," but that "perfidious means such as spies or assassins" may not be used).

⁷³ Anatol Rapoport, *Introduction* to CARL VON CLAUSEWITZ, *ON WAR*, 1, 11 (1967) ("[T]he nature of war is itself to a large extent determined by how man conceives of it."); David Kennedy, *Modern War and Modern Law*, 36 U. BALT. L. REV. 173, 183 (2007) ("And communicating the war is fighting the war.").

⁷⁴ Cole, *supra* note 7.

⁷⁵ Savage, *Secret U.S. Memo*, *supra* note 6, at A12.

⁷⁶ *Id.*

⁷⁷ *Id.*

any concrete evidence that the government might have of al-Aulaqi playing an active role has not been released.⁷⁸ Though the cause of groups like al-Qaeda and AQAP is necessarily bound up with religious beliefs, this does not mean that clerics should be considered leaders. Would we ever want our own religious leaders targeted? One would think not. The interest of world stability, which is presumably implicated in such an analysis, should require more proof than sheer religious rhetoric; hence, imminence is not satisfied by mere propaganda that does not cross the line of telling one to fight, regardless of the propagandists' citizenship.

Al-Aulaqi was a propagandist, not a soldier,⁷⁹ and thus did not present an imminent risk to the United States. He was not found on a battlefield when he was killed. Rather, he was in Yemen at the time of his death, far from the active battlegrounds of Afghanistan or Pakistan.⁸⁰ It is true that in International Humanitarian Law it "is not the location of the attack, but the status of the attacker and target" that matter.⁸¹ While this functional—as opposed to territorial—view of just war theory must be taken into account, the proximity of a combatant to the battlefield perhaps directly corresponds to the imminence requirement. Short of directing hostile attacks from afar, one cannot be deemed an imminent threat if one is not actively taking part in a threat. On information now available, al-Aulaqi was arguably not such a leader.

The legal memo drafted by the Obama Administration to justify targeting al-Aulaqi furthermore concluded that "what was reasonable, and the process that was due, was different for Mr. [al-Aulaqi] than for an ordinary criminal."⁸² Such an argument brings forth a domestic analogy, in which al-Aulaqi's life was being likened to that of a criminal in a law enforcement model. Regarding imminence, it would seem that a law enforcement model for targeted killing would actually be less permissive than an analysis under the laws of war. The law enforcement model of legality rests primarily on international human rights law standards, which have a type of reverence for life and thereby are necessarily more restrictive than the laws of war.⁸³ Rather than citing imminence, the Model Penal Code in fact uses the term "immediately necessary" in terms of its imminence requirement.⁸⁴ "Immediately necessary" inevitably falls on the more

78 Cole, *supra* note 7 (characterizing the claims against al-Aulaqi as "unofficial 'allegations' of encouragement").

79 Savage, *Secret U.S. Memo*, *supra* note 6, at A12; Cole, *supra* note 7.

80 Savage, *Secret U.S. Memo*, *supra* note 6, at A1; Mary L. Dudziak, *This War Is Not Over Yet*, N.Y. TIMES, Feb. 16, 2012, at A31.

81 Dehn & Heller, *supra* note 5, at 190.

82 Savage, *Secret U.S. Memo*, *supra* note 6, at A12 (reporting on the memo).

83 Kretzmer, *supra* note 3, at 174.

84 MODEL PENAL CODE § 3.07(1) (1985).

restrictive end of the imminence scale. Under this view, “use of force can never be regarded as necessary (let alone absolutely necessary) unless it is clear that there was no feasible possibility of protecting the prospective victim by apprehending the suspected perpetrator.”⁸⁵ That is, one must use restraint and capture a suspect unless doing so would cause harm to a potential victim.

In terms of targeted killing, this would translate to mean that one may use targeted killing against a terrorist in self-defense only if he serves as a threat that must be *immediately* guarded against and if capture is not feasible. Only then would targeted killing be warranted. Though the laws of war and criminal law are somewhat analogous, the latter is much more limiting, and under its view targeted killing should not be used until the last possible moment. Given the attributes of targeted killing, waiting until such a time is most likely not possible. The law enforcement model hence does not inform the issue of targeted killing in a manner consistent with the Obama Administration’s use of it. Its application is impractical.

B. Proportionality

In terms of proportionality, International Humanitarian Law furthermore requires that attacks may not result in “excessive ‘collateral damage.’”⁸⁶ If the United States is to engage in targeted killing, then, the resulting destruction of killing a terrorist may not exceed the good that is gained by not allowing the terroristic act to proceed. This raises the question of which life is more important: the life of an enemy civilian, or the life of one’s own combatants.⁸⁷ Although some argue that one’s own combatants’ lives are always worth more than an enemy civilian’s life,⁸⁸ this is not an appropriate, moral balancing of lives. Enemy civilians are considered unlawful targets under International Humanitarian Law.⁸⁹ Targeted killing must be reasonably restricted to killing as few enemy civilians as possible; as

⁸⁵ Kretzmer, *supra* note 3, at 179; *cf.* Scott v. Harris, 550 U.S. 372, 384, 386 (2007) (citing the proposition that deadly force is reasonable when one poses an “actual and imminent threat”); Tennessee v. Garner, 471 U.S. 1, 3 (1985) (setting forth the idea that in criminal law preventive killing is impermissible except where there is probable cause to believe the suspect is dangerous to others).

⁸⁶ Radsan & Murphy, *supra* note 3, at 1206.

⁸⁷ There are four groups that are relevant to this analysis: one’s own civilians, one’s own combatants, civilians in an enemy state (“enemy civilians”), and combatants from an enemy state (“enemy combatants”).

⁸⁸ Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS 3, 18 (2005).

⁸⁹ First Additional Protocol, *supra* note 34, at art. 50 (essentially defining civilians in the negative as all persons who are not combatants); WALZER, *supra* note 13, at 136 (“‘Soldiers are made to be killed,’ as Napoleon once said . . . [N]o one else is made to be killed.”).

civilians, they have not opened themselves to attack and are thus not liable to be killed. “The war convention rests . . . on a certain view of noncombatants, which holds that they are men and women with rights and that they cannot be used for some military purpose, even if it is a legitimate purpose.”⁹⁰ This is not to say that one may not value one’s own civilians with higher priority than an enemy’s civilians. However, this means that an enemy’s civilians should be prioritized over one’s own soldiers’ lives, as the latter have opened themselves up to attack while the former have not.

A utilitarian argument can be made for the justification of the killing of some enemy civilians if the benefits of taking out a terrorist with some civilian collateral damage outweigh the risks to one’s own civilian population by not killing the terrorist.⁹¹ But in a non-traditional war, and without a specific situation presented, it would seem that it is prudent to argue for no civilian deaths. The blurred state of affairs inherent in the War on Terror necessitates caution. Proportionality, therefore, requires that in many cases one must attempt capture rather than targeted killing despite the added danger to one’s troops so as to reduce the possibility of civilian deaths.

Regarding the domestic analogy, proportionality means that when targeted killing takes place, one must believe that not using force will result in the person being targeted “caus[ing] death or serious bodily injury.”⁹² This limits targeted killing in that it must be believed that the person being targeted is involved in causing deadly force. It is therefore not enough for one to simply be a driver or a cook for an enemy cause to be the object of targeted killing. However, the law enforcement model also means that one must “believe[] that the force employed creates no substantial risk of injury to innocent persons.”⁹³ Rather than limiting targeted killing, this in effect allows one to be exculpated for those innocent deaths that could not have been predicted. It is true that it guards against innocents being explicitly targeted, but it implicitly accepts that there will be innocent casualties. Such consequences should not be allowed. If innocent lives become collateral damage, the associated consequences of violating the laws of war should be accepted. Those that engage in targeted killing must be held responsible for the destruction they cause to innocents.⁹⁴

⁹⁰ WALZER, *supra* note 13, at 137.

⁹¹ For a description of such a utilitarian argument, see *id.* at 146 (arguing “[t]he relevant distinction is not between those who work for the war effort and those who do not, but between those who make what soldiers need to fight and those who make what they need to live, like all the rest of us. When it is militarily necessary, workers in a tank factory can be attacked and killed, but not workers in a food processing plant”).

⁹² MODEL PENAL CODE § 3.07(2)(b)(iv)(B) (1985).

⁹³ MODEL PENAL CODE § 3.07(2)(b)(iii) (1985) (emphasis added).

⁹⁴ See, e.g., WALZER, *supra* note 13, at 136–37 (“[T]he law can be enforced even by criminal states against ‘policemen’ who deliberately kill innocent bystanders. For these bystanders

Targeted killing, as all acts of war under just war theory, therefore must be constrained to the extent that engaging in targeted killing should not enable a disproportionate amount of force to be used against one's enemies.⁹⁵ In many cases, this may mean that capture is preferable to targeted killing. Capture effectively takes one's enemy off the battlefield, thereby circumventing any efforts he is involved in against the state that conducts the capture. Capture would seem preferable to targeted killing in most instances, but the policy of targeted killing has been taken up by the United States, and the United States will most likely not turn back. It should be ensured, then, that when targeted killing is conducted, that it satisfies the proportionality requirement.

When the possibility of civilian death is apparent, proportionality is not satisfied. Accordingly, in the War on Terror, it is not apparent that such proportionality is in fact met. According to some accounts, as many as an average of fifty civilians are killed for every intended target.⁹⁶ While this may be an overestimated figure,⁹⁷ it remains that the United States calculates the number of civilian casualties resulting from its drone strikes using a method of calculation that brings into question both proportionality and morality. The procedure by which civilian casualties are calculated by the United States consists of including all military-age males killed in the strike zone as combatants, unless there is unambiguous intelligence to the contrary.⁹⁸ This, as one administration official has called it, is "'guilt by association' that has led to 'deceptive' estimates of civilian casualties."⁹⁹ Consequently, the United States can claim proportionality by willfully ignoring that innocents are being killed. Such a procedure not only leads to a lack of proportionality, but it is also anything but moral.

It is perhaps not easy to draw a line where too many civilians have been killed. But though the line is difficult to draw, "that does not mean that no line should be drawn."¹⁰⁰ Morally, any civilian death is too much. When even one civilian is killed while engaging in targeted killing, this is too much

do not forfeit their rights when their states wrongly go to war. An army warring against aggression . . . cannot violate the life and liberty of enemy civilians.").

95 See WALZER, *supra* note 13, at 129 ("In the conduct of hostilities, it is not permissible to do 'any mischief which does not tend materially to the end [of victory], nor any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief.'" (quoting HENRY SIDGWICK, *ELEMENTS OF POLITICS* 254 (1891))).

96 Radsan & Murphy, *supra* note 3, at 1221.

97 *Id.* (characterizing the estimate of fifty civilians killed for every intended target as a "remarkable figure," and suggesting by implication that this figure is overestimated).

98 Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

99 *Id.*

100 G.E.M. ANSCOMBE, *Mr. Truman's Degree*, in 3 THE COLLECTED PHILOSOPHICAL PAPERS OF G.E.M. ANSCOMBE 62, 67 (1981).

civilian death. Again, a consequentialist argument would disagree and argue that one's own civilians saved by a terrorist threat that has been avoided by engaging in targeted killing outweighs the civilian deaths of one's enemies.¹⁰¹ Given that many of these threats also occur at a time when the factor of imminence is questionable, though, a questionable balancing of proportionality does not sway the decision.

In Anwar al-Aulaqi's situation, the United States decided that killing al-Aulaqi was permissible if capture was not feasible.¹⁰² Even if it is accepted that targeting an American citizen is permissible, it was not so justified in this instance. When al-Aulaqi was killed, so too was another American, Samir Khan. Khan also never took up arms against the United States.¹⁰³ The United States effectively killed its own civilian, a life that should be prioritized in the utmost regard. When one's own citizens could possibly become collateral damage, targeted killing is never warranted. Perhaps the United States did not know that Khan was present when they targeted al-Aulaqi, but that is not a defense to killing one's own citizen. Targeted killing should only take place in a situation where the certainty of safety for one's own citizens is guaranteed. That criterion was obviously violated when Khan was killed.

V. THE IMPORTANCE OF CONFLICT CHARACTERIZATION

Building off of the previously discussed categories that inform the discussion of targeted killing, the characterization of the conflict itself is also important. According to the Geneva Convention, a conflict is international when it is waged between two or more states.¹⁰⁴ All other conflicts are necessarily non-international.¹⁰⁵ Due to the lack of state boundaries in the latter type of conflicts, a "substantially higher threshold" must be met for an armed conflict to exist; this is so that it is possible to distinguish an armed conflict from acts of short and unorganized insurrections, banditry, and

¹⁰¹ An example of such balancing can be seen in the World War II bombing of Hiroshima. American leaders effectively made the decision that the bombing "would save lives where the lives counted [were] the lives of American soldiers. The lives of Japanese, military or civilian, presumably counted for less." JOHN RAWLS, *Fifty Years after Hiroshima*, in COLLECTED PAPERS 565, 570 (Samuel Freeman ed., 1999) (explaining that a utilitarian seeks to promote overall utility, which involves a calculation of net utility, rather than promote or protect the rights of individuals).

¹⁰² Cole, *supra* note 7.

¹⁰³ Savage, *Secret U.S. Memo*, *supra* note 6.

¹⁰⁴ Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516.

¹⁰⁵ Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516.

even in some cases, terrorist activities.¹⁰⁶ Terrorist activities may therefore sometimes be characterized as unarmed conflicts, especially when such aggression is intermittent.

When an unarmed conflict exists, states are restricted in their resort to force.¹⁰⁷ This Comment argues that targeted killing should not be permitted in these instances; an armed conflict, whether it is international or not, must exist for the threshold issue of targeted killing to be permitted. This is true regardless of the citizenship of the person targeted. If a war does not exist, traditional or not, targeted killing should not occur. A terrorist in an unarmed conflict does open himself up to attack when actively carrying out hostilities, but then capture must occur after this stage.¹⁰⁸ For instance, Timothy McVeigh, having bombed the Alfred P. Murrah Federal Building in Oklahoma City,¹⁰⁹ could not be the object of targeted killing after the bombing took place; short of a standoff between himself and police, it would be necessary to capture him. This would be true whether or not he was an American citizen. In an armed conflict, though, targeted killing may be permitted, as the rules of *jus in bello* apply in an armed conflict;¹¹⁰ the applicability of just war theory to such a conflict may warrant the targeting of one's enemies that pose an imminent risk.

A. *The War on Terror Is a Non-International Armed Conflict*

According to the Authorization for the Use of Military Force ("AUMF") and various Supreme Court decisions, the conflict with al-Qaeda is a non-international armed conflict.¹¹¹ However, some scholars criticize this characterization as an overly permissive classification.¹¹² To them, the War on Terror amounts to "sporadic acts of terrorism" not amounting to a non-international armed conflict; they argue that only International

¹⁰⁶ Ben-Naftali & Michaeli, *supra* note 4, at 257.

¹⁰⁷ Stephen C. Neff, *Towards a Law of Unarmed Conflict: A Proposal for a New International Law of Hostility*, 28 CORNELL INT'L L.J. 1, 5, 28 (1995).

¹⁰⁸ In many cases of unarmed conflict this point is probably moot as many terrorists kill themselves when carrying out terrorist plots.

¹⁰⁹ Dale Russakoff & Serge F. Kovaleski, *An Ordinary Boy's Extraordinary Rage*, WASH. POST, July 2, 1995, at A1.

¹¹⁰ See Kretzmer, *supra* note 3, at 186 (defining *jus in bello* as International Humanitarian Law that governs parties in an armed conflict).

¹¹¹ See 50 U.S.C. § 1541 (2006); *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (explaining that the conflict with al-Qaeda is not a conflict of an "international character"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 526–27 (2004). See also Dehn & Heller, *supra* note 5, at 190 (arguing that "whatever the substantive international law on the subject, the AUMF and Supreme Court decisions interpreting it have established in U.S. law the existence of an armed conflict and the authority to exercise belligerent powers—such as armed attacks and preventive detentions").

¹¹² See *id.* at 190.

Humanitarian Law scholars of American nationality truly believe that the War on Terror is an armed conflict.¹¹³ But characterizing the War on Terror as a non-international unarmed conflict neglects the fact that this conflict has been ongoing for more than a decade. Though fighting may not occur on a regular basis, it is anything but sporadic.¹¹⁴ The War on Terror has consisted of continuous fighting. And it is not just the United States that sanctions such a categorization. When other members of the United Nations take part in the War on Terror, they too implicitly agree with the portrayal of the War on Terror as an armed conflict. Consequently, the War on Terror should be classified as a non-international armed conflict.¹¹⁵

The question then remains as to what groups exactly are a part of this non-international armed conflict. The AUMF provides the legal authorization for the use of force against those groups that “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”; under the AUMF those groups are in conflict with the United States.¹¹⁶ It follows that the members of the groups implicitly listed by the AUMF, namely al-Qaeda and the Taliban, receive combatant status and may be on the receiving end of force employed by the United States. So long as a member of al-Qaeda or the Taliban presents an imminent threat, and targeted killing is deemed proportionate, targeted killing may be utilized. Though this analysis seems relatively straightforward, in practice it may not be so simple, as some groups against which the United States employs targeted killing are not covered by the AUMF and therefore may not be targeted.

B. Al-Qaeda in the Arabian Peninsula Is Not a Part of the Non-International Armed Conflict that Exists Under the AUMF

For instance, al-Qaeda in the Arabian Peninsula (“AQAP”) cannot be sufficiently characterized as a member of al-Qaeda in the sense required for it to be the target of U.S. animosity. Given the use of force against members of AQAP, it is apparent that the United States government does not agree with this assertion. It deems AQAP a co-belligerent with al-Qaeda.¹¹⁷

113 *Id.* at 197.

114 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Claudette Roulo, *Panetta: Nation Faces ‘Dangerous and Unpredictable’ World*, U.S. DEP’T OF DEF. (Oct. 19, 2012), <http://www.defense.gov/news/newsarticle.aspx?id=118273>.

115 This conclusion is consistent with Dehn & Heller, *supra* note 5, at 190.

116 50 U.S.C. § 1541 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

117 *See, e.g.*, Dehn & Heller, *supra* note 5, at 190 (suggesting that “the Government argue[s] that AQAP is either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda that has directed attacks against the United States” (internal quotation marks omitted)).

Consequently, government officials would assert that AQAP is a force associated with al-Qaeda and is thus part of the armed conflict between the United States and al-Qaeda.¹¹⁸

Despite such assertions by the United States government, there is a basis in just war theory for rejecting AQAP as a part of the conflict that is the War on Terror. There is no customary rule in just war theory that allows co-belligerency to apply to non-state actors in a non-international armed conflict.¹¹⁹ It must be asserted that AQAP is a distinct organization from al-Qaeda, and hence is not a target that the United States may consider as covered by the AUMF. Consequently, the AUMF does not cover hostilities against AQAP: AQAP is an organization founded in Yemen, long after the attacks of September 11, 2001 that prompted the issuance of the AUMF.¹²⁰ Just war theory should limit the interpretation of the AUMF, not merely inform it.¹²¹

Moreover, due to the fact that co-belligerency is not permitted in non-international conflicts, it is also pertinent that al-Qaeda is not organized at a global level to a sufficient extent for the two groups to be considered one organization.¹²² It is simply not enough to say that AQAP is an enemy on par with al-Qaeda because the United States says so; the groups must be sufficiently organized so as to warrant singular status in order for AQAP to truly be a part of the armed conflict with the United States. In the case of al-Qaeda and AQAP, that requirement arguably has not been met. They may share a common goal, but their interconnections stop there. Al-Qaeda and AQAP are separate entities with separate leadership. Furthermore, “the ‘combat’ [between the United States and AQAP] is not even close to being sufficiently protracted or intense” to be characterized as a non-international armed conflict.¹²³ Hostilities between the United States and AQAP are too

118 *Id.*

119 Conversely, in a more traditional war, co-belligerency among state actors is recognized. The problem arises in this case due to the non-international nature of the hostilities. See Dehn & Heller, *supra* note 5, at 200 (arguing that one “reason[] why cobelligerency does not apply to nonstate actors in [non-international armed conflicts]” is due to the fact that there is a “complete absence of state practice . . . supporting the existence of such a customary rule”).

120 Cole, *supra* note 7.

121 Dehn & Heller, *supra* note 5, at 200–01 (“It is no accident that the United States claims the interpretation of the AUMF is ‘informed’ by the laws of war, not limited by them. . . . If IHL limited the AUMF, the government would not be able to maintain either the fiction that the United States is involved in a global [non-international armed conflict] with al-Qaeda or the fiction that cobelligerency applies to nonstate actors in [non-international armed conflicts]. And without those fictions, the government would find it much more difficult to justify its position that the laws of war entitle it to kill [a]-Aulaqi.”).

122 *Id.* at 198.

123 *Id.* at 183.

intermittent. The United States may still assert force against AQAP to defend itself, but the United States is more constrained in its ability to target AQAP because an armed conflict does not exist. Targeted killing is only warranted when an armed conflict exists.

In the case of Anwar al-Aulaqi, then, he was not adequately associated with the specific non-international armed conflicts in Afghanistan and Pakistan for targeted killing to be allowed.¹²⁴ The targeted killing of al-Aulaqi did not take place in the context of an armed conflict. Moreover, lethal force was not warranted, as it was not absolutely necessary. He was not part of a non-international armed conflict with the United States because he was not even alleged to be a part of the Taliban or al-Qaeda, the two groups Congress has authorized force against under the AUMF.¹²⁵ He was not a combatant against which targeted killing should have been used, regardless of his citizenship.

VI. THE RIGHTS OF AMERICAN CITIZENS: WHEN TARGETED KILLING IS TURNED ON OUR OWN

What, then, should occur when an American is targeted? Despite the prudence of distinguishing citizens from non-citizens, according to some scholars there is not a problem with using targeted killing against American citizens *per se*.¹²⁶ These scholars assert that the United States government has just as much standing to kill Americans as it does non-Americans, which is to say that due process must be satisfied in both cases. The problem, in this view, is not that an American is killed, but that the missiles could be fired inaccurately or without justification, resulting in death for individuals who were not meant to be targeted.¹²⁷ This could not be further from the truth, as historically the United States has indeed taken into account one's

124 The United States reportedly used many of the arguments set forth in the prior paragraph to assert its right to target al-Aulaqi. *Cf.* Cole, *supra* note 7 (describing the government's position on al-Aulaqi as "the leader of AQAP, which it deemed a 'co-belligerent,' effectively fighting alongside al-Qaeda itself"); Savage, *Secret U.S. Memo*, *supra* note 6, at A12 (setting forth the government's argument that the AUMF covered al-Aulaqi's killing, thereby making him "a lawful target in the armed conflict"); Dehn & Heller, *supra* note 5, at 178 (characterizing the clash with AQAP as "a congressionally authorized, armed conflict").

125 Cole, *supra* note 7.

126 *See* Radsan & Murphy, *supra* note 3, at 1238 ("[M]orally speaking . . . the U.S. government has just as much standing to kill Americans as non-Americans."); Murphy & Radsan, *supra* note 2, at 405 ("[U]nder *Boumediene*, the executive has a due process obligation to develop fair, rational procedures for its use of targeted killing no matter whom it might be targeting anywhere in the world.>").

127 Radsan & Murphy, *supra* note 3, at 1207.

citizenship when administering justice against Americans who have turned against our country.

A. *The History of Due Process Towards American Traitors*

The Constitution itself provides for the possibility that Americans will turn against their own government. The Constitution states in relevant part:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.¹²⁸

An American citizen does not receive fewer rights under the Treason Clause; the Constitution explicitly provides for guarantees of a citizen's rights in those instances in which treason, as clearly defined in this subsection, occurs. Those citizens who levy war against the United States are thereby "entitled to specific procedural protections," namely the requirements that there must be at least two witnesses against the accused traitor as well as prosecution before an Article III court.¹²⁹ The requirements explicitly laid out in the Constitution do not allow for military authority—such as the decision to use targeted killing—against one's own citizens who have committed treason.¹³⁰

However, after the Supreme Court's decision in *Ex parte Quirin*, in which the Court approved a military trial and execution of an American citizen who aided Nazi Germany, the law essentially changed. Since that time the Court has failed to recognize a distinction between those subject to treason, and hence granted due process within the criminal justice system, and those subject to military authority as enemies of the United States.¹³¹ Regardless of this modification to the traditional rule of treason, the fact that it is contained within the Constitution is informative in itself. Its inclusion provides a strong argument for those people who engage in acts of war or aid the enemy to keep their rights that they have by virtue of being American citizens.

128 U.S. CONST. art. III, § 3.

129 Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 865 (2006).

130 *Id.* at 863.

131 *See Ex parte Quirin*, 317 U.S. 1, 31 (1942) (granting unlawful combatants a right to trial and punishment by military tribunal); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 518–20 (2004) (upholding the *Quirin* decision).

Inherent in the Supreme Court's decision in *Ex parte Quirin* is the idea that citizens will receive some sort of process under military authority.¹³² But this is not what happens with targeted killing. When the United States engages in targeted killing, the person who is targeted is, as argued below, killed without sufficient due process. As evidenced by the inclusion of the Treason Clause in the Constitution, the War on Terror is clearly not the first time that an American citizen has betrayed the United States.¹³³ The Constitution ensures the rights of Americans whether they are loyal or not.

B. Due Process: The Rights of Americans To Not Be the Objects of Targeted Killing

In order to evaluate the rights of American citizens within the War on Terror it is necessary to ask what an American citizen's protections would be if he were indeed a part of al-Qaeda. The case of Anwar al-Aulaqi is still informative on this discussion, as the United States effectively granted him the same status that it would have granted an American member of al-Qaeda. This is due to the fact that the United States deems AQAP a co-belligerent of al-Qaeda that is a combatant under the AUMF. For the purpose of this argument, several assumptions will be made. First, the argument assumes that al-Aulaqi was indeed a lawful combatant involved with al-Qaeda in the armed conflict against the United States. After all, that is precisely what lawyers in the Obama Administration claimed when they wrote a memo justifying the killing of al-Aulaqi.¹³⁴ Second, the argument assumes that the CIA does not partake in targeted killing so as to cure any issues regarding their status under the laws of war.¹³⁵

1. Justifying the Targeted Killing of Americans: The Secret Office of Legal Counsel Memo

The memo justifying the targeting of al-Aulaqi, which has yet to be released, measures roughly fifty pages in length, and was principally drafted by two lawyers in the Obama Administration's Office of Legal Counsel ("OLC"), David Barron and Martin Lederman. Completed in June 2010,

¹³² *Ex parte Quirin*, 317 U.S. at 44 ("Since the Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that they present no greater obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies.").

¹³³ Note that treason charges have been brought approximately thirty times since the passing of the Constitution. Douglas A. Kash, *The United States v. Adam Gadahn: A Case for Treason*, 37 CAP. U. L. REV. 1, 1 (2008).

¹³⁴ *Justifying the Killing of an American*, *supra* note 11, at A22.

¹³⁵ *See supra* Part III.

the memo was supposedly narrowly drawn to the specifics of al-Aulaqi's case, finding that targeting al-Aulaqi would be lawful only if capture were not feasible.¹³⁶ The memorandum sets out the legal analysis for the targeted killing of al-Aulaqi but neglects to "independently analyze the quality of the evidence against him."¹³⁷

The memo reportedly argues that the imminence criterion is satisfied if a target is a leader of a group in conflict with the United States that attempts to attack the United States whenever it gets the chance, regardless of whether or not the leader is involved in any such attacks when he is targeted.¹³⁸ According to this analysis, when the imminence requirement is met, a trial is not warranted.¹³⁹ As is argued in the imminence section above, such analysis may in fact be true. A leader of a group fighting the United States opens himself up to harm by taking part in hostilities. However, this is not the case when the target is an American citizen. Targeted killing is much different than a case in which an American is killed on the battlefield of a traditional war. Under the laws of war, one is not required to capture an American citizen and provide a jury trial and Supreme Court review if he is found carrying a gun on the battlefield against the United States. "[I]t is not necessarily illegal, in wartime, to kill a citizen without a trial. Lincoln's Union Army did it repeatedly, of course, during the Civil War."¹⁴⁰

It must be remembered that targeted killing is the "premeditated killing by a state of a specifically identified person not in its custody."¹⁴¹ Premeditation makes all the difference when a country targets its own citizens in such a manner. The issue, then, is perhaps not that an American citizen is killed, as that could happen in the course of a traditional war in which an American takes up arms against the United States. The problem arises when one is expressly targeted with such premeditated intent.¹⁴² As a United States citizen, al-Aulaqi—and any American who becomes the object of targeted killing carried out by the United States—was entitled to more due process simply by virtue of his citizenship and the corresponding rights provided by the Constitution. President Obama, in reference to his decision

136 See Savage, *Secret U.S. Memo*, *supra* note 6, at A1 ("The Obama administration's secret legal memorandum that opened the door to the killing of Anwar al-[Aulaqi] . . . found that it would be lawful only if it were not feasible to take him alive . . .").

137 *Id.* at A12.

138 See Cole, *supra* note 7 (reporting on the content of the Obama Administration's secret legal memorandum regarding the killing of Anwar al-Aulaqi).

139 *Id.*

140 *Id.*

141 Murphy & Radsan, *supra* note 2, at 406.

142 It could be argued that this point is contradicted by the Civil War, since during this conflict the United States certainly knew United States citizens were being killed. However, the Civil War was an *internal* conflict, and so it is a sort of anomaly that does not disprove the theory presented.

to target al-Aulaqi, told colleagues that the decision was “an easy one.”¹⁴³ It should be anything but easy to deliberately decide to kill one’s own citizen.

It has been reported that the secret legal memorandum justifying the killing of al-Aulaqi relied upon an executive ban against assassinations, a federal law against murder, and the protections of the Bill of Rights, as well as the laws of war.¹⁴⁴ The former two are perhaps less informative during war, however, due to the nature of war itself. This is because if one is fighting a war, it is not murder to kill an enemy combatant. Nor is it assassination if one kills a leader who has opened himself up to attack by partaking in a war.¹⁴⁵ These prohibitions must yield to the latter points of the Constitution and International Humanitarian Law. As previously mentioned, International Humanitarian Law does not take citizenship into account, so the only possible basis for evaluating the targeting of an American citizen is the Constitution itself, particularly the Due Process Clause of the Fifth Amendment.¹⁴⁶ If due process analysis is warranted when detention is used in the War on Terror, then it is certainly warranted in targeted killing.¹⁴⁷ The Obama memorandum supposedly cites various cases that allow the government to detain or try in military court Americans who join enemy forces in order to justify targeted killing.¹⁴⁸ There is a large difference, however, between detention and loss of life.

According to leaked descriptions of the memorandum, joining an enemy force effectively deprived al-Aulaqi of a citizen’s due process rights, as the protection of innocent lives should be weighed to a greater extent than the possible death of a suspect.¹⁴⁹ Such a utilitarian argument, while valid, nevertheless goes against the basic rights granted by the Constitution. The Constitution does not say that one’s life can be deprived if others will be

143 See Becker & Shane, *supra* note 98, at A10.

144 See Savage, *Secret U.S. Memo*, *supra* note 6, at A12 (detailing the Justice Department’s rejection of potential legal prohibitions on killing al-Aulaqi). The ban on assassinations, promulgated by President Reagan in response to alleged abuses by intelligence agencies, appears in Exec. Order No. 12333, 46 Fed. Reg. 59,952 (Dec. 8, 1981), while the prohibition of murder is codified in 18 U.S.C. § 1111 (2006).

145 See Andrew Altman & Christopher Heath Wellman, *From Humanitarian Intervention to Assassination: Human Rights and Political Violence*, 118 ETHICS 228, 253 (2008) (“Surely, it would have been permissible for someone to have assassinated Stalin in the 1930s.”). See generally Radsan & Murphy, *supra* note 3, at 1231 (characterizing targeted killings as “[coming] close to prohibited acts of assassination”).

146 See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

147 See Murphy & Radsan, *supra* note 2, at 409–10 (arguing that the Fifth Amendment’s due process rights are controlling in determining the legality of targeted killings of suspected terrorists).

148 See Savage, *Secret U.S. Memo*, *supra* note 6, at A12 (reporting on the memorandum’s purported interpretation of what constitutes due process for al-Aulaqi).

149 *Justifying the Killing of an American*, *supra* note 11, at A22.

saved. Rather, one may not be “deprived of life, liberty, or property, without due process of law.”¹⁵⁰ There is no balancing present. And while some may think it would be the moral decision to save the innocent lives that hang in the balance, is it not also moral to give credence to one’s constitutional rights? Especially with regard to the manner in which targeted killing is carried out, it is furthermore difficult to make such a balance in any case. No one can tell how many lives are in the balance, and thus the United States should value the lives of its own citizens that are targeted, rather than the hypothetical ones that may be put at risk via terrorist attack.

Moreover, if joining an enemy force causes one to be deprived of due process rights, as the memo supposedly asserts,¹⁵¹ then a long line of Supreme Court cases must be overturned. Even enemies are sometimes afforded rights under the Constitution during times of war. The Supreme Court decided that U.S. laws extend throughout United States territory, including Guantanamo Bay,¹⁵² and that this is true even for non-citizen detainees.¹⁵³ If even non-citizen detainees in the War on Terror are guaranteed the right of due process inherent in the writ of habeas corpus, then surely United States citizens must be guaranteed due process rights as well.¹⁵⁴ American citizens are guaranteed the right to due process throughout the world.¹⁵⁵ “The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.”¹⁵⁶ Due process, therefore, must apply even to American citizens who take part in non-international armed conflicts against the United States.

2. *Counterarguments Against Due Process*

Those who disagree with such an assertion regarding the rights held by an American acting against the United States could argue that, especially in al-Aulaqi’s case, his American citizenship is nothing more than an accident

150 U.S. CONST. amend. V.

151 See Savage, *Secret U.S. Memo*, *supra* note 6, at A1 (noting that the memo’s analysis relied, in part, on al-Aulaqi’s support of al Qaeda, an enemy force).

152 *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

153 *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (holding that even non-citizens are “entitled to the privilege of habeas corpus to challenge the legality of their detention”).

154 *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker”).

155 *See Reid v. Covert*, 354 U.S. 1, 5 (1957) (noting that the Bill of Rights constrains the actions of the government even against citizens abroad).

156 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

of birth. He had no control whatsoever over where he was born, and he had no loyalty or allegiance to the United States. Under this view, it is perhaps unfair to grant al-Aulaqi the further due process rights accorded to American citizens for no other reason than he happened to be born on American soil.

But a counterargument in this vein runs contrary to the very principles inherent in American citizenship. If al-Aulaqi were not afforded the same rights as other American citizens, there could potentially be nothing to stop the United States government from taking these rights away from other citizens as well. As unfair as it may seem to some, allowing al-Aulaqi all of the rights of an American citizen—even despite the fact that his citizenship could be a mere accident of birth—is the best way to ensure these rights for all Americans. A person is a United States citizen by virtue of being born on American soil.¹⁵⁷ If further conditions were required to receive citizenship, there is no telling how the government would do so. Making exceptions for al-Aulaqi to be deprived of his citizenship could lead to a slippery slope whereby Americans are deprived of their rights as United States citizens, perhaps sometimes for reasons just as seemingly trivial as an accident of birth. When the rights of American citizens hang in the balance, caution should be used to protect these rights.

Additionally, under contractarianism, citizens of the United States subject themselves to the rights and protections of the United States government.¹⁵⁸ However, via such acts as treason or rebellion, some may argue that it is possible for a citizen to break such a contract. As a result, it would be permissible for the United States to engage in targeted killing to kill one of its own citizens, provided that the citizen has effectively rejected his “contract” with America. But, is it even possible for a citizen to give up such rights? Short of openly denouncing one’s citizenship and breaking all ties with the United States, it is not possible to simply lose one’s rights as a United States citizen. And even then it may not be possible. American citizens, no matter where they are located, are necessarily entitled to the considerations of due process by virtue of their citizenship.¹⁵⁹ One cannot break this tie. In terms of targeted killing, due process can never be

157 8 U.S.C. § 1401 (2006) (“The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof . . .”).

158 See Michael Walzer, *contract, social*, in *THE OXFORD COMPANION TO PHILOSOPHY* 164 (Ted Honderich ed., 1995) (detailing that under contract theory “political society is a human construct”).

159 See *Reid*, 354 U.S. at 5; see also Murphy & Radsan, *supra* note 2, at 435 (arguing that “[t]he relationship between *Boumediene* and *Mathews* suggests that the Due Process Clause applies . . . to government action worldwide”).

satisfied, and hence it is never permissible for the United States to kill one of its own American citizens via targeted killing.

3. *Due Process for American Citizens*

So what, then, does due process entail? It is true that one must not capture a United States citizen and give him a jury trial and Supreme Court review if he is found carrying a gun on the battlefield against the United States; he would then be subject to force immediately, as he poses an imminent threat in war.¹⁶⁰ In terms of targeted killing, where a citizen is not explicitly found in a battlefield situation, due process seems to require more than a military risk analysis.¹⁶¹ To some, this means allowing a targeted killing decision to be the subject of review before an Article III judge prior to it being carried out.¹⁶² To others, even a “post-deprivation procedure” like that in *North American Cold Storage Co. v. City of Chicago*, may be enough, allowing one to challenge the legality of a targeted killing after the death has occurred.¹⁶³ The latter suggestion clearly has more problems than the former, as challenging the deprivation of one’s life after the fact is mere show; there could obviously be no remedy for the victim if the killing is found to be unwarranted.¹⁶⁴

Given the constantly changing circumstances in the War on Terror, even the former could not be enough, as it would be akin to putting someone on trial for murder without being given the opportunity to defend oneself. The

160 See Michael Bahar, *As Necessity Creates the Rule: Eisentrager, Boumediene, and the Enemy—How Strategic Realities Can Constitutionally Require Greater Rights for Detainees in the Wars of the Twenty-First Century*, 11 U. PA. J. CONST. L. 277, 300, 324 (2009).

161 *Justifying the Killing of an American*, *supra* note 11, at A22.

162 Lindsay Kwoka, Comment, *Trial by Sniper: The Legality of Targeted Killing in the War on Terror*, 14 U. PA. J. CONST. L. 301, 303 (2011) (proposing that the President’s decision “to target a citizen for death should be reviewed in a private hearing before an Article III judge before the killing is carried out”).

163 211 U.S. 306 (1908). See Murphy & Radsan, *supra* note 2, at 410–13 (arguing that just as Supreme Court precedents allow a due process right to judicial review after imprisonment for alleged terrorists, a form of judicial review may analogously be appropriate after an attack).

164 This, in a sense, is exactly the type of justice currently being sought by the families of al-Aulaqi, his son Abdulrahman, and Samir Khan. In *al-Aulaqi v. Panetta*, their families are challenging the targeted killing of these three American citizens as violating the Constitution’s guarantee against the deprivation of life without due process of law. The complaint, which seeks unspecified damages, was filed against four senior national security officials, including Secretary of Defense Leon C. Panetta, former CIA Director David H. Petraeus, and two senior commanders of the Special Operations Command of the military, Admiral William H. McRaven of the Navy and Lieutenant General Joseph Votel of the Army. The complaint specifically alleges a violation of the Fourth and Fifth Amendments as well as the Bill of Attainder Clause of the United States Constitution. Complaint at 15–16, *Al-Aulaqi v. Panetta*, No. 1:12-cv-01192-RMC (D.D.C. July, 18, 2012).

OLC memorandum justifying the targeted killing of al-Aulaqi reportedly offers such “due process,” as it asserts that the Fifth Amendment’s guarantee of due process can be satisfied via the internal deliberation of the executive branch.¹⁶⁵ As Attorney General Eric Holder once put it, “[d]ue process’ and ‘judicial process’ ‘are not one and the same, particularly when it comes to national security.’”¹⁶⁶ The Sixth Amendment, however, grants citizens the right to confront their accusers and to set forth witnesses in their favor;¹⁶⁷ none of this is possible in terms of targeted killing. The ad hoc decisionmaking of the executive branch or of an Article III judge does not allow one to confront one’s accusers. Moreover, if one were to present oneself for such a trial, one would be detained indefinitely as a prisoner of war. “[T]he idea that an American citizen should be forced to choose between death and potentially indefinite detention simply because the executive has decided she is a terrorist hardly seems consistent with any coherent notion of citizenship.”¹⁶⁸

Even if the United States were to set forth criterion in which it clearly and publicly states for what actions a citizen would be subject to targeted killing, this would not be enough. Each individual citizen has a right to defend oneself against charges that would render a citizen subject to targeted killing.¹⁶⁹ This, again, does not mean that an American citizen cannot be targeted on the battlefield. It does mean, though, that there is a major difference between the premeditation involved in targeted killing and the perchance death of an American on a battlefield. Due process against United States citizens in terms of targeted killing can never reach a level of acceptability; no amount of due process can justify targeted killing.

Rather than provide for executive or judicial review of a decision to utilize targeted killing—which does not allow one to confront his accusers—or to require a citizen to surrender—which would be highly impractical—the only option is to capture American citizens or to kill them in the heat of battle according to traditional laws of war. It can be argued that detaining American citizens can lead to problems of its own, such as indefinite detention, regardless of whether or not the Supreme Court has invalidated

¹⁶⁵ Becker & Shane, *supra* note 98, at A1. Note that the weekly counterterrorism meetings at the White House in which security officials discuss the latest developments regarding those on the kill list are known derisively amongst some as “‘Terror Tuesday’ meetings.” Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&_r=0.

¹⁶⁶ Charlie Savage, *U.S. Law May Allow Killings, Holder Says*, N.Y. TIMES, Mar. 5, 2012, at A18 [hereinafter Savage, *U.S. Law May Allow Killings*].

¹⁶⁷ U.S. CONST. amend. VI.

¹⁶⁸ Dehn & Heller, *supra* note 5, at 188.

¹⁶⁹ See U.S. CONST. amend. VI.

such practices.¹⁷⁰ It is certainly a valid argument that problems exist when the United States detains its own citizens under military authority; but such concerns are beyond the scope of this Comment. What is pertinent here is that an American citizen be given the chance to be captured or killed according to just war theory, and that his rights as an American citizen are not violated in the process.

Consequently, capturing American citizens or killing them in traditional battles should be the only practices used by the United States against its own citizens. Doing so is the only way to ensure that Americans in these situations receive proper due process under both the laws of war and laws of the United States itself. Targeted killing does not allow for these rights to be recognized. Therefore, United States citizens retain the rights of *lex generalis* under the Constitution even while being subjected to the *lex specialis* of armed conflict.¹⁷¹

C. *Morality and Law in the Targeting of American Citizens*

At the heart of the issue is not whether a state can actually use targeted killing against its own: the United States proved that a state can do so when it targeted al-Aulaqi. Instead, the question is whether it is legally—and morally—proper to do so. When the United States targets its own citizens, there are three elements that come into play: citizenship, premeditation, and due process. Each element, when taken alone, may not be sufficient to allow the targeting of one's own citizens to reach a level of iniquity. When taken together, the interplay of these three factors points to a major undermining of one's rights that can be expressed in a moral legal framework.

1. *Legal Framework*

Although armed conflict necessarily allows the use of coercive measures that are not usually lawful in other contexts,¹⁷² International Humanitarian Law does not make certain distinctions. Namely, International Humanitarian Law and the laws of war make no reference to nationality or citizenship when defining combatants in war.¹⁷³

When invoking the domestic analogy, it is nevertheless clear that even the United States takes citizenship into account to a certain extent because

¹⁷⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (setting forth that the United States may detain its own citizens as enemy combatants, but that the writ of habeas corpus has not been suspended).

¹⁷¹ Thanks to Professor Claire Finkelstein for conversations which sparked this idea.

¹⁷² Kutz, *supra* note 14, at 152–53.

¹⁷³ First Additional Protocol, *supra* note 34, at arts. 43 & 44.

the domestic context infers American citizenship.¹⁷⁴ The Obama Administration took into account citizenship both when it invoked domestic cases in the memorandum justifying the killing of al-Aulaqi and when it wrote the memo itself.¹⁷⁵ By writing the memo, the Obama Administration effectively assented to the need for extra justification when a United States citizen is the object of targeted killing. The laws of war, in this sense, are thus more permissive in that they do not take into account citizenship when targeted killing occurs, whereas domestic law does.

The interpretation of the interplay between International Humanitarian Law and domestic law, as supposedly set forth in the Obama memorandum justifying the targeting of al-Aulaqi, is necessarily flawed, as it attempts to allow one to do in one context what the other would not allow. In the domestic analogy, as in the laws of war, one may kill a criminal that poses an imminent threat.¹⁷⁶ One may not, however, premeditatively kill a criminal that one thinks will commit a crime in the distant future.¹⁷⁷ Conversely, International Humanitarian Law, to a certain extent, does allow preemptive strikes.¹⁷⁸

It seems that the United States uses domestic law to invoke citizenship, but then uses International Humanitarian Law to disregard the same element of citizenship. When using targeted killing—a practice that is by definition premeditative—against its own citizens, the United States uses one law to allow them to do what another—domestic law—would not allow. This is because domestic law, which does take into account citizenship, does not allow premeditative strikes, while International Humanitarian Law does not take into account citizenship but does allow certain premeditative strikes. The United States takes into account aspects of the domestic law, specifically one's citizenship, to appear as if they are satisfying this law's elements. This effectively results in an end-run around domestic law in a manner that seems to set it forth as authoritative while simultaneously disregarding it. The legal framework for the targeted killing of one's own citizens is therefore tenuous at best.

2. *Morality as Legal Framework*

But why does the United States invoke the domestic analogy at all? If International Humanitarian Law does not take into account citizenship, then there is no need to even address it. Regardless of this fact, the Obama

174 Savage, *U.S. Law May Allow Killings*, *supra* note 166, at A18.

175 *Id.*; Savage, *Secret U.S. Memo*, *supra* note 6, at A1.

176 MODEL PENAL CODE § 3.04(1) (1985).

177 *Id.*

178 WALZER, *supra* note 13, at 80–85.

Administration wrote an entire memo justifying its use of force against al-Aulaqi.¹⁷⁹ This could be because the Administration was simply trying to insulate itself from criticism. But if this were the case, then it would behoove the Administration to release its analysis.

Conversely, such a memo could possibly have been written because there is something normatively repugnant about the use of targeted killing against one's own citizens. A memo could thereby reassure the Administration that it was proceeding in a sound manner. Even if an armed conflict exists in a traditional war, where the laws of war are more established, issues still remain regarding the targeted killing of one's own citizens, and thus these concerns would still exist.

It is not necessarily the process involved in targeted killing that causes apprehension, as even preapproval can lead to problems of its own.¹⁸⁰ It is rather that there is a type of moral defect in a law that allows a government to kill its own citizens in such a manner. "The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."¹⁸¹ However, it is precisely this human dignity of the targeted that is not taken into account. The interplay of the human dignity of the targeted with the lack of due process given to American citizens points towards a normative problem with the targeted killing of one's own citizens.

It was asserted above that due process cannot be satisfied in the targeted killing of an American citizen by the United States. While that argument still stands, the moral outrage of targeting one's own citizen adds an extra element to the case against this practice. Rather than International Humanitarian Law, it is the human rights model that lends credence to the analysis of evaluating the taking of our own citizens' life. The human rights model, codified in such treaties as the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), is meant to promote "the inherent dignity and . . . the equal and inalienable rights of all."¹⁸² The human rights model, however, defers to International Humanitarian Law during times of armed conflict.¹⁸³ But this does not mean that such a deferral is appropriate. The right to life in the human rights model is non-derogable; one's life can-

179 Savage, *Secret U.S. Memo*, *supra* note 6, at A1.

180 *See supra* Part VI.B.3.

181 *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

182 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at preamble (Dec. 10, 1948).

183 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8) ("[W]hat is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.").

not be deprived arbitrarily.¹⁸⁴ It is this morality that should be taken into account in the legal framework that sets the standards for the United States and its use of force, and it is this morality that should be implemented in order to circumvent the overly permissive character of International Humanitarian Law. The human rights element seems to complement the domestic analogy in a manner consistent with the preservation of a citizen's rights, as both the due process analysis under the Constitution and the human rights model would preserve a citizen's right to life in the face of targeted killing.

VII. CONCLUSION

Under the laws of war there are thus many constraints that apply to targeted killing regardless of one's citizenship. Targeted killing by the United States should only be used against combatants involved in an armed conflict with the United States. Members of al-Qaeda should receive combatant status, with the corresponding protections and risks that this status entails, regardless of their citizenship. The conflict between the United States and al-Qaeda may indeed be characterized as a non-international armed conflict. But the hostilities between the United States and AQAP may not, as there is not a sufficient amount of organization between al-Qaeda and AQAP to deem them one organization and because co-belligerency does not exist amongst non-state actors under the laws of war.

A disproportionate amount of force may never be used against an enemy, and the enemy must always pose an imminent danger for force to be warranted. The United States may therefore not use targeted killing when imminence is questionable, when capture is feasible, or when civilian lives are at risk of becoming collateral damage. Problems exist when the United States uses CIA agents to engage in targeted killings, regardless of the citizenship of those they target. The CIA is not part of the military, and thus its members are not combatants under just war theory. They should not be able to use targeted killing against enemies in any circumstances.

¹⁸⁴ See, e.g., African Charter on Human and Peoples' Rights, art. 4, June 27, 1981, 1520 U.N.T.S. 217 ("Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."); American Convention on Human Rights: "Pact of San José, Costa Rica" art. 4(1), Nov. 22, 1969, 1144 U.N.T.S. 123 ("Every person has the right to have his life respected. This right shall be protected by law No one shall be arbitrarily deprived of his life."); International Covenant on Civil and Political Rights art. 6(1), Dec. 19, 1966, 999 U.N.T.S. 171 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

However, if the military were to carry out targeted killing, there is a conspicuous distinction that should be made based on one's citizenship. That is, the United States should never partake in targeted killing against its own citizens. No amount of due process is able to ameliorate the problems inherent with taking the life of one's own citizens in this premeditated manner. One's right to life and to a trial under the Constitution forbids it. Indeed, sometimes the "laws we should adopt do not directly correspond to morality."¹⁸⁵ But sometimes they do. An American's right to life under the Constitution reveals such morality. The lack of distinction in terms of one's citizenship under the laws of war, however, does not do so. The United States should therefore look to a combination of domestic law and the human rights model when dealing with its own citizens in terms of targeted killing. The United States, as it does now, should take into account the citizenship of those that they target. When the person that is targeted is an American citizen, the United States should defer to the human rights model; the United States should refrain from using targeted killing against its own citizens. This is the only way the United States can adhere to the law while simultaneously invoking morality.

185 FROWE, *supra* note 26, at 40.