## 1AC

### plan

The United States federal government should limit the war power authority of the president for self-defense targeted killings to outside an armed conflict.

### legal regimes adv

The administration has asserted TK is legally justified under armed conflict AND self-defense authority

Naz K. Modirzadeh 14, Senior Fellow at Harvard Law School-Brookings Project on Law and Security, Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance, <http://harvardnsj.org/wp-content/uploads/2014/01/Modirzadeh-Final.pdf>

As to the jus ad bellum, 124 the government based its authority to attack 125 targets outside of the armed conflicts in Iraq and Afghanistan on three concepts.126 The government has not articulated which of these principles it relied upon or how the three concepts legally interacted.127 First, the U.S. is engaged in an ongoing non-international armed conflict with al Qaeda, the Taliban, and associated forces around the world, authorized by the AUMF.128 Second, the U.S. may be operating within a given territorial state, such as Yemen or Pakistan, with that state’s consent. That consent may take the form of inviting the U.S. to support that nation in its own preexisting NIAC with a particular purported branch or associated force of al Qaeda or the Taliban.129 Such a framework tracks the same logic as the multinational/transnational NIACs of Iraq and Afghanistan, where the sovereign territorial states have invited the U.S. to remain on their territory. Alternatively, that consent may be given simply to allow the U.S. to intervene on the sovereign territory of the state in order to pursue the U.S.’s armed conflict with al Qaeda, the Taliban, and/or associated forces in that particular instance. This consent need not be public; it need not be officially or formally articulated; it may be construed by silence; and it may indeed be gleaned from lack of objection after the attack has occurred.130 Third, the U.S. maintains a seemingly separate legal justification for attacks against al Qaeda, the Taliban, and/or associated forces targets in any country based on self-defense. Such self-defense would allow the United States to attack if the territorial state is “unable or unwilling” to obviate the threat from terrorists on its territory. Furthermore, a self-defense claim may be legally sound if a state cannot control its own territory, or is a “failed state.”131 Meanwhile, some American academics began to argue for a theory—reportedly developed by Koh132—of “elongated imminence” based on “battered spouse syndrome.”133

• As to jus in bello rules applicable to the geographically unbounded NIAC against al Qaeda, the Taliban, and/or associated forces, and associated targeting operations, including against U.S. citizens, the government “takes great care to adhere to the principles” of distinction and proportionality, as defined in IHL.134 While the CIA and any military agencies acting under its orders or authority are to act in accordance with IHL “principles” in their targeting, it is not clear whether the CIA can or will be held accountable for any violations of IHL, or whether, particularly when acting in “covert operations,” they would be subject to criminal liability under the Uniform Code of Military Justice or the War Crimes Act.135

• In February 2013, an unsigned and undated Department of Justice White Paper on “The Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force" publicly surfaced.136 While the While Paper does not provide the DOJ's comprehensive legal analysis, it does serve as a sort of "folk international law" primer, conflating concepts, rules, and principles from IHL, IHRL, and jus ad bellum. For instance, the White Paper invokes a concept of imminence that appears to be unrecognizable under longstanding IHRL and jus ad bellum11 It also seems to take an extraordinarily narrow view under international law of the Administration's obligation to seek the capture of terrorists away from "hot" battlefields before using lethal force.138 Finally, it argues for territorially unbounded NIAC by way of analogy.139

Combined, this remarkably opaque collection of purported international legal bases for the CIA and, perhaps less so, the military to target members of al Qaeda, the Taliban, and associated forces in any country at any time may make some nostalgic for the days when the government simply rejected the applicability of international law to the war on terror. These legal arguments and positions indicate that while the Bush Administration coined and regularly used the term "war on terror," the Obama Administration much more actively pursues an armed conflict with al Qaeda, the Taliban, and associated forces in & global context}40 That is, it extends the conduct of hostilities, as opposed to detention operations or CIA capture operations, to multiple sites around the world, and explicitly states that it is doing so pursuant to an armed conflict with a terrorist organization and its associates. In doing so, the Obama Administration purportedly expands the scope of the applicability of IHL to any place that the United States targets these individuals, typically with only a passing reference to the “sovereignty” of the state on which the terrorist is being targeted.141 It then states that certain IHL principles are being applied—or at least considered—by a clandestine branch of the government whose accountability to the rules of IHL is unclear.142

Whether or not it is meaningfully different, and whether or not Obama Administration officials lament the condition in which they found the country and the government, it is certainly the case that President Obama made the “war against al Qaeda” much more than a rhetorical flourish or a tool that is mainly used to capture individuals abroad and bring them into secretive prisons or Guantánamo. The upshot is that the Obama Administration treats the war against al Qaeda and associated forces much more as a war in the sense of actual armed attacks against targets all over the world than did the Bush Administration. While there had been several instances of such treatment during the Bush Administration, perhaps most infamously the 2002 attack in Yemen, the scale and speed of the attacks under President Obama is far greater than anything carried out by his predecessor.

The Obama Administration’s policy shift occurs within an entirely different rhetorical environment and in a context in which this approach— which one could reasonably call “global war”—is articulated through the language of IHL. After the profound dismay felt by many in the legal profession and academia over the legal memoranda provided to President Bush, the Obama Administration appoints some of the country’s finest international lawyers, many of them well known to the IHL and human rights lawyers who have been fighting against the war on terror throughout this story.143 Indeed, many of the international lawyers who join the Obama Administration have been involved in legal or scholarly efforts to curtail the Bush Administration’s pursuit of the global war on terror. In this sense, as we head into the reactions by IHL and IHRL to these positions, there seems to be far more benefit of the doubt granted to this Administration’s approach to the conflict.144

In a strange coda to the arguments and positions taken by the government throughout these debates, a number of officials suggest by the end of this phase that killing suspected terrorists has become legally and logistically easier than detaining them. Indeed, many have argued that this is precisely what is happening in various situations around the world— whether in Iraq and Afghanistan, as troop drawdown is contemplated in earnest, or in Somalia,145 Yemen,146 and Pakistan 147— with members of the armed forces and drone operators reportedly finding it easier to kill targets148 than to take them into U.S. custody.149

That erodes international norm development for both humanitarian and human rights law

Laurie Blank, Director, International Humanitarian Law Clinic, Emory Law School, 2012, Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications, http://www.wmitchell.edu/lawreview/Volume38/documents/11.BlankFINAL.pdf

As noted in the introduction to this article, maintaining the separation between and independence of jus ad bellum and jus in bello is vital for the effective application of the law and protection of persons in conflict. The discussion that follows will refer to both the LOAC and the law of self-defense extensively in a range of situations in order to analyze and highlight the risks of blurring the lines between the two paradigms. However, it is important to note that the purpose here is not to conflate the two paradigms, but to emphasize the risks inherent in blurring these lines. Preserving the historic separation remains central to the application of both bodies of law, to the maintenance of international security, and to the regulation of the conduct of hostilities.

III. BLURRING THE LINES

The nature of the terrorist threat the United States and other states face does indeed raise the possibility that both the armed conflict and the self-defense paradigms are relevant to the use of targeted strikes overall. The United States has maintained for the past ten years that it is engaged in an armed conflict with al Qaeda66 and, notwithstanding continued resistance to the notion of an armed conflict between a state and a transnational terrorist group in certain quarters, there is general acceptance that the scope of armed conflict can indeed encompass such a state versus non-state conflict. Not all U.S. counterterrorism measures fit within the confines of this armed conflict, however, with the result that many of the U.S. targeted strikes over the past several years may well fit more appropriately within the self-defense paradigm. The existence of both paradigms as relevant to targeted strikes is not inherently problematic. It is the United States’ insistence on using reference to both paradigms as justification for individual attacks and the broader program of targeted strikes that raises significant concerns for the use of international law and the protection of individuals by blurring the lines between the key parameters of the two paradigms.

A. Location of Attacks: International Law and the Scope of the Battlefield

The distinct differences between the targeting regimes in armed conflict and in self-defense and who can be targeted in which circumstances makes understanding the differentiation between the two paradigms essential to lawful conduct in both situations. The United States has launched targeted strikes in Afghanistan, Pakistan, Yemen, Somalia, and Syria during the past several years. The broad geographic range of the strike locations has produced significant questions—as yet mostly unanswered— and debate regarding the parameters of the conflict with al Qaeda.67 The U.S. armed conflict with al Qaeda and other terrorist groups has focused on Afghanistan and the border regions of Pakistan, but the United States has launched an extensive campaign of targeted strikes in Yemen and some strikes in Somalia in the past year as well. In the early days of the conflict, the United States seemed to trumpet the notion of a global battlefield, in which the conflict with al Qaeda extended to every corner of the world.68 Others have argued that conflict, even one with a transnational terrorist group, can only take place in limited, defined geographic areas.69 At present, the United States has stepped back from the notion of a global battlefield, although there is little guidance to determine precisely what factors influence the parameters of the zone of combat in the conflict with al Qaeda.70

Traditionally, the law of neutrality provided the guiding framework for the parameters of the battlespace in an international armed conflict. When two or more states are fighting and certain other states remain neutral, the line between the two forms the divider between the application of the laws of war and the law of neutrality.71 The law of neutrality is based on the fundamental principle that neutral territory is inviolable72 and focuses on three main goals: (1) contain the spread of hostilities, particularly by keeping down the number of participants; (2) define the legal rights of parties and nonparties to the conflict; and (3) limit the impact of war on nonparticipants, especially with regard to commerce.73 In this way, neutrality law leads to a geographic-based framework in which belligerents can fight on belligerent territory or the commons, but must refrain from any operations on neutral territory. In essence, the battlespace in a traditional armed conflict between two or more states is anywhere outside the sovereign territory of any of the neutral states.74 The language of the Geneva Conventions tracks this concept fairly closely. Common Article 2, which sets forth the definition of international armed conflict, states that such conflict occurs in “all cases of declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties.”75 In Common Article 3, noninternational armed conflicts include conflicts between a state and non-state armed groups that are “occurring in the territory of one of the High Contracting Parties.”76 Both of these formulations tie the location of the armed conflict directly to the territory of one or more belligerent parties.

The neutrality framework as a geographic parameter is left wanting in today’s conflicts with terrorist groups, however. First, as a formal matter, the law of neutrality technically only applies in cases of international armed conflict.77 Even analogizing to the situations we face today is highly problematic, however, because today’s conflicts not only pit states against non-state actors, but because those actors and groups often do not have any territorial nexus beyond wherever they can find safe haven from government intrusion. As state and non-state actors have often shifted unpredictably and irregularly between acts characteristic of wartime and those characteristic of not-wartime[, t]he unpredictable and irregular nature of these shifts makes it difficult to know whether at any given moment one should understand them as armies and their enemies or as police forces and their criminal adversaries.78

Simply locating terrorist groups and operatives does not therefore identify the parameters of the battlefield—the fact that the United States and other states use a combination of military operations and law enforcement measures to combat terrorism blurs the lines one might look for in defining the battlefield. In many situations, “the fight against transnational jihadi groups . . . largely takes place away from any recognizable battlefield.”79

Second, a look at U.S. jurisprudence in the past and today demonstrates a clear break between the framework applied in past wars and the views courts are taking today. U.S. courts during World War I viewed “the port of New York [as] within the field of active [military] operations.”80 Similarly, a 1942 decision upholding the lawfulness of an order evacuating JapaneseAmericans to a military area stated plainly that the field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive.81

In each of those cases, the United States was a belligerent in an international armed conflict; the law of neutrality mandated that U.S. territory was belligerent territory and therefore part of the battlefield or combat zone. The courts take a decidedly different view in today’s conflicts, however, consistently referring to the United States as “outside a zone of combat,”82 “distant from a zone of combat,”83 or not within any “active [or formal] theater of war,”84 even while recognizing the novel geographic nature of the conflict. Even more recently, in Al Maqaleh v. Gates, both the District Court and the Court of Appeals distinguished between Afghanistan, “a theater of active military combat,”85 and other areas (including the United States), which are described as “far removed from any battlefield.”86 In a traditional belligerency-neutrality framework, one would expect to see U.S. territory viewed as part of the battlefield; the fact that courts consistently trend the other way highlights both the difference in approach and the uncertainty involved in defining today’s conflicts.

The current U.S. approach of using both the armed conflict paradigm and the self-defense paradigm as justifications for targeted strikes without further clarification serves to exacerbate the legal challenges posed by the geography of the conflict, at both a theoretical and a practical level. First, at the most fundamental level, uncertainty regarding the parameters of the battlefield has significant consequences for the safety and security of individuals. During armed conflict, the LOAC authorizes the use of force as a first resort against those identified as the enemy, whether insurgents, terrorists or the armed forces of another state. In contrast, human rights law, which would be the dominant legal framework in areas where there is no armed conflict, authorizes the use of force only as a last resort.87 Apart from questions regarding the application of human rights law during times of war, which are outside the scope of this article, the distinction between the two regimes is nonetheless starkest in this regard. The former permits targeting of individuals based on their status as members of a hostile force; the latter—human rights law—permits lethal force against individuals only on the basis of their conduct posing a direct threat at that time. The LOAC also accepts the incidental loss of civilian lives as collateral damage, within the bounds of the principle of proportionality;88 human rights law contemplates no such casualties. These contrasts can literally mean the difference between life and death in many situations. Indeed, “If it is often permissible to deliberately kill large numbers of humans in times of armed conflict, even though such an act would be considered mass murder in times of peace, then it is essential that politicians and courts be able to distinguish readily between conflict and nonconflict, between war and peace.”89 However, the overreliance on flexibility at present means that U.S. officials do not distinguish between conflict and non-conflict areas but rather simply use the broad sweep of armed conflict and/or self-defense to cover all areas without further delineation.

Second, on a broader level of legal application and interpretation, the development of the law itself is affected by the failure to delineate between relevant legal paradigms. “Emerging technologies of potentially great geographic reach raise the issue of what regime of law regulates these activities as they spread,”90 and emphasize the need to foster, rather than hinder, development of the law in these areas. Many argue that the ability to use armed drones across state borders without risk to personnel who could be shot down or captured across those borders has an expansive effect on the location of conflict and hostilities. In effect, they suggest that it is somehow “easier” to send unmanned aircraft across sovereign borders because there is no risk of a pilot being shot down and captured, making the escalation and spillover of conflict more likely.91 Understanding the parameters of a conflict with terrorist groups is important, for a variety of reasons, none perhaps more important than the life-and-death issues detailed above. By the same measure, understanding the authorities for and limits on a state’s use of force in self-defense is essential to maintaining orderly relations between states and to the ability of states to defend against attacks, from whatever quarter. The extensive debates in the academic and policy worlds highlight the fundamental nature of both inquiries. However, the repeated assurances from the U.S. government that targeted strikes are lawful in the course of armed conflict or in exercise of the legitimate right of self-defense—without further elaboration and specificity—allows for a significantly less nuanced approach. As long as a strike seems to fit into the overarching framework of helping to defend the United States against terrorism, there no longer would be a need to carefully delineate the parameters of armed conflict and self-defense, where the outer boundaries of each lie and how they differ from each other. From a purely theoretical standpoint, this limits the development and implementation of the law. Even from a more practical policy standpoint, the United States may well find that the blurred lines prove detrimental in the future when it seeks sharper delineations for other purposes.

The impact is unrestrained use of force in conflict

Naz K. Modirzadeh 14, Senior Fellow at Harvard Law School-Brookings Project on Law and Security, Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance, <http://harvardnsj.org/wp-content/uploads/2014/01/Modirzadeh-Final.pdf>

The central purpose of the convergence of IHL and IHRL is to increase the protection of individuals in armed conflict. The notion behind the insistence that IHL and IHRL are part of the same discipline suggests that IHL is part of the far larger and more broadly applicable legal realm of IHRL. Indeed, the very idea of the “humanization of humanitarian law”159 is that the cold, brutal balancing of IHL, its perceived deference to the military and the needs of the state is opened up and mitigated by a body of law that protects the individual’s human rights against the state. Yet here the story flips: It is IHRL that seems to become part of IHL. It is IHRL that, by the end of our narrative, seems to be brought into the service of conflict, to act not as a powerful check on the brute force of the sovereign, not as the voice of the international community against those who wish to prioritize national security over individual liberties, but rather as a means to regulate the use of lethal violence. Having argued vociferously that IHRL applies in all situations of armed conflict at all times in order to protect individuals, the argument suddenly turns in the other direction. It becomes possible to say that IHRL can be utilized to allow for one state to invade another state’s territory in order to murder individuals without an attempt to arrest, detain, charge, and try these individuals. What is so striking in this view is how well—if that is the right word—the convergence argument worked, or at least how much work convergence ended up doing. Remarkably, many who wish to justify a far broader and even more aggressive CIA drone program cite convergence as a basis for doing so.160

For the application of IHL, on the other hand, the dominant assumption of convergence—that human rights law and IHL are part of the same general field, that they apply simultaneously, and that they are part of the same conversation—may have had the effect of loosening the boundaries around the field of application of IHL. As the two bodies of law began to be used interchangeably—as an attack utilizing a five hundred pound bomb is analogized to a police officer using a weapon when faced with the imminent danger of a hostage situation—one effect on the perception of IHL may be that it is no longer seen as a tightly controlled body of law. As many leading IHL lawyers warned in 2001 and 2002, once IHL is applied, many ugly things that we generally see as illegal, as outside the realm of rule of law, suddenly become lawful. Those IHRL lawyers who argued that IHRL applies simultaneously to IHL during armed conflict may have contributed to the blurring of the line between war and not-war.

That causes global war

Ryan Goodman, Anne and Joel Ehrenkranz Professor of Law, New York University School of Law, December 2009, CONTROLLING THE RECOURSE TO WAR BY MODIFYING JUS IN BELLO, Yearbook of International Humanitarian Law / Volume 12

A substantial literature exists on the conflation of jus ad bellum and jus in bello. However, the consequences for the former side of the equation – the resort to war – is generally under-examined. Instead, academic commentary has focused on the effects of compliance with humanitarian rules in armed conflict and, in particular, the equality of application principle. In this section, I attempt to help correct that imbalance.

In the following analysis, I use the (admittedly provocative) short-hand labels of ‘desirable’ and ‘undesirable’ wars. The former consists of efforts that aim to promote the general welfare of foreign populations such as humanitarian interventions and, on some accounts, peacekeeping operations. The latter – undesirable wars – include conflicts that result from security spirals that serve neither state’s interest and also include predatory acts of aggression.

4.1.1 Decreased likelihood of ‘desirable wars’

A central question in debates about humanitarian intervention is whether the international community should be more concerned about the prospect of future Kosovos – ambitious military actions without clear legal authority – or future Rwandas – inaction and deadlock at the Security Council. Indeed, various institutional designs will tend to favor one of those outcomes over the other. In 1999, Kofi Annan delivered a powerful statement that appeared to consider the prospect of repeat Rwandas the greater concern; and he issued a call to arms to support the ‘developing international norm in favor of intervention to protect civilians from wholesale slaughter’.95 Ifoneassumesthatthereis,indeed,aneedforcontinuedorgreatersupport for humanitarian uses of force, Type I erosions of the separation principle pose a serious threat to that vision. And the threat is not limited to unilateral uses of force. It also applies to military operations authorized by the Security Council. In short, all ‘interventions to protect civilians from wholesale slaughter’ are affected.

Two developments render desirable interventions less likely. First, consider implications of the Kosovo Commission/ICISS approach. The scheme imposes greater requirements on armed forces engaged in a humanitarian mission with respect to safeguarding civilian ives.96 If that scheme is intended to smoke out illicit intent,97 it is likely to have perverse effects: suppressing sincere humanitarian efforts at least on the margins. Actors engaged in a bona fide humanitarian intervention generally tend to be more protective of their own armed forces than in other conflicts. It is instructive to consider, for instance, the precipitous US withdrawal from the UN mission in Somalia – code-named Operation Restore Hope – after the loss of eighteen American soldiers in the Battle of Mogadishu in 1993, and the ‘lesson’ that policymakers drew from that conflict.98 Additionally, the Kosovoc ampaign – code-named Operation Noble Anvil – was designed to be a ‘zero-casualty war’ for US soldiers, because domestic public support for the campaign was shallow and unstable. The important point is that the Kosovo Commission/ICISS approach would impose additional costs on genuine humanitarian efforts, for which it is already difficult to build and sustain popular support. As a result, we can expect to see fewer bona fide interventions to protect civilians from atrocities.99 Notably, such results are more likely to affect two types of states: states with robust, democratic institutions that effectively reflect public opinion and states that highly value compliance with jus in bello. Both of those are the very states that one would most want to incentivize to initiate and participate in humanitarian interventions.

The second development shares many of these same consequences. Consider the implications of the British House of Lords decision in Al-Jedda which cast doubt on the validity of derogations taken in peacekeeping operations as well as other military efforts in which the homeland is not directly at stake and the state could similarly withdraw. The scheme imposes a tax on such interventions by precluding the government from adopting measures that would otherwise be considered lawful and necessary to meet exigent circumstances related to the conflict. Such extraordinary constraints in wartime may very well temper the resolve to engage in altruistic intervention and military efforts that involve similar forms of voluntarism on the part of the state. Such a legal scheme may thus yield fewer such operations and the participation of fewer states in such multilateral efforts. And, the impact of the scheme should disproportionately affect the very states that take international human rights obligations most seriously.

Notably, in these cases, the disincentives might weigh most heavily on third parties: states that decide whether and to what degree to participate in a coalition with the principal intervener. It is to be expected that the commitment on the part of the principal intervener will be stronger, and thus not as easily shifted by the erosion of the separation principle. The ability, however, to hold together a coalition of states is made much more difficult by these added burdens. Indeed, as the United States learned in the Kosovo campaign, important European allies were wary about the intervention, in part due to its lack of an international legal pedigree. And the weakness of the alliance, including German and Italian calls for an early suspension of the bombing campaign, impeded the ability to wage war in the first place. It may be these third party states and their decision whether to join a humanitarian intervention where the international legal regime matters most. Without such backing of important allies, the intervention itself is less likely to occur. It is also those states – the more democratic, the more rights respecting, and the more law abiding – that the international regime should prefer to be involved in these kinds of interventions.

The developments regulating jus ad bellum through jus in bello also threaten to make ‘undesirable wars’ more likely. In previous writing, I argue that encouraging states to frame their resort to force through humanitarian objectives rather than other rationales would, in the aggregate, reduce the overall level of disputes that result in uncontrolled escalation and war.100 A reverse relationship also holds true. That is, encouraging states to forego humanitarian rationales in favor of other justifications for using force may culminate in more international disputes ending in uncontrolled escalation and war. This outcome is especially likely to result from the pressures created by Type I erosions of the separation principle.

First, increasing the tax on humanitarian interventions (the Kosovo Commission/ICISS approach) and ‘wars of choice’ (the Al-Jedda approach) would encourage states to justify their resort to force on alternative grounds. For example, states would be incentivized to invoke other legitimated frameworks – such as security rationales involving the right to self-defense, collective self-defense, anticipatory self-defense, and traditional threats to international peace and security. And, even if military action is pursued through the Security Council, states may be reluctant to adopt language (in resolutions and the like) espousing or emphasizing humanitarian objectives.

Second, the elevation of self-regarding – security and strategic – frameworks over humanitarian ones is more likely to lead to uncontrolled escalation and war. A growing body of social science scholarship demonstrates that the type of issue in dispute can constitute an important variable in shaping the course of interstate hostilities. The first generation of empirical scholarship on the origins of war did not consider this dimension. Political scientists instead concentrated on features of the international system (for example, the distribution of power among states) and on the characteristics of states (for example, forms of domestic governance structures) as the key explanatory variables. Research agendas broadened considerably, however, in subsequent years. More recently, ‘[s]everal studies have identified substantial differences in conflict behavior over different types of issues’.101 The available evidence shows that states are significantly more inclined to fight over particular types of issues that are elevated in a dispute, despite likely overall material and strategic losses.102 Academic studies have also illuminated possible causal explanations for these empirical patterns. Specifically, domestic (popular and elite) constituencies more readily support bellicose behavior by their government when certain salient cultural or ideological issues are in contention. Particular issue areas may also determine the expert communities (humanitarian versus security mindsets) that gain influence in governmental circles – a development that can shape the hard-line or soft-line strategies adopted in the course of the dispute. In short, these links between domestic political processes and the framing of international disputes exert significant influence on whether conflicts will eventually culminate in war.

Third, a large body of empirical research demonstrates that states will routinely engage in interstate disputes with rivals and that those disputes which are framed through security and strategic rationales are more likely to escalate to war. Indeed, the inclusion of a humanitarian rationale provides windows of opportunity to control and deescalate a conflict. Thus, eliminating or demoting a humanitarian rationale from a mix of justifications (even if it is not replaced by another rationale) can be independently destabilizing. Espousing or promoting security rationales, on the other hand, is more likely to culminate in public demands for increased bellicosity, unintended security spirals, and military violence.103

Importantly, these effects may result even if one is skeptical about the power of international law to influence state behavior directly. It is reasonable to assume that international law is unlikely to alter the determination of a state to wage war, and that international law is far more likely to influence only the justificatory discourse states employ while proceeding down the warpath. However, as I argue in my earlier work, leaders (of democratic and nondemocratic) states become caught in their official justifications for military campaigns. Consequently, framing the resort to force as a pursuit of security objectives, or adding such issues to an ongoing conflict, can reshape domestic political arrangements, which narrows the subsequent range of policy options. Issues that initially enter a conflict due to disingenuous representations by political leaders can become an authentic part of the dispute over time. Indeed, the available social science research, primarily qualitative case studies, is even more relevant here. A range of empirical studies demonstrate such unintended consequences primarily in the case of leaders employing security-based and strategic rationales to justify bellicose behavior.104 A central finding is that pretextual and superficial justifications can meaningfully influence later stages of the process that shape popular and elite conceptions of the international dispute. And it is those understandings that affect national security strategies and the ladder of escalation to war. Indeed, one set of studies – of empires – suggests these are mechanisms for powerful states entering into disastrous military campaigns that their leaders did not initially intend.

TK self-defense norms modeled globally --- causes global war

Fisk & Ramos 13 (Kerstin Fisk --- PhD in Political Science focusing on interstate war @ Claremont Graduate University, Jennifer M. Ramos-- PhD in Polisci and Professor @ Loyola Marymount focusing on norms and foreign policy, including drone warfare and preventative use of force, “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm” 15 APR 2013, International Studies Perspectives (2013), 1–23)

Conclusion

Preventive self-defense entails waging a war or an attack by choice, in order to prevent a suspected enemy from changing the status quo in an unfavorable direction. Prevention is acting in anticipation of a suspected latent threat that might fully emerge someday. One might rightfully point out that preventive strikes are nothing new—the Iraq War is simply a more recent example in a long history of the preventive use of force. The strategic theorist Colin Gray (2007:27), for example, argues that “far from being a rare and awful crime against an historical norm, preventive war is, and has always been, so common, that its occurrence seems remarkable only to those who do not know their history.” Prevention may be common throughout history, but this does not change the fact that it became increasingly difficult to justify after World War II, as the international community developed a core set of normative principles to guide state behavior, including war as a last resort. The threshold for war was set high, imposing a stringent standard for states acting in self-defense. Gray concedes that there has been a “slow and erratic, but nevertheless genuine, growth of a global norm that regards the resort to war as an extraordinary and even desperate measure” and that the Iraq war set a “dangerous precedent” (44). Although our cases do not provide a definitive answer for whether a preventive self-defense norm is diffusing, they do provide some initial evidence that states are re-orienting their military and strategic doctrines toward offense. In addition, these states have all either acquired or developed unmanned aerial vehicles for the purposes of reconnaissance, surveillance, and/or precision targeting.

Thus, the results of our plausibility probe provide some evidence that the global norm regarding the use of force as a last resort is waning, and that **a preventive self-defense norm is emerging and cascading following the example set by the U**nited **S**tates. At the same time, there is variation among our cases in the extent to which they apply the strategy of self-defense. China, for example, has limited their adaption of this strategy to targeted killings, while Russia has declared their strategy to include the possibility of a preventive nuclear war. Yet, the preventive self-defense strategy is not just for powerful actors. Lesser powers may choose to adopt it as well, though perhaps only implementing the strategy against actors with equal or lesser power. Research in this vein would compliment our analyses herein.

With the proliferation of technology in a globalized world, it seems only a matter of time before countries that do not have drone technology are in the minority. While preventive self-defense strategies and drones are not inherently linked, current rhetoric and practice do tie them together. Though it is likely far into the future**, it is all the more important to consider the final stage of norm evolution—internalization—for this particular norm**. While scholars tend to think of norms as “good,” this one is not so clear-cut. If the preventive self-defense norm is taken for granted, integrated into practice without further consideration, it inherently changes the functioning of international relations. And unmanned aerial vehicles, by reducing the costs of war, make claims of preventive self-defense more palatable to the public. Yet **a global norm of preventive self-defense is likely to be** destabilizing**,** leading to more war **in the international system**, not less. It clearly violates notions of just war principles—jus ad bellum. **The U**nited **S**tates **has set a dangerous precedent, and by continuing its preventive strike policy it continues to provide other states with the justification to do the same.**

Self-defense regime collapse causes every hot spot to escalate

William Bradford, Assistant Professor of Law, Indiana University School of Law, July 2004, SYMPOSIUM: THE CHANGING LAWS OF WAR: DO WE NEED A NEW LEGAL REGIME AFTER SEPTEMBER 11?: "THE DUTY TO DEFEND THEM": n1 A NATURAL LAW JUSTIFICATION FOR THE BUSH DOCTRINE OF PREVENTIVE WAR, 79 Notre Dame L. Rev. 1365

For restrictivists, n67 anticipatory self-defense, despite its pedigree, is "fertile ground for torturing the self-defense concept" n68 and a dangerous warrant for manipulative, self-serving states to engage in prima facie illegal aggression while cloaking their actions under the guise of anticipatory self-defense and claiming legal legitimacy. n69 Analysis of the legitimacy of an act of anticipatory self-defense requires replacing the objectively verifiable prerequisite of an "armed attack" under Article 51 with the subjective perception of a "threat" of such an attack as perceived by the state believing itself a target, and thus determination of whether a state has demonstrated imminence before engaging in anticipatory self-defense lends itself to post hoc judgments of an infinite number of potential scenarios, spanning a continuum from the most innocuous of putatively civilian acts, including building roads and performing scientific research, to the most threatening, including the overt marshaling of thousands of combat troops in offensive dispositions along a contested border. Establishing the necessity of anticipatory self-defense in response to a pattern of isolated incidents over a period of time is an equally subjective task susceptible to multiple determinations and without empirical standards to guide judgment. n70 History is replete with examples of aggression masquerading as anticipatory self-defense, n71 including the Japanese invasion of Manchuria in [\*1385] 1931 n72 and the German invasion of Poland in 1939, n73 and by simply recharacterizing their actions as anticipatory self-defense rather than aggression dedicated to territorial revanchism or fulfillment of religious obligations, **self-interested states such as China, North Korea, Pakistan, or members of the Arab League,** restrictivists warn, **might claim the legal entitlement to attack**, respectively, **Taiwan, South Korea, India, and Israel**. n74 Moreover, taken to its logical extreme the doctrine of anticipatory self-defense might be interpreted as authorizing a state under the leadership of a paranoid decisionmaker to attack the entire world on the false suspicion of threats emanating from every corner. n75

**A strong, adaptive LOAC regime is key to regulate inevitable autonomous weapons – the impact is global war**

Mark Gubrud 14, prof at UNC-Chapel Hill, was a research fellow at Princeton specializing in arms control, Stopping killer robots, Bulletin of the Atomic Scientists January/February 2014 vol. 70 no.1 32-42

Since the first lethal drone strike in 2001, the US use of remotely operated robotic weapons has dramatically expanded. Along with the broader use of robots for surveillance, ordnance disposal, logistics, and other military tasks, robotic weapons have spread rapidly to many nations, captured public attention, and sparked protest and debate. Meanwhile, every dimension of the technology is being vigorously explored. From stealthy, unmanned jets like the X-47B and its Chinese and European counterparts, to intelligent missiles, sub-hunting robot ships, and machine gun-wielding micro-tanks, robotics is now the most dynamic and destabilizing component of the global arms race.

Drones and robots are enabled by embedded autonomous subsystems that keep engines in tune and antennas pointed at satellites, and some can navigate, walk, and maneuver in complex environments autonomously. But with few exceptions, the targeting and firing decisions of armed robotic systems remain tightly under the control of human operators. This may soon change.

Autonomous weapons are robotic systems that, once activated, can select and engage targets without further intervention by a human operator (Defense Department, 2012). Examples include drones or missiles that hunt for their targets, using their onboard sensors and computers. Based on a computer’s decision that an appropriate target has been located, that target will then be engaged. Sentry systems may have the capability to detect intruders, order them to halt, and fire if the order is not followed. Future robot soldiers may patrol occupied cities. Swarms of autonomous weapons may enable a preemptive attack on an adversary’s strategic forces. Autonomous weapons may fight each other.

Just as the emergence of low-cost, high-performance information technology has been the most important driver of technological advance over the past half-century—including the revolution in military affairs already seen in the 1980s and displayed to the world during the 1991 Gulf War—so the emergence of artificial intelligence and autonomous robotics will likely be the most important development in both civilian and military technology to unfold over the next few decades.

Proponents of autonomous weapons argue that technology will gradually take over combat decision making: “Detecting, analyzing and firing on targets will become increasingly automated, and the contexts of when such force is used will expand. As the machines become increasingly adept, the role of humans will gradually shift from full command, to partial command, to oversight and so on” (Anderson and Waxman, 2013). Automated systems are already used to plan campaigns and logistics, and to assemble intelligence and disseminate lethal commands; in some cases, humans march to orders generated by machines. If, in the future, machines are to act with superhuman speed and perhaps even superhuman intelligence, how can humans remain in control? As former Army Lt. Colonel T. K. Adams observed more than a decade ago (2001), “Humans may retain symbolic authority, but automated systems move too fast, and the factors involved are too complex for real human comprehension.”

Almost nobody favors a future in which humans have lost control over war machines. But proponents of autonomous weapons argue that effective arms control would be unattainable. Many of the same claims that propelled the Cold War are being recycled to argue that autonomous weapons are inevitable, that international law will remain weak, and that there is no point in seeking restraint since adversaries will not agree—or would cheat on agreements. This is the ideology of any arms race.

Is autonomous warfare inevitable?

Challenging the assumption of the inevitability of autonomous weapons and building on the work of earlier activists, the Campaign to Stop Killer Robots, a coalition of nongovernmental organizations, was launched in April 2013. This effort has made remarkable progress in its first year. In May, the United Nations Special Rapporteur on extrajudicial killings, Christof Heyns, recommended that nations immediately declare moratoriums on their own development of lethal autonomous robotics (Heyns, 2013). Heyns also called for a high-level study of the issue, a recommendation seconded in July by the UN Advisory Board on Disarmament Matters. At the UN General Assembly’s First Committee meeting in October, a flood of countries began to express interest or concern, including China, Russia, Japan, the United Kingdom, and the United States. France called for a mandate to discuss the issue under the Convention on Certain Conventional Weapons, a global treaty that restricts excessively injurious or indiscriminate weapons. Meeting in Geneva in November, the state parties to the Convention agreed to formal discussions on autonomous weapons, with a first round in May 2014. The issue has been placed firmly on the global public and diplomatic agenda.

Despite this impressive record of progress on an issue that was until recently virtually unknown—or scorned as a mixture of science fiction and paranoia—there seems little chance that a strong arms control regime banning autonomous weapons will soon emerge from Geneva. Unlike glass shrapnel, blinding lasers, or even landmines and cluster munitions, autonomous weapon systems are not niche armaments of negligible strategic importance and unarguable cost to humanity. Instead of the haunting eyes of children with missing limbs, autonomous weapons present an abstract, unrealized horror, one that some might hope will simply go away.

Unless there is a strong push from civil society and from governments that have decided against pursuing autonomous weapons, those that have decided in favor of them—including the United States (Gubrud, 2013)—will seek to manage the issue as a public relations problem. They will likely offer assurances that humans will remain in control, while continually updating what they mean by control as technology advances. Proponents already argue that humans are never really out of the loop because humans will have programmed a robot and set the parameters of its mission (Schmitt and Thurnher, 2013). But autonomy removes humans from decision making, and even the assumption that autonomous weapons will be programmed by humans is ultimately in doubt.

Diplomats and public spokesmen may speak in one voice; warriors, engineers, and their creations will speak in another. The development and acquisition of autonomous weapons will push ahead if there is no well-defined, immovable, no-go red line. The clearest and most natural place to draw that line is at the point when a machine pulls the trigger, making the decision on whether, when, and against whom or what to use violent force. Invoking a well-established tenet of international humanitarian law, opponents can argue that this is already contrary to principles of humanity, and thus inherently unlawful. Equally important, opponents must point out the threat to peace and security posed by the prospect of a global arms race toward robotic arsenals that are increasingly out of human control.

Humanitarian law vs. killer robots

The public discussion launched by the Campaign to Stop Killer Robots has mostly centered on questions of legality under international humanitarian law, also called the law of war. “Losing Humanity,” a report released by Human Rights Watch in November 2012—coincidentally just days before the Pentagon made public the world’s first open policy directive for developing, acquiring, and using autonomous weapons—laid out arguments that fully autonomous weapons could not satisfy basic requirements of the law, largely on the basis of assumed limitations of artificial intelligence (Human Rights Watch and International Human Rights Clinic at Harvard Law School, 2012).

The principle of distinction, as enshrined in Additional Protocol I of the Geneva Conventions—and viewed as customary international law, thus binding even on states that have not ratified the treaty—demands that parties to a conflict distinguish between civilians and combatants, and between civilian objects and military objectives. Attacks must be directed against combatants and military objectives only; weapons not capable of being so directed are considered to be indiscriminate and therefore prohibited. Furthermore, those who make attack decisions must not allow attacks that may be expected to cause excessive harm to civilians, in comparison with the military gains expected from the attack. This is known as the principle of proportionality.

“Losing Humanity” argues that technical limitations mean robots could not reliably distinguish civilians from combatants, particularly in irregular warfare, and could not fulfill the requirement to judge proportionality.1 Distinction is clearly a challenge for current technology; face-recognition technology can rapidly identify individuals from a limited list of potential targets, but more general classification of persons as combatants or noncombatants based on observation is well beyond the state of the art. How long this may remain so is less clear. The capabilities to be expected of artificial intelligence systems 10, 20, or 40 years from now are unknown and highly controversial within both expert and lay communities.

While it may not satisfy the reified principle of distinction, proponents of autonomous weapons argue that some capability for discrimination is better than none at all. This assumes that an indiscriminate weapon would be used if a less indiscriminate one were not available; for example, it is often argued that drone strikes are better than carpet bombing. Yet at some point autonomous discrimination capabilities may be good enough to persuade many people that their use in weapons is a net benefit.

Judgment of proportionality seems at first an even greater challenge, and some argue that it is beyond technology in principle (Asaro, 2012). However, the military already uses an algorithmic “collateral damage estimation methodology” (Defense Department, 2009) to estimate incidental harm to civilians that may be expected from missile and drone strikes. A similar scheme could be developed to formalize the value of military gains expected from attacks, allowing two numbers to be compared. Human commanders applying such protocols could defend their decisions, if later questioned, by citing such calculations. But the cost of this would be to degrade human judgment almost to the level of machines.

On the other hand, IBM’s Watson computer (Ferruci et al., 2010) has demonstrated the ability to sift through millions of pages of natural language and weigh hundreds of hypotheses to answer ambiguous questions. While some of Watson’s responses suggest it is not yet a trustworthy model, it seems likely that similar systems, given semantic information about combat situations, including uncertainties, might be capable of making military decisions that most people would judge as reasonable, most of the time.

“Losing Humanity” also argues that robots, necessarily lacking emotion,2 would be unable to empathize and thus unable to accurately interpret human behavior or be affected by compassion. An important case of the latter is when soldiers refuse orders to put down rebellions. Robots would be ideal tools of repression and dictatorship.

If robot soldiers become available on the world market, it is likely that repressive regimes will acquire them, either by purchase or indigenous production. While it is theoretically possible for such systems to be safeguarded with tamper-proof programming against human rights abuses, in the event that the world fails to prohibit robot soldiers, unsafeguarded or poorly safeguarded versions will likely be available. A strong prohibition has the best chance of keeping killer robots out of the hands of dictators, both by restricting their availability and stigmatizing their use.

Accountability is another much-discussed issue. Clearly, a robot cannot be held responsible for its actions, but human commanders and operators—or even manufacturers, programmers, and engineers—might be held responsible for negligence or malfeasance. In practice, however, the robot is likely to be a convenient scapegoat in case of an unintended atrocity—a technical failure occurred, it was unintended and unforeseen, so nobody is to blame. Going further, David Akerson (2013) argues that since a robot cannot be punished, it cannot be a legal combatant.

These are some of the issues most likely to be discussed within the Convention on Certain Conventional Weapons. However, US Defense Department policy (2012) preemptively addresses many of these issues by directing that “[a]utonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.”

Under the US policy, commanders and operators are responsible for using autonomous weapons in accordance with the laws of war and relevant treaties, safety rules, and rules of engagement. For example, an autonomous weapon may be sent on a hunt-and-kill mission if tactics, techniques, and procedures ensure that the area in which it is directed to search contains no objects, other than the intended targets, that the weapon might decide to attack. In this case, the policy regards the targets as having been selected by humans and the weapon as merely semi-autonomous, even if the weapon is operating fully autonomously when it decides that a given radar return or warm object is its intended target. The policy pre-approves the immediate development, acquisition, and use of such weapons.

Although the policy does not define “appropriate levels,” it applies this rubric even in the case of fully autonomous lethal weapons targeting human beings without immediate human supervision. This makes it clear that appropriate levels, as understood within the policy, do not necessarily require direct human involvement in the decision to kill a human being (Gubrud, 2013). It seems likely that the United States will press other states to accept this paradigm as the basis for international regulation of autonomous weapons, leaving it to individual states to determine what levels of human judgment are appropriate.

Demanding human control and responsibility

As diplomatic discussions about killer robot regulation get under way, a good deal of time is apt to be lost in confusion about terms, definitions, and scope. “Losing Humanity” seeks to ban “fully autonomous weapons,” and Heyns’s report used the term “lethal autonomous robotics.” The US policy directive speaks of “autonomous and semi-autonomous weapon systems,” and the distinction between these is ambiguous (Gubrud, 2013). The Geneva mandate is to discuss “lethal autonomous weapon systems.”

Substantive questions include whether non-lethal weapons and those that target only matériel are within the scope of discussion. Legacy weapons such as simple mines may be regarded as autonomous, or distinguished as merely automatic, on grounds that their behavior is fully predictable by designers.3 Human-supervised autonomous and semi-autonomous weapon systems, as defined by the United States, raise issues that, like fractal shapes, appear more complex the more closely they are examined.

Instead of arguing about how to define what weapons should be banned, it may be better to agree on basic principles. One is that any use of violent force, lethal or non-lethal, must be by human decision and must at all times be under human control. Implementing this principle as strictly as possible implies that the command to engage an individual target (person or object) must be given by a human being, and only after the target is being reliably tracked by a targeting system and a human has determined that it is an appropriate and legal target.

A second principle is that a human commander must be responsible and accountable for the decision, and if the commander acts through another person who operates a weapon system, that person must be responsible and accountable for maintaining control of the system. “Responsible” refers here to a moral and legal obligation, and “accountable” refers to a formal system for accounting of actions. Both elements are essential to the approach.

Responsibility implies that commanders and operators may not blame inadequacies of technological systems for any failure to exercise judgment and control over the use of violent force. A commander must ensure compliance with the law and rules of engagement independently of any machine decision, either as to the identity of a target or the appropriateness of an attack, or else must not authorize the attack. Similarly, if a system does not give an operator sufficient control over the weapon to prevent unintended engagements, the operator must refuse to operate the system.

Accountability can be demonstrated by states that comply with this principle. They need only maintain records showing that each engagement was properly authorized and executed. If a violation is alleged, selected records can be unsealed in a closed inquiry conducted by an international body (Gubrud and Altmann, 2013).4

This framing, which focuses on human control and responsibility for the decision to use violent force, is both conceptually simple and morally compelling. What remains then is to set standards for adequate information to be presented to commanders, and to require positive action by operators of a weapon system. Those standards should also address any circumstances under which other parties—designers and manufacturers, for instance—might be held responsible for an unintended engagement.

There is at least one exceptional circumstance in which human control may be applied less strictly. Fully autonomous systems are already used to engage incoming missiles and artillery rounds; examples include the Israeli Iron Dome and the US Patriot and Aegis missile defense systems, as well as the Counter Rocket, Artillery, and Mortar system. The timeline for response in such systems is often so short that the requirement for positive human decision might impose an unacceptable risk of failure. Another principle—the protection of life from immediate threats—comes into play here. An allowance seems reasonable, if it is strictly limited. In particular, autonomous return fire should not be permitted, but only engagement of unmanned munitions directed against human-occupied territory or vehicles. Each such system should have an accountable human operator, and autonomous response should be delayed as long as possible to allow time for an override decision.

The strategic need for robot arms control

Principles of humanity may be the strongest foundation for an effective ban of autonomous weapons, but they are not necessarily the most compelling reason why a ban must be sought. The perceived military advantages of autonomy are so great that major powers are likely to strongly resist prohibition, but by the same token, autonomous weapons pose a severe threat to global peace and security.

Although humans have (for now) superior capabilities for perception in complex environments and for interpretation of ambiguous information, machines have the edge in speed and precision. If allowed to return fire or initiate it, they would undoubtedly prevail over humans in many combat situations. Humans have a limited tolerance of the physical extremes of acceleration, temperature, and radiation, are vulnerable to biological and chemical weapons, and require rest, food, breathable air, and drinkable water. Machines are expendable; their loss does not cause emotional pain or political backlash. Humans are expensive, and their replacement by robots is expected to yield cost savings.

While today’s relatively sparse use of drones, in undefended airspace, to target irregular forces can be carried out by remote control, large-scale use of robotic weapons to attack modern military forces would require greater autonomy, due to the burdens and vulnerabilities of communications links, the need for stealth, and the sheer numbers of robots likely to be involved. The US Navy is particularly interested in autonomy for undersea systems, where communications are especially problematic. Civilians are sparse on the high seas and absent on submarines, casting doubt on the relevance of humanitarian law. As the Navy contemplates future conflict with a peer competitor, it projects drone-versus-drone warfare in the skies above and waters below, and the use of sea-based drones to attack targets inland as well.

In a cold war, small robots could be used for covert infiltration, surveillance, sabotage, or assassination. In an open attack, they could find ways of getting into underground bunkers or attacking bases and ships in swarms. Because robots can be sent on one-way missions, they are potential enablers of aggression or preemption. Because they can be more precise and less destructive than nuclear weapons, they may be more likely to be used. In fact, the US Air Force’s Long Range Strike Bomber is planned to be both nuclear-capable and potentially unmanned, which would almost certainly mean autonomous.

There can be no real game-changers in the nuclear stalemate. Yet the new wave of robotics and artificial intelligence-enabled systems threatens to drive a new strategic competition between the United States and other major powers—and lesser powers, too. Unlike the specialized technologies of high-performance military systems at the end of the Cold War, robotics, information technology, and even advanced sensors are today globally available, driven as much by civilian as military uses. An autonomous weapons arms race would be global in scope, as the drone race already is.

Since robots are regarded as expendable, they may be risked in provocative adventures. Recently, China has warned that if Japan makes good on threats to shoot down Chinese drones that approach disputed islands, it could be regarded as an act of war. Similarly, forward-basing of missile interceptors (Lewis and Postol, 2010) or other strategic weapons on unmanned platforms would risk misinterpretation as a signal of imminent attack, and could invite preemption.

Engineering the stability of a robot confrontation would be a wickedly hard problem even for a single team working together in trust and cooperation, let alone hostile teams of competing and imperfectly coordinated sub-teams. Complex, interacting systems-of-systems are prone to sudden unexpected behavior and breakdowns, such as the May 6, 2010 stock market crash caused by interacting exchanges with slightly different rules (Nanex, 2010). Even assuming that limiting escalation would be a design objective, avoiding defeat by preemption would be an imperative, and this implies a constant tuning to the edge of instability. The history of the Cold War contains many well-known examples in which military response was interrupted by the judgment of human beings. But when tactical decisions are made with inhuman speed, the potential for events to spiral out of control is obvious.

The way out

Given the military significance of autonomous weapons, substantial pressure from civil society will be needed before the major powers will seriously consider accepting hard limits, let alone prohibition. The goal is as radical as, and no less necessary than, the control and abolition of nuclear weapons.

The principle of humanity is an old concept in the law of war. It is often cited as forbidding the infliction of needless suffering, but at its deepest level it is a demand that even in conflict, people should not lose sight of their shared humanity. There is something inhumane about allowing technology to decide the fate of human lives, whether through individual targeting decisions or through a conflagration initiated by the unexpected interactions of machines. The recognition of this is already deeply rooted. A scientific poll (Carpenter, 2013) found that Americans opposed to autonomous weapons outnumbered supporters two to one, in contrast to an equally strong consensus in the United States supporting the use of drones. The rest of the world leans heavily against the drone strikes (Pew Research Center, 2012), making it seem likely that global public opinion will be strongly against autonomous weapons, both on humanitarian grounds and out of concern for the dangers of a new arms race.

In the diplomatic discussions now under way, opponents of autonomous weapons should emphasize a well-established principle of international humanitarian law. Seeking to resolve a diplomatic impasse at the Hague Conference in 1899, Russian diplomat Friedrich Martens proposed that for issues not yet formally resolved, conduct in war was still subject to “principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience.” Known as the Martens Clause, it reappeared in the second Hague Convention (1907), the Tehran Conference on Human Rights (1968), and the Geneva Convention additional protocols (1977). It has been invoked as the source of authority for retroactive liability in war crimes and for preemptive bans on inhumane weapons, implying that a strong public consensus has legal force in anticipation of an explicit law (Meron, 2000).

Autonomous weapons are a threat to global peace and therefore a matter of concern under the UN Charter. They are contrary to established custom, principles of humanity, and dictates of public conscience, and so should be considered as preemptively banned by the Martens Clause. These considerations establish the legal basis for formal international action to prohibit machine decision in the use of force. But for such action to occur, global civil society will need to present major-power governments with an irresistible demand: Stop killer robots.

China models US self-defense precedent --- they’ll strike the South China Sea

Fisk & Ramos 13 (Kerstin Fisk --- PhD in Political Science focusing on interstate war @ Claremont Graduate University, Jennifer M. Ramos PhD in Polisci and Professor @ Loyola Marymount focusing on norms and foreign policy, including drone warfare and preventative use of force, “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm” 15 APR 2013, International Studies Perspectives (2013), 1–23)

China

Though scholars debate the strategic culture of China, the dominant view has been one that emphasizes the defensive nature of Chinese military strategy (for an alternative view, see Johnston 1995; Feng 2007; Silverstone 2009). In this view, China prefers diplomacy over the use of force to achieve its objectives, and is more focused on defending against aggressors than acting as one. Seemingly consistent with this view, in 2003, China publically declared its position against states seeking to legitimize preventive self-defense. From China's perspective, the US-led war in Iraq was an example of America's hegemonic lust for power (Silverstone 2009). It was an act of aggression that violated the international norm that China holds dear—the norm of sovereignty. **However, the country's position on this may be evolving**, or at least **contingent on its own geo-political interests**. In 2005, the People's Congress of China passed an anti-secession law, clearly with an eye toward Taiwan. This law includes language that allows “non-peaceful means” in the case that reunification goals are not achieved (Reisman and Armstrong 2006). This suggests that China leaves open the possibility of some kind of military action to thwart Taiwan's formal secession—a preventive move. Still, China considers the Taiwan “problem” a domestic issue, thus the anti-secession law is not compelling evidence that China is buying into the norm of preventive self-defense.

Indeed, a year later (in 2006), China released a national defense report that articulates a strategy of “active defense” for the twenty-first century, in which China moves to an offensive defensive strategy (Yang 2008). Within this report, China declares a policy that prohibits the first use of nuclear weapons “at any time and under any circumstances.” This is consistent with its general orientation against preventive strikes, though it only specifies this idea with regard to nuclear weapons, and may leave the door open to a first use strategy with other types of weapons, but it is not clear from the report. China is likely to be tested in several key areas beyond the Taiwan situation mentioned earlier.71 **China is quite aggressive regarding its claims to territories in the South China Sea**. One of the most hotly disputed assertions is its sovereignty over the Spratly Islands and areas close to the Philippine island of Palawan, which is contested by the Philippines among other countries (Beckman 2012). With Chinese Premier Wen Jiabao's recent statement regarding the necessity of possessing a military that could win “local wars under information age conditions,” it is not surprising that **states in the region are on edge**.72 Last October, **Chinese news reported that states with which China has territorial disputes should “mentally prepare for the** sounds of cannons.”73

Beyond the territorial disputes, also consider the recent terrorist attacks within China and their connection to Pakistan and Afghanistan. The East Turkistan Islamic Movement (ETIM) is responsible for several deadly attacks in the Chinese province of Xinjiang, driving Chinese officials to “go all out to counter the violence” that originates from both ETIM terrorist training camps in Pakistan and remote areas in Xinjiang.74 The significance of these threats to China is reflected in its continuing military modernization efforts, including increasing defense spending by more than 11%.75 Amid investment in aircraft carriers and stealth fighter jets, **China is focused on the development of drone technology, hoping to rival that of the U**nited **S**tates.76 Such technology would likely be used in preventive self-defense against terrorists along China's borders.77 Reports suggest that after seeing the critical use of drones by the United States in its engagements abroad, **China has prioritized drone technology acquisition and production**. 78 In sum, these developments in Chinese defense strategy point to a quite offensive posture—one consistent with a commitment to a norm of preventive use of force (though not as clear-cut as in the India and Russia cases).

In each of the cases under review, **the military has shifted in its orientation from defense to offense**. In India, for example, where UAV development is further along compared to the other cases, there have been notable changes in defense strategy. The strategies in all four cases are tied to a concurrent trend toward states’ acquiring unmanned systems, or drones for precision strikes and real-time surveillance. Political and military elites have demonstrated a desire to successfully harness sophisticated new RMA technology, after having observed US success in this area.

Alongside our analysis of state rhetoric, **these changes in strategies** and high-tech tactical weaponry **suggest the diffusion of a preventive use of force norm** across cases, though to varying degrees, depending on their geostrategic interests. India is largely focused on fighting terrorism abroad, whereas Russia's main terrorist concern is within its own borders. China is concerned about terrorism from domestic and foreign sources. Thus, India is more compelled to espouse the norm of preventive self-defense as a legitimate norm governing international state behavior than Russia. China's commitment to such a norm is evolving, perhaps somewhere in between that of Russia and India. Unlike the cases of India, Russia, and China, Germany's military modernization and interest in drones stems largely from pressure from the United States to take on a larger, global role in promoting security and stability, particularly within NATO. In 2008, for example, US Secretary of Defense Robert Gates scolded “defensive players” who “sometimes…have to focus on offense.”79 At the time, Germany had troops in Afghanistan—but they were located in the safest part of the country (the north) while the United States, Canada and Britain fought in the volatile south. Directing his criticism toward Germany in particular, Gates stated, “In NATO, some allies ought not to have the luxury of opting only for stability and civilian operations, thus forcing other allies to bear a disproportionate share of the fighting and dying.”79 As stated above, one of the ways in which norm entrepreneurs promote norms is by invoking a state's reputation or “international image.” This has certainly been the case with Germany, which took on a direct role in combat operations in Afghanistan in 2009—by borrowing American drones.

Taken together, though, in terms of their position on the idea of preventive self-defense, our findings suggest two similarities. First, **in all** four **cases** reviewed here, leaders invoked the US example to justify their actions. Particularly in India, similarities to 9/11 were drawn in an effort to legitimize moves toward offensive strategies. Second, asymmetric tactics are not only a tool of the weak, but also of stronger states**. We found a strong correlation between strategies of preventive self-defense and the acquisition of drone technology. Because of their precision-strike capability, drones are an obvious choice for states committed to preventive self-defense.**

SCS conflict causes extinction

Wittner 11 (Lawrence S. Wittner, Emeritus Professor of History at the State University of New York/Albany, Wittner is the author of eight books, the editor or co-editor of another four, and the author of over 250 published articles and book reviews. From 1984 to 1987, he edited Peace & Change, a journal of peace research., 11/28/2011, "Is a Nuclear War With China Possible?", [www.huntingtonnews.net/14446](http://www.huntingtonnews.net/14446))

While nuclear weapons exist, there remains a danger that they will be used. After all, for centuries national conflicts have led to wars, with nations employing their deadliest weapons. The current deterioration of U.S. relations with China might end up providing us with yet another example of this phenomenon. The gathering tension between the United States and China is clear enough. Disturbed by China’s growing economic and military strength, the U.S. government recently challenged China’s claims in the South China Sea, increased the U.S. military presence in Australia, and deepened U.S. military ties with other nations in the Pacific region. According to Secretary of State Hillary Clinton, the United States was “asserting our own position as a Pacific power.” But need this lead to nuclear war? Not necessarily. And yet, there are signs that it could. After all, both the United States and China possess large numbers of nuclear weapons. The U.S. government threatened to attack China with nuclear weapons during the Korean War and, later, during the conflict over the future of China’s offshore islands, Quemoy and Matsu. In the midst of the latter confrontation, President Dwight Eisenhower declared publicly, and chillingly, that U.S. nuclear weapons would “be used just exactly as you would use a bullet or anything else.” Of course, China didn’t have nuclear weapons then. Now that it does, perhaps the behavior of national leaders will be more temperate. But the loose nuclear threats of U.S. and Soviet government officials during the Cold War, when both nations had vast nuclear arsenals, should convince us that, even as the military ante is raised, nuclear saber-rattling persists. Some pundits argue that nuclear weapons prevent wars between nuclear-armed nations; and, admittedly, there haven’t been very many—at least not yet. But the Kargil War of 1999, between nuclear-armed India and nuclear-armed Pakistan, should convince us that such wars can occur. Indeed, in that case, the conflict almost slipped into a nuclear war. Pakistan’s foreign secretary threatened that, if the war escalated, his country felt free to use “any weapon” in its arsenal. During the conflict, Pakistan did move nuclear weapons toward its border, while India, it is claimed, readied its own nuclear missiles for an attack on Pakistan. At the least, though, don’t nuclear weapons deter a nuclear attack? Do they? Obviously, NATO leaders didn’t feel deterred, for, throughout the Cold War, NATO’s strategy was to respond to a Soviet conventional military attack on Western Europe by launching a Western nuclear attack on the nuclear-armed Soviet Union. Furthermore, if U.S. government officials really believed that nuclear deterrence worked, they would not have resorted to championing “Star Wars” and its modern variant, national missile defense. Why are these vastly expensive—and probably unworkable—military defense systems needed if other nuclear powers are deterred from attacking by U.S. nuclear might? Of course, the bottom line for those Americans convinced that nuclear weapons safeguard them from a Chinese nuclear attack might be that the U.S. nuclear arsenal is far greater than its Chinese counterpart. Today, it is estimated that the U.S. government possesses over five thousand nuclear warheads, while the Chinese government has a total inventory of roughly three hundred. Moreover, only about forty of these Chinese nuclear weapons can reach the United States. Surely the United States would “win” any nuclear war with China. But what would that “victory” entail? A nuclear attack by China would immediately slaughter at least 10 million Americans in a great storm of blast and fire, while leaving many more dying horribly of sickness and radiation poisoning. The Chinese death toll in a nuclear war would be far higher. Both nations would be reduced to smoldering, radioactive wastelands. Also, radioactive debris sent aloft by the nuclear explosions would blot out the sun and bring on a “nuclear winter” around the globe—destroying agriculture, creating worldwide famine, and generating chaos and destruction.

High risk of escalation

Ian Easton 1-31, research fellow at the Project 2049 Institute, visiting fellow at the Japan Institute of International Affairs in Tokyo, was a China analyst at the Center for Naval Analyses, China’s Deceptively Weak (and Dangerous) Military, <http://thediplomat.com/2014/01/chinas-deceptively-weak-and-dangerous-military/?allpages=yes>

Yet none of this should be comforting to China’s potential military adversaries. It is precisely China’s military weakness that makes it so dangerous. Take the PLA’s lack of combat experience, for example. A few minor border scraps aside, the PLA hasn’t seen real combat since the Korean War. This appears to be a major factor leading it to act so brazenly in the East and South China Seas. Indeed, **China’s navy** now **appears to be itching for a fight anywhere it can find one**. Experienced combat veterans almost never act this way. Indeed, history shows that military commanders that have gone to war are significantly less hawkish than their inexperienced counterparts. Lacking the somber wisdom that comes from combat experience, **today’s PLA is** all hawk **and no dove**.

The Chinese military is dangerous in another way as well. Recognizing that it will never be able to compete with the U.S. and its allies using traditional methods of war fighting, **the PLA has turned to unconventional “asymmetric”** first-strike weapons and capabilities to make up for its lack of conventional firepower, professionalism and experience. **These weapons** include more than 1,600 **offensive ballistic and cruise** missiles**, whose very nature is** so strategically destabilizing **that the U.S. and Russia decided to outlaw them** with the INF Treaty some **25 years ago**.

In concert with its strategic missile forces, **China has** also **developed** a broad array of **space weapons** designed to destroy satellites used to verify arms control treaties, provide military communications, and warn of enemy attacks. China has also built the world’s largest army of **cyber warriors**, **and** the planet’s second largest fleet of **drones**, to exploit areas where the U.S. and its allies are under-defended. All of **these capabilities make it** more **likely that China could one day be tempted to start a war, and** none **come** with **any built in** escalation control.

Yet while there is ample and growing evidence to suggest **China could, through malice or mistake, start a devastating war in the Pacific**, it is highly improbable that the PLA’s strategy could actually win a war. Take a Taiwan invasion scenario, which is the PLA’s top operational planning priority. While much hand-wringing has been done in recent years about the shifting military balance in the Taiwan Strait, so far no one has been able to explain how any invading PLA force would be able to cross over 100 nautical miles of exceedingly rough water and successfully land on the world’s most inhospitable beaches, let alone capture the capital and pacify the rest of the rugged island.

Prefer new evidence – China thinks they can win

David Axe 2-1, freelance military correspondent, China Thinks It Can Defeat America in Battle, <https://medium.com/war-is-boring/874bffe1b1b9>

That was then. But after two decades of sustained military modernization, **the Chinese military has fundamentally changed its strategy** in just the last year or so. According to Fuell, **recent writings by PLA officers indicate “a growing confidence within the PLA that they can** more-readily **withstand U.S. involvement**.”

The preemptive strike is off the table—and with it, the risk of a full-scale American counterattack. Instead, Beijing believes it can attack Taiwan or another neighbor while also bloodlessly deterring U.S. intervention. It would do so by deploying such overwhelmingly strong military forces—ballistic missiles, aircraft carriers, jet fighters and the like—that Washington dare not get involved.

**The knock-on effects** of deterring America **could be world-changing**. “Backing away from our commitments to protect Taiwan, Japan or the Philippines would be tantamount to **ceding East Asia** to China’s domination,” Roger Cliff, a fellow at the Atlantic Council, said at the same U.S.-China Economic and Security Review Commission hearing on Jan. 30.

Worse, **the** world’s liberal **economic order—and** indeed, the whole notion of **democracy—could suffer irreparable harm**. “The United States has both a moral and a material interest in a world in which democratic nations can survive and thrive,” Cliff asserted.

**States choose to follow LOAC based on a system of incentives – studies prove that solves violence**

**Prorock and Appel ’13** (Alyssa, and Benjamin, Department of Political Science, Michigan State University, “Compliance with International Humanitarian Law: Democratic Third Parties and Civilian Targeting in Interstate War,” Journal of Conflict Resolution 00(0) 1-28)

Coercion is a strategy of statecraft involving the threat or use of positive inducements and negative sanctions to alter a target state’s behavior. It influences the decision making of governments by altering the payoffs of pursuing various policies. Recent studies demonstrate, for example, that third-party states have used the carrot of preferential trade agreements (PTAs) to induce better human rights outcomes in target states (Hafner-Burton 2005, 2009), while the World Bank has withheld aid to states with poor human rights records as a form of coercive punishment (Lebovic and Voeten 2009).

We focus theoretically and empirically on the **expectation of coercion**. As Thompson (2009) argues, coercion has already failed once an actor has to carry through on its coercive threat. Thus, an accurate understanding of coercion’s impact must account for **the expectation rather than the implementation** **of overt penalties** or benefits. It follows that leaders likely incorporate the expected reactions of third parties into their decision making when they weigh the costs/benefits of complying with international law (Goodliffe and Hawkins 2009; Goodliffe et al. 2012). Because governments care about the ‘‘economic, security, and political goods their network partners provide, they anticipate likely reactions of their partners and behave in ways they expect their partners will approve’’ (Goodliffe et al. 2012, 132).8 Anticipated positive third-party reactions for compliance increase the expected payoffs for adhering to legal obligations, while anticipated negative responses to violation decrease the expected payoffs for that course of action. Coercion succeeds, therefore, when states comply with the law because the expected reactions of third parties alter payoffs such that compliance has a higher utility than violating the law. Based on this logic, we focus on the conditions under which states expect third parties to engage in coercive statecraft. We identify when combatant states will anticipate coercion and when that expectation will alter payoffs sufficiently to induce compliance with the law.

While a **growing body of literature** recognizes that international coercion can **induce compliance and contribute to international cooperation** more generally (Goldsmith and Posner 2005; Hafner-Burton 2005; Thompson 2009; Von Stein 2010), many scholars remain skeptical about coercion’s effectiveness as an enforcement mechanism. Skeptics argue that coercion is costly to implement; third parties value the economic, political, and military ties they share with target states and may suffer along with the target from cutting those ties. This may undermine the credibility of coercive threats and a third party’s ability to induce compliance through this enforcement mechanism.

While acknowledging this critique of coercion, we argue that it can act as an **effective enforcement mechanism** under certain conditions. Specifically, successful coercion requires that third parties have (1) the incentive to commit to and implement their coercive threats and (2) sufficient leverage over target states in order to meaningfully alter payoffs for compliance. This suggests that only some third parties can engage in successful coercion and that it is necessary to identify the specific conditions under which third parties can generate credible coercive threats to enforce compliance with international humanitarian law. In the following sections, we argue that third-party states are most likely to effectively use coercion to alter the behavior of combatants when they have both the willingness and opportunity to coerce (e.g., Most and Starr 1989; Siverson and Starr 1990; Starr 1978).

Willingness: Clarity, Democracy, and the Salience of International Humanitarian Law

Enforcement through the coercion mechanism is only likely when at least one third-party state has a substantial enough interest in another party’s compliance that it is willing to act (Von Stein 2010). Third-party willingness, in turn, depends upon two conditions: (1) legal principles must be clearly defined, making violations easily identifiable and (2) third parties must regard the legal obligation as highly salient.

First, scholars have long recognized that there is significant variation in the precision and clarity of legal rules, and that clarity contributes to compliance with the law (e.g., Abbott et al. 2000; Huth, Croco, and Appel 2011; Morrow 2007; Wallace 2013**). Precise rules increase the effectiveness of the law** by **narrowing the range of possible interpretations** and allowing all states to clearly identify acceptable versus unacceptable conduct. By clearly proscribing unacceptable behavior, clear legal obligations allow states to more precisely respond to compliant versus noncompliant behavior. In contrast, **ambiguous legal principle**s often lead to **multiple interpretations** among relevant actors, **impeding a convergence of expectations** and increasing uncertainty about the payoffs for violating (complying with) the law. Thus, the clarity of the law shapes states’ expectations by allowing them to predict the reactions of other states with greater confidence. In particular, they can expect **greater cooperation and rewards following compliance** and more punishment and sanctions for violating the law when legal obligations are clearly defined.

While some bodies of law are imprecise, i**nternational humanitarian law establishes a comprehensive code of conduct** regarding the intentional targeting of noncombatants during war (e.g., Murphy 2006; Shaw 2003). Starting with the 1899 and 1907 Hague Conventions and continuing through the 1949 Geneva Convention (Protocol IV), the law clearly prohibits the intentional targeting of noncombatants in war.

This clarity **allows international humanitarian law to serve as a “bright line”** **that coordinates the expectations of both war combatants and third parties** (Morrow 2007). By creating a **common set of standards,** it reduces uncertainty, narrowing the range of interpretations of the law and allowing both combatants and third parties to readily recognize violations of these standards. Third parties are, as a result, more likely to expend resources to punish conduct that transgresses legal standards or to support behavior in accordance with them. This, in turn, alters the expectations of war combatants who can expect greater support for abiding by the law and greater punishment for violating it when the clarity condition is met.

### solvency

Only restricting self-defense prevents collapse of norms

Beau Barnes, J.D., Boston University School of Law, Spring 2012, REAUTHORIZING THE “WAR ON TERROR”: THE LEGAL AND POLICY IMPLICATIONS OF THE AUMF’S COMING OBSOLESCENCE, https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/b7396120928e9d5e85257a700042abb5/$FILE/By%20Beau%20D.%20Barnes.pdf

Therefore, the more likely result is that the Executive Branch, grappling with the absence of explicit legal authority for a critical policy, would need to make increasingly strained legal arguments to support its actions.121 Thus, the Obama Administration will soon be forced to rationalize ongoing operations under existing legal authorities, which, I argue below, will have significant harmful consequences for the United States. Indeed, the administration faces a Catch-22—its efforts to destroy Al Qaeda as a functioning organization will lead directly to the vitiation of the AUMF. The administration is “starting with a result and finding the legal and policy justifications for it,” which often leads to poor policy formulation.122 Potential legal rationales would perforce rest on exceedingly strained legal arguments based on the AUMF itself, the President’s Commander in Chief powers, or the international law of selfdefense.123 Besides the inherent damage to U.S. credibility attendant to unconvincing legal rationales, each alternative option would prove legally fragile, destabilizing to the international political order, or both.

1. Effect on Domestic Law and Policy

Congress’s failure to reauthorize military force would lead to bad domestic law and even worse national security policy. First, a legal rationale based on the AUMF itself will increasingly be difficult to sustain. Fewer and fewer terrorists will have any plausible connection to the September 11 attacks or Al Qaeda, and arguments for finding those connections are already logically attenuated. The definition of those individuals who may lawfully be targeted and detained could be expanded incrementally from the current definition, defining more and more groups as Al Qaeda’s “co-belligerents” and “associated forces.”124 But this approach, apart from its obvious logical weakness, would likely be rejected by the courts at some point.125 The policy of the United States should not be to continue to rely on the September 18, 2001, AUMF.

Second, basing U.S. counterterrorism efforts on the President’s constitutional authority as Commander in Chief is legally unstable, and therefore unsound national security policy, because a combination of legal difficulties and political considerations make it unlikely that such a rationale could be sustained. This type of strategy would likely run afoul of the courts and risk destabilizing judicial intervention,126 because the Supreme Court has shown a willingness to step in and assert a more proactive role to strike down excessive claims of presidential authority.127 Politically, using an overly robust theory of the Commander in Chief’s powers to justify counterterrorism efforts would, ultimately, be difficult to sustain. President Obama, who ran for office in large part on the promise of repudiating the excesses of the Bush Administration, and indeed any president, would likely face political pressure to reject the claims of executive authority made “politically toxic” by the writings of John Yoo.128 Because of the likely judicial resistance and political difficulties, claiming increased executive authority to prosecute the armed conflict against Al Qaeda would prove a specious and ultimately futile legal strategy. Simply put, forcing the Supreme Court to intervene and overrule the Executive’s national security policy is anathema to good public policy. In such a world, U.S. national security policy would lack stability—confounding cooperation with allies and hindering negotiations with adversaries.

There are, of course, many situations where the president’s position as Commander in Chief provides entirely uncontroversial authority for military actions against terrorists. In 1998, President Clinton ordered cruise missile strikes against Al Qaeda-related targets in Afghanistan and Sudan in response to the embassy bombings in Kenya and Tanzania. In 1986, President Reagan ordered air strikes against Libyan targets after U.S. intelligence linked the bombing of a Berlin discotheque to Libyan operatives.129 Executive authority to launch these operations without congressional approval was not seriously questioned, and no congressional approval was sought.130 To be sure, many of the targeted killing operations carried out today fall squarely within the precedent of past practice supplied by these and other valid exercises of presidential authority. Notwithstanding disagreement about the scope of Congress’s and the president’s “war powers,” few would disagree with the proposition that the president needs no authorization to act in selfdefense on behalf of the country. However, it is equally clear that not all terrorists pose such a threat to the United States, and thus the on terror,”137 further distancing counterterrorism operations from democratic oversight would exacerbate this problem.138 Indeed, congressional oversight of covert operations—which, presumably, operates with full information—is already considered insufficient by many.139 By operating entirely on a covert basis, “the Executive can initiate more conflict than the public might otherwise [be] willing to support.”140

In a world without a valid AUMF, the United States could base its continued worldwide counterterrorism operations on various alternative domestic legal authorities. All of these alternative bases, however, carry with them significant costs—detrimental to U.S. security and democracy. The foreign and national security policy of the United States should rest on “a comprehensive legal regime to support its actions, one that [has] the blessings of Congress and to which a court would defer as the collective judgment of the American political system about a novel set of problems.”141 Only then can the President’s efforts be sustained and legitimate.

2. Effect on the International Law of Self-Defense

A failure to reauthorize military force would lead to significant negative consequences on the international level as well. Denying the Executive Branch the authority to carry out military operations in the armed conflict against Al Qaeda would force the President to find authorization elsewhere, most likely in the international law of selfdefense—the jus ad bellum.142 Finding sufficient legal authority for the United States’s ongoing counterterrorism operations in the international law of self-defense, however, is problematic for several reasons. As a preliminary matter, relying on this rationale usurps Congress’s role in regulating the contours of U.S. foreign and national security policy. If the Executive Branch can assert “self-defense against a continuing threat” to target and detain terrorists worldwide, it will almost always be able to find such a threat.143 Indeed, the Obama Administration’s broad understanding of the concept of “imminence” illustrates the danger of allowing the executive to rely on a self-defense authorization alone.144

This approach also would inevitably lead to dangerous “slippery slopes.” Once the President authorizes a targeted killing of an individual who does not pose an imminent threat in the strict law enforcement sense of “imminence,”145 there are few potential targets that would be off-limits to the Executive Branch. Overly malleable concepts are not the proper bases for the consistent use of military force in a democracy. Although the Obama Administration has disclaimed this manner of broad authority because the AUMF “does not authorize military force against anyone the Executive labels a ‘terrorist,’”146 relying solely on the international law of self defense would likely lead to precisely such a result.

The slippery slope problem, however, is not just limited to the United States’s military actions and the issue of domestic control. The creation of international norms is an iterative process, one to which the United States makes significant contributions. Because of this outsized influence, the United States should not claim international legal rights that it is not prepared to see proliferate around the globe. Scholars have observed that the Obama Administration’s “expansive and open-ended interpretation of the right to self-defence threatens to destroy the prohibition on the use of armed force . . . .”147 Indeed, “[i]f other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos.”148

Encouraging the proliferation of an expansive law of international self-defense would not only be harmful to U.S. national security and global stability, but it would also directly contravene the Obama Administration’s national security policy, sapping U.S. credibility. The Administration’s National Security Strategy emphasizes U.S. “moral leadership,” basing its approach to U.S. security in large part on “pursu[ing] a rules-based international system that can advance our own interests by serving mutual interests.”149 Defense Department General Counsel Jeh Johnson has argued that “[a]gainst an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge.”150 Cognizant of the risk of establishing unwise international legal norms, Johnson argued that the United States “must not make [legal authority] up to suit the moment.”151 The Obama Administration’s global counterterrorism strategy is to “adher[e] to a stricter interpretation of the rule of law as an essential part of the wider strategy” of “turning the page on the past [and rooting] counterterrorism efforts within a more durable, legal foundation.”152

Widely accepted legal arguments also facilitate cooperation from U.S. allies, especially from the United States’ European allies, who have been wary of expansive U.S. legal interpretations.153 Moreover, U.S. strategy vis-à-vis China focuses on binding that nation to international norms as it gains power in East Asia.154 The United States is an international “standard-bearer” that “sets norms that are mimicked by others,”155 and the Obama Administration acknowledges that its drone strikes act in a quasi-precedential fashion.156 Risking the obsolescence of the AUMF would force the United States into an “aggressive interpretation” of international legal authority,157 not just discrediting its own rationale, but facilitating that rationale’s destabilizing adoption by nations around the world.158

Congress is key

Mark David Maxwell, Colonel, Judge Advocate with the U.S. Army, Winter 2012, TARGETED KILLING, THE LAW, AND TERRORISTS, Joint Force Quarterly, http://www.ndu.edu/press/targeted-killing.html

In the wake of the attacks by al Qaeda on September 11, 2001, an analogous phenomenon of feeling safe has occurred in a recent U.S. national security policy: America’s explicit use of targeted killings to eliminate terrorists, under the legal doctrines of selfdefense and the law of war. Legal scholars define targeted killing as the use of lethal force by a state4 or its agents with the intent, premeditation, and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.5 In layman’s terms, targeted killing is used by the United States to eliminate individuals it views as a threat.6 Targeted killings, for better or for worse, have become “a defining doctrine of American strategic policy.”7 Although many U.S. Presidents have reserved the right to use targeted killings in unique circumstances, making this option a formal part of American foreign policy incurs risks that, unless adroitly controlled and defined in concert with Congress, could drive our practices in the use of force in a direction that is not wise for the long-term health of the rule of law.

This article traces the history of targeted killing from a U.S. perspective. It next explains how terrorism has traditionally been handled as a domestic law enforcement action within the United States and why this departure in policy to handle terrorists like al Qaeda under the law of war—that is, declaring war against a terrorist organization—is novel. While this policy is not an ill-conceived course of action given the global nature of al Qaeda, there are practical limitations on how this war against terrorism can be conducted under the orders of the President. Within the authority to target individuals who are terrorists, there are two facets of Presidential power that the United States must grapple with: first, how narrow and tailored the President’s authority should be when ordering a targeted killing under the rubric of self-defense; and second, whether the President must adhere to concepts within the law of war, specifically the targeting of individuals who do not don a uniform. The gatekeeper of these Presidential powers and the prevention of their overreach is Congress. The Constitution demands nothing less, but thus far, Congress’s silence is deafening.

History of Targeted Killing During the Cold War, the United States used covert operations to target certain political leaders with deadly force.8 These covert operations, such as assassination plots against Fidel Castro of Cuba and Ngo Dinh Diem of South Vietnam, came to light in the waning days of the Richard Nixon administration in 1974. In response to the public outrage at this tactic, the Senate created a select committee in 1975, chaired by Senator Frank Church of Idaho, to “Study Government Operations with Respect to Intelligence Activities.”9 This committee, which took the name of its chairman, harshly condemned such targeting, which is referred to in the report as assassination: “We condemn assassination and reject it as an instrument of American policy.”10 In response to the Church Committee’s findings, President Gerald R. Ford issued an Executive order in 1976 prohibiting assassinations: “No employee of the United States Government shall engage in, or conspire to engage in political assassination.”11 The order, which is still in force today as Executive Order 12333, “was issued primarily to preempt pending congressional legislation banning political assassination.”12 President Ford did not want legislation that would impinge upon his unilateral ability as Commander in Chief to decide on the measures that were necessary for national security. 13 In the end, no legislation on assassinations was passed; national security remained under the President’s purview. Congress did mandate, however, that the President submit findings to select Members of Congress before a covert operation commences or in a timely fashion afterward.14 This requirement remains to this day. Targeted killings have again come to center stage with the Barack Obama administration’s extraordinary step of acknowledging the targeting of the radical Muslim cleric Anwar al-Awlaki, a U.S. citizen who lived in Yemen and was a member of an Islamic terrorist organization, al Qaeda in the Arabian Peninsula.15 Al-Awlaki played a significant role in an attack conducted by Umar Farouk Abdulmutallab, the Nigerian Muslim who attempted to blow up a Northwest Airlines flight bound for Detroit on Christmas Day 2009.16 According to U.S. officials, al-Awlaki was no longer merely encouraging terrorist activities against the United States; he was “acting for or on behalf of al-Qaeda in the Arabian Peninsula . . . and providing financial, material or technological support for . . . acts of terrorism.”17 Al-Awlaki’s involvement in these activities, according to the United States, made him a belligerent and therefore a legitimate target. The context of the fierce debates in the 1970s is different from the al-Awlaki debate. The targeted killing of an individual for a political purpose, as investigated by the Church Committee, was the use of lethal force during peacetime, not during an armed conflict. During armed conflict, the use of targeted killing is quite expansive.18 But in peacetime, the use of any lethal force is highly governed and limited by both domestic law and international legal norms. The presumption is that, in peacetime, all use of force by the state, especially lethal force, must be necessary. The Law Enforcement Paradigm Before 9/11, the United States treated terrorists under the law enforcement paradigm—that is, as suspected criminals.19 This meant that a terrorist was protected from lethal force so long as his or her conduct did not require the state to respond to a threat or the indication of one. The law enforcement paradigm assumes that the preference is not to use lethal force but rather to arrest the terrorist and then to investigate and try him before a court of law.20 The presumption during peacetime is that the use of lethal force by a state is not justified unless necessary. Necessity assumes that “only the amount of force required to meet the threat and restore the status quo ante may be employed against [the] source of the threat, thereby limiting the force that may be lawfully applied by the state actor.”21 The taking of life in peacetime is only justified “when lesser means for reducing the threat were ineffective.”22 Under both domestic and international law, the civilian population has the right to be free from arbitrary deprivation of life. Geoff Corn makes this point by highlighting that a law enforcement officer could not use deadly force “against suspected criminals based solely on a determination an individual was a member of a criminal group.”23 Under the law enforcement paradigm, “a country cannot target any individual in its own territory unless there is no other way to avert a great danger.”24 It is the individual’s conduct at the time of the threat that gives the state the right to respond with lethal force. The state’s responding force must be reasonable given the situation known at the time. This reasonableness standard is a “commonsense evaluation of what an objectively reasonable officer might have done in the same circumstances.”25 The U.S. Supreme Court has opined that this reasonableness is subjective: “[t]he calculus of reasonableness must embody allowances for the fact that police officers often are forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation.”26 The law enforcement paradigm attempts to “minimize the use of lethal force to the extent feasible in the circumstances.”27 This approach is the starting point for many commentators when discussing targeted killing: “It may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill.”28 The presumption is that intentional killing by the state is unlawful unless it is necessary for self-defense or defense of others.29 Like the soldier who acts under the authority of self-defense, if one acts reasonably based on the nature of the threat, the action is justified and legal. What the law enforcement paradigm never contemplates is a terrorist who works outside the state and cannot be arrested. These terrorists hide in areas of the world where law enforcement is weak or nonexistent. The terrorists behind 9/11 were lethal and lived in ungovernable areas; these factors compelled the United States to rethink its law enforcement paradigm. The Law of War Paradigm The damage wrought by the 9/11 terrorists gave President George W. Bush the political capital to ask Congress for authorization to go to war with these architects of terror, namely al Qaeda. Seven days later, Congress gave the President the Authorization for the Use of Military Force (AUMF) against those “nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”30 For the first time in modern U.S. history, the country was engaged in an armed conflict with members of an organization, al Qaeda, versus a state. The legal justification to use force, which includes targeted killings, against al Qaeda, the Taliban, and associated forces is twofold: self-defense and the law of war.31 In armed conflict, the rules governing when an individual can be killed are starkly different than in peacetime. The law enforcement paradigm does not apply in armed conflict. Rather, designated terrorists may be targeted and killed because of their status as enemy belligerents. That status is determined solely by the President under the AUMF. Unlike the law enforcement paradigm, the law of war requires neither a certain conduct nor an analysis of the reasonable amount of force to engage belligerents. In armed conflict, it is wholly permissible to inflict “death on enemy personnel irrespective of the actual risk they present.”32 Killing enemy belligerents is legal unless specifically prohibited—for example, enemy personnel out of combat like the wounded, the sick, or the shipwrecked.33 Armed conflict also negates the law enforcement presumption that lethal force against an individual is justified only when necessary. If an individual is an enemy, then “soldiers are not constrained by the law of war from applying the full range of lawful weapons.”34 Now the soldier is told by the state that an enemy is hostile and he may engage that individual without any consideration of the threat currently posed. The enemy is declared hostile; the enemy is now targetable. Anticipatory Self-defense

This paradigm shift is novel for the United States. The President’s authority to order targeted killings is clear under domestic law; it stems from the AUMF. Legal ambiguity of the U.S. authority to order targeted killings emerges, however, when it is required to interpret international legal norms like self-defense and the law of war. The United States has been a historic champion of these international norms, but now they are hampering its desires to target and kill terrorists.

Skeptics of targeted killing admit that “[t]he decision to target specific individuals with lethal force after September 11 was neither unprecedented nor surprising.”35 Mary Ellen O’Connell has conceded, for example, that targeted killing against enemy combatants in Afghanistan is not an issue because “[t]he United States is currently engaged in an armed conflict” there.36 But when the United States targets individuals outside a zone of conflict, as it did with alAwlaki in Yemen,37 it runs into turbulence because a state of war does not exist between the United States and Yemen.38 A formidable fault line that is emerging between the Obama administration’s position and many academics, international organizations,39 and even some foreign governments40 is where these targeted killings can be conducted.41

According to the U.S. critics, if armed conflict between the states is not present at a location, then the law of war is never triggered, and the state reverts to a peacetime paradigm. In other words, the targeted individual cannot be killed merely because of his or her status as an enemy, since there is no armed conflict. Instead, the United States, as in peacetime, must look to the threat the individual possesses at the time of the targeting. There is a profound shift of the burden upon the state: the presumption now is that the targeted killing must be necessary. When, for example, the United States targeted and killed six al Qaeda members in Yemen in 2002, the international reaction was extremely negative: the strike constituted “a clear case of extrajudicial killing.”42

The Obama administration, like its predecessor, disagrees. Its legal justification for targeted killings outside a current zone of armed conflict is anticipatory self-defense. The administration cites the inherent and unilateral right every nation has to engage in anticipatory self-defense. This right is codified in the United Nations charter43 and is also part of the U.S. interpretation of customary international law stemming from the Caroline case in 1837. A British warship entered U.S. territory and destroyed an American steamboat, the Caroline. In response, U.S. Secretary of State Daniel Webster articulated the lasting acid test for anticipatory self-defense: “[N]ecessity of self defense [must be] instant, overwhelming, leaving no choice of means and no moment for deliberation . . . [and] the necessity of self defense, must be limited by that necessity and kept clearly within it.”44

A state can act under the guise of anticipatory self-defense. This truism, however, leaves domestic policymakers to struggle with two critical quandaries: first, the factual predicate required by the state to invoke anticipatory self-defense, on the one hand; and second, the protections the state’s soldiers possess when they act under this authority, on the other. As to the first issue, there is simply no guidance from Congress to the President; the threshold for triggering anticipatory self-defense is ad hoc. As to the second issue, under the law of war, a soldier who kills an enemy has immunity for these precapture or warlike acts.45 This “combatant immunity” attaches only when the law of war has been triggered. Does combatant immunity attach when the stated legal authority is self-defense? There is no clear answer.

The administration is blurring the contours of the right of the state to act in Yemen under self-defense and the law of war protections afforded its soldiers when so acting. Therefore, what protections do U.S. Airmen enjoy when operating the drone that killed an individual in Yemen, Somalia, or Libya?

If they are indicted by a Spanish court for murder, what is the defense? Under the law of war, it is combatant immunity. But if the law of war is not triggered because the killing occurred outside the zone of armed conflict, the policy could expose Airmen to prosecution for murder. In order to alleviate both of these quandaries, Congress must step in with legislative guidance. Congress has the constitutional obligation to fund and oversee military operations.46 The goal of congressional action must not be to thwart the President from protecting the United States from the dangers of a very hostile world. As the debates of the Church Committee demonstrated, however, the President’s unfettered authority in the realm of national security is a cause for concern. Clarification is required because the AUMF gave the President a blank check to use targeted killing under domestic law, but it never set parameters on the President’s authority when international legal norms intersect and potentially conflict with measures stemming from domestic law.

But there’s no uniqueness for their DA’s – TK operational policy is already restricted more than the plan mandates

Robert Chesney 14, law prof at UT, “Postwar”, <http://harvardnsj.org/wp-content/uploads/2014/01/Chesney-Final.pdf>

Would shifting to a postwar framework impact the status quo regarding the use of lethal force more so than it does detention? Surprisingly, no.

That some amount of targeting authority would remain even under the postwar rubric is not in doubt. Jeh Johnson said as much, after all, when he indicated that military options would remain available in the postwar period for “continuing and imminent threats.” 35 But that is not the interesting question. The interesting question is whether postwar targeting authority would be narrower than the scope of authority currently asserted by the government even under the armed-conflict model, such that drone strikes—and other exercises of lethal force—in the postwar world would have to be eliminated or at least curtailed substantially as compared to the status quo.

A. Policy Constraints on Attacks Outside the Hot Battlefield

It is tempting to assume that the answer must be yes, that the postwar model surely would be a narrower affair—a much narrower affair —than the status quo when it comes to lethal force. On close inspection, however, that proves not to be the case. Why? For two seemingly contradictory reasons. First, **the government** for reasons of policy **already embraces an approach** that is more restrictive **than the armed-conflict model** arguably **would require**. Second, **the legal framework the government** most likely **would apply in the absence of** the **armed-conflict** model **is** considerably less restrictive than one might expect. Indeed, it is the same **framework that applies already as a matter of policy**.

There’s also link uq – Obama’s openly called for restrictions on authority

Christopher Preble 13, vice president for Defense and Foreign Policy Studies at the Cato Institute, How to End the War on Terrorism Properly, June 10, <http://www.cato.org/publications/commentary/how-end-war-terrorism-properly?utm_source=Cato+Institute+Emails&utm_campaign=d7856100b8-Cato_Today&utm_medium=email&utm_term=0_395878584c-d7856100b8-141711634&mc_cid=d7856100b8&mc_eid=719812f23e>

In his speech on counterterrorism last month, President Barack Obama said something both profound and overdue — the war underway since 2001 **should** **end, not just factually but also legally**. Outlining his views, the president said he **wanted to** “refine, and ultimately repeal,” the Authorization for Use of Military Force (AUMF), the main legislative vehicle governing U.S. counterterrorism operations around the world. **He also** pledged not to sign **laws designed to expand this mandate further.**

“The most successful counterterrorism operations involve timely intelligence collection and analysis, not open-ended military operations involving large deployments of U.S. troops.”

But to make that goal a concrete reality, the president should have called for legislation repealing the administration’s authority for war — sunsetting the AUMF, which provides the legal authorization for our troops in Afghanistan, once combat operations there conclude at the end of 2014. Future counterterrorism operations can rely on the plentiful authorities the executive branch already has, including some that have been added since 9/11. And if this president — or any other in the future — needs greater war powers to deal with a threat, they can return to Congress and ask for specific, limited authorities tailored to address the future challenge.

Executive “clarification” fails

Laurie Blank, Emory International Humanitarian Law Clinic Director, Professor, 10/10/13, “Raid Watching” and Trying to Discern Law from Policy, today.law.utah.edu/projects/raid-watching-and-trying-to-discern-law-from-policy/

Trying to identify and understand the legal framework the United States believes is applicable to counterterrorism operations abroad sometimes seems quite similar to “Fed watching,” the predictive game of trying to figure out what the Federal Reserve is likely to do based on the hidden meaning behind even the shortest or most cryptic of comments from the Chairman of the Federal Reserve. With whom exactly does the United States consider itself to be in an armed conflict? Al Qaeda, certainly, but what groups fall within that umbrella and what are associated forces? And to where does the United States believe its authority derived from this conflict reaches?

On Saturday, U.S. Special Forces came ashore in Somalia and engaged in a firefight with militants at the home of a senior leader of al Shabaab; it is unknown whether the target of the raid was killed. I must admit, my initial reaction was to wonder whether official information about the raid would give us any hints — who was the target and why was he the target? What were the rules of engagement (ROE) for the raid (in broad strokes, because anything specific is classified, of course)? And can we make any conclusions about whether the United States considers that its armed conflict with al Qaeda extends to Somalia or whether it believes that al Shabaab is a party to that armed conflict or another independent armed conflict?

The reality, however, is that this latest counterterrorism operation highlights once again the conflation of law and policy that exemplifies the entire discourse about the United States conflict with al Qaeda and other U.S. counterterrorism operations as well. And that using policy to discern law is a highly risky venture.

The remarkable series of public speeches by top Obama Administration legal advisors and national security advisors, the Department of Justice White Paper, and the May 2013 White House fact sheet on U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities all appear to offer extensive explanations of the international legal principles governing the use of drone strikes against al-Qaeda operatives in various locations around the globe, as well as related counterterrorism measures. In actuality, they offer an excellent example of the conflation of law and policy and the consequences of that conflation.

Policy and strategic considerations are without a doubt an essential component of understanding contemporary military operations and the application of international law. However, it is equally important to distinguish between law and policy, and to recognize when one is driving analysis versus the other.

The law regarding the use of force against an individual or group outside the borders of the state relies on one of two legal frameworks: the law of armed conflict (LOAC) and the international law of self-defense (jus ad bellum). During armed conflict, LOAC applies and lethal force can be used as a first resort against legitimate targets, a category that includes all members of the enemy forces (the regular military of a state or members of an organized armed group) and civilians who are directly participating in hostilities. Outside of armed conflict, lethal force can be used in self-defense against an individual or group who has engaged in an armed attack – or poses an imminent threat of such an attack, where the use of force is necessary and proportionate to repel or deter the attack or threat.

The United States has consistently blurred these two legal justifications for the use of force, regularly stating that it has the authority to use force either as part of an ongoing armed conflict or under self-defense, without differentiating between the two or delineating when one or the other justification applies. From the perspective of the policymaker, the use of both justifications without further distinction surely offers greater flexibility and potential for action in a range of circumstances. From the perspective of careful legal analysis, however, it can prove problematic.

In effect, it is U.S. policy to eliminate “bad guys” — whether by use of lethal force or detention — who are attacking or posing a threat to the United States or U.S. interests. Some of these “bad guys” are part of a group with whom we are in an armed conflict (such as al Qaeda); some pose an imminent threat irrespective of the armed conflict; some are part of a group that shares an ideology with al Qaeda or is linked in some more comprehensive way. Drone strikes, Special Forces raids, capture — each situation involves its own tactical plans and twists.

But do any of these specific tactical choices tell us anything in particular about whether LOAC applies to a specific operation? Whether the United States believes it applies? Unfortunately, not really. Take Saturday’s raid in Somalia, for example. Some would take the use of lethal force by the United States against a member of al Shabaab in Somalia to suggest that the United States views al Shabaab as part of the conflict with al Qaeda, or that the United States views the geographical arena of the conflict as extending at least into Somalia. Others analyze it through the lens of self-defense, because news reports suggest that U.S. forces sought to capture the militant leader and used deadly force in the process of trying to effectuate that capture.

Ultimately, however, the only certain information is that the United States viewed this senior leader of al Shabaab as a threat – but whether that threat is due to participation in an armed conflict or due to ongoing or imminent attacks on the United States is not possible to discern. Why? Because more than law guides the planning and execution of the mission. Rules of engagement (ROE) are based on law, strategy and policy: the law forms the outer parameters for any action; ROE operate within that framework to set the rules for the use of force in the circumstances of the particular military mission at hand, the operational imperatives and national command policy.

The fact that the operation may have had capture as its goal, if feasible, does not mean that it could only have occurred outside the framework of LOAC. Although LOAC does not include an obligation to capture rather than kill an enemy operative — it is the law enforcement paradigm applicable outside of armed conflict that mandates that the use of force must be a last resort — ROE during an armed conflict may require attempt to capture for any number of reasons, including the desire to interrogate the target of the raid for intelligence information. Likewise, the use of military personnel and the fact that the raid resulted in a lengthy firefight does not automatically mean that armed conflict is the applicable framework — law enforcement in the self-defense context does narrowly prescribe the use of lethal force, but that use of force may nonetheless be robust when necessary.

“Raid-watching” — trying to predict the applicable legal framework from reports of United States strikes and raids on targets abroad — highlights the challenges of the conflation of law and policy and the concomitant risks of trying to sift the law out from the policy conversation. First, determining the applicable legal framework when two alternate, and even opposing, frameworks are presented as the governing paradigm at all times is extraordinarily complicated. This means that assessing the legality of any particular action or operation can be difficult at best and likely infeasible, hampering efforts to ensure compliance with the rule of law. Second, conflating law and policy risks either diluting or unnecessarily constraining the legal regimes. The former undermines the law’s ability to protect persons in the course of military operations; the latter places undue limits on the lawful strategic options for defending U.S. interests and degrading or eliminating enemy threats. Policy can and should be debated and law must be interpreted and applied, but substituting policy for legal analysis ultimately substitutes policy’s flexibility for the law’s normative foundations.

Simualted national security law debates inculcate agency and decision-making skills—that enables activism and avoids cooption

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

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

**Simulating the plan creates unique pedagogical benefits by forcing us to build expertise on the details of national security policy—the simulation iself activates agency and enables change—it also builds problem-solving and decision-making skills**

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

2. Factual Chaos and Uncertainty

One of the most important skills for students going into national security law is the ability to deal with factual chaos. The presentation of factual chaos significantly differs from the traditional model of legal education, in which students are provided a set of facts which they must analyze. Lawyers working in national security law must figure out what information they need, integrate enormous amounts of data from numerous sources, determine which information is reliable and relevant, and proceed with analysis and recommendations. Their recommendations, moreover, must be based on contingent conditions: facts may be classified and unavailable to the legal analyst, or facts may change as new information emerges. This is as true for government lawyers as it is for those outside of governmental structures. They must be aware of what is known, what is unsure, what is unknown, and the possibility of changing circumstances, and they must advise their clients, from the beginning, how the legal analysis might shift if the factual basis alters.

a. Chaos. Concern about information overload in the national security environment is not new: in the 1970s scholars discussed and debated how to handle the sequential phases of intelligence gathering and analysis in a manner that yielded an optimal result.132 But the digital revolution has exponentially transformed the quantitative terms of reference, the technical means of collection and analysis, and the volume of information available. The number of sources of information – not least in the online world – is staggering.

Added to this is the rapid expansion in national security law itself: myriad new Executive Orders, Presidential Directives, institutions, programs, statutes, regulations, lawsuits, and judicial decisions mean that national security law itself is rapidly changing. Lawyers inside and outside of government must keep abreast of constantly evolving authorities.

The international arena too is in flux, as global entities, such as the United Nations, the European Court of Human Rights, the G-7/G-8, and other countries, introduce new instruments whose reach includes U.S. interests. Rapid geopolitical changes relating to critical national security concerns, such as worldwide financial flows, the Middle East, the Arab Spring, South American drug cartels, North Korea, the former Soviet Union, China, and other issues require lawyers to keep up on what is happening globally as a way of understanding domestic concerns. Further expanding the information overload is the changing nature of what constitutes national security itself.133

In sum, the sheer amount of information the national security lawyer needs to assimilate is significant. The basic skills required in the 1970s thus may be similar – such as the ability (a) to know where to look for relevant and reliable information; (b) to obtain the necessary information in the most efficient manner possible; (c) to quickly discern reliable from unreliable information; (d) to know what data is critical; and (e) to ascertain what is as yet unknown or contingent on other conditions. But the volume of information, the diversity of information sources, and the heavy reliance on technology requires lawyers to develop new skills. They must be able to obtain the right information and to ignore chaos to focus on the critical issues. These features point in opposite directions – i.e., a broadening of knowledge and a narrowing of focus.

A law school system built on the gradual and incremental advance of law, bolstered or defeated by judicial decisions and solidified through the adhesive nature of stare decisis appears particularly inapposite for this rapidly-changing environment. An important question that will thus confront students upon leaving the legal academy is how to keep abreast of rapidly changing national security and geopolitical concerns in an information-rich world in a manner that allows for capture of relevant information, while retaining the ability to focus on the immediate task at hand.

Staying ahead of the curve requires developing a sense of timing – when to respond to important legal and factual shifts – and identifying the best means of doing so. Again, this applies to government and non-government employees. How should students prioritize certain information and then act upon it? This, too, is an aspect of information overload.

b. Uncertainty. National security law proves an information-rich, factuallydriven environment. The ability to deal with such chaos may be hampered by gaps in the information available and the difficulty of engaging in complex fact-finding – a skill often under-taught in law school. Investigation of relevant information may need to reach far afield in order to generate careful legal analysis. Uncertainty here plays a key role.

In determining, for instance, the contours of quarantine authority, lawyers may need to understand how the pandemic in question works, where there have been outbreaks, how it will spread, what treatments are available, which social distancing measures may prove most effective, what steps are being taken locally, at a state-level, and internationally, and the like. Lawyers in non-profit organizations, legal academics, in-house attorneys, and others, in turn, working in the field, must learn how to find out the relevant information before commenting on new programs and initiatives, agreeing to contractual terms, or advising clients on the best course of action. For both government and non-government lawyers, the secrecy inherent in the field is of great consequence. The key here is learning to ask intelligent questions to generate the best legal analysis possible.

It may be the case that national security lawyers are not aware of the facts they are missing – facts that would be central to legal analysis. This phenomenon front-loads the type of advice and discussions in which national security lawyers must engage. It means that analysis must be given in a transparent manner, contingent on a set of facts currently known, with indication given up front as to how that analysis might change, should the factual basis shift. This is particularly true of government attorneys, who may be advising policymakers who may or may not have a background in the law and who may have access to more information than the attorney. Signaling the key facts on which the legal decision rests with the caveat that the legal analysis of the situation might change if the facts change, provides for more robust consideration of critically important issues.

c. Creative Problem Solving. Part of dealing with factual uncertainty in a rapidly changing environment is learning how to construct new ways to address emerging issues. Admittedly, much has been made in the academy about the importance of problem-based learning as a method in developing students’ critical thinking skills.134 Problem-solving, however, is not merely a method of teaching. It is itself a goal for the type of activities in which lawyers will be engaged. The means-ends distinction is an important one to make here. Problemsolving in a classroom environment may be merely a conduit for learning a specific area of the law or a limited set of skills. But problem-solving as an end suggests the accumulation of a broader set of tools, such as familiarity with multidisciplinary approaches, creativity and originality, sequencing, collaboration, identification of contributors’ expertise, and how to leverage each skill set.

This goal presents itself in the context of fact-finding, but it draws equally on strong understanding of legal authorities and practices, the Washington context, and policy considerations. Similarly, like the factors highlighted in the first pedagogical goal, adding to the tensions inherent in factual analysis is the abbreviated timeline in which national security attorneys must operate. Time may not be a commodity in surplus. This means that national security legal education must not only develop students’ complex fact-finding skills and their ability to provide contingent analysis, but it must teach them how to swiftly and efficiently engage in these activities.

3. Critical Distance

As was recognized more than a century ago, analytical skills by themselves are insufficient training for individuals moving into the legal profession.135 Critical thinking provides the necessary distance from the law that is required in order to move the legal system forward. Critical thought, influenced by the Ancient Greek tradition, finds itself bound up in the Socratic method of dialogue that continues to define the legal academy. But it goes beyond such constructs as well.

Scholars and educators disagree, of course, on what exactly critical thinking entails.136 For purposes of our present discussion, I understand it as the metaconversation in the law. Whereas legal analysis and substantive knowledge focus on the law as it is and how to work within the existing structures, critical thought provides distance and allows students to engage in purposeful discussion of theoretical constructs that deepen our understanding of both the actual and potential constructs of law. It is inherently reflective.

For the purpose of practicing national security law, critical thought is paramount. This is true partly because of the unique conditions that tend to accompany the introduction of national security provisions: these are often introduced in the midst of an emergency. Their creation of new powers frequently has significant implications for distribution of authority at a federal level, a diminished role for state and local government in the federalism realm, and a direct impact on individual rights.137 Constitutional implications demand careful scrutiny.

Yet at the time of an attack, enormous pressure is on officials and legislators to act and to be seen to act to respond.138 With the impact on rights, in particular, foremost in legislators’ minds, the first recourse often is to make any new powers temporary. However, they rarely turn out to be so, instead becoming embedded in the legislative framework and providing a baseline on which further measures are built.139 In order to withdraw them, legislators must demonstrate either that the provisions are not effective or that no violence will ensue upon their withdrawal (either way, a demanding proof). Alternatively, legislators would have to acknowledge that some level of violence may be tolerated – a step no politician is willing to take.

Any new powers, introduced in the heat of the moment, may become a permanent part of the statutory and regulatory regime. They may not operate the way in which they were intended. They may impact certain groups in a disparate manner. They may have unintended and detrimental consequences. Therefore, it is necessary for national security lawyers to be able to view such provisions, and related policy decisions, from a distance and to be able to think through them outside of the contemporary context.

There are many other reasons such critical analysis matters that reflect in other areas of the law. The ability to recognize problems, articulate underlying assumptions and values, understand how language is being used, assess whether argument is logical, test conclusions, and determine and analyze pertinent information depends on critical thinking skills. Indeed, one could draw argue that **it is the goal of higher education to build the capacity to engage in critical thought**. Deeply humanistic theories underlie this approach. The ability to develop discerning judgment – the very meaning of the Greek term, 􏰀􏰁􏰂􏰃􏰄􏰅􏰆 – provides the basis for advancing the human condition through reason and intellectual engagement.

Critical thought as used in practicing national security law may seem somewhat antithetical to the general legal enterprise in certain particulars. For government lawyers and consultants, there may be times in which not providing legal advice, when asked for it, may be as important as providing it. That is, it may be important not to put certain options on the table, with legal justifications behind them. Questions whether to advise or not to advise are bound up in considerations of policy, professional responsibility, and ethics. They may also relate to questions as to who one’s client is in the world of national security law.140 It may be unclear whether and at what point one’s client is a supervisor, the legal (or political) head of an agency, a cross-agency organization, the White House, the Constitution, or the American public. Depending upon this determination, the national security lawyer may or may not want to provide legal advice to one of the potential clients. Alternatively, such a lawyer may want to call attention to certain analyses to other clients. Determining when and how to act in these circumstances requires critical distance.

4. Nontraditional Written and Oral Communication Skills

Law schools have long focused on written and oral communication skills that are central to the practice of law. Brief writing, scholarly analysis, criminal complaints, contractual agreements, trial advocacy, and appellate arguments constitute standard fare. What is perhaps unique about the way communication skills are used in the national security world is the importance of non-traditional modes of legal communication such as concise (and precise) oral briefings, email exchanges, private and passing conversations, agenda setting, meeting changed circumstances, and communications built on swiftly evolving and uncertain information.

For many of these types of communications speed may be of the essence – and unlike the significant amounts of time that accompany preparation of lengthy legal documents (and the painstaking preparation for oral argument that marks moot court preparations.) Much of the activity that goes on within the Executive Branch occurs within a hierarchical system, wherein those closest to the issues have exceedingly short amounts of time to deliver the key points to those with the authority to exercise government power. Unexpected events, shifting conditions on the ground, and deadlines require immediate input, without the opportunity for lengthy consideration of the different facets of the issue presented. This is a different type of activity from the preparation of an appellate brief, for instance, involving a fuller exposition of the issues involved. It is closer to a blend of Supreme Court oral argument and witness crossexamination – although national security lawyers often may not have the luxury of the months, indeed, years, that cases take to evolve to address the myriad legal questions involved.

Facts on which the legal analysis rests, moreover, as discussed above, may not be known. This has substantive implications for written and oral communications. Tension between the level of legal analysis possible and the national security process itself may lead to a different norm than in other areas of the law. Chief Judge Baker explains,

If lawyers insist on knowing all the facts all the time, before they are willing to render advice, or, if they insist on preparing a written legal opinion in response to every question, then national security process would become dysfunctional. The delay alone would cause the policymaker to avoid, and perhaps evade, legal review.141

Simultaneously, lawyers cannot function without some opportunity to look carefully at the questions presented and to consult authoritative sources. “The art of lawyering in such context,” Baker explains, “lies in spotting the issue, accurately identifying the timeline for decision, and applying a meaningful degree of formal or informal review in response.”142 The lawyer providing advice must resist the pressure of the moment and yet still be responsive to the demand for swift action. The resulting written and oral communications thus may be shaped in different ways. Unwilling to bind clients’ hands, particularly in light of rapidly-changing facts and conditions, the potential for nuance to be lost is considerable.

The political and historical overlay of national security law here matters. In some circumstances, even where written advice is not formally required, it may be in the national security lawyer’s best interests to commit informal advice to paper in the form of an email, notation, or short memo. The process may serve to provide an external check on the pressures that have been internalized, by allowing the lawyer to separate from the material and read it. It may give the lawyer the opportunity to have someone subject it to scrutiny. Baker suggests that “on issues of importance, even where the law is clear, as well as situations where novel positions are taken, lawyers should record their informal advice in a formal manner so that they may be held accountable for what they say, and what they don’t say.”143

Written and oral communication may occur at highly irregular moments – yet it is at these moments (in the elevator, during an email exchange, at a meeting, in the course of a telephone call), that critical legal and constitutional decisions are made. This model departs from the formalized nature of legal writing and research. Yet it is important that students are prepared for these types of written and oral communication as an ends in and of themselves.

5. Leadership, Integrity and Good Judgment

National security law often takes place in a high stakes environment. There is tremendous pressure on attorneys operating in the field – not least because of the coercive nature of the authorities in question. The classified environment also plays a key role: many of the decisions made will never be known publicly, nor will they be examined outside of a small group of individuals – much less in a court of law. In this context, leadership, integrity, and good judgment stand paramount.

The types of powers at issue in national security law are among the most coercive authorities available to the government. Decisions may result in the death of one or many human beings, the abridgment of rights, and the bypassing of protections otherwise incorporated into the law. The amount of pressure under which this situation places attorneys is of a higher magnitude than many other areas of the law. Added to this pressure is the highly political nature of national security law and the necessity of understanding the broader Washington context, within which individual decision-making, power relations, and institutional authorities compete. Policy concerns similarly dominate the landscape. It is not enough for national security attorneys to claim that they simply deal in legal advice. Their analyses carry consequences for those exercising power, for those who are the targets of such power, and for the public at large. The function of leadership in this context may be more about process than substantive authority. It may be a willingness to act on critical thought and to accept the impact of legal analysis. It is closely bound to integrity and professional responsibility and the ability to retain good judgment in extraordinary circumstances.

Equally critical in the national security realm is the classified nature of so much of what is done in national security law. All data, for instance, relating to the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of nuclear material in the production of energy is classified from birth.144 NSI, the bread and butter of the practice of national security law, is similarly classified. U.S. law defines NSI as “information which pertains to the national defense and foreign relations (National Security) of the United States and is classified in accordance with an Executive Order.” Nine primary Executive Orders and two subsidiary orders have been issued in this realm.145

The sheer amount of information incorporated within the classification scheme is here relevant. While original classification authorities have steadily decreased since 1980, and the number of original classification decisions is beginning to fall, the numbers are still high: in fiscal year 2010, for instance, there were nearly 2,300 original classification authorities and almost 225,000 original classification decisions.146

The classification realm, moreover, in which national security lawyers are most active, is expanding. Derivative classification decisions – classification resulting from the incorporation, paraphrasing, restating, or generation of classified information in some new form – is increasing. In FY 2010, there were more than seventy-six million such decisions made.147 This number is triple what it was in FY 2008. Legal decisions and advice tend to be based on information already classified relating to programs, initiatives, facts, intelligence, and previously classified legal opinions.

The key issue here is that with so much of the essential information, decisionmaking, and executive branch jurisprudence necessarily secret, lawyers are limited in their opportunity for outside appraisal and review.

Even within the executive branch, stove-piping occurs. The use of secure compartmentalized information (SCI) further compounds this problem as only a limited number of individuals – much less lawyers – may be read into a program. This diminishes the opportunity to identify and correct errors or to engage in debate and discussion over the law. Once a legal opinion is drafted, the opportunity to expose it to other lawyers may be restricted. The effect may be felt for decades, as successive Administrations reference prior legal decisions within certain agencies. The Office of Legal Counsel, for instance, has an entire body of jurisprudence that has never been made public, which continues to inform the legal analysis provided to the President. Only a handful of people at OLC may be aware of the previous decisions. They are prevented by classification authorities from revealing these decisions. This results in a sort of generational secret jurisprudence. Questions related to professional responsibility thus place the national security lawyer in a difficult position: not only may opportunities to check factual data or to consult with other attorneys be limited, but the impact of legal advice rendered may be felt for years to come.

The problem extends beyond the executive branch. There are limited opportunities, for instance, for external judicial review. Two elements are at work here: first, very few cases involving national security concerns make it into court. Much of what is happening is simply not known. Even when it is known, it may be impossible to demonstrate standing – a persistent problem with regard to challenging, for instance, surveillance programs. Second, courts have historically proved particularly reluctant to intervene in national security matters. Judicially-created devices such as political question doctrine and state secrets underscore the reluctance of the judiciary to second-guess the executive in this realm. The exercise of these doctrines is increasing in the post-9/11 environment. Consider state secrets. While much was made of some five to seven state secrets cases that came to court during the Bush administration, in more than 100 cases the executive branch formally invoked state secrets, which the courts accepted.148 Many times judges did not even bother to look at the evidence in question before blocking it and/or dismissing the suit. In numerous additional cases, the courts treated the claims as though state secrets had been asserted – even where the doctrine had not been formally invoked.149

In light of these pressures – the profound consequences of many national security decisions, the existence of stovepiping even within the executive branch, and limited opportunity for external review – the practice of national security law requires a particularly rigorous and committed adherence to ethical standards and professional responsibility. This is a unique world in which there are enormous pressures, with potentially few external consequences for not acting in accordance with high standards. It thus becomes particularly important, from a pedagogical perspective, to think through the types of situations that national security attorneys may face, and to address the types of questions related to professional responsibility that will confront them in the course of their careers.

Good judgment and leadership similarly stand paramount. These skills, like many of those discussed, may also be relevant to other areas of the law; however, the way in which they become manifest in national security law may be different in important ways. Good judgment, for instance, may mean any number of things, depending upon the attorney’s position within the political hierarchy. Policymaking positions will be considerably different from the provision of legal advice to policymakers. Leadership, too, may mean something different in this field intimately tied to political circumstance. It may mean breaking ranks with the political hierarchy, visibly adopting unpopular public or private positions, or resigning when faced by unethical situations. It may mean creating new bureaucratic structures to more effectively respond to threats. It may mean holding off clients until the attorneys within one’s group have the opportunity to look at issues while still being sensitive to the political needs of the institution. Recourse in such situations may be political, either through public statements and use of the media, or by going to different branches of government for a solution.

6. Creating Opportunities for Learning

In addition to the above skills, national security lawyers must be able to engage in continuous self-learning in order to improve their performance. They must be able to identify new and emerging legal and political authorities and processes, systems for handling factual chaos and uncertainty, mechanisms to ensure critical distance, evaluating written and oral performance, and analyzing leadership skills. Law schools do not traditionally focus on how to teach students to continue their learning beyond the walls of academia. Yet it is vital for their future success to give students the ability to create conditions of learning.

The best scholarship validates our theory of international norms—US lead is key

Robert Farley 11, assistant professor at the Patterson School of Diplomacy and International Commerce at the University of Kentucky, Over the Horizon: U.S. Drone Use Sets Global Precedent, October 12, http://www.worldpoliticsreview.com/articles/10311/over-the-horizon-u-s-drone-use-sets-global-precedent

Is the world about to see a "drone race" among the United States, China and several other major powers? Writing in the New York Times, Scott Shane argued that just such an arms race is already happening and that it is largely a result of the widespread use of drones in a counterterror role by the United States. Shane suggests that an international norm of drone usage is developing around how the United States has decided to employ drones. In the future, we may expect that China, Russia and India will employ advanced drone technologies against similar enemies, perhaps in Xinjiang or Chechnya. Kenneth Anderson agrees that the drone race is on, but disagrees about its cause, arguing that improvements in the various drone component technologies made such an arms race inevitable. Had the United States not pursued advanced drone technology or launched an aggressive drone campaign, some other country would have taken the lead in drone capabilities.

So which is it? Has the United States sparked a drone race, or was a race with the Chinese and Russians inevitable? While there's truth on both sides, on balance Shane is correct. Arms races don't just "happen" because of outside technological developments. Rather, they are embedded in political dynamics associated with public perception, international prestige and bureaucratic conflict. China and Russia pursued the development of drones before the United States showed the world what the Predator could do, but they are pursuing capabilities more vigorously because of the U.S. example. Understanding this is necessary to developing expectations of what lies ahead as well as a strategy for regulating drone warfare.

States run arms races for a variety of reasons. The best-known reason is a sense of fear: The developing capabilities of an opponent leave a state feeling vulnerable. The Germany's build-up of battleships in the years prior to World War I made Britain feel vulnerable, necessitating the expansion of the Royal Navy, and vice versa. Similarly, the threat posed by Soviet missiles during the Cold War required an increase in U.S. nuclear capabilities, and so forth. However, states also "race" in response to public pressure, bureaucratic politics and the desire for prestige. Sometimes, for instance, states feel the need to procure the same type of weapon another state has developed in order to maintain their relative position, even if they do not feel directly threatened by the weapon. Alternatively, bureaucrats and generals might use the existence of foreign weapons to argue for their own pet systems. All of these reasons share common characteristics, however: They are both social and strategic, and they depend on the behavior of other countries.

Improvements in technology do not make the procurement of any given weapon necessary; rather, geostrategic interest creates the need for a system. So while there's a degree of truth to Anderson's argument about the availability of drone technology, he ignores the degree to which dramatic precedent can affect state policy. The technologies that made HMS Dreadnought such a revolutionary warship in 1906 were available before it was built; its dramatic appearance nevertheless transformed the major naval powers' procurement plans. Similarly, the Soviet Union and the United States accelerated nuclear arms procurement following the Cuban Missile Crisis, with the USSR in particular increasing its missile forces by nearly 20 times, partially in response to perceptions of vulnerability. So while a drone "race" may have taken place even without the large-scale Predator and Reaper campaign in Pakistan, Yemen and Somalia, the extent and character of the race now on display has been driven by U.S. behavior. Other states, observing the effectiveness -- or at least the capabilities -- of U.S. drones will work to create their own counterparts with an enthusiasm that they would not have had in absence of the U.S. example.

What is undeniable, however, is that we face a drone race, which inevitably evokes the question of arms control. Because they vary widely in technical characteristics, appearance and even definition, drones are poor candidates for "traditional" arms control of the variety that places strict limits on number of vehicles constructed, fielded and so forth. Rather, to the extent that any regulation of drone warfare is likely, it will come through treaties limiting how drones are used.

Such a treaty would require either deep concern on the part of the major powers that advances in drone capabilities threatened their interests and survival, or widespread revulsion among the global public against the practice of drone warfare. The latter is somewhat more likely than the former, as drone construction at this point seems unlikely to dominate state defense budgets to the same degree as battleships in the 1920s or nuclear weapons in the 1970s. However, for now, drones are used mainly to kill unpleasant people in places distant from media attention. So creating the public outrage necessary to force global elites to limit drone usage may also prove difficult, although the specter of "out of control robots" killing humans with impunity might change that. P.W. Singer, author of "Wired for War," argues that new robot technologies will require a new approach to the legal regulation of war. Robots, both in the sky and on the ground, not to mention in the sea, already have killing capabilities that rival those of humans. Any approach to legally managing drone warfare will likely come as part of a more general effort to regulate the operation of robots in war.

However, even in the unlikely event of global public outrage, any serious effort at regulating the use of drones will require U.S. acquiescence. Landmines are a remarkably unpopular form of weapon, but the United States continues to resist the Anti-Personnel Mine Ban Convention. If the United States sees unrestricted drone warfare as being to its advantage -- and it is likely to do so even if China, Russia and India develop similar drone capabilities -- then even global outrage may not be sufficient to make the U.S. budge on its position. This simply reaffirms the original point: Arms races don't just "happen," but rather are a direct, if unexpected outcome of state policy. Like it or not, the behavior of the United States right now is structuring how the world will think about, build and use drones for the foreseeable future. Given this, U.S. policymakers should perhaps devote a touch more attention to the precedent they're setting.

## 2AC

### plan pik

Prioritization claims are counter-productive and illogical – you should evaluate the veracity of the 1ac’s claims about the world while embracing a plurality of (methods / ontologies / theories)

Andrew Bennett 13, government prof at Georgetown, The mother of all isms: Causal mechanisms and structured pluralism in International Relations theory, European Journal of International Relations 2013 19:459

The political science subfield of International Relations (IR) continues to undergo debates on whether and in what sense it is a 'science,1 how it should organize its inquiry into international politics, and how it should build and justify its theories. On one level, an 'inter-paradigm' debate, while less prominent than during the 1990s, has continued to limp along among researchers who identify their work as fitting within the research agenda of a grand school of thought, or 'ism,' and the scholar most closely associated with it, including neorealism (Waltz, 1979), neoliberalism (Keohane, 1984), constructivism (Wendt, 1992), or occasionally Marxism (Wallerstein, 1974) or feminism (Tickner, 1992). Scholars participating in this debate have often acted as if their preferred 4 ism' and its competitors were either "paradigms" (following Kuhn, 1962) or "research programs' (as defined by Lakatos, 19701. and some have explicitly framed their approach as paradigmatic or programmatic (Hopf, 1998).

A second level of the debate involves post-positivist critiques of IR as a "scientific' enterprise (Lapid, 1989). While the vague label "post-positivist, encompasses a diverse group of scholars, frequent post-positivist themes include arguments that observation is theory-laden (Kuhn, 1962), that knowledge claims are always part of mechanisms of power and that meaning is always social (Foucault, 1978), and that individual agents and social structures are mutually constitutive (Wendt, 1992). Taken together, these arguments indicate that the social sciences face even more daunting challenges than the physical sciences.

A third axis of contestation has been methodological, involving claims regarding the strengths and limits of statistical, formal, experimental, qualitative case study, narrative, and other methods. In the last two decades the argument that there is 'one logic of inference1 and that this logic is 'explicated and formalized clearly in discussions of quantitative research methods' (King et al., 1994: 3) has generated a useful debate that has clarified the similarities, differences, uses, and limits of alternative methods ( Brady and Collier, 2010; George and Bennett, 2005; Goertz and Mahoney, 2006).

These debates have each in their own way proved fruitful, increasing the theoretical, epistemological, and methodological diversity of the field (Jordan el al., 2009). The IR subfield has also achieved considerable progress in the last few decades in its theoretical and empirical understanding of important policy-relevant issues, including the inter-democratic peace, terrorism, peacekeeping, international trade, human rights, international law, international organizations, global environmental politics, economic sanctions, nuclear proliteration, military intervention, civil and ethnic conflicts, and many other topics.

Yet there is a widespread sense that this progress has arisen in spite of interparadigmatic debates rather than because of them. Several prominent scholars, including Rudra Sil and Peter Katzenstein, have argued that although research cast within the framework of paradigmatic debates has contributed useful concepts and findings, framing the IR field around inter-paradigmatic debates is ultimately distracting and even counterproductive (Sil and Katzenstein, 2010; see also David Lake, 2011, and in this special issue, and Patrick Thaddeus Jackson and Daniel Nexon, 2009, and in this special issue). These scholars agree that IR researchers have misapplied Kuhn's notion of paradigms in ways that imply that grand theories of tightly connected ideas — the isms — are the central focus of IR theorizing, and that such isms should compete until one wins general consensus. Sil and Katzenstein argue that the remedy for this is to draw on pragmatist philosophers and build upon an 'eclectic' mix of theories and methods to better understand the world (Sil and Katzenstein, 2010). In this view, no single grand theory can capture the complexities of political life, and the real explanatory weight is carried by more fine-grained theories about 'causal mechanisms."

In this article I argue that those urging a pragmatic turn in IR are correct in their diagnosis of the drawbacks of paradigms and their prescription tor using theories about causal mechanisms as the basis for explanatory progress in IR. Yet scholars are understandably reluctant to jettison the "isms' and the inter-paradigmatic debate not only because they fear losing the theoretical and empirical contributions made in the name of the isms, but because framing the field around the isms has proven a useful shorthand for classroom teaching and field-wide discourse. The 'eclectic' label that Sil and Katzenstein propose can easily be misinterpreted in this regard, as the Merriam-Webster online dictionary defines 'eclectic\* as 'selecting what appears to be best in various doctrines, methods, or styles,' as Sil and Katzenstein clearly intend, but it also includes as synonyms "indiscriminate" and 'ragtag.'1 By using the term 'eclecticism' and eschewing any analytic structure for situating and translating among different examples of IR research, Sil and Katzenstein miss an opportunity to enable a discourse that is structured as well as pluralistic, and that reaches beyond IR to the rest of the social sciences.

I maintain that in order to sustain the genuine contributions made under the guise of the inter-paradigmatic debate and at the same time get beyond it to focus on causal mechanisms rather than grand theoretical isms, four additional moves are necessary. First, given that mechanism-based approaches are generally embedded within a scientific realist philosophy of science, it is essential to clarify the philosophical and definitional issues associated with scientific realism, as well as the benefits — and costs — of making hypothesized causal mechanisms the locus of explanatory theories. As Christian Reus-Smit argues in this special issue, IR theory cannot sidestep metatheoretical debates. Second, it is important to take post-positivist critiques seriously and to articulate standards for theoretical progress, other than paradigmatic revolutions, that are defensible even if they are fallible. Third, achieving a shift toward mechanismic explanations requires outlining the contributions that diverse methods can make to the study of causal mechanisms. Finally, it is vital to demonstrate that a focus on mechanisms can serve two key functional roles that paradigms played for the IR subfield: first, providing a framework for cumulative theoretical progress; and, second, constituting a useful, vivid, and structured vocabulary for communicating findings to fellow scholars, students, political actors, and the public (see also Stefano Guzzini's article in this special issue). I argue that the term 'structured pluralism' best captures this last move, as it conveys the sense that IR scholars can borrow the best ideas from different theoretical traditions and social science disciplines in ways that allow both intelligible discourse and cumulative progress.

Alter briefly outlining the problems associated with organizing the IR field around the "isms/ this article addresses each of these four tasks in turn. First, it takes on the challenges of defining "causal mechanisms' and using them as the basis of theoretical explanations. Second, it acknowledges the relevance and importance of post-positivist critiques of causal explanation, yet it argues that scientific realism and some approaches to interpretivism are compatible, and that there are standards upon which they can agree forjudging explanatory progress. Third, it very briefly clarifies the complementary roles that alternative methods can play in elucidating theories about causal mechanisms. Finally, the article presents a taxonomy of theories about social mechanisms to provide a pluralistic but structured framework for cumulative theorizing about politics. This taxonomy provides a platform for developing typological theories — or what others in this special issue, following Robert Merton, have called middle-range theories — on the ways in which combinations of mechanisms interact to produce outcomes. Here, I join Lake in this special issue in urging that IR theorizing be centered around middle-range theories, and I take issue with Jackson and Nexon's suggestion herein that such theorizing privileges correlational evidence, and their assertion that statistical evidence is inherently associated with Humean notions of causation. I argue that my taxonomy of mechanisms offers a conceptual bridge to the paradigmatic isms in IR. adopting and organizing their theoretical insights while leaving behind their paradigmatic pretensions. The article concludes that, among its other virtues, this taxonomy can help reinvigorate dialogues between IR theory and the fields of comparative and American politics, economics, sociology, psychology, and history, stimulating cross-disciplinary discourses that have been inhibited by the scholasticism of IR's ingrown 'isms.'

Their ABSOLUTIST reading of flux destroys our relationship to ALTERITY

Nevo 92

Professor Isaac Nevo of Ben Gurion University of the Negev.

Difference without the flux: Pragmatic vs. romantic conceptions of alterity

Man and World 25: 149-164, 1992.

@ 1992 Kluwer Academic Publishers. Printed in the Netherlands.

A difficult problem for the possibility of inter-cultural understanding, including the social-scientific understanding of remote cultural systems, is raised by the concept of alterity. The term "alterity" suggests differences in personal or cultural perspective that defy translation, or commensuration, and the difficulty such differences pose is one of interpreting their significance while preserving their quality of "otherness." Discussions of alterity tend to be polarized between theorists of interpretation who dismiss the whole notion as incoherent, and advocates of cultural diversity who, on account of alterity, make pleas for a radical departure from received canons of rationality. Davidson (1984), for example, argues that since concepts are attributable only in relation to holistic interpretations, the attribution of uninterpretable concepts would make little sense. At the other extreme, Derrida's notion of "differance," with its play on the cognates of "to differ" and "to defer," introduces a radical, logic-defying notion of temporality on behalf of alterity and difference. My aim in this paper is to uncover a common assumption underlying this polarity of opinion, namely, that conceptual alterity is best articulated as an absolute feature of languages or cultures, e.g., untranslatability, rather than a secondary feature of such systems, relative to the position taken towards them by an observer or translator. I propose an alternative to this constraining assumption within a theory of interpretation which stays clear of any degree of incommensurability, but which incorporates a modest notion of alterity by varying on the translational positions, or stances, available to a translator. In the first part of this paper, I shall consider Derrida's attempt to secure the possibility of alterity by means of a Nietzschean-Heraclitean conception of linguistic temporality as it affects signs and "writing." Derrida's views on this issue are representative of a romantic tradition in philosophy that prioritizes the perspectival difference of an Other over the unifying demands of any explanatory theory. Den-ida's views are indicated, if somewhat obliquely, in the following passage: My "written communication" must, if you will, remain legible despite the absolute disappearance of every determined addressee in general for it to function as writing, that is, for it to be legible. It must be repeatable - iterable - in the absolute absence of the addressee or of the empirically determinable set of addressees. This iterability (iter, once again, comes from itara, other in Sanskrit, and everything that follows may be read as the exploitation of the logic that links repetition to alterity), structures the mark of writing itself, and does so moreover for no matter what type of writing (pictographic, hieroglyphic, ideographic, phonetic, alphabetic, to use the old categories). (Derrida, 1982) How is the reference to alterity in this passage to be interpreted? As in the "differance" neologism, a link is promised here between repetition and alterity, i.e., between temporal sequencing and differences of a perspectival nature. Moroever, this link is claimed to be one of logic, not merely of contingent association or alliterative quality (as in "differance"). Unfortunately, Derrida's rhetoric leaves us in the dark as to the nature of this link. Etymological evidence is cited, but such evidence does not suffice to settle the issue, nor even to clarify the kind of reasoning that would be needed to support the claim about temporal and perspectival differences being in any way connected. Derrida's suggestions are to be understood against the background of a Nietzschean-Heraclitean tradition of argument concerning logic and its presuppositions. The logic that links repetition to alterity is the Nietzschean-Heraclitean argument that links logic, or the application of it, to objective identities across time. The bare bones of this traditional argument consist in a major premise that asserts that logic, e.g., the principle of non-contradiction, is applicable only if there are, in fact, timeless, self-same, logical forms, i.e., only if the identity across time of tokens of such forms is an objective matter or fact. The minor premise of the argument denies that there are such objective identities - the world is but a river into which one cannot jump the second time. It follows, and the conclusion is embraced, that logic is inapplicable, or unjustifiable. A similar conclusion follows with respect to truth, since there would seem to be no unchanging reality to which a sentence is to correspond. Logic and truth are thus made to appear as the biases of a culture that favors identity, the expressions of a will to control the world by arresting its constant changing. As we shall see below, Derrida makes two contributions to this tradition of reasoning, both of which are indicated in the passage quoted above. In the first place, Derrida's understanding of the flux argument is metalinguistic ("This interability ... structures the mark of writing itself"). Under this interpretation, jumping twice into the same river is a metaphor for reference and predication, taken as temporally extended acts. The import of the metaphor is that sameness of reference between temporally separated signs is impossible. Secondly, Derrida applies the flux argument directly to the question of alterity, going beyond the mere relativization of logic and truth to the perspectives of "identity" to actually affirm cultural "Others." The two points are linked, as the comment on the etymology of "iter" and "other" suggests. Presumably, the othemess projected in relation to the biases of logic is given expression by a language that breaks with identity and its logic, namely, the language of "differance." The meta-linguistic application of the flux argument involves an unexpected logical strength. As a condition that affects language, Heraclitean flux makes logical truths, as well as their denials, unformulable, 'p&-la', to take the crucial example, expresses an impossible state of affairs only on the assumption that some value of the sentential variable 'p' expresses the same proposition in two of its token occurrences. To deny the assumption, as the flux metaphor suggests, is to deny that the principle of non contradiction is formulable, not - absurdly - that it is true. Hence, in its metalinguistic application the conclusion of the flux argument need not be taken to affirm the illogical. If there is an absurdity in the proposed rejection of logic, it is not the absurdity of self contradictions. Rather, it lies in the attempt to reject logic on the strength of a logical argument. It is a practical, not a cognitive, absurdity. For the flux argument clearly has force only if one accepts the logic it involves. Another, more important, weakness of the argument is that its premises are unfounded. In particular, the assumption that logic requires absolute, rather than merely relative, identities is made without further justification. Ironically, the assumption in question is logocentric with a vengeance. It is, in particular, logocentric with respect to logic, for it needlessly ties the application of logic to a notion of timeless forms. That such an assumption is made is clear if we look at the minor premise of the flux argument, namely, that there are no "identities." The only plausible reading of that premise is that identities across time are not absolute identities, i.e., they are not identities in every respect. No two objects, in other words, are identical in every respect, if they are also temporally distanced from one another. Alternatively, the minor premise could be read as the assertion that there are not even relative identities between temporally distanced objects, i.e., that no two such objects can be identified in any respect whatsoever. The latter reading, however, renders the minor premise highly implausible, and it is hard to see what arguments could be made in its favor. Thus to avoid equivocation, the major premise of the flux argument should also be read in terms of absolute, rather than relative, identifies. But then, of course, it is vulnerable to the criticism mentioned above. Indeed, why should the application of logic require temporally distanced objects that are absolutely identical, i.e., identical in every respect? The requirement is, of course, logicaUy unsatisfiable, but it is also unnecessary. The token occurrences of 'p', to revert to our previous example, need only be identical in some respects for the principle of non-contradiction to be formulated. The requirement of absolute identity exemplifies what in a similar context, Putnam (1990) has called "the craving for absolutes." It has, however, little else to recommend it. In the second part of the paper, I move on to discuss the issue of alterity independently of the flux argument. I offer an account of alterity that is in agreement with Clifford Geertz's comment that one "need not accept hermetic views of ecriture as so many signs signing signs ... to see that there has come into our view ... a distinctly democrational temper." (Geertz, 1983). In the account I offer, conceptual alterity is construed as a relative trait of another's language that depends on the translational stance selectively adopted towards it by an interpreter. 1 No absolute notion of incommensurability is thereby accepted. Thus, alternative conceptual schemes are conceptual schemes under alternative translational stances, the choice of which, being under-determined, is subject to practical rather than theoretical considerations. It is thus in the theory of interpretation that alterity can be discussed most fruitfully, for the availability of alternative translational stances can only be shown in that framework.

### law k

**Legal restraints work – the theory of the exception is self-serving and wrong**

William E. **Scheuerman 6**, Professor of Political Science at Indiana University, Carl Schmitt and the Road to Abu Ghraib, Constellations, Volume 13, Issue 1

Yet this argument relies on Schmitt’s controversial model of politics, as outlined eloquently but unconvincingly in his famous Concept of the Political. To be sure, there are intense conflicts in which it is naïve to expect an easy resolution by legal or juridical means. But the argument suffers from a troubling circularity: **Schmitt** occasionally **wants to define “political” conflicts as those irresolvable by legal** or juridical **devices in order** then **to argue against** **legal** or juridical **solutions** to them. **The claim** also **suffers from** a certain **vagueness** and lack of conceptual precision. At times, it seems to be directed against trying to resolve conflicts in the courts or juridical system narrowly understood; at other times it is directed against any legal regulation of intense conflict. The former argument is surely stronger than the latter. After all, **legal devices have undoubtedly played a positive role** **in taming** or at least minimizing the potential dangers of harsh **political antagonisms**. In the Cold War, for example, international law contributed to the peaceful resolution of conflicts which otherwise might have exploded into horrific violence, even if attempts to bring such conflicts before an international court or tribunal probably would have failed.22

Second, Schmitt dwells on the legal inconsistencies that result from modifying the traditional state-centered system of international law by expanding protections to non-state fighters. His view is that irregular combatants logically enjoyed no protections in the state-centered Westphalian model. By broadening protections to include them, international law helps undermine the traditional state system and its accompanying legal framework. Why is this troubling? The most obvious answer is that Schmitt believes that the traditional state system is normatively superior to recent attempts to modify it by, for example, extending international human rights protections to individuals against states. 23 But what if we refuse to endorse his nostalgic preference for the traditional state system? Then a sympathetic reading of the argument would take the form of suggesting that the project of regulating irregular combatants by ordinary law must fail for another reason: it rests on a misguided quest to integrate incongruent models of interstate relations and international law. We cannot, in short, maintain core features of the (state-centered) Westphalian system while extending ambitious new protections to non-state actors.

This is a powerful argument, but it remains flawed. Every modern legal order rests on diverse and even conflicting normative elements and ideals, in part because human existence itself is always “in transition.” When one examines the so-called classical liberal legal systems of nineteenth-century England or the United States, for example, one quickly identifies liberal elements coexisting uneasily alongside paternalistic and authoritarian (e.g., the law of slavery in the United States), monarchist, as well as republican and communitarian moments. The same may be said of the legal moorings of the modern welfare state, which arguably rest on a hodgepodge of socialist, liberal, and Christian and even Catholic (for example, in some European maternity policies) programmatic sources. In short, **it is by no means self-evident that trying to give coherent legal form to a transitional** political and social **moment is always doomed to fail**. Moreover, there may be sound reasons for claiming that the contemporary transitional juncture in the rules of war is by no means as incongruent as Schmitt asserts. In some recent accounts, **the general trend** towards extending basic protections to non-state actors **is** plausibly interpreted in a more **positive** – **and by no means incoherent** – light.24

Third, Schmitt identifies a deep tension between the classical quest for codified and stable law and the empirical reality of a social world subject to permanent change: “The tendency to modify or even dissolve classical [legal] concepts…is general, and in view of the rapid change of the world it is entirely understandable” (12). Schmitt’s postwar writings include many provocative comments about what contemporary legal scholars describe as the dilemma of legal obsolescence. 25 In The Partisan, he suggests that the “great transformations and modifications” in the technological apparatus of modern warfare place strains on the aspiration for cogent legal norms capable of regulating human affairs (17; see also 48–50). Given the ever-changing character of warfare and the fast pace of change in military technology, it inevitably proves difficult to codify a set of cogent and stable rules of war. The Geneva Convention proviso that legal combatants must bear their weapons openly, for example, seems poorly attuned to a world where military might ultimately depends on nuclear silos buried deep beneath the surface of the earth, and not the success of traditional standing armies massed in battle on the open field. “Or what does the requirement mean of an insignia visible from afar in night battle, or in battle with the long-range weapons of modern technology of war?” (17).

As I have tried to show elsewhere, these are powerful considerations deserving of close scrutiny; Schmitt is probably right to argue that the enigma of legal obsolescence takes on special significance in the context of rapid-fire social change.26 Unfortunately, he seems uninterested in the slightest possibility that we might successfully adapt the process of lawmaking to our dynamic social universe. To be sure, he discusses the “motorization of lawmaking” in a fascinating 1950 publication, but only in order to underscore its pathological core.27 Yet **one** possible **resolution** of the dilemma he describes **would be** to figure how **to reform the process** whereby rules of war are adapted to novel changes in military affairs in order **to minimize the danger of** anachronistic or **out-of-date law. Instead, Schmitt** simply **employs the dilemma of legal obsolescence as a battering ram** against the rule of law and the quest to develop a legal apparatus suited to the special problem of irregular combatants.

### causality

Saying some elements of nature are inexplicable doesn’t prove everything is always already perfectly chaotic – there is zero evidence to support their totalizing assertions

Jean **Bricmont 96**, professor of theoretical physics at the University of Louvain, “Science of Chaos or Chaos in Science?”, March 22, <http://arxiv.org/pdf/chao-dyn/9603009.pdf>

On the basis of these theories, a number of speculations are put forward on the notion of “event”, on the place of human beings in Nature, or even on overcoming Cartesian dualism (see [98], chap.9, [99], p.106, and [101]). These writings have been indeed quite influential, mostly among non-experts. They are frequently quoted in philosophical or cultural circles, as an indication that chaos, nonlinear phenomena or the “arrow of time” have led to a profound revolution in our way of thinking. I want to develop quite different views on most of these issues. In my opinion, chaos does not invalidate in the least the classical deterministic world-view; the existence of chaotic dynamical systems actually strengthens that view (Sect. 2). Besides, the relationship between chaos and irreversibility is quite different from what is claimed e.g. in “Les lois du chaos” [98] . Finally, when they are correctly presented, the classical views of Boltzmann perfectly account for macroscopic irreversibility on the basis of deterministic, reversible, microscopic laws (Sect. 3). Part of the difficulty in understanding those views comes from some confusions about the use of the words “objective” and “subjective”, associated with probability or entropy. I will try to be careful with these notions (Sect. 4 and 5). In section 6, I will discuss the applications of probabilistic reasoning to complex phenomena and biology. I shall also argue that most of the speculation on the “new alliance” between the human sciences and the natural ones is misguided and that the people working in sociology or psychology have very little to learn from the alleged “leap from Newtonianism to Prigoginianism” (Sect. 7).

### baudrillard (info)

Info saturation is inevitable and not a reason to disregard all info – our presentation spurs action

Morlot et al 7

Global Warming in the Public Sphere

Author(s): Jan Corfee-Morlot, Mark Maslin, Jacquelin BurgessReviewed work(s):Source: Philosophical Transactions: Mathematical, Physical and Engineering Sciences, Vol. 365,No. 1860, Climate Change and Urban Areas (Nov. 15, 2007), pp. 2741-2776

Geography Department, University College London, Pearson Building, Gower Street, London WC1E 6BT, UK 2School of Environmental Sciences, University of East Anglia, Norwich NR4 7TJ, UK

Jan Corfee-Morlot currently of the Environment Directorate at the OECD; the article was written while she was on academic leave with UCL

Media coverage does not tell people what to think; however, it is able to direct public attention towards specific policy concerns and in this way to influence agenda setting for social concerns and policy issues. Mazur k Lee (1993, p. 682) note that agenda setting is not powerful per se rather it is 'limited to raising an issue to salience'. Most viewers and readers will carry away simple images, thus it is also important to distinguish in media coverage between the 'substantive' content and a 'simple image', which is conveyed from visuals and from lead text in reporting (Mazur k Lee 1993, p. 683). Cognitive psychology tells us that simple images repeated often become 'availability heuristics' of real and potent danger (Tversky k Kahneman 1973; Mazur k Lee 1993). A similar notion is that of 'affect heuristics' where affect refers to a person's feelings about a particular risk; when combined with images, this notion describes how a person may draw on experience and feelings to quickly bring meaning to an image (Leiserowitz 2006a). Further, the 'quantity of coverage theory' says that increased coverage turns public opinion in a negative direction, increasing the fear of environmental hazards or technology, whether or not the reporting of an environmental or technology issue is positive or negative (Mazur k Lee 1993). This implies that even when media coverage of global warming may report on the potential benefits of global warming in certain regions for agricultural crops or people's lifestyles, there is a tendency for lay publics to interpret this negatively. Burgess (1990) and later Carvalho k Burgess (2005) present a 'circuit of culture' model to understand social change with respect to global environ mental issues and the role of media (figure 2). Such a model starts from media production of news stories (in a private sphere with respect to methods, data and opinions), moving on to public dissemination, for example, through broadcasts, internet, newspapers and finally to a consumption stage where different kinds of specialist and non-specialist audiences mediate interpretation of the news stories (Carvalho k Burgess 2005). Media attention and political action have also been shown to be closely interrelated (Mazur k Lee 1993; Carvalho k Burgess 2005).

### green and hicks

Switch side debate in a controlled setting is key to dialogue

Escobar, project officer – Public Policy Network, and PhD candidate in politics –School of Social and Political Science @ University of Edinburgh, ‘9

(Oliver, “The dialogic turn: dialogue for deliberation,” *In-Spire Journal of Law, Politics and Societies*, 4:2, p. 42-70)

Firstly, the notion - postulated by Gadamer, Buber and Habermas - that truth is “emergent” (Stewart et al., 2004:35; Kim & Kim, 2008:57). The Cartesian division between subject and object is disputed by dialogic epistemology, which understands **truth as constructed in communicative interaction**, rather than being given a priori. In this sense, persuasion is monologic because it is based on advocating predefined truth (Heidlebaugh, 2008:37). Two ideas are crucial here. On the one hand, our individual perspectives are “partial, local and limited”. On the other, it is necessary to realise the conversational value of “remaining in the tension between standing one’s own ground and being profoundly open to the other” (Pearce & Pearce, 2004:55), approaching difference and disagreement as **places for further exploration**, rather than obstacles (Pearce & Pearce, 2001:111). Accordingly, dialogue facilitators put immense effort into engaging participants in active listening.

Secondly, dialogue is understood as a “particular quality or type of relating” (Stewart et al., 2004:21). As argued above, communication is not neutral, but constitutive and consequential. It plays a central role in shaping personal identity, as it represents “the process through which cultural values, beliefs, goals, and the like are formulated and lived” (Pearce & Pearce, 2004:42). Dialogue processes are based on transparency, inclusion, participation and the creation of safe spaces for personal expression. In this sense, dialogue is not only focused on the results of communication, but especially on its consequences.

Finally, there is certain consensus about the need for specialised facilitation of dialogue, because this form of public conversation has become a “countercultural process” (Schein, 2003:30; Innes & Booher, 2003:55). Interestingly, policy analysts such as Fischer (2003; 2009) and Maarten (2003) have started to postulate the active role to be played by political scientists as facilitators of deliberative processes or, in other words, to become practical theorists.

Dialogue practices

The table below offers a synthesis13 to illustrate some key contrasts between the discursive practices of adversarial and dialogic communication. Let us make clear that they refer to ideal types. In reality, these two orientations appear mixed along the complex communication spectrum, forming what Barge & Little (2002:379) call ”conversational hybrids”.

The left column represents dynamics that typically appear in public relations‟ campaigns, advocacy coalitions and party politics, media debates, and traditional policy making processes. In contrast, the right column focuses on principles and practices that underpin a dialogic orientation to public dialogue and deliberation, and it illustrates some of the common themes shared by dialogue and deliberative scholarship.

[table omitted]

In practice, the challenge is to facilitate communication dynamics that balance advocacy and inquiry (Ellinor & Gerard, 1998). This conceptual separation serves only as an illustration of different orientations to conversational interaction. It helps us to grasp the underpinning of broader themes before finally understanding that

When communicating dialogically, one can listen, ask direct questions, present one’s ideas, argue, debate, and so forth. The defining characteristic of dialogic communication is that all of these speech acts are done in ways that hold one’s own position but allow others the space to hold theirs, and are profoundly open to hearing others’ positions without needing to oppose or assimilate them. When communicating dialogically, participants often have important agendas and purposes, but make them inseparable from their relationship in the moment with others who have equally strong but perhaps conflicting agendas and purposes (Pearce & Pearce, 2004:45).

### bauman

That makes all the difference

Michael Eber, former Director of Debate at Michigan State University, “Everyone Uses Fiat”, April 8th 200**5**,<http://www.opensubscriber.com/message/edebate@ndtceda.com/1077700.html>

**It is shocking to me how**, after literally a DECADE of debates, **no one seems to understand *what the hell fiat is***.**Policy teams foolishly defend "role playing" even though *they do not role play*.** And critique teams reject fiat even though almost every single K alternative relies on a utopian imaginary that necessitates a greater degree of fiat than the reformist Aff. **Debate is about *opinion formation, not role-playing. Affirmative policy teams do not pretend to BE the federal government. They merely IMAGINE the consequences of the government enacting the plan as a means of determining whether it SHOULD be done***. **All fiat represents is the step of imagining hypothetical enactment of the plan as an intellectual tool for deciding whether WE should endorse it.**"**How should we determine whether or not to ENDORSE lifting sanctions on Cuba?**" "**Well, what would happen if the government did that**?" "**Let's** ***IMAGINE*** **a world where sanctions are lifted**. **What would that world look like? Would it be better than the status quo**?" "Is that world better than competitive alternatives?"***This conversation does NOT posit the discussants AS the federal government. They do not switch identities and act like Condaleeza*** and Rummy. ***They do not give up the agency to decide something for themselves - the whole point is simply to use the imagination of fiat to determine OUR OPINION.***"**I think sanctions should be removed [by the government] because IT IS A GOOD IDEA. It would save lives**." "I think sanctions should not be removed because that policy would help Castro and make things worse" ***It is nonsensical to***simultaneously ***say "Aff = fiat = bad"*** a**nd then defend alternatives that are only coherent/debatable/endorsable BY USING THE IMAGINITIVE TOOL** OF FIAT. "Our alternative is revolution against capitalism" "Why do that? How should we determine whether or not to ENDORSE revolution against capitalism?" "Well, what would happen if we did that?" "Let's IMAGINE a world of revolution against capitalism [or us demanding revolution, or whatever]. Would that be a good thing?" ***It is NEARLY IMPOSSIBLE, and certainly irresponsible, to have a debate about whether to reject capitalism without imagining what would happen if we did***. It is also incoherent to say something like "we will defend the consequences of our plan, but not fiat." ***The imagination of "what would happen if" IS FIAT.***If you want to make framework debates better, then never again utter the stupid phrases "pre-fiat" and "post-fiat."

### mcloughlin

**We link turn mcloughlin – the best way to overcome sovereign violence is to get into the nitty gritty of legalistic debate and train ourselves to take action**

Orna **Ben-Naftali**, Head of the International Law Division and of the Law and Culture Division, The Law School, The College of Management Academic Studies, Spring 200**3**, ARTICLE: '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

Our analysis concludes that while a specific act of preemptive killing may be legal if it meets the above-specified requirements, the policy of state targeted preemptive killings is not. Furthermore, some specific acts of targeted killings may generate state responsibility, while others may constitute a war crime entailing criminal accountability. These conclusions, emanating from the reading of the three legal texts applicable to the context, and informed by a sensibility that coheres them, do not rest on a negation of the importance of the national interest in security. On the contrary, these conclusions incorporate and express the way it should be balanced with a minimum standard of humanity and against the relevant context.

This delicate, ever precarious balance is at the heart of the democratic discourse. A democratic state is not a meek state. True, it is fighting with "one hand tied behind its back,"n342 as soberly observed by Chief Justice Barak of the Israeli Supreme Court, but democratic sensibilities internalize this limitation on State power, not as a source of weakness but as a sign of strength. Democracies require a public discourse forever alert to the importance of human rights, suspicious of the way power is used, and committed to the rule of law. The legal culture, in turn, while not a substitute for this public discourse, is never absent from it and indeed serves as a catalyst for its development.

We therefore reject the notion that the policy of targeted killings, designed by Israel as a way to combat terrorist attacks, is beyond the purview of the rule of law.n343 We also deny the purist position suggesting that the legalistic nitty-gritty preoccupation with details entailed in the above discussion is likely to obscure and legitimize a harrowing policy; n344 one that, on principle, should be condemned. n345 This position in fact maintains that the legality or illegality of targeted state killings is not a legitimate issue of discussion; that while an emergency situation may exceptionally necessitate the deed, it should never be elevated to the sphere of the Word. n346 We appreciate the sensibility of this position, but, alas, do not find it sensible. Indeed, nor would the people who consider themselves victims of the policy of targeted killings, and appeal to the courts to intervene. n347 Purity belongs to the Platonic world of ideas; it is a necessary ideal to strive for, even if forever unachievable in this all too fallible City of Man. n348 In the best of all possible worlds law would be superfluous; in this world, it is a necessary, albeit insufficient means to achieve some possible betterment. This article hopes to contribute to this modest goal.

**Legal norms don’t cause wars and the alt can’t effect liberalism**

David **Luban 10**, law prof at Georgetown, Beyond Traditional Concepts of Lawfare: Carl Schmitt and the Critique of Lawfare, 43 Case W. Res. J. Int'l L. 457

Among these associations is the positive, constructive side of politics, the very foundation of Aristotle's conception of politics, which Schmitt completely ignores. Politics, we often say, is the art of the possible. It is the medium for organizing all human cooperation. Peaceable civilization, civil institutions, and elemental tasks such as collecting the garbage and delivering food to hungry mouths all depend on politics. Of course, peering into the sausage factory of even such mundane municipal institutions as the town mayor's office will reveal plenty of nasty politicking, jockeying for position and patronage, and downright corruption. Schmitt sneers at these as "banal forms of politics, . . . all sorts of tactics and practices, competitions and intrigues" and dismisses them contemptuously as "parasite- and caricature-like formations." n55 The fact is that **Schmitt has nothing** whatever **to say about the constructive side of politics**, and his entire theory focuses on enemies, not friends. In my small community, political meetings debate issues as trivial as whether to close a street and divert the traffic to another street. It is hard to see mortal combat as even a remote possibility in such disputes, and so, in Schmitt's view, they would not count as politics, but merely administration. Yet issues like these are the stuff of peaceable human politics.

Schmitt, I have said, uses the word "political" polemically--in his sense, politically. I have suggested that his very choice of the word "political" to describe mortal enmity is tendentious, attaching to mortal enmity Aristotelian and republican associations quite foreign to it. But the more basic point is that Schmitt's critique of humanitarianism as political and polemical is itself political and polemical. In a word, the critique of lawfare is itself lawfare. It is self-undermining because to the extent that it succeeds in showing that lawfare is illegitimate, it de-legitimizes itself.

What about the merits of Schmitt's critique of humanitarianism? His argument is straightforward: either humanitarianism is toothless and [\*471] apolitical, in which case ruthless political actors will destroy the humanitarians; or else humanitarianism is a fighting faith, in which case it has succumbed to the political but made matters worse, because wars on behalf of humanity are the most inhuman wars of all. Liberal humanitarianism is either too weak or too savage.

The argument has obvious merit. When Schmitt wrote in 1932 that wars against "outlaws of humanity" would be the most horrible of all, it is hard not to salute him as a prophet of Hiroshima. The same is true when Schmitt writes about the League of Nations' resolution to use "economic sanctions and severance of the food supply," n56 which he calls "imperialism based on pure economic power." n57 Schmitt is no warmonger--he calls the killing of human beings for any reason other than warding off an existential threat "sinister and crazy" n58 --nor is he indifferent to human suffering.

But **international** humanitarian law **and criminal law are not the same thing as wars to end all war or humanitarian military interventions, so Schmitt's** important moral **warning** against ultimate military self-righteousness **does not** really **apply**. n59 Nor does "bracketing" war by humanitarian constraints on war-fighting presuppose a vanished order of European public law. The fact is that in nine years of conventional war, the United States has significantly bracketed war-fighting, even against enemies who do not recognize duties of reciprocity. n60 This may frustrate current lawfare critics who complain that American soldiers in Afghanistan are being forced to put down their guns. Bracketing warfare is a decision--Schmitt might call it an existential decision--that rests in part on values that transcend the friend-enemy distinction. **Liberal values are not alien extrusions into politics** or evasions of politics; **they are part of politics, and**, as Stephen Holmes argued against Schmitt, **liberalism has proven remarkably strong, not weak**. n61 We could choose to abandon liberal humanitarianism, and that would be a political decision. It would simply be a bad one.

### academy

There’s no alt

Jamie Peck 10, geography prof at the University of British Columbia, Postneoliberalism and its Malcontents, Antipode, Volume 41, Issue Supplement s1, pages 94–116

While Latin American experiences can and should spur the postneoliberal imagination, the region's lessons are also sobering ones. Here, audacious forms of neoliberalized accumulation by dispossession inadvertently prepared the ground for widespread social mobilization and radical resistance politics. And in the decade or so that followed, electoral realignments in Venezuela, Brazil, Argentina, Bolivia, Chile and elsewhere consolidated progressive gains, as a period of hegemonic dispute gave way to region-wide hegemonic instability (Sader 2009). **Moving purposefully in the direction of postneoliberal forms of governance has**, however, **been a challenge, even for the region's largest economies**. Global financial flows, trading regimes, and investment policies continue to be guided by logics of short-term, price competition—in the context of global overaccumulation—while progressive forms of multilateral coordination can only be negotiated in the long shadows of imperial and neoimperial power (Drake 2006). As Sader (2009:176) notes:

the deregulation fostered by neoliberal policies favoured the hegemony of financial capital in its speculative mode. In order to instate a different model, it would be necessary to introduce new forms of economic regulation, **which would be very difficult, even in the current crisis**, once deregulation has a foothold. **It could not come from a single country**, no matter what its importance, **because others would benefit from the flow of capital rejected in this country**. At the same time, **it would be hard to come to a large-scale international agreement, due to the different interests of the biggest powers and international corporations**.

**Whereas neoliberalism may have exposed the limits of financial capitalism, it has also undermined the strategic and organizational resources required for its transcendence**. In Sader's (2009) eyes, the root of the problem for progressive forces is what he characterizes as a “gulf” between the evident failures of neoliberalized capitalism and the potential of postneoliberal movements, forces, and interests. The short- and medium-term prospects for such forms of alternative politics will surely be structured (and to some extent constrained) by the neoliberalized terrains on which they must be prosecuted. **This is not simply a matter of contending with** (residual) **neoliberal power centers**, in economics ministries, in international financial institutions, in think tanks, in the media, and in much of the corporate sector. Perhaps more intractably, **it must also entail overcoming the profound reconstitution of** cross-national, interlocal, and cross-scalar **relations through** various forms of **market rule**, which facilitate the reproduction of neoliberalized logics of action, institutional routines, and political projects—both through the dull compulsion of competitive pressures and through the harsh imperatives of regulatory downloading.

**Capitalism solves war**

**Gartzke 7** (Eric, associate professor of political science and a member of the Saltzman Institute of War and Peace Studies at Columbia University, “The Capitalist Peace”, American Journal of Political Science, Vol. 51, No. 1, January 2007, Pp. 166–191)

If war is a product of incompatible interests and failed or abortive bargaining, peace ensues when states lack differences worthy of costly conflict, or when circumstances favor successful diplomacy. Realists and others argue that state interests are inherently incompatible, but this need be so only if state interests are narrowly defined or when conquest promises tangible benefits. Peace can result from at least three attributes of mature capitalist economies. First, the historic impetus to territorial expansion is tempered by the rising importance of intellectual and financial capital, factors that are more expediently enticed than conquered. Land does little to increase the worth of the advanced economies while resource competition is more cheaply pursued through markets than by means of military occupation. At the same time, development actually increases the ability of states to project power when incompatible policy objectives exist. Development affects who states fight (and what they fight over) more than the overall frequency of warfare. Second, substantial overlap in the foreign policy goals of developed nations in the post–World War II period further limits the scope and scale of conflict. Lacking territorial tensions, consensus about how to order the international system has allowed liberal states to cooperate and to accommodate minor differences. Whether this affinity among liberal states will persist in the next century is a question open to debate. Finally, the rise of global capital markets creates a new mechanism for competition and communication for states that might otherwise be forced to fight. Separately, these processes influence patterns of warfare in the modern world. Together, they explain the absence of war among states in the developed world and account for the dyadic observation of the democratic peace.

**Specificity matters – rejecting neoliberalism as a monolithic entity undermines the alt**

**Duffy and Moore 10**

Article: Neoliberalizing nature? Elephants as imperfect commodities Author: Duffy, R Journal: Antipode ISSN: 0066-4812 Date: 2010 Volume: 42 Issue: 3 Page: 742

Note: from 1 September 2012 I take up the post of Professor of Conservation Politics at the Durrell Institute of Conservation Ecology (DICE) in the School of Anthropology and Conservation, University of Kent.

I am Professor of International Politics, and I held posts at Edinburgh University and Lancaster University before joining Manchester in 2005. I take a deliberately interdisciplinary approach to understanding conservation; my work is located at the intersection between international relations, geography and sociology. My work examines the debates on global environmental governance, especially the roles of international NGOs, international treaties, international financial institutions and epistemic communities. I am particularly interested in how global environmental management regimes play out on the ground, how they are contested, challenged and resisted by their encounter at the local level. I focus on wildlife conservation, tourism and illicit trading networks to understand the local level complexities of global environmental management. I have undertaken a number of ESRC funded research projects on Peace Parks, gemstone mining and national parks,and on ecotourism (more details are under 'research interests'. My most recent book, Nature Crime: How We're Getting Conservation Wrong (Yale University Press, 2010) examines how global dynamics of wealth and poverty shape conservation outcomes. More information is on my personal wesbite 'Conservation Politics' <http://conservationpolitics.wordpress.com/>

However, it is critically important not to **reify neoliberalism** and ascribe it **a greater level of** coherence and **dominance** than it really deserves (Bakker 2005; Castree 2008a; Brenner and Theodore 2002; Mansfield 2004; McCarthy and Prudham 2004). Instead it is important to interrogate how neoliberalism plays out “on the ground”, to probe its complexities, unevenness and messiness (see Peck and Tickell 2002). In this paper we concentrate on comparing the practices of neoliberalism in order to draw out these messy entanglements; this demonstrates how neoliberalism can be challenged, resisted and changed by its encounter with nature (Bakker 2009; Castree 2008b:161). Therefore, we do not rehearse the well worn debates on definitions of neoliberalism, but rather take up the challenge of comparative research on “actually existing neoliberalisms”, which involves engaging with contextual embeddedness in order to **complicate** neat theoretical debates. As Brenner and Theodore (2002:356–358) suggest, to understand actually existing neoliberalism we must explore the path-dependent, contextually specific interactions between inherited regulatory landscapes and emergent forms of neoliberalism. As such, the neat lines and models generated via theoretical debates can be traced, refined, critiqued and challenged through engagement with specific case studies (Bakker 2009; Castree 2008b).

### galli

No risk of endless warfare

Gray 7—Director of the Centre for Strategic Studies and Professor of International Relations and Strategic Studies at the University of Reading, graduate of the Universities of Manchester and Oxford, Founder and Senior Associate to the National Institute for Public Policy, formerly with the International Institute for Strategic Studies and the Hudson Institute (Colin, July, “The Implications of Preemptive and Preventive War Doctrines: A Reconsideration”, <http://www.ciaonet.org/wps/ssi10561/ssi10561.pdf>)

7. A policy that favors preventive warfare expresses a futile quest for absolute security. It could do so. Most controversial policies contain within them the possibility of misuse. In the hands of a paranoid or boundlessly ambitious political leader, prevention could be a policy for endless warfare. However, the American political system, with its checks and balances, was designed explicitly for the purpose of constraining the executive from excessive folly. Both the Vietnam and the contemporary Iraqi experiences reveal clearly that although the conduct of war is an executive prerogative, in practice that authority is disciplined by public attitudes. Clausewitz made this point superbly with his designation of the passion, the sentiments, of the people as a vital component of his trinitarian theory of war. 51 It is true to claim that power can be, and indeed is often, abused, both personally and nationally. It is possible that a state could acquire a taste for the apparent swift decisiveness of preventive warfare and overuse the option. One might argue that the easy success achieved against Taliban Afghanistan in 2001, provided fuel for the urge to seek a similarly rapid success against Saddam Hussein’s Iraq. In other words, the delights of military success can be habit forming. On balance, claim seven is not persuasive, though it certainly contains a germ of truth. A country with unmatched wealth and power, unused to physical insecurity at home—notwithstanding 42 years of nuclear danger, and a high level of gun crime—is vulnerable to demands for policies that supposedly can restore security. But we ought not to endorse the argument that the United States should eschew the preventive war option because it could lead to a futile, endless search for absolute security. One might as well argue that the United States should adopt a defense policy and develop capabilities shaped strictly for homeland security approached in a narrowly geographical sense. Since a president might misuse a military instrument that had a global reach, why not deny the White House even the possibility of such misuse? In other words, constrain policy ends by limiting policy’s military means. This argument has circulated for many decades and, it must be admitted, it does have a certain elementary logic. It is the opinion of this enquiry, however, that the claim that a policy which includes the preventive option might lead to a search for total security is **not at all convincing**. Of course, folly in high places is always possible, which is one of the many reasons why popular democracy is the superior form of government. It would be absurd to permit the fear of a futile and dangerous quest for absolute security to preclude prevention as a policy option. Despite its absurdity, this rhetorical charge against prevention is a stock favorite among prevention’s critics. It should be recognized and dismissed for what it is, a debating point with little pragmatic merit. And strategy, though not always policy, **must be nothing if not pragmatic**.

### spanos

Their impacts demand informed debate about federal policy

Martha Minow, Harvard Law School Faculty Dean, and Jeremiah Smith, Harvard Law School Professor, 2010, Dialogue, Discourse, and Debate, harvardnsj.org/2010/01/minow/

September 11, 2001, stands as a critical pivot point in our nation’s history, one that put the threat of terrorism in the national spotlight and demanded immediate expertise in national security. Yet, as new as the issue may have seemed to many observers, this demand for legal, political, and technical attention to national security reflected a longer-term set of profound changes. The fall of Communism and the end of the Cold War ushered in a new era of geopolitics, ending a past marked largely by alliances between — and rivalries across — nations and beginning an era of global risks from actors not easily defined by, or constrained within, state borders. The collapse of the Soviet Union left nuclear weapons and materials in unstable countries and unprotected facilities, providing attractive targets for rogue states and terrorist groups. This precarious situation has been exacerbated by the growing ambitions of Iran and North Korea. A revolution in digital and information technologies has produced innovations that not only afford new intelligence capabilities for government authorities but also create new forums for terrorist communication, recruitment, and training. Mass migrations of people due to economic hardship, ethnic and religious conflicts, and climate change increase the likelihood of disputes over basic resources, further adding to the risk of violence. Alongside these emerging threats, many traditional security concerns remain salient, including human rights violations in China, tensions between India and Pakistan, and the menace of international piracy. Devising responses to threats from each of these sources produces its own set of complications and complexities for any nation and for the international community. The U.S.-led invasions of Iraq and Afghanistan called into question settled precepts of warfare, including the use of preemptive force, the relevance of the Geneva Conventions, the distinction between enemy combatants and civilians, the role of private military contractors, and the function of the United Nations Security Council. The global war on terror challenges domestic law, practices, and politics inside the United States, especially regarding port and border security; coordination among federal agencies; individual privacy and government secrecy; and collaboration between federal, state and local governments. Assessing and responding to national security threats requires new bridges across the public and private divide, for effective security strategies must bring together government actors, private companies, and nongovernmental organizations in direct or indirect partnerships. New **legal questions accompany each of these challenges**; such questions cast doubt on once-settled legal doctrines and thus present an opportunity for the forging of new areas of law, which in turn raises an array of legal and policy concerns. Lawyers and legal scholars are discovering that in this new age, national security issues cannot be broken down and analyzed as isolated topics. **National security concerns implicate domestic and international dimensions, legal and policy issues, and technological and philosophical problems, and**, indeed, **call for attention to all of these elements as a whole**. In this context, the Harvard National Security Journal is both welcome and important. Defining the very scope of national security law deserves the kind of attention it will receive from the contributors to this journal as they address the dangers of terrorism, insurgency, and cyber-threats and the diverse domains of law, politics, and private action that can be mobilized in response. Until recently, few academic journals on the theme of national security existed in the United States. Most scholarly articles in this field have been scattered across general law reviews or journals devoted to law and policy, international relations, or human rights. By drawing together the various disciplines related to national security, this journal is dedicated to providing a unified and non-partisan forum for national security developments, fostering productive exchanges among scholars and practitioners, and influencing public policy.

**Debating the law teaches us how to make it better – rejection is worse**

Todd **Hedrick**, Assistant Professor of Philosophy at Michigan State University, Sept 20**12**, Democratic Constitutionalism as Mediation: The Decline and Recovery of an Idea in Critical Social Theory, Constellations Volume 19, Issue 3, pages 382–400

Habermas’ alleged abandonment of immanent critique, however, is belied by the role that the democratic legal system comes to play in his theory. While in some sense just one system among others, it has a special capacity to shape the environments of other systems by regulating their interaction. Of course, the legal system is not the only one capable of affecting the environments of other systems, but law is uniquely open to inputs from ordinary language and thus potentially more pliant and responsive to democratic will formation: “Normatively substantive messages can circulate throughout society only in the language of law … . Law thus functions as the ‘transformer’ that guarantees that the socially integrating network of communication stretched across society as a whole holds together.”55 This allows for the possibility of consensual social regulation of domains ranging from the economy to the family, where actors are presumed to be motivated by their private interests instead of respect for the law, while allowing persons directed toward such interests to be cognizant that their privately oriented behavior is compatible with respect for generally valid laws. While we should be cautious about automatically viewing the constitution as the fulcrum of the legal order, its status as basic law is significant in this respect. For, recalling Hegel's broader conception of constitutionalism, political constitutions not only define the structure of government and “the relationship between citizens and the state” (as in Hegel's narrower “political” constitution); they also “implicitly prefigure a comprehensive legal order,” that is, “the totality comprised of an administrative state, capitalist economy, and civil society.”56 So, while these social spheres can be conceived of as autonomous functional subsystems, their boundaries are legally defined in a way that affects the manner and degree of their interaction: “The political constitution is geared to shaping each of these systems by means of the medium of law and to harmonizing them so that they can fulfill their functions as measured by a presumed ‘common good’.”57 Thus, constitutional discourses should be seen less as interpretations of a positive legal text, and more as attempts to articulate legal norms that could shift the balance between these spheres in a manner more reflective of generalizable interests, occurring amidst class stratification and cultural pluralism.

A constitution's status as positive law is also of importance for fundamentally Hegelian reasons relating to his narrower sense of political constitutionalism: its norms must be public and concrete, such that differently positioned citizens have at least an initial sense of what the shared hermeneutic starting points for constitutional discourse might be. But these concrete formulations must also be understood to embody principles in the interest of all citizens, so that constitutional discourse can be the site of effective democratic will formation concerning the basic norms that mediate between particular individuals and the general interests of free and equal citizens. This recalls Hegel's point that constitutions fulfill their mediational function by being sufficiently positive so as to be publicly recognizable, yet are not exhausted by this positivity – the content of the constitution is instead filled in over time through ongoing legislation. In order to avoid Hegel's foreshortened conception of public participation in this process and his consequent authoritarian tendencies, Habermas and, later, Benhabib highlight the importance of being able to conceive of basic constitutional norms as themselves being the products of public contestation and discourse. In order to articulate this idea, they draw on legal theorists like Robert Cover and Frank Michelman who characterize this process of legal rearticulation as “jurisgenesis”58: a community's production of legal meaning by way of continuous rearticulation, through reflection and contestation, of its constitutional project.

Habermas explicitly conceives of the democratic legal order in this way when, in the context of considering the question of how a constitution that confers legitimacy on ordinary legislation could itself be thought to be democratically legitimate, he writes:

I propose that we understand the regress itself as the understandable expression of the future-oriented character, or openness, of the democratic constitution: in my view, a constitution that is democratic – not just in its content but also according to its source of legitimation – is a tradition-building project with a clearly marked beginning in time. All the later generations have the task of actualizing the still-untapped normative substance of the system of rights.59

A constitutional order and its interpretive history represent a community's attempt to render the terms under which they can give themselves the law that shapes their society's basic structure and secure the law's integrity through assigning basic liberties. Although philosophical reflection can give us some grasp of the presuppositions of a practice of legitimate lawmaking, this framework of presuppositions (“the system of rights”) is “unsaturated.”60 In Hegelian fashion, it must, to be meaningful, be concretized through discourse, and not in an one-off way during a founding moment that fixes the terms of political association once and for all, but continuously, as new persons enter the community and as new circumstances, problems, and perspectives emerge.

The stakes involved in sustaining a broad and inclusive constitutional discourse turn out to be significant. Habermas has recently invoked the concept of dignity in this regard, linking it to the process through which society politically constitutes itself as a reciprocal order of free and equal citizens. As a status rather than an inherent property, “dignity that accrues to all persons equally preserves the connotation of a self-respect that depends on social recognition.”61 Rather than being understood as a quality possessed by some persons by virtue of their proximity to something like the divine, the modern universalistic conception of dignity is a social status dependent upon ongoing practices of mutual recognition. Such practices, Habermas posits, are most fully instantiated in the role of citizens as legislators of the order to which they are subject.

[Dignity] can be established only within the framework of a constitutional state, something that never emerges of its own accord. Rather, this framework must be created by the citizens themselves using the means of positive law and must be protected and developed under historically changing conditions. As a modern legal concept, human dignity is associated with the status that citizens assume in the self-created political order.62

Although the implications of invoking dignity (as opposed to, say, autonomy) as the normative core of democratic constitutionalism are unclear,63 plainly Habermas remains committed to strongly intersubjective conceptions of democratic constitutionalism, to an intersubjectivity that continues to be legally and politically mediated (a dimension largely absent from Honneth's successor theory of intersubectivity).

What all of this suggests is a constitutional politics in which citizens are empowered to take part and meaningfully impact the terms of their cultural, economic, and political relations to each other. Such politics would need to be considerably less legalistic and precedent bound, less focused on the democracy-constraining aspects of constitutionalism emphasized in most liberal rule of law models. The sense of incompleteness and revisability that marks this critical theory approach to constitutionalism represents a point where critical theories of democracy may claim to be more radical and revisionary than most liberal and deliberative counterparts. It implies a sharp critique of more familiar models of bourgeois constitutionalism: whether they conceive of constitutional order as having a foundation in moral rights or natural law, or in an originary founding moment, such models a) tend to be backward-looking in their justifications, seeing the legal order as founded on some exogenously determined vision of moral order; b) tend to represent the law as an already-determined container within which legitimate ordinary politics takes place; and c) find the content of law to be ascertainable through the specialized reasoning of legal professionals. On the critical theory conception of constitutionalism, this presumption of completeness and technicity amounts to the reification of a constitutional project, where a dynamic social relation is misperceived as something fixed and objective.64 We can see why this would be immensely problematic for someone like Habermas, for whom constitutional norms are supposed to concern the generalizable interests of free and equal citizens. If it is overall the case for him that generalizable interests are at least partially constituted through discourse and are therefore not given in any pre-political, pre-discursive sense,65 this is especially so in a society like ours with an unreconciled class structure sustained by pseudo-compromises. Therefore, discursive rearticulation of basic norms is necessary for the very emergence of generalizable interests.

Despite offering an admirably systematic synthesis of radical democracy and the constitutional rule of law, Habermas’ theory is hobbled by the hesitant way he embraces these ideas. Given his strong commitment to proceduralism, the view that actual discourses among those affected must take place during the production of legitimate law if constitutionalism is to perform its mediational function, as well as his opposition to foundational or backward-looking models of political justification, we might expect Habermas to advocate the continuous circulation in civil society of constitutional discourses that consistently have appreciable impact on the way constitutional projects develop through ongoing legislation such that citizens can see the links between their political constitution (narrowly construed), the effects that democratic discourse has on the shape that it takes, and the role of the political constitution in regulating and transforming the broader institutional backbone of society in accordance with the common good. And indeed, at least in the abstract, this is what the “two track” conception of democracy in Between Facts and Norms, with its model of discourses circulating between the informal public sphere and more formal legislative institutions, seeks to capture.66 As such, Habermas’ version of constitutionalism seems a natural ally of theories of “popular constitutionalism”67 emerging from the American legal academy or of those who, like Jeremy Waldron,68 are skeptical of the merits of legalistic constitutionalism and press for democratic participation in the ongoing rearticulation of constitutional norms. Indeed, I would submit that the preceding pages demonstrate that the Left Hegelian social theoretic backdrop of Habermas’ theory supplies a deeper normative justification for more democratic conceptions of constitutionalism than have heretofore been supplied by their proponents (who are, to be fair, primarily legal theorists seeking to uncover the basic commitments of American constitutionalism, a project more interpretive than normative.69) Given that such theories have very revisionary views on the appropriate method and scope of judicial review and the role of the constitution in public life, it is surprising that Habermas evinces at most a mild critique of the constitutional practices and institutions of actually existing democracies, never really confronting the possibility that institutions of constitutional review administered by legal elites could be paternalistic or extinguish the public impetus for discourse he so prizes.70 In fact, institutional questions concerning where constitutional discourse ought to take place and how the power to make authoritative determinations of constitutional meaning should be shared among civil society, legislative, and judiciary are mostly abstracted away in Habermas’ post-Between Facts and Norms writings, while that work is mostly content with the professional of administration of constitutional issues as it exists in the United States and Germany.

This is evident in Habermas’ embrace of figures from liberal constitutional theory. He does not present an independent theory of judicial decision-making, but warmly receives Dworkin's well-known model of “law as integrity.” To a certain extent, this allegiance makes sense, given Dworkin's sensitivity to the hermeneutic dimension of interpretation and the fact that his concept of integrity mirrors discourse theory in holding that legal decisions must be justifiable to those affected in terms of publicly recognizable principles. Habermas does, however, follow Michelman in criticizing the “monological” form of reasoning that Dworkin's exemplary Judge Hercules employs,71 replacing it with the interpretive activities of a specialized legal public sphere, presumably more responsive to the public than Hercules. But this substitution does nothing to alleviate other aspects of Dworkin's theory that make a match between him and Habermas quite awkward: Dworkin's standard of integrity compels judges to regard the law as a complete, coherent whole that rests on a foundation of moral rights.72 Because Dworkin regards deontic rights in a strongly realistic manner and as an unwritten part of the law, there is a finished, retrospective, “already there” quality to his picture of it. Thinking of moral rights as existing independently of their social articulation is what moves Dworkin to conceive of them as, at least in principle, accessible to the right reason of individual moral subjects.73 Legal correctness can be achieved when lawyers and judges combine their specialized knowledge of precedent with their potentially objective insights into deontic rights. Fashioning the law in accordance with the demands of integrity thereby becomes the province of legal elites, rendering public discourse and the construction of generalizable interests in principle unnecessary. This helps explain Dworkin's highly un-participatory conception of democracy and his comfort with placing vast decision-making powers in the hands of the judiciary.7

There is more than a little here that should make Habermas uncomfortable. Firstly, on his account, legitimate law is the product of actual discourses, which include the full spate of discourse types (pragmatic, ethical-political, and moral). If the task of judicial decision-making is to reconstruct the types of discourse that went into the production of law, Dworkin's vision of filling in the gaps between legal rules exclusively with considerations of individual moral rights (other considerations are collected under the heading of “policy”75) makes little sense.76 While Habermas distances himself from Dworkin's moral realism, calling it “hard to defend,”77 he appears not to appreciate the extent to which Dworkin links his account of legal correctness to this very possibility of individual insight into the objective moral order. If Habermas wishes to maintain his long held position that constitutional projects involve the ongoing construction of generalizable interests through the democratic process – which in my view is really the heart of his program – he needs an account of legal correctness that puts some distance between this vision and Dworkin's picture of legal elites discovering the content of law through technical interpretation and rational intuition into a fixed moral order.

Also puzzling is the degree of influence exercised by civil society in the development of constitutional projects that Habermas appears willing to countenance. While we might expect professional adjudicative institutions to play a sort of yeoman's role vis-à-vis the public, Habermas actually puts forth something akin to Bruce Ackerman's picture of infrequent constitutional revolutions, where the basic meaning of a constitutional project is transformed during swelling periods of national ferment, only to resettle for decades at a time, during which it is administered by legal professionals.78 According to this position, American civil society has not generated new understandings of constitutional order that overcome group divisions since the New Deal, or possibly the Civil Rights era. Now, this may actually be the case, and perhaps Habermas’ apparent acquiescence to this view of once-every-few-generations national conversations is a nod to realism, i.e., a realistic conception of how much broad based, ongoing constitutional discourse it is reasonable to expect the public to conduct. But while a theory with a Left Hegelian pedigree should avoid “the impotence of the ought” and utopian speculation, and therefore ought not develop critical conceptions of legal practice utterly divorced from present ones, such concessions to realism are unnecessary. After all, critical theory conceptions of constitutionalism will aim to be appreciably different from the more authoritarian ones currently in circulation, which more often than not fail to stimulate and sustain public discourse on the basic constitution of society. Instead, their point would be to suggest how a more dynamic, expansive, and mediational conception of constitutionalism could unlock greater democratic freedom and rationally integrated social identities.

Given these problems in Habermas’ theory, the innovations that Benhabib makes to his conception of constitutionalism are most welcome. While operating within a discourse theoretic framework, her recent work more unabashedly recalls Hegel's broader conception of the constitution as the basic norms through which a community understands and relates to itself (of which a founding legal document is but a part): a constitution is a way of life through which individuals seek to connect themselves to each other, and in which the very identity and membership of a community is constantly at stake.79 Benhabib's concept of “democratic iterations,” which draws on meaning-as-use theories, emphasizes how meaning is inevitably transformed through repetition:

In the process of repeating a term or a concept, we never simply produce a replica of the original usage and its intended meaning: rather, very repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever-so-subtle ways. In fact, there is really no ‘originary’ source of meaning, or an ‘original’ to which all subsequent forms must conform … . Every iteration involves making sense of an authoritative original in a new and different context … . Iteration is the reappropriation of the ‘origin’; it is at the same time its dissolution as the original and its preservation through its continuous deployment.80

Recalling the reciprocal relationship that Hegel hints at between the narrow “political” constitution and the broader constitution of society's backbone of interrelated institutions, Benhabib here seems to envision a circular process whereby groups take up the conceptions of social relations instantiated in the legal order and transform them in their more everyday attempts to live with others in accordance with these norms. Like Cover and Michelman, she stresses that the transformation of legal meaning takes place primarily in informal settings, where different groups try (and sometimes fail) to live together and to understand themselves in their relation to others according to the terms they inherit from the constitutional tradition they find themselves subject to.81 Her main example of such democratic iteration is the challenge Muslim girls in France raised against the head scarf prohibition in public schools (“L’Affaire du Foulard”), which, while undoubtedly antagonistic, she contends has the potential to felicitously transform the meaning of secularity and inclusion in the French state and to create new forms of togetherness and understanding. But although Benhabib illustrates the concept of democratic iterations through an exemplary episode, this iterative process is a constant and pervasive one, which is punctuated by events and has the tendency to have a destabilizing effect on authority.82

It is telling, however, that Benhabib's examples of democratic iterations are exclusively centered on what Habermas would call ethical-political discourses.83 While otherwise not guilty of the charge,84 Benhabib, in her constitutional theory, runs afoul of Nancy Fraser's critical diagnosis of the trend in current political philosophy to subordinate class and distributional conflicts to struggles for cultural inclusion and recognition.85 Perhaps this is due to the fact that “hot” constitutional issues are so often ones with cultural dimensions in the foreground, rarely touching visibly on distributional conflicts between groups. This nonetheless is problematic since much court business clearly affects – often subtly and invisibly – the outcomes of these conflicts, frequently with bad results.86 For another reason why centering constitutional discourse on inclusion and cultural issues is problematic, it is useful to remind ourselves of Habermas’ critique of civic republicanism, according to which the main deficit in republican models of democracy is its “ethical overburdening” of the political process.87 To some extent, republicanism's emphasis on ethical discourse is understandable: given the level of cooperativeness and public spirit that republicans view as the font of legitimate law, political discourses need to engage the motivations and identities of citizens. Arguably, issues of ethical self-understanding do this better than more abstract or arid forms of politics. But it is not clear that this is intrinsically so, and it can have distorting effects on politics. In the American media, for example, this amplification of the cultural facets of issues is very common; conflicts over everything from guns to taxes are often reduced to conflicts over who is a good, real American and who is not. It is hard to say that this proves edifying; substantive issues of rights and social justice are elided, politics becomes more fraudulent and conflictual. None of this is to deny a legitimate place for ethical-political discourse. However, we do see something of a two-steps-forward-one-step-back movement in Benhabib's advancement of Habermas’ discourse theory of law: although her concept of democratic iterations takes center stage, she develops the notion solely along an ethical-political track. Going forward, critical theorists developing conceptions of constitutional discourse should work to see it as a way of integrating questions of distributional justice with questions of moral rights and collective identities without subordinating or conflating them.

4. Conclusion

Some readers may find the general notion of reinvigorating a politics of constitutionalism quixotic. Certainly, it has not been not my intention to overstate the importance or positive contributions of constitutions in actually existing democracies, where they can serve to entrench political systems experiencing paralysis in the face of long term fiscal and environmental problems, and where public appeals to them more often than not invoke visions of society that are more nostalgic, ethno-nationalistic, authoritarian, and reactionary than what Habermas and Benhabib presumably have in mind. Instead, I take the basic Hegelian point I started this paper with to be this: modern persons ought to be able to comprehend their social order as the work of reason; the spine of institutions through which their relations to differently abled and positioned others are mediated ought to be responsive to their interests as fully-rounded persons; and comprehending this system of mediation ought to be able to reconcile them to the partiality of their roles within the universal state. Though modern life is differentiated, it can be understood, when seen through the lens of the constitutional order, as a result of citizens’ jointly exercised rationality as long as certain conditions are met. These conditions are, however, more stringent than Hegel realized. In light of this point, that so many issues deeply impacting citizens’ social and economic relations to one another are rendered marginal – and even invisible – in terms of the airing they receive in the public sphere, that they are treated as mostly settled or non-questions in the legal system consitutues a strikingly deficient aspect of modern politics. Examples include the intrusion of market logic and technology into everyday life, the commodification of public goods, the legal standing of consumers and residents, the role of shareholders and public interests in corporate governance, and the status of collective bargaining arrangements. Surely a contributing factor here is the absence of a shared sense of possibility that the basic terms of our social union could be responsive to the force that discursive reason can exert. Such a sense is what I am contending jurisgenerative theories ought to aim at recapturing while critiquing more legalistic and authoritarian models of law.

This is not to deny the possibility that democratic iterations themselves may be regressive or authoritarian, populist in the pejorative sense. But the denial of their legitimacy or possibility moves us in the direction of authoritarian conceptions of law and political power and the isolation of individuals and social groups wrought by a political order of machine-like administration that Horkheimer and Adorno describe as a main feature of modern political domination. Recapturing some sense of how human activity makes reason actual in the ongoing organization of society need not amount to the claim that reason culminates in some centralized form, as in the Hegelian state, or in some end state, as in Marx. It can, however, move us to envision the possibility of an ongoing practice of communication, lawmaking, and revision that seeks to reconcile and overcome positivity and division, without the triumphalist pretension of ever being able to fully do so.

**The right fills in**

Orly **Lobel**, University of San Diego Assistant Professor of Law, 200**7**, The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics,” 120 HARV. L. REV. 937, http://www.harvardlawreview.org/media/pdf/lobel.pdf

Both the practical failures and the fallacy of rigid boundaries generated by extralegal activism rhetoric permit us to broaden our inquiry to the underlying assumptions of current proposals regarding transformative politics — that is, attempts to produce meaningful changes in the political and socioeconomic landscapes. The suggested alternatives produce a new image of social and political action. This vision rejects a shared theory of social reform, rejects formal programmatic agendas, and embraces a multiplicity of forms and practices. Thus, it is described in such terms as a plan of no plan,211 “a project of projects,”212 “anti-theory theory,”213 politics rather than goals,214 presence rather than power,215 “practice over theory,”216 and chaos and openness over order and formality. As a result, the contemporary message rarely includes a comprehensive vision of common social claims, but rather engages in the description of fragmented efforts. As Professor Joel Handler argues, the commonality of struggle and social vision that existed during the civil rights movement has disappeared.217 There is no unifying discourse or set of values, but rather an aversion to any metanarrative and a resignation from theory. Professor Handler warns that this move away from grand narratives is self-defeating precisely because only certain parts of the political spectrum have accepted this new stance: “[T]he opposition is not playing that game . . . . [E]veryone else is operating as if there were Grand Narratives . . . .”218 Intertwined with the resignation from law and policy, the new bromide of “neither left nor right” has become axiomatic only for some.219 The contemporary critical legal consciousness informs the scholarship of those who are interested in progressive social activism, but less so that of those who are interested, for example, in a more competitive securities market. Indeed, an interesting recent development has been the rise of “conservative public interest lawyer[ing].”220 Although “public interest law” was originally associated exclusively with liberal projects, in the past three decades conservative advocacy groups have rapidly grown both in number and in their vigorous use of traditional legal strategies to promote their causes.221 This growth in conservative advocacy is particularly salient in juxtaposition to the decline of traditional progressive advocacy. Most recently, some thinkers have even suggested that there may be “something inherent in the left’s conception of social change — focused as it is on participation and empowerment — that produces a unique distrust of legal expertise.”222

Once again, this conclusion reveals flaws parallel to the original disenchantment with legal reform. Although the new extralegal frames present themselves as apt alternatives to legal reform models and as capable of producing significant changes to the social map, in practice they generate very limited improvement in existing social arrangements. Most strikingly, the cooptation effect here can be explained in terms of the most profound risk of the typology — that of legitimation. The common pattern of extralegal scholarship is to describe an inherent instability in dominant structures by pointing, for example, to grassroots strategies,223 and then to assume that specific instances of counterhegemonic activities translate into a more complete transformation. This celebration of multiple micro-resistances seems to rely on an aggregate approach — an idea that the multiplication of practices will evolve into something substantial. In fact, the myth of engagement obscures the actual lack of change being produced, while the broader pattern of equating extralegal activism with social reform produces a false belief in the potential of change. There are few instances of meaningful reordering of social and economic arrangements and macro-redistribution. Scholars write about decoding what is really happening, as though the scholarly narrative has the power to unpack more than the actual conventional experience will admit.224 Unrelated efforts become related and part of a whole through mere reframing. At the same time, the elephant in the room — the rising level of economic inequality — is left unaddressed and comes to be understood as natural and inevitable.225 This is precisely the problematic process that critical theorists decry as losers’ self-mystification, through which marginalized groups come to see systemic losses as the product of their own actions and thereby begin to focus on minor achievements as representing the boundaries of their willed reality.

The explorations of micro-instances of activism are often fundamentally performative, obscuring the distance between the descriptive and the prescriptive. The manifestations of extralegal activism — the law and organizing model; the proliferation of informal, soft norms and norm-generating actors; and the celebrated, separate nongovernmental sphere of action — all produce a fantasy that change can be brought about through small-scale, decentralized transformation. The emphasis is local, but the locality is described as a microcosm of the whole and the audience is national and global. In the context of the humanities, Professor Carol Greenhouse poses a comparable challenge to ethnographic studies from the 1990s, which utilized the genres of narrative and community studies, the latter including works on American cities and neighborhoods in trouble.226 The aspiration of these genres was that each individual story could translate into a “time of the nation” body of knowledge and motivation.227 In contemporary legal thought, a corresponding gap opens between the local scale and the larger, translocal one. In reality, although there has been a recent proliferation of associations and grassroots groups, few new local-statenational federations have emerged in the United States since the 1960s and 1970s, and many of the existing voluntary federations that flourished in the mid-twentieth century are in decline.228 There is, therefore, an absence of links between the local and the national, an absent intermediate public sphere, which has been termed “the missing middle” by Professor Theda Skocpol.229 New social movements have for the most part failed in sustaining coalitions or producing significant institutional change through grassroots activism. Professor Handler concludes that this failure is due in part to the ideas of contingency, pluralism, and localism that are so embedded in current activism.230 Is the focus on small-scale dynamics simply an evasion of the need to engage in broader substantive debate?

It is important for next-generation progressive legal scholars, while maintaining a critical legal consciousness, to recognize that not all extralegal associational life is transformative. We must differentiate, for example, between inward-looking groups, which tend to be self-regarding and depoliticized, and social movements that participate in political activities, engage the public debate, and aim to challenge and reform existing realities.231 We must differentiate between professional associations and more inclusive forms of institutions that act as trustees for larger segments of the community.232 As described above, extralegal activism tends to operate on a more divided and hence a smaller scale than earlier social movements, which had national reform agendas. Consequently, within critical discourse there is a need to recognize the limited capacity of small-scale action. We should question the narrative that imagines consciousness-raising as directly translating into action and action as directly translating into change. Certainly not every cultural description is political. Indeed, it is questionable whether forms of activism that are opposed to programmatic reconstruction of a social agenda should even be understood as social movements. In fact, when groups are situated in opposition to any form of institutionalized power, they may be simply mirroring what they are fighting against and merely producing moot activism that settles for what seems possible within the narrow space that is left in a rising convergence of ideologies. The original vision is consequently coopted, and contemporary discontent is legitimated through a process of self-mystification.

## 1AR

### simulation

**Simulation allows us to influence state policy AND is key to agency**

**Eijkman 12**

The role of simulations in the authentic learning for national security policy development: Implications for Practice / Dr. Henk Simon Eijkman. [electronic resource] <http://nsc.anu.edu.au/test/documents/Sims_in_authentic_learning_report.pdf>. Dr Henk Eijkman is currently an independent consultant as well as visiting fellow at the University of New South Wales at the Australian Defence Force Academy and is Visiting Professor of Academic Development, Annasaheb Dange College of Engineering and Technology in India. As a sociologist he developed an active interest in tertiary learning and teaching with a focus on socially inclusive innovation and culture change. He has taught at various institutions in the social sciences and his work as an adult learning specialist has taken him to South Africa, Malaysia, Palestine, and India. He publishes widely in international journals, serves on Conference Committees and editorial boards of edited books and international journal

However, whether as an approach to learning, innovation, persuasion or culture shift, policy simulations derive their power from two central features: their combination of simulation and gaming (Geurts et al. 2007). 1. The simulation element: the unique combination of simulation with role-playing.The unique simulation/role-play mix enables participants to create **possible futures** relevant to the topic being studied. This is diametrically opposed to the more traditional, teacher-centric approaches in which a future is produced for them. In policy simulations, possible futures are much more than an object of tabletop discussion and verbal speculation. ‘**No other technique** allows a group of participants to engage in collective action in a safe environment to create and analyse the futures they want to explore’ (Geurts et al. 2007: 536). 2. **The game element:** the interactive and tailor-made modelling and design of the policy game. The actual run of the policy simulation is only one step, though a most important and visible one, in a collective process of investigation, communication, and evaluation of performance. In the context of a post-graduate course in public policy development, for example, a policy simulation is a dedicated game constructed in collaboration with practitioners to achieve a high level of proficiency in relevant aspects of the policy development process. To drill down to a level of finer detail, **policy development simulations**—as forms of interactive or participatory modelling— are particularly effective in developing participant knowledge and skills in the five key areas of the policy development process (and success criteria), namely: Complexity, Communication, Creativity, Consensus, and Commitment to action (‘the five Cs’). The capacity to provide effective learning support in these five categories has proved to be particularly helpful in strategic decision-making (Geurts et al. 2007). Annexure 2.5 contains a detailed description, in table format, of the synopsis below.

**Best data confirms our argument**

**Eijkman 12**

The role of simulations in the authentic learning for national security policy development: Implications for Practice / Dr. Henk Simon Eijkman. [electronic resource] <http://nsc.anu.edu.au/test/documents/Sims_in_authentic_learning_report.pdf>. Dr Henk Eijkman is currently an independent consultant as well as visiting fellow at the University of New South Wales at the Australian Defence Force Academy and is Visiting Professor of Academic Development, Annasaheb Dange College of Engineering and Technology in India. As a sociologist he developed an active interest in tertiary learning and teaching with a focus on socially inclusive innovation and culture change. He has taught at various institutions in the social sciences and his work as an adult learning specialist has taken him to South Africa, Malaysia, Palestine, and India. He publishes widely in international journals, serves on Conference Committees and editorial boards of edited books and international journal

This is where simulations have come into their own. The operative word is ‘have’, as there is a substantive record of success, which will be shown below. The point is that simulations have demonstrated the capacity either singularly, or in combination with other learning methods, for dealing effectively with the learning demands posed by public policy development; and this is not just at post-graduate level in universities, but at the highest echelons of American military leaders and policymakers (see for example Brewer, 1984; Beriker & Druckman, 1996; Babus, Hodges & Kjonnerod, 1997; Andreozzi, 2002McCown, 2005 and attached reading list in Annexure 2.10). Policy development simulations are effective in meeting the learning needs of both early career and highly experienced practitioners. Simulations help them to deal more proficiently with a complex mix of highly adaptive, interdependent, and interactive socio-technical, political, and economic systems; their often uncertain systemic reactions; and their unpredictable unexpected and undesired effects (Glouberman & Zimmerman, 2002; Jacobsen, & Wilensky, 2006; Bekebrede, 2010; van Bilsen, Bekerede & Mayer, 2010)

**DEBATE doesn’t jeopardize agency**

Hanghoj 8

http://static.sdu.dk/mediafiles/Files/Information\_til/Studerende\_ved\_SDU/Din\_uddannelse/phd\_hum/afhandlinger/2009/ThorkilHanghoej.pdf

Thorkild Hanghøj, Copenhagen, 2008

Since this PhD project began in 2004, the present author has been affiliated with DREAM (Danish

Research Centre on Education and Advanced Media Materials), which is located at the Institute of

Literature, Media and Cultural Studies at the University of Southern Denmark. Research visits have

taken place at the Centre for Learning, Knowledge, and Interactive Technologies (L-KIT), the

Institute of Education at the University of Bristol and the institute formerly known as Learning Lab

Denmark at the School of Education, University of Aarhus, where I currently work as an assistant

professor.

Thus, **debate games** require teachers to balance the centripetal/centrifugal forces of gaming and teaching, to be able to reconfigure their discursive authority, and to orchestrate the multiple voices of a dialogical game space in relation to particular goals. These Bakhtinian perspectives provide a valuable analytical framework for describing the discursive interplay between different practices and knowledge aspects when enacting (debate) game scenarios. In addition to this, Bakhtin’s **dialogical** philosophy also offers an explanation of why **debate games** (and other game types) may be valuable within an educational context. One of the central features of multi-player games is that players are expected to experience a simultaneously real and **imagined scenario** both in relation to an insider’s (participant) perspective and to an outsider’s (co-participant) perspective. According to Bakhtin, the **outsider’s perspective** reflects a fundamental aspect of human understanding: In order to understand, it is immensely important for the person who understands to be located outside the object of his or her creative understanding – in time, in space, in culture. For one cannot even really see one's own exterior and comprehend it as a whole, and no mirrors or photographs can help; our real exterior can be seen and understood only by other people, because they are located outside us in space, and because they are others (Bakhtin, 1986: 7). As the quote suggests, every person is influenced by others in an inescapably intertwined way, and consequently no voice can be said to be isolated. Thus, it is in the interaction with other voices that individuals are able to reach understanding and f**ind their own voice.** Bakhtin also refers to the ontological process of finding a voice as **“ideological becoming”**, which represents “the process of selectively assimilating the words of others” (Bakhtin, 1981: 341). Thus, by teaching and playing **debate scenarios,** it is possible to support students in their process of becoming not only themselves, but also in becoming articulate and responsive citizens in a democratic society.

### 1ar – no impact

**‘Wars for humanity’ are an ahistorical myth**

Benno Gerhard **Teschke 11**, IR prof at the University of Sussex, “Fatal attraction: a critique of Carl Schmitt's international political and legal theory”, International Theory (2011), 3 : pp 179-227

For at the centre of the heterodox – partly post-structuralist, partly realist – neo-Schmittian analysis stands the conclusion of The Nomos: the thesis of a structural and continuous relation between liberalism and violence (Mouffe 2005, 2007; Odysseos 2007). It suggests that, in sharp contrast to the liberal-cosmopolitan programme of ‘perpetual peace’, the geographical expansion of liberal modernity was accompanied by the intensification and de-formalization of war in the international construction of liberal-constitutional states of law and the production of liberal subjectivities as rights-bearing individuals. Liberal world-ordering proceeds via the conduit of wars for humanity, leading to Schmitt's ‘spaceless universalism’. In this perspective, **a straight line is drawn from WWI to the War on Terror to verify Schmitt's** long-term **prognostic** of the 20th century as the age of ‘neutralizations and de-politicizations’ (Schmitt 1993). **But this attempt to read the history of 20th century international relations in terms of a succession of confrontations between the carrier-nations of liberal modernity and the criminalized foes at its outer margins seems unable to comprehend the complexities and specificities of ‘liberal’ world-ordering, then and now**. For in the cases of Wilhelmine, Weimar and fascist Germany, the assumption that their conflicts with the Anglo-American liberal-capitalist heartland were grounded in an antagonism between liberal modernity and a recalcitrant Germany outside its geographical and conceptual lines runs counter to the historical evidence. For this reading presupposes that late-Wilhelmine Germany was not already substantially penetrated by capitalism and fully incorporated into the capitalist world economy, posing the question of whether the causes of WWI lay in the capitalist dynamics of inter-imperial rivalry (Blackbourn and Eley 1984), or in processes of belated and incomplete liberal-capitalist development, due to the survival of ‘re-feudalized’ elites in the German state classes and the marriage between ‘rye and iron’ (Wehler 1997). It also assumes that the late-Weimar and early Nazi turn towards the construction of an autarchic German regionalism – Mitteleuropa or Großraum – was not deeply influenced by the international ramifications of the 1929 Great Depression, but premised on a purely political–existentialist assertion of German national identity. Against a reading of the early 20th century conflicts between ‘the liberal West’ and Germany as ‘wars for humanity’ between an expanding liberal modernity and its political exterior, there is more evidence to suggest that these confrontations were interstate conflicts within the crisis-ridden and nationally uneven capitalist project of modernity. Similar objections and caveats to the binary opposition between the Western discourse of liberal humanity against non-liberal foes apply to the more recent period. For how can this optic explain that **the ‘liberal West’ coexisted** (and keeps coexisting) **with a large number of** pliant **authoritarian client-regimes** (Mubarak's Egypt, Suharto's Indonesia, Pahlavi's Iran, Fahd's Saudi-Arabia, even Gaddafi's pre-intervention Libya, to name but a few), **which** were and **are actively managed** and supported by the West **as anti-liberal** Schmittian **states of emergency**, with concerns for liberal subjectivities and Human Rights secondary to the strategic interests of political and geopolitical stability and economic access? Even in the more obvious cases of Afghanistan, Iraq, and, now, Libya, the idea that Western intervention has to be conceived as an encounter between the liberal project and a series of foes outside its sphere seems to rely on a denial of their antecedent histories as geopolitically and socially contested state-building projects in pro-Western fashion, deeply co-determined by long histories of Western anti-liberal colonial and post-colonial legacies. If these states (or social forces within them) turn against their imperial masters, the conventional policy expression is ‘blowback’. And as **the Schmittian analytical vocabulary** does not include a conception of human agency and social forces – only friend/enemy groupings and collective political entities governed by executive decision – **it** also **lacks the categories of analysis to comprehend** the social dynamics that drive the **struggles around sovereign power and the eventual overcoming**, for example, **of Tunisian and Egyptian states of emergency without US-led wars for humanity**.

Similarly, it seems unlikely that the generic idea of liberal world-ordering and the production of liberal subjectivities can actually explain why Western intervention seems improbable in some cases (e.g. Bahrain, Qatar, Yemen or Syria) and more likely in others (e.g. Serbia, Afghanistan, Iraq, and Libya). Liberal world-ordering consists of differential strategies of building, coordinating, and drawing liberal and anti-liberal states into the Western orbit, and overtly or covertly intervening and refashioning them once they step out of line. These are conflicts within a world, which seem to push the term liberalism beyond its original meaning. The generic Schmittian idea of a liberal ‘spaceless universalism’ sits uncomfortably with the realities of maintaining an America-supervised ‘informal empire’, **which has to manage a persisting interstate system in diverse and case-specific ways**. But it is this persistence of a worldwide system of states, which encase national particularities, which renders challenges to American supremacy possible in the first place.

### 2ac no root cause

**Violence is proximately caused – root cause logic is poor scholarship**

**Sharpe**, lecturer, philosophy and psychoanalytic studies, and Goucher, senior lecturer, literary and psychoanalytic studies – Deakin University, **‘10**

(Matthew and Geoff, Žižek and Politics: An Introduction, p. 231 – 233)

We realise that this argument, which we propose as a new ‘quilting’ framework to explain Žižek’s theoretical oscillations and political prescriptions, raises some large issues of its own. While this is not the place to further that discussion, we think its analytic force leads into a much wider critique of ‘Theory’ in parts of the latertwentieth- century academy, which emerged following the ‘cultural turn’ of the 1960s and 1970s in the wake of the collapse of Marxism. Žižek’s paradigm to try to generate all his theory of culture, subjectivity, ideology, politics and religion is psychoanalysis. But a similar criticism would apply, for instance, to theorists who feel that the method Jacques Derrida developed for criticising philosophical texts can meaningfully supplant the methodologies of political science, philosophy, economics, sociology and so forth, when it comes to thinking about ‘the political’. Or, differently, thinkers who opt for Deleuze (or Deleuze’s and Guattari’s) Nietzschean Spinozism as a new metaphysics to explain ethics, politics, aesthetics, ontology and so forth, seem to us candidates for the same type of **criticism, as a reductive passing over** the **empirical and analytic distinctness of** the **different** object **fields in complex societies.**

In truth, we feel that Theory, and the continuing line of ‘master thinkers’ who regularly appear particularly in the English- speaking world, is the last gasp of what used to be called First Philosophy. The philosopher ascends out of the city, Plato tells us, from whence she can espie the Higher Truth, which she must then bring back down to political earth. From outside the city, we can well imagine that she can see much more widely than her benighted political contemporaries. But from these philosophical heights, we can equally suspect that the ‘master thinker’ is also **always in danger of passing over** the **salient differences** and features of political life – differences only too evident to people ‘on the ground’. Political life, after all, is always a more complex affair than a bunch of ideologically duped fools staring at and enacting a wall (or ‘politically correct screen’) of ideologically produced illusions, from Plato’s timeless cave allegory to Žižek’s theory of ideology.

We know that Theory largely understands itself as avowedly ‘post- metaphysical’. It aims to erect its new claims on the gravestone of First Philosophy as the West has known it. But it also tells us that people very often do not know what they do. And so it seems to us that too many of its proponents and their followers are mourners who remain in the graveyard, propping up the gravestone of Western philosophy under the sign of some totalising account of absolutely everything – enjoyment, différance, biopower . . . Perhaps the time has come, we would argue, less for one more would- be global, allpurpose existential and political Theory than for a **multi- dimensional and interdisciplinary** critical **theory** that would challenge the chaotic specialisation neoliberalism speeds up in academe, which mirrors and accelerates the splintering of the Left over the last four decades. This would mean that we would have to shun the hope that one method, one perspective, or one master thinker could single- handedly decipher all the complexity of socio- political life, the concerns of really existing social movements – which specifi cally does not mean mindlessly celebrating difference, marginalisation and multiplicity as if they could be suffi cient ends for a new politics. **It would be to reopen critical theory and non- analytic philosophy to the other intellectual disciplines**, most of **whom** today **pointedly reject Theory’s legitimacy,** neither reading it nor taking it seriously.

### at: convictions

**Our model of education doesn’t trade off with personal convictions, but it does make debaters stronger advocates**

**Hodson**, professor of education – Ontario Institute for Studies @ University of Toronto, **‘9**

(Derek, “Towards an Action-oriented Science Curriculum,” Journal for Activist Science & Technology Education, Vol. 1, No. 1)

\*\*note: SSI = socioscientific issues

Politicization of science education can be achieved by giving students the opportunity to confront **real world issues that have a scientific, technological or environmental dimension.** By grounding content in socially and personally relevant contexts, an issues-based approach can provide the motivation that is absent from current abstract, de-contextualized approaches and can **form a base** from which students can **construct understanding that is personally relevant**, meaningful and important. It can provide increased opportunities for active learning, inquiry-based learning, collaborative learning and direct experience of the situatedness and multidimensionality of scientific and technological practice. In the Western contemporary world, technology is all pervasive; its social and environmental impact is clear; its disconcerting social implications and disturbing moral-ethical dilemmas are made apparent almost every day in popular newspapers, TV news bulletins and Internet postings. In many ways, it is much easier to recognize how technology is determined by the sociocultural context in which it is located than to see how science is driven by such factors. It is much easier to see the environmental impact of technology than to see the ways in which science impacts on society and environment. For these kinds of reasons, it makes good sense to **use problems and issues** in technology and engineering as the **major vehicles for contextualizing** the **science** curriculum. This is categorically not an argument against teaching science; rather, it is an argument for teaching the science that informs an understanding of everyday technological problems and may assist students in **reaching tentative** **solutions** about where they stand on key SSI.