

DRONES AND DIRTY HANDS

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Abstract:

Debates over how the US should respond to terrorism have generated renewed interest in the concept of dirty hands. In particular, the US policy of drone strikes against suspected terrorists has struck many as a species of the “dirty hands” dilemma discussed by contemporary moral philosophers and political theorists. For example, Stephen de Wijze argues that the dirty hands framework is apt for understanding a policy of targeted killings. We challenge this view. Properly understood, a dirty hands dilemma describes an emergency that forces an individual to break a moral rule, not a policy that routinely breaks moral rules. Rather than provide moral clarity, dirty hands justifications of current US drone policy risk legitimizing a practice that expands state power in potentially dangerous ways.

Introduction

The period known as the “War on Terror” has prompted a revival of interest in the idea of moral dilemmas and the problem of “dirty hands” in public life. This renewed interest is hardly surprising, given that the US response to the September 11th attacks quickly led policymakers anxious to prevent another attack into a reconsideration of just the kinds of morally troubling tactics that the literature about dirty hands addresses. Indeed, perhaps the most pervasive trope of the period originated within this discussion: the so-called “ticking time-bomb” scenario, envisioning a captured terrorist who (very probably) possesses actionable intelligence about a devastating and imminent attack on civilians and the decision confronting his captors whether to torture the terrorist to obtain the information, first appears in Michael Walzer’s seminal article “Political Action: The Problem of Dirty Hands.”¹ Predictably, several of the other motifs from the dirty-hands literature have migrated into public discourse as well: in particular, the image of

¹ Michael Walzer, “The Problem of Dirty Hands,” *Philosophy and Public Affairs* 2 (1973): 62-82.

the anguished public leader torn between the solemn duty to protect the public safety and the distasteful acts of violence which are the unavoidable means to achieve this noble end. The Obama years notably accelerated the use of this mythos (the preceding president never having worn anguish particularly well). Popular news stories regularly characterize Obama as personally wrestling with the insoluble moral dilemmas inherent in “the president’s attempt to apply the ‘just war’ theories of Christian philosophers to a brutal modern conflict,” yet ultimately resolving these conflicts in favor of the more aggressive course of action.²

It is easily understandable why those charged with managing the president’s image would avail themselves of such a convenient theoretical rationalization of the policy path the Obama Administration has chosen. More surprising, however, the portrait of the targeted killing policies pursued by the US and other countries as exemplifying dirty hands has begun to enlist defenders among moral philosophers and political theorists. Notable in this regard is Stephen de Wijze, who contends that a policy of targeted killing of terrorist actors is (under specified but not uncommon circumstances) an instance of a dirty-handed moral dilemma – morally required yet morally forbidden, the least evil choice available in the circumstances that still leaves an indelible moral stain on the character of the person making the choice. Transposed to this more theoretical context, the identification of targeted killing with the problem of dirty hands carries more significant and far-reaching ethical implications than those implied by popular news accounts. We therefore think it is important to challenge what we feel is a mischaracterization of dirty-handed dilemmas as they relate to the moral requirements of targeted killings.

² See Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>; and Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Boston: Houghton Mifflin Harcourt, 2012), especially 39-43. Both appeared as the White House was pivoting to the general election campaign in the summer of 2012.

In this paper we argue that, while dirty hands situations do exist as a persistent problem of political life, it is a mistake to classify policies of targeted killing as an example of dirty hands. If these policies are to be justified at all, they must meet the more exacting standards of the just war ethic or the law enforcement ethic and their provisions for justified killing, in particular the requirement (with limited and defined exceptions) that noncombatants be immune from violence. We review a proposal by Walzer that a third, “in-between” ethic is needed to accommodate a gap between the circumstances under which the just war and law enforcement ethics are applicable, and conclude that it is unnecessary and potentially undermines existing traditions and law in place to restrain the use of force. The concept of dirty hands can prove insightful for moral analysis, but applying it to ongoing, established policies and practices, rather than specific emergencies, opens the door to predictable and all-too-easy appropriations of the concept to domains it was never intended to address, with potentially disastrous consequences. The US drone program serves as a case in point: it has resulted in several thousand deaths, with credible estimates putting the number of noncombatant casualties as high as one in four, and the percentage of casualties among “mere foot soldiers” rather than high value terrorist targets at over 90%.³ Much turns on what moral principles ultimately define the limits of this policy.

³ “Covert Drone War,” The Bureau of Investigative Journalism, March 28, 2014, <http://www.thebureauinvestigates.com/category/projects/drones/>; Greg Miller, “Increased U.S. Drone Strikes in Pakistan Killing few High-Value Militants,” *The Washington Post*, February 11, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>; Peter Bergen and Megan Braun, “Drone is Obama’s Weapon of Choice,” CNN, September 19, 2012, <http://edition.cnn.com/2012/09/05/opinion/bergen-obama-drone/>; and International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), *Living Under the Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan*, vi, September 2012, <http://livingunderdrones.org/report/>.

Dirty Hands and Emergency Ethics

In a recent article entitled “Targeted Killing: A ‘Dirty Hands’ analysis,” Stephen de Wijze argues that a policy of targeted killing “can indeed be justified” under certain circumstances, but nevertheless “also remains morally wrong and leaves a moral remainder that pollutes those who authorize, plan and execute it,” a status he classifies as a “dirty hands action.”⁴ De Wijze’s underlying motivation in advancing this argument appears to be laudable. By appropriating the language of dirty hands, with its implication of a residue of moral pollution and a requirement of subsequent punishment or opprobrium, he denies that those participating in targeted killings can escape moral blame. His adoption of the dirty hands framework permits him to argue that targeted killing remains ineliminably wrong, and that consequently “a policy of [targeted killing] must be adopted only with the greatest reluctance and as rarely as possible.”⁵ And important aspects of de Wijze’s adaptation of the dirty hands framework to his analysis of this issue do seem valid. Some aspects of the moral quandary faced by government officials do result from “the immoral and evil acts (or projects)” of the terrorist organizations themselves: their unwillingness to engage in conventional struggle (precluding their easy identification as combatants) and targeting of innocent civilians in peaceful contexts (making the imminence of the threat posed difficult to ascertain).⁶ Yet his central claim, that the idea of dirty hands is an appropriate description for the *practice* of targeted killing, is genuinely problematic.

⁴ Stephen de Wijze, “Targeted Killing: A ‘Dirty Hands’ Analysis,” *Contemporary Politics* 15 (2009): 308.

⁵ De Wijze, “Targeted Killing,” 318.

⁶ De Wijze, “Tragic-Remorse – the Anguish of Dirty Hands,” *Ethical Theory and Moral Practice* 7 (2005): 456, 464; and “Targeted Killing,” 309-310.

Dirty-handed actions may mirror certain features of morally legitimate practices while simultaneously departing significantly from them in other respects. De Wijze claims that the practice of targeted killing qualifies as an example of dirty hands, but his analysis fails to recognize and engage with the *specific* moral principles violated by the practice. He focuses rather on the regret and moral anguish that those engaged in targeted killings should experience. While these factors are characteristic by-products of dirty-handed choices, they are not by themselves constitutive of what gives such choices their distinctive moral ambiguity. If regret and anguish were the only distinguishing aspects of dirty hands, then the morally legitimate use of lethal force for self-defense in war or law enforcement would also qualify as a dirty-handed action whenever the individual carrying out the killing happened to feel moral anguish afterward. While there may be good reason to desire that our soldiers and law enforcement officers experience anguish over the use of lethal force in certain circumstances, classifying all those who feel anguish as actors with dirty hands tends to render the concept overly broad and to rob it of its specific explanatory power. What makes the concept of dirty hands unique is the presence of moral conflict between two real yet incompatible moral values or obligations, where no practically available action enables the agent to avoid violating a deeply held moral principle.

De Wijze's failure to specify the exact moral principles violated by targeted killing becomes apparent in his description of the practice. He distinguishes targeted killing from forms of political assassination (aimed at civilian leaders to promote regime change or other political gains), and instead defines targeted killing as the killing of individuals who: (1) pose an "imminent threat"; (2) have "a proven record of actively planning and/or executing terrorist attacks against civilians" as well as a perceptible intention to continue to do so; and (3) present officials with "no realistic possibility of preventing such attacks by nonlethal methods and

bringing the perpetrators before a proper court of law.”⁷ These broad criteria capture a host of actions that seem to be distinct from each other in morally significant ways. For example, a law enforcement officer killing a terrorist driving a vehicle laden with explosives barreling toward a crowded building of civilians involves each of de Wijze’s criteria: it is the killing of an individual posing an imminent threat, with a clear intent to harm civilians, where nonlethal means are not feasible for stopping the threat. Yet we easily recognize this case as a paradigm example of the legitimate use of force within a domestic law enforcement context. This example differs importantly from de Wijze’s sustained case study in his article, the Israeli military’s targeted killing of Hamas leader Salah Shehada along with 14 civilian fatalities.⁸ According to de Wijze, the practice of targeted killing as defined by these broadly inclusive criteria should be understood as instances of dirty hands wherever these criteria are satisfied. But as these two examples show, key morally relevant features of a targeted killing – such as whether it results in noncombatant casualties – offer a basis for differentiating between a range of targeted killings: some legitimate, some morally questionable, and some morally blameworthy. By ignoring relevant features for evaluating these distinct cases,⁹ de Wijze mistakenly collapses many varieties of this practice under the general category of dirty-handed dilemmas. This permits him to apply the concept of dirty hands to a diverse genus of policies or practices rather than specific instances of it, in the process conflating situations that are ethically distinguishable in important ways.

⁷ De Wijze, “Targeted Killing,” 307-308.

⁸ De Wijze, “Targeted Killing,” 310-317.

⁹ These features are discussed in more detail below on pp. 12-18.

In contrast to de Wijze's approach, we believe the best way to understand the concept of dirty hands is as a dilemma that characteristically arises in emergency situations that are difficult to foresee and plan for. Walzer's thought is a promising place to explore this connection, since he has repeatedly addressed (with varying degrees of directness) the relationship between dirty hands and emergency ethics. In his influential treatment of just war theory, *Just and Unjust Wars*, Walzer does not appeal directly to the idea of dirty hands, but approaches closest to it in his chapter on "Supreme Emergency."¹⁰ Walzer argues that situations combining an imminent threat with enormously consequential stakes (no mere danger, but catastrophe "of an unusual and horrifying kind") may create a situation of "supreme emergency" (the phrase is Churchill's) in which "one might well be required to override the rights of innocent people and shatter the war convention."¹¹ Walzer illustrates the kind of scenario he has in mind by reference to the British decision to bomb German cities in 1940, when Britain teetered on the edge of defeat at the hands of the Nazis, fulfilling both the criteria of imminence (defeat was at hand) and outsized consequences (not just defeat, but surrendering to rule under the inhumanity of the Nazi system). He contrasts this situation, where the emergency does seem genuinely supreme, with the decisions by the British to bomb German cities later in the war (when British defeat was no longer a realistic possibility) and the American decision to bomb Hiroshima and Nagasaki (where he argues a negotiated peace might have been had if the Allies had not held firm to their demand of unconditional surrender by Japan). In a later essay "Emergency Ethics," Walzer

¹⁰ Notably, Walzer is highly skeptical that the assassination of noncombatants can be justified in most war-time scenarios. See Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 2000), 176-206.

¹¹ Walzer, *Just and Unjust Wars*, 259.

explicitly identifies a supreme emergency in war as a specific instance of the problem of dirty hands that his earlier essay had treated.¹²

Some commentators, notably C. A. J. Coady, have puzzled over an apparent shift in Walzer's thinking on dirty hands, noting that his original characterization in "Political Action" included such seemingly mundane cases as campaign finance corruption, which could never approach the degree of justificatory burden he establishes for a supreme emergency. Coady notes that in "Political Action" Walzer's argument "seemed much closer to a utilitarianism of extremity with the extreme being nowhere near the limit set by supreme emergency," since even in his most dramatic illustration, the ticking-bomb case, the stakes while high amount to the lives of a few hundred innocents, not the survival of western civilization and a free way of life.¹³ In "Emergency Ethics," however, Walzer repeatedly invokes the image of dirty hands in describing the moral status of the person who authorizes (or at least acquiesces in) mass murder of noncombatants in a case of a supreme emergency, invoking his previous treatment of the topic in *Just and Unjust Wars*.¹⁴ Coady suggests this represents a change in Walzer's view, substantially narrowing the scope and raising the stakes for when dirty hands justifications are appropriate to invoke.

We believe this alleged shift is better explained by interpreting Walzer's supreme emergency as an instance of dirty hands, but not the only instance. Bombing cities is one possible kind of dirty handed action, presumably at the farthest extreme of justificatory burden, with the ticking-

¹² Walzer, "Emergency Ethics," in *Arguing About War* (New Haven, CT: Yale University Press, 2004), 33-50.

¹³ C. A. J. Coady, *Morality and Political Violence* (New York: Cambridge University Press, 2008), 84-85; and "The Problem of Dirty Hands," *The Stanford Encyclopedia of Philosophy*, Spring 2014, <http://plato.stanford.edu/entries/dirty-hands/>.

¹⁴ Walzer, "Emergency Ethics," 37, 45-46, 48.

bomb case a not-too-distant neighbor; telling a lie or bribing a local boss to win an election is another and more familiar type of instance, closer to our regular experience. Walzer does indeed suggest different thresholds for invoking dirty hands in each of these cases, but not because his view about the broad category has shifted. It is more likely that the differing thresholds reflect a divergence in the harm contemplated (one needs a better justification, or excuse, for bombing a city than for telling a lie). Admittedly Walzer contributes to the ambiguity by employing a few phrasings that lend themselves to misinterpretation, in particular his statement that “dirty hands aren’t permissible (or necessary) when anything less than the ongoingness of the community is at stake, or when the danger that we face is anything less than communal death.”¹⁵ On closer examination, however, Walzer’s actual point here appears to be that the form of the problem of dirty hands *that typically arises in cases of war* (his subject in the essay) – namely, violating the just war protections for noncombatants – requires a higher threshold to be reached, without excluding the possibility (indeed, likelihood) that a lower standard may be required for the commission of lesser evils (such as campaign finance improprieties or deceptions).

Thus Walzer’s considered view appears to be that the deliberate killing of noncombatants as a direct instrumental means to one’s end (as opposed to a foreseen but not directly intended side-effect) requires the highest conceivable standard of justification – a supreme emergency. This standard is even higher than the standard required to justify torture of a terrorist or combatant (though Walzer wants that to be no easy bar to clear either). For the remaining cases, we have what Walzer calls “the war convention” – that is, the traditional rules of *jus in bello*, including the proportionality of force requirement and the principle of noncombatant immunity. It should be noted that Walzer’s construal of the latter principle is narrower than the traditional doctrine of

¹⁵ Walzer, “Emergency Ethics,” 46.

double effect. Walzer requires not only that harm to noncombatants be unintended, but also that combatants themselves be willing to run risks to minimize dangers to noncombatants (for instance, bombing at a lower altitude to permit more accurate targeting, even if this results in greater vulnerability for the bomber pilots themselves).¹⁶ Since de Wijze himself identifies proportionality as one of the criteria that must be satisfied for even a dirty hands action to be morally permissible, it is in reality the noncombatant immunity issue that constitutes the primary point of focus in analyzing their different views.¹⁷

Drawing this distinction between dirty hands broadly understood and emergency ethics more narrowly allows us to note a further crucial point of contrast between Walzer's view of dirty hands and de Wijze's: namely, that Walzer's view explicitly rules out the idea that the dramatic action demanded by an emergency could ever become the normal state of affairs, or that a dirty hands action could ever become an ongoing *policy*. The very nature of Walzer's concept of supreme emergency implicitly confines its applicability to a temporally limited context. "Even in wars where the stakes are very high," Walzer cautions, "they may not be so high at every moment in the course of the war as to bring the supreme-emergency argument into play. Each moment is a moment-in-itself; we make judgments again and again, not once for each war."¹⁸ Most importantly, this caveat means that emergency ethics, the form of dirty hands associated with taking human life, cannot become rationalized, bureaucratized, made a matter of habit:

We must resist the routinization of emergency, reminding ourselves again and again that the threats we force others to live with, and live with ourselves, are immoral threats. Over the years we become habituated, callous, hardened against the crimes we were pledged to

¹⁶ Walzer, *Just and Unjust Wars*, 151-59.

¹⁷ De Wijze, "Targeted Killing," 310.

¹⁸ Walzer, "Emergency Ethics," 46.

commit. But it isn't incompatible with the pledge to think concretely about those crimes and about our own unwilling criminality – for it won't be unwilling unless we think about it. This is the essential feature of emergency ethics: that we recognize at the same time the evil we oppose and the evil we do, and that we set ourselves, do far as possible, against both.”¹⁹

Dirty hands is the wrong terminology to use to describe an ongoing policy that provides for the intentional taking of life under specified and predictably recurring conditions. Rather, that is what the principles governing the use of force in law enforcement and just war are there for: to mark out the limits within which the necessary evil of killing can and cannot be justifiably pursued.

In light of our explication of Walzer's original conception of dirty hands and the related topic of emergency ethics, it is now clear that these paradigms are intended as a distinct category from the ordinary actions a soldier or domestic law enforcement officer takes in accordance with the rules and conventions governing force in the spheres of war and peace, respectively. This distinction does not imply that there is no relation between dirty hands and the violence associated with war or law enforcement. It is possible that war in particular, writ large, may at bottom constitute a kind of dirty-handed dilemma, an awful necessity posed by the nature of violence and public order. (Something of this kind seems to have been the view underlying Augustine's just war theory, and more recent echoes can be found in Max Weber's political theory.)²⁰ Similarly, the overall choice to enter into a specific war, particularly a non-defensive

¹⁹ Walzer, “Emergency Ethics,” 49.

²⁰ Augustine, *City of God*, trans. Henry Bettenson (New York: Penguin Books, 1984), XIX.6-7, 860-862; *Against Faustus the Manichean*, in *Political Writings*, ed. Michael W. Tkacz and Douglas Kries (Indianapolis, IN: Hackett, 1994), XXII.73-79, 221-222; Letters 138 and 189, in *Political Writings*, ed. E. M. Atkins and R. J. Dodaro (New York: Cambridge University Press, 2001), 38-39, 217; *On Free Choice of the Will* (Indianapolis, IN: Hackett, 1993), I.4-5, 6-8. All cites are from Parrish, *Paradoxes of Political Ethics: From Dirty Hands to the Invisible Hand* (New York: Cambridge University Press, 2007). See Parrish, *Paradoxes of Political Ethics*, 95-101; and Max Weber, “Politics as a Vocation,” in *From Max Weber: Essays in Sociology*, trans. and ed. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1958), 122-128.

war, might frequently meet many of the criteria for a dirty-handed dilemma. But within the context of a specific war, if the rules of conduct associated with war have any meaning at all, they claim to mark out territory within which soldiers may follow their directives with moral safety, knowing that actions taken in accord with both their spirit and their letter will be internally justifiable moral actions.²¹

Just War and Law Enforcement

The critique developed in the previous section points out what is wrong with applying the concept of dirty hands too easily to an area such as war for which there is already a well-developed body of ethical theory to assess its practices. The concept of dirty hands describes moral conflict at the margins, where we experience friction between the spheres of value in unexpected and uncooperative ways. Just war theory, however, is not surprised to find moral conflict in its midst. It *begins* with a recurring experience of moral conflict, the kind that arises in war, and purports to map out the terrain so that soldiers and commanders may each follow a path with relative ethical safety. Perhaps just war theory is wrong that such a mapping is possible, but this is undoubtedly what the theory supposes itself to be doing.

In this sense, just war theory describes the ethical dimension of a *practice* – soldiering and commanding – that is of ongoing relevance to one regrettably large sphere of human life, war and preparation for war. In the domestic context, a similar practice exists – law enforcement – and it too is guided by an ethical theory, perhaps less formally developed in political philosophy but familiar enough in its broad outlines. We will call these theories the *just war ethic* (JWE) and *law enforcement ethic* (LEE), respectively. For both these areas, the ethics in question offer

²¹ On the concept of internal justifiability, see Parrish, “Benevolent Skulduggery,” in *Corruption and American Politics*, ed. A. Genovese and Victoria A. Farrar-Meyers (Amherst, NY: Cambria Press, 2011), especially 70-71.

themselves as a basis for guiding the practices they circumscribe along morally permissible paths. If the practice itself is morally justified and the ethic properly describes the ethical permissions and limitations that apply *systematically* within the practice, then the practitioner – the soldier, the police officer – may refer directly to the practice’s ethic with confidence, without need in ordinary circumstances to go beyond it. As John Rawls famously argued in his essay “Two Concepts of Rules,” prescriptions that arise *within* a morally justified practice can claim a kind of day-to-day insulation from the broader “all-things-considered” judgments that grander ethical theories – such as consequentialism and deontology – might invite.²² We can critique the practice *itself* from whatever theoretical vantage point we find most compelling. We can also question *which* practice applies, or ought to apply, to our present circumstance. What we *cannot* do, on Rawls’s view, is critique the applicability of the rules from a standpoint located *within* the practice itself. We may debate what just war theory *should* prescribe in circumstances of war and whether this really *is* a circumstance of war or not. But *as* soldiers, we do what the code of soldiers prescribes.

In the case of targeted killing *via* drones, the two ethics, the JWE and LEE, both offer themselves as potential guides. Which framework applies? The JWE, as enshrined in international humanitarian law, requires that military actions do not violate the following principles: (1) only combatants are legitimate intended targets in military operations; (2) there must be reasonable certainty in distinguishing between combatants and noncombatants when carrying out attacks against combatants; (3) the force used against combatants must be proportional to the threat; and (4) military advantage gained from an attack must outweigh any

²² John Rawls, “Two Concepts of Rules,” *The Philosophical Review* 64 (1955): 3-32.

unintended harm that the attack inflicts on civilians.²³ This ethic does not place an outright prohibition on knowingly causing noncombatant casualties, but emphasizes basic protections for noncombatants and seeks to minimize harm to them.

The LEE, as reflected in international human rights law, serves as an alternative moral framework for evaluating drone strikes. In contrast to the JWE, the LEE puts forward the following more stringent criteria governing the use of force: (1) only imminent threats to life permit the use of lethal force; (2) there must be certain identification of a threat before using force against him or her; (3) lethal force is justified only when nonlethal measures are not feasible for stopping a threat; and (4) any use of force must avoid all foreseeable risk of civilian casualties.²⁴ The LEE prioritizes guaranteeing due process and the presumption of innocence to those suspected of wrongdoing over swift action against them. Therefore this ethic greatly restrains the use of lethal force, permitting it only in instances where it is absolutely necessary to stop an imminent threat to life and where nonlethal measures are not a feasible option.²⁵

What framework – the JWE or LWE – should we apply when evaluating the current US policy of targeted killings by drones? Some instances of drone strikes constitute relatively easy cases, where it is clear which ethical framework applies to them. Contemporary militaries now actively employ armed drones in conventional warfare. In the context of conventional war, a

²³ For more on *jus in bello* or the principles guiding just conduct in war, see Walzer, *Just and Unjust Wars*, 127-222; Nils Melzer, *Targeted Killing in International Law* (New York: Oxford University Press), 243-419; and Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” *International Review of the Red Cross* 90 (2008): 991-1047.

²⁴ One exception to the prohibition on foreseeable civilian casualties under the LEE is those rare cases when civilians find themselves trapped in a criminal’s a threat – such as a hijacked airplane headed toward a populated area – and stopping the threat regrettably entails the deaths of those civilians within it. Besides those rare exceptions, the LEE requires police to avoid measures that carry the likely risk of civilian deaths.

²⁵ Melzer, *Targeted Killing in International Law*, 85-239.

military is justified in using drones against targets that do not present an imminent threat, as long as these operations adhere to the principles of the JWE. Drones may be a new technology, but there is nothing inherently unjust about the way that they kill enemy combatants. The same criteria used to evaluate other military operations – such as a cruise missile strike or bomber raid – apply to drone strikes in clear conflict zones like Iraq and Afghanistan.²⁶

There is greater moral ambiguity, however, surrounding US drone strikes against suspected terrorists in areas that are not conventional conflict zones, such as Pakistan, Yemen, and Somalia. The US has authorized over 400 strikes in these areas since 2002, as the targeted killing of suspected terrorists by drones has become an entrenched practice of US foreign policy.²⁷ Should we understand these strikes as operations guided by the JWE or LWE? How we morally assess the US program of targeted drone strikes hinges on the answer to this question.

The US has made clear its position: the policy of targeted killings falls under the JWE and is consistent with international humanitarian law. According to both the Bush and the Obama Administrations, the US is engaged in an ongoing non-international armed conflict²⁸ against al-Qaeda and its affiliates. Congress's 2001 Authorization for the Use of Military Force provides legal legitimacy for these ongoing strikes against suspected terrorists and extends beyond the official battlefields of recognized war zones (Iraq and Afghanistan) to the more ambiguous cases

²⁶ Bradley Strawser, "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles," *Journal of Military Ethics* 9 (2010): 356-358; and Philip Alston, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," United Nations Human Rights Council, May 28, 2010, 24.

²⁷ "Covert Drone War," The Bureau of Investigative Journalism.

²⁸ The US uses the term "non-international armed conflict" to specify that it is not at war with another state (what would be an *international* conflict), but rather at war with a non-state actor.

of the non-conventional zones of periodic conflict (Pakistan, Yemen, and Somalia).²⁹ Many in the international community, however, have expressed skepticism toward the administration's legal rationale for its program of targeted killings. In particular, critics find the US government's expansive interpretation of its current conflict with al-Qaeda – that the US is engaged in a conflict without geographic or obvious temporal limits – to be unprecedented and dangerous.³⁰

The legitimacy of targeted killings by the US outside of traditional conflict zones depends largely on whether the JWE or LEE properly applies in these contexts. Under the JWE, targeted killing will sometimes be justified, though not necessarily as practiced by the US at the moment. But under the LEE, targeted killing is justified only in those rare cases when lethal force is absolutely necessary to incapacitate an imminent threat to life, and never as a punitive response for past actions.³¹ The US policy of drone warfare in recent practice often falls short of the LEE's imminent threat criterion. The US has sought to circumvent this limitation by adopting a definition of imminence that undermines the basic meaning of the requirement. As a leaked

²⁹ Department of Justice, 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; John Brennan, "Obama Administration Counterterrorism Strategy," C-Span, June 29, 2011, <http://www.c-spanvideo.org/program/AdministrationCo>; Eric Holder, Speech to Northwestern University School of Law, The United States Department of Justice, March 5, 2012, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; Harold Hongju Koh, "The Obama Administration and International Law," U.S. Department of State, March 25, 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm>; Barack Obama, "Full Text of President Obama's May 23 Speech on National Security (as prepared for delivery)," *The Washington Post*, May 23, 2013, http://www.washingtonpost.com/politics/president-obamas-may-23-speech-on-national-security-as-prepared-for-delivery/2013/05/23/02c35e30-c3b8-11e2-9fe2-6ee52d0eb7c1_print.html.

³⁰ United Nations Special Rapporteur Ben Emerson, who launched an inquiry into the use of drones for targeted killings, suggests that the current US position is untenable: "I'm not aware of any state in the world that currently shares the United States' expansive legal perspective that it is engaged in a global war ... that would therefore lawfully entitle the United States to take action involving targeted killing wherever an individual is found." See Ben Brumfield and Mark Morgenstein, "Drones Killing Innocent Pakistanis U.N. Official Says," CNN, March 15, 2013, <http://www.cnn.com/2013/03/15/world/asia/u-n-drone-objections>. See also Steven R. Ratner, "Predator and Prey: Seizing and Killing Suspected Terrorists Abroad," *The Journal of Political Philosophy* 15 (2007): 271-72.

³¹ Melzer, *Targeted Killings in International Law*, 423; and Philip Alston, "Report of the Special Rapporteur," 11.

Department of Justice legal memo shows, under US policy “the condition that an operational leader present an ‘imminent’ threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on the U.S. persons and interests will take place in the immediate future.”³² A pattern of planning attacks is sufficient to qualify an individual as an imminent threat, not active participation in a specific future plot.

There are similar shortcomings in the application of the LEE’s certainty standard. In addition to “personality strikes” – drone strikes against named terrorist suspects – the CIA carries out “signature strikes” against individuals based on their pattern of behavior, though the identity of the targets is unknown.³³ Since US officials do not even know the identities of the targets of signature strikes, this practice clearly violates the LEE’s requirement that officials identify a target with high certainty before authorizing a strike.

In addition, the very nature of drone strikes, killing at a distance by machine, often puts in jeopardy any hope of meeting the LEE’s requirement to use nonlethal measures in stopping a threat and to only opt for lethal measures as a last resort. General James Cartwright, former vice-chair of the Joint Chiefs of Staff, points out that a suspected terrorist facing a drone strike has little opportunity to surrender, even if he wants to, when there is no one on the ground in conjunction with a drone.³⁴ Defenders of US drone policy argue that strikes only occur in areas where it is impossible for troops to seize suspected terrorists. Yet the risk associated with putting boots on the ground, or the controversy inherent in incarcerating and trying suspected terrorists

³² Department of Justice, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen*, 7.

³³ Klaidman, *Kill or Capture*, 40-41.

³⁴ Tara McKelvey, “Interview with Harold Koh, Obama’s Defender of Drone Strikes,” *The Daily Beast*, April 8, 2012, <http://www.thedailybeast.com/articles/2012/04/08/interview-with-harold-koh-obama-s-defender-of-drone-strikes.html>.

on US soil, creates strong political incentives to choose drone strikes as a first rather than last resort, which increasingly appears to be the Obama administration's counterterrorism policy of choice.³⁵

Finally and importantly, the CIA drone program violates the LEE's – and arguably also the JWE's – noncombatant protection standard by authorizing numerous strikes that clearly entail likely civilian casualties. One example occurred in North Waziristan (part of the Federally Administered Tribal Areas of Pakistan) on March 17, 2011, when missiles hit a large gathering for a *jirga*, a tribal assembly responsible for resolving disputes. Under the LEE, the presence of militants at this gathering in no way justifies the strike, given the large number – between 19 and 41 – of civilian casualties.³⁶ Also, so called “double tap” strikes – a follow up strike in the same location as an initial strike – often kill civilians, especially first responders and mourners who rush to the scene of a drone strike. For all four of the LEE's criteria, then, evidence suggests that the US drone policy regularly violates these standards and even the less stringent JWE standards on occasion.

Walzer's “In-Between Zones”

Walzer addresses the thorny question of which moral principles should shape a policy of targeted killing in recent writings on just war and terrorism. Walzer believes that targeted killings are justified in some instances, but at the same time he finds troubling the lack of restraints on and broad implications of the current US drone program. In particular, Walzer

³⁵ Klaidman, *Kill or Capture*, 117-43.

³⁶ Stanford and NYU, *Living Under the Drones*, 57-62; and “Obama 2011 Drone Strikes,” The Bureau of Investigative Journalism, August 11, 2011, <http://www.thebureauinvestigates.com/2011/08/10/obama-2011-strikes/>. Given the large number of civilian casualties, it also would be difficult to justify this strike under the JWE's test for non-combatant protection.

points out that the US drone program as currently practiced almost certainly violates the just war principle of proportionality³⁷ (a concern obscured by the US practice of counting all military-age males killed in a strike as militants unless explicit evidence emerges proving their innocence).³⁸ But Walzer's criticism goes beyond concerns that current US drone policy is not living up to the principles of just war theory. Walzer suggests that, for targeted killings outside of conflict zones, the JWE is not necessarily the proper perspective for evaluating these strikes. He does not object to the term "war on terror," but argues that in such a war governments in most instances should follow the ethical rules governing law enforcement:

Though the risks are larger in the "war" against terror than they are in the "war" against crime, I believe that the first of these can be conducted – certainly we should try to conduct it – within the moral and constitutional constraints that [hold in a domestic context or a zone of peace]. The details of the constraints have to be negotiated, of course, and they are negotiated through ordinary democratic processes. And it is entirely legitimate that sometimes they will be less restrictive with regard to what the police can do and sometimes more so. But the basic principles of morality and constitutionalism should be defended, even in hard times.³⁹

Here Walzer gestures at a legal and moral framework for evaluating antiterrorism activities such as targeted killings that closely follows the LEE in many respects but could deviate from it.

In several different articles,⁴⁰ Walzer specifically discusses the practice of targeted killings of suspected terrorists. In none of these articles does he set out a systematic framework for evaluating targeted killings outside of a war zone, and he even expresses wariness toward

³⁷ Walzer, "Targeted Killing and Drone Warfare," *Dissent*, January 11, 2013, http://www.dissentmagazine.org/online_articles/targeted-killing-and-drone-warfare.

³⁸ Becker and Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will."

³⁹ Walzer, "On Fighting Terrorism Justly," *International Relations* 21 (2007): 481.

⁴⁰ Walzer, "On Fighting Terrorism Justly"; "Targeted Killing and Drone Warfare,"; and "Terrorism and Just War." *Philosophia* 34 (2006): 3-12.

developing a new framework distinct from either the LEE or JWE.⁴¹ But together his recommendations appear to suggest that conditions in areas such as Pakistan and Yemen require applying a novel moral and legal framework that synthesizes these two existing ethics governing the legitimate use of force.

To reconstruct Walzer's proposal, we can begin by examining what he believes is an instance of a justified targeted killing. He approvingly cites a strike against al-Qaeda militants in the desert of Yemen in 2002.⁴² This strike, according to Walzer, occurred in a context that does not fit neatly into either a war zone or a zone of peace: "Yemen lies somewhere between Afghanistan and Philadelphia. It is not a zone of war where armies fight, and it is not a zone of peace where the police do their work. The state's writ does not run in the desert of South Yemen."⁴³ Walzer appeals to the fact that certain presumptive features underlying the LEE do not apply to "in-between zones" such as Yemen. For instance, in the strike Walzer cites, the Yemeni government had previously tried to capture the militants, and it was only when these efforts failed that the US resorted to a targeted killing.⁴⁴ When police work fails to stop those

⁴¹ Walzer, "On Fighting Terrorism Justly," 483.

⁴² In separate articles, Walzer gives different details to describe what appears to be the same strike. In "Terrorism and Just War," he describes "the case of the five Al Qaeda militants (so they were described by US officials) traveling in a van in the Yemini desert, who were killed by a Hellfire missile late in 2001" (10). In "On Fighting Terrorism Justly," he references "the 2002 targeted killing of a group of al-Qaeda militants traveling in a van in South Yemen by a rocket fired from an American helicopter" (480). Walzer appears to be referencing the first US targeted killing by a drone, in which a CIA drone killed six people traveling by car in the desert in Yemen on November 3, 2002. Among the dead was al-Qaeda leader Ali Qaed Senyan al-Harithi. See Melzer, *Targeted Killing in International Law*, 439.

⁴³ Walzer, "On Fighting Terrorism Justly," 481.

⁴⁴ Walzer, "On Fighting Terrorism Justly," 481. For the purpose of reconstructing Walzer's position, I do not question his description of the facts of the targeted killing by the CIA in Yemen in 2002. It is important to point out, however, that the example is somewhat messier than Walzer implies. This strike killed a US citizen, Kemal Darwish, and was carried out without consultation with domestic law enforcement. See Chris Woods, "'Ok, fine. Shoot him.' Four words that heralded a decade of secret US drone killings," Bureau of Investigative Journalism,

actively engaged in terrorist activities, Walzer implies, Special Forces are justified in adopting measures more in line with just war principles.⁴⁵ As the example from Yemen makes clear, under Walzer's proposed ethic for "in-between" zones, it is not necessary that the targets constitute an imminent threat – that is, are in the process of carrying out an attack – at the time of a strike. Furthermore, in an "in-between zone" like the Yemeni desert, Walzer suggests, the strict requirement of nonlethal force may be relaxed – especially in cases where pursuing nonlethal options would put Special Forces in grave danger.

Though Walzer proposes some targeting criteria for in-between zones similar to those governing force in war, he emphasizes that protections for noncombatants in in-between zones remain similar to those that apply in a zone of peace. Specifically, Walzer proposes two limits on the practice of targeting killing in in-between zones that are more demanding than what traditional *jus in bello* principles require. First, he states, we must attain a higher standard of certainty than required under the JWE: to perform a targeted killing in an in-between zone, we must "be as sure as we can be, without judge or jury, that the people we are aiming at are really Al Qaeda militants or, more generally, that they are engaged in planning and carrying out terrorist attacks." Second, Walzer claims, the non-combatant protection requirement is also strengthened: "We have to be sure as we can be that we are able to hit the targeted person without killing innocent people in his (or her) vicinity."⁴⁶ To stop an imminent threat in an in-

November 3, 2012, <http://www.thebureauinvestigates.com/2012/11/03/ok-fine-shoot-him-four-words-that-heralded-a-decade-of-secret-us-drone-killings/>.

⁴⁵ Walzer, "On Fighting Terrorism Justly," 483.

⁴⁶ Walzer, "Terrorism and Just War," 11.

between zone, Walzer reluctantly concedes that noncombatant casualties may be permissible, but cautions that crossing this line easily can lead to cruelty and brutality that cannot be justified.⁴⁷

Thus, Walzer sets forth targeting criteria for in-between zones that combine principles from the JWE and LEE. With respect to (1) legitimate targets, only individuals actively engaged in terror activities count as legitimate targets in in-between zones (a standard closer to the JWE requirements since the target does not need to be an *imminent* threat). With respect to (2) certainty, there must be certain identification of a threat before using force against him or her (corresponding to the LEE requirement). Regarding (3) the permissible degree of force, the force used against suspected terrorists must be proportional to the threat (the same requirement as under the JWE). Finally, in terms of (4) risk to non-combatants, any use of force must avoid all foreseeable risk of civilian casualties, except in emergencies (a slightly relaxed variation on the LEE standard). Figure 1 shows how Walzer's "in-between zone" proposal compares with the requirements of the JWE and LEE.

On its surface, Walzer's proposal appears to offer a sensible compromise. For in-between zones where US drone strikes are common, Walzer recommends that we "maneuver between our conception of combat and our conception of police work, between international conflict and domestic crime, between zones of war and peace."⁴⁸ This compromise, however, proves to be more far-reaching than it seems. In offering this compromise, Walzer does not merely critique US officials for incorrectly applying existing principles that govern the use of force. He goes further to suggest that the principles of the JWE and LEE are inadequate to provide guidance on the proper use of force against suspected terrorists. In other words, the uncertainty and concern

⁴⁷ Walzer, "On Fighting Terrorism Justly," 483-84.

⁴⁸ Walzer, "Terrorism and Just War," 12.

over the US practice of targeted killings stems partly from the need to define a new practice altogether – the use of force in in-between zones – with its own distinct rules. There is no category in international humanitarian law or international human rights law corresponding to the in-between zones that Walzer discusses. Thus Walzer’s compromise requires carving out a new theoretical category. International law clearly prohibits the targeted killing of a non-imminent threat outside of a war zone, for example, whereas Walzer’s proposal permits such action in certain instances.

FIGURE 1. COMPARISON OF THE CRITERIA GOVERNING THE USE OF FORCE

Note: shading denotes which criteria in Walzer’s proposal correspond with the just war ethic and which correspond with the law enforcement ethic

	<i>Just War (War Zone)</i>	<i>Law Enforcement (Zone of Peace)</i>	<i>Walzer’s Proposal (In-Between Zones)</i>
<i>Legitimate Targets</i>	Combatants	Imminent threats only	Individuals actively engaged in terrorist activities but not necessarily imminent threats
<i>Certainty</i>	Reasonable certainty in distinguishing combatants from noncombatants	Certain ID of Threat	Certain ID of Threat
<i>Degree of Force</i>	Proportionality	Always nonlethal measures, except when not feasible	Proportionality
<i>Risk to Noncombatants</i>	Principle of double effect limits the acceptable risk of non-combatant casualties	Avoid all foreseeable risks of noncombatant casualties	Avoid all foreseeable risks of noncombatant casualties (except in emergencies)

The two ethical traditions governing the use of force are not set in stone: like any practices, their rules and norms have changed over time. But to revise the long-established distinction between conflict zones and non-conflict zones by creating a third category should not be approached lightly. The temptation to do so is understandable. Disanalogies between the domestic context and the more conflict-ridden territories Walzer refers to are not negligible. Domestic terrorism occurs in a context where the rule of law is strong, which fosters an environment favorable for law enforcement working to stop terrorist activities. The planning, preparation, and execution of foreign terrorism, however, often takes place in distant locations where the reach of domestic law enforcement is weak or nonexistent. Success in countering foreign terrorism depends, then, on the ability of domestic law enforcement agencies to cooperate with their counterparts overseas, who may be ineffective or unwilling to assist. When law enforcement finds itself powerless to act in such instances, this challenge might be thought to justify relaxing the restrictions imposed by the LEE and adopting criteria suggested by Walzer's proposal for in-between zones. Yet it is important to balance this perceived need for a new "in-between" ethic with a sober understanding of what results from implementing it. Walzer's proposal would weaken the (theoretical) protections against force enjoyed by civilians and suspects in areas that, under the current dichotomous framework, generally are characterized as non-conflict zones. Perhaps a halfway step toward the JWE is better than holding onto a LEE that proves impotent to deliver its promises of peace. But though the JWE places constraints on the devastating forces of war, these forces still ravage and destroy humanity within these constraints. For this reason, any step toward the zone of war is to be accepted only as a last resort.

The key step in Walzer's argument comes in drawing the conclusion that, when law enforcement's efforts are stymied, the moral force of the LEE essentially vanishes, opening the door to systematically permitting lethal force as a response to foreign terrorism in contexts where it would ordinarily be forbidden. We can see the problems with this conclusion by considering an analogy with domestic terrorism. In the domestic context, where the LEE clearly applies, there is a strict prohibition against police exercising lethal force as a punitive response to someone suspected of committing a terrorist act. In the absence of an identifiable imminent threat, the use of lethal force by the police strikes us as unwarranted. Even if police have an opportunity to exact punitive measures directly against a suspect, we instead require them to follow the law, take the suspect into custody, and let the judicial process take its course. This conclusion still holds in cases where we have doubts that the justice system can be trusted to succeed in its objectives. For instance, what if all the evidence points to the guilt of a suspected domestic terrorist, yet she gets off on a technicality or is never brought to trial because certain witnesses are too fearful to testify? This scenario is not far-fetched, especially when we think of domestic terrorist groups like the Ku Klux Klan that frequently used intimidation to operate with impunity during the Jim Crow era. Yet such failures in the justice system do not allow us to suddenly discard the LEE in favor of less stringent guidelines that allow lethal force to be used more indiscriminately in response to past actions.

For these reasons, we want to resist Walzer's implication that the in-between zones he identifies require a new ethic distinct from the LEE or JWE. Certainly, there is undeniable value in Walzer's analysis of these cases, for it brings into focus challenges to peace short of war that pose a moral dilemma for those committed to following the prescriptions of the LEE and JWE. Where terrorism makes peace precarious, the impetus is greatest to resort to lethal force in

situations that fall short of satisfying the criteria demanded by LEE. The danger in choosing this path, however, lies in its broader impact on communities and noncombatants. Systematically relaxing the restraints on the use of force against suspected terrorists puts not only these suspects at greater risk, but also the communities of innocent men, women, and children where they reside. In fact, such an approach to in-between zones has the effect of empowering terrorists to bring conditions approaching war wherever they go, even areas where, though the rule of law may be less than ideal, retain many of the characteristics of domestic stability and peace.

It is precisely this consequence of the US's choice to define its counterterrorism efforts against al-Qaeda and its affiliates as a war without geographic limits that raises concerns. As Steven Ratner argues, by understanding this conflict as a *global* war that extends wherever al-Qaeda is found, the US pursues a policy that makes in-between zones particularly vulnerable.⁴⁹ Indeed, these areas have suffered the most under the CIA covert drone program and, unsurprisingly, strikes in these areas have proven the most controversial. Walzer's proposal does seek to limit some of the excesses of the US drone program as employed in the in-between zones – which in some instances even fail to meet the less stringent criteria of the JWE. But the implication of his proposal still weakens noncombatant protections in ways that are difficult to justify categorically, given the strong resemblance these zones bear to conditions of domestic peace.

Across a variety of different contexts, there is strong presumption to hold onto the protections of the LEE. The mere presence of a dangerous individual domestically does not compel us to abandon the LEE, nor should this dynamic alone lead to a different conclusion for a

⁴⁹ Ratner, "Predator and Prey," 272.

far away land. The principles of just war, the *jus ad bellum* specifically, set forth demanding criteria that must be met before ever bringing war into a community.⁵⁰ It is a mistake to claim that, for entities as diverse and amorphous as terrorist organizations, a nation can make a proclamation of war against them once and then pursue war wherever these organizations are found. This perspective casts away important restraints on war and invites an expansive conflict. A terrorist organization could exercise control over a territory, exacting terror within and without to such an extent to meet the traditional *jus ad bellum* principles and justify war as a response. But decisions regarding war always must be sensitive to conditions on the ground and made separately for distinct locales, on a case-by-case basis. Any attempt to systematically weaken the LEE where the challenge of terrorism arises misses this critical point, which is the fundamental flaw with de Wijze's and Walzer's approaches to targeted killings.

The LEE places more stringent restrictions on targeted killings and the use of force generally than the JWE, but it is not impotent in the face of terror and possesses resources for addressing it. When applying the LEE to in-between zones, we observe that it is more likely that the third condition for a targeted killing – nonlethal measures are not feasible for stopping an imminent threat – will be met than in standard domestic contexts because law enforcement is weak in such areas. This observation by itself does not imply a weakening of the normative force of the LEE. On the contrary, officials retain a substantial *prima facie* obligation to pursue nonlethal responses whenever such measures have a reasonable prospect of success. The implication of the distinction between zones of peace and in-between zones is more modest: if justified targeted killings of suspected terrorists becomes somewhat more plausible within in-between zones, that

⁵⁰ The exact requirements of the *jus ad bellum* are subject to much debate. See Walzer, *Just and Unjust Wars*, 51-124; and James Turner Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), 41-70.

is only because the lack of effective law enforcement in these areas tends to make capture and other nonlethal responses to imminent terrorist threats less feasible.

Potential Dirty Hands Dilemmas Raised by Drones and Terrorism

Our approach, therefore, invites moral reasoning about the use of violence to consistently adopt the standpoint of the relevant ethic (JWE or LEE, depending on the context) as a starting point, and only then engage in adaptations of its strictures based on specific features of the situation at hand. Here the traditional concept of dirty hands again becomes relevant, particularly in emergencies where the morally obligatory features of the relevant ethic potentially are overridden by competing consequentialist considerations.⁵¹ This approach, like most forms of ethical analysis, leaves the door open to potential abuse, as it is possible to use any specific instance of dirty hands to broadly defend tactics that should be limited by the appropriate ethical theory. Sensitive to this concern, we focus on examples of legitimate dirty-handed dilemmas to highlight the truly hard cases that could arise when considering the targeted killing of a suspected terrorist, which stand in sharp contrast to the systematic abuses that often result from categorical exemptions to the LEE or JWE.

The complexity of terrorism makes it impossible to put forth a comprehensive list of potential dirty-handed actions related to the practice of targeted killings in in-between zones. Nevertheless, going through scenarios where one of the LEE criteria for a targeted killing is not met in the context generating the most controversy – in-between zones where the LEE still

⁵¹ Where this happens without remainder – where the violation of the moral principle can be internally justified by the same values that are compromised – we may merely have a case of a *prima facie* obligation being over-ridden by competing moral considerations. When there *is* a morally significant remainder – where the moral principle violated is incommensurable with the competing moral principle which motivates the violation – we have a genuine case of dirty hands.

applies – provides an instructive sampling of potential dilemmas of dirty hands. In this section, we consider such dilemmas of dirty hands by developing four brief hypothetical examples, each of which eliminates one of the ordinarily required conditions of the LEE while leaving the other three intact.

Example 1: Condition requiring presence of an imminent threat is not met. A certain terrorist suspect is a charismatic leader who has a history of drawing new recruits and inspiring attacks against civilians, trends that are expected to continue as long as he remains in his leadership role. Nevertheless, there is no evidence that the terrorist suspect poses an imminent threat through participation in a specific plot that endangers civilian lives. Capturing the leader through traditional law enforcement methods has proven impossible, which tempts officials to authorize a targeted strike against the leader based on his past actions and likelihood of similar actions in the future. Clearly, a strike in such a situation runs afoul of the criteria set forth by the LEE, which requires that an imminent threat, not past actions, provide the motivation for a targeted killing. But because of the terrorist suspect's unique authority, some officials argue that they need to put aside the LEE in this particular instance. Killing this individual will significantly damage the terrorist organization's capabilities and limit its ability to carry out future attacks.

Example 2: Condition requiring certainty of target's identity is not met. A little known terrorist group succeeds in carrying out a series of devastating attacks on civilians, and fear grips the country that more attacks are on the way. The attacks catch intelligence officials off guard. Because officials do not have a long history of studying and tracking this group, they lack in-depth knowledge of its members and how it operates. Officials succeed in piecing together parts of this terrorist network, but significant gaps in their knowledge of the group remain. Based on chatter that they have heard, intelligence officials believe with a high degree of certainty that

more attacks are planned. Yet intelligence officials are less certain about the identity of the network's leaders and who should be priority targets in efforts to stop another attack. Given this imperfect information, any strikes would carry the significant risk of killing individuals unaffiliated with the terrorist network or who occupy relatively minor roles within it. Officials face this undesirable choice, while feeling strong public pressure to take decisive action to counter the terrorist threat.

Example 3: Condition requiring the necessity of lethal force is not met. Intelligence officials learn that a terrorist cell in a remote region is close to making operational a potentially devastating plot directed at civilians in a large city. The country where this terrorist cell resides wants to stop them just as much as the US. In fact, the US has participated with this country on joint operations to capture other suspected terrorists in its network. But the two countries have carried out these operations with varying degrees of success. Some operations have resulted in the successful capture of terrorist suspects. Other operations, however, have been bloody and cost both countries many lives. Moreover, the ability of this terrorist group to repel forces trying to capture its members has helped its legend grow and bring in more recruits. Attempting to capture members of this terrorist cell through nonlethal means is an option, but based on past experiences some officials argue that targeted strikes are necessary to ensure that the plot is stopped, as well as reduce projected military casualties and preclude costly prestige and recruitment gains by the terrorist group.

Example 4: Condition prohibiting foreseen civilian casualties is not met. For a number of weeks, officials have been carrying out surveillance on a terrorist suspect. Through this surveillance, officials have established that he is planning a chemical weapons attack in a populated area. Due to a variety of factors, capturing the suspect proves impossible in his current

location. The attack is imminent, so officials want to move forward with a strike. Members of the suspect's family always are near him, however. Those observing the suspect have tried to find an opportunity to strike when other family members are not in the immediate vicinity, but such an opportunity has yet to arise. Officials have to make a decision: carry out the targeted killing, which almost certainly will result in the noncombatant death of family members of the terrorist suspect, or allow the terrorist plot to proceed, which could succeed and inflict high numbers of domestic civilian casualties.

Whether a targeted killing in any of the above dirty hand dilemmas would be justified depends on the precise nature of the threat and the harm caused by forgoing a strike when not all the necessary conditions are met. Arguably the list of scenarios could include examples when two conditions of the LEE are not met, but as more conditions are not met, the required justification for permitting the legitimate use of lethal force becomes increasingly more demanding. For all dilemmas of dirty hands, the burden of proof rests with government officials to show that emergency circumstances compelled them to break the rules that normally bind them. The public has good reason to be skeptical of a dirty hands justification for a targeted killing, given how often governments offer dubious post hoc justifications for violations of moral rules or individual rights for expansions of state power.⁵² In any evaluation of a dirty hands justification, it is critical to remember that by their nature such dilemmas ordinarily arise in distinctive emergency situations. If advocates of a policy repeatedly have to make dirty hand arguments to defend implementation of it, that is a strong prima facie reason to suspect the policy. Dirty hands justifications may sometimes succeed in preserving the moral legitimacy of

⁵² Jeremy Waldron, *Torture, Terror, and Trade-offs: Philosophy for the White House* (New York: Oxford University Press, 2012), 39.

certain actions that normally would constitute ethical violations, but such justifications never can save a policy that routinely disregards basic moral principles.

Drones and Accountability

In Walzer's original essay on the dirty hands dilemma, he emphasizes the dangers of political actors stepping outside established moral frameworks to justify their actions. When a political actor breaks a moral rule, the worry is that she will become increasingly accustomed to wrongdoing. If nothing checks this behavior, the political actor may very well embrace the mindset that, in service of the greater good, she can break moral rules with impunity. Because of this concern, Walzer suggests that political leaders who dirty their hands should face punishment. Walzer himself recognizes the challenges of incorporating a system of punishing leaders with dirty hands into the political process, but the proposal conveys the essential idea that we must hold accountable those leaders who occasionally dirty their hands for the public good.⁵³ An ethical leader embraces this aspect of the dirty hands situation: she recognizes the legitimacy and binding nature of her moral and legal responsibilities, even as outside factors force her to regrettably forsake them. By contrast, a political system that lacks specific mechanisms for accountability invites political actors to permanently claim and abuse emergency powers. That worry is particularly acute in the case of targeted killings. It is a short journey between the practice of targeted killings and government assuming the power to assassinate. Few powers are more dangerous than that of assassination, and for that reason it is prudent to be wary of attempts to legitimize an expansive program of targeted killings.

⁵³ Walzer, "The Problem of Dirty Hands," 80-81.

Political incentives, however, encourage expanding rather than limiting the US practice of targeting killings. Current US drone policy plays well in the court of domestic public opinion, with a strong majority of Americans supporting the policy as a seemingly forceful response to terrorist threats.⁵⁴ Equally important, this military technology allows the US to wage war against terrorists without what usually is the inevitable consequence of war – significant casualties among one’s own soldiers. Drone usage comes with its costs, but these costs are easier for the media and public to ignore. The unfortunate victims of drone strikes are mostly nameless individuals in far away lands with whom Americans have little connection. Each successful strike of a high-profile target is a ready-made campaign ad for elected officials.⁵⁵ Strikes that take the lives of innocent civilians gain little attention and carry few if any political costs for officials – especially given that the drone program remains classified. From the perspective of electoral politics, then, there is little reason for politicians to curb US drone strikes: successful strikes advance politicians’ ambitions, while inaccurate strikes carry little risk of backlash from voters.

Through drone technology, the US has developed capabilities of both targeting precision and lethality that are unrivaled in the world. CIA and military drone operators have the capability to carry out surveillance for days, hovering a drone above a targeted individual until choosing the ideal time to strike. The technology and capabilities of drones only will improve with time. For example, one current proposal involves designing an armed drone small enough to slip through

⁵⁴ Unsurprisingly, US drone strikes prove dramatically less popular abroad. See Pew Research Global Attitudes Project, *Global Opinion of Obama Slips, International Policies Faulted*, June 13, 2012, <http://www.pewglobal.org/2012/06/13/global-opinion-of-obama-slips-international-policies-faulted/>.

⁵⁵ Illustrating this point is the reported obsession with drone strikes of Rahm Emanuel when he was Obama’s chief of staff. Anxious to learn of and publicize successful strikes, Emanuel recognized the political upsides of the drone program for the President. See Klaidman, *Kill or Capture*, 121-22.

an open window and kill a target.⁵⁶ As the technology continues to advance, it will become even more difficult for anyone targeted by drones to elude assassination. It is an awesome and dangerous power to ever entrust in human hands.

Is it possible to rein in the power to assassinate and keep targeted killings – outside the context of war – limited to instances of responding to an emergency that poses an imminent threat to human life? To achieve a policy consistent with this goal, the political incentive structure surrounding their use needs to be changed so that leaders are accountable for their choices, but also so that citizens are more directly implicated in moral responsibility for their leaders' choices.⁵⁷ To achieve this goal, a much greater degree of transparency is required than has thus far been seriously contemplated by policymakers. For targeted killings occurring outside of conflict zones, policies and oversight mechanisms expected in law enforcement in a democratic state need to govern these strikes. First of all, it is essential to take the rationale for the drone program out of the shadows and make public the conditions for justifying a strike. Widely publicizing these criteria allow the public and other government officials to evaluate whether a particular drone strike meets the relevant standards.⁵⁸ Given the demanding conditions that must be met to justify a strike, they should become much rarer occurrences. In addition, to prevent the abuse of this power, the discretion to authorize strikes must be subject to both a clear chain of command – with identifiable individuals who can be held responsible in cases of error or abuse – and there must also be a mechanism of oversight empowered to review strikes and

⁵⁶ Jane Mayer, "The Predator War," *The New Yorker*, October 26, 2009, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

⁵⁷ Dennis F. Thompson, *Political Ethics and Public Life* (Cambridge, MA: Harvard University Press, 1987), 11-39; Parrish, "Collective Responsibility and the State," *International Theory* 2009 (1): 119-154; and Eric Beerbohm, *In Our Name: The Ethics of Democracy* (Princeton, NJ: Princeton University Press, 2012).

⁵⁸ For further on this point, see Thompson, *Political Ethics and Public Life*, 11-39.

take disciplinary action when necessary. Transparent processes will help to evaluate the decisions that were made and hold accountable any individual or agency that violated the criteria.⁵⁹

Dirty hands dilemmas may arise in rare emergency situations. For those authorizing a strike in such an instance, the burden rests with them to demonstrate that extraordinary circumstances forced them to abandon the rules governing the program. If the facts surrounding the strike retrospectively justify its authorization, there will be good reason to exonerate those officials caught in the dilemma. As Walzer cautions, however, even in these cases it is desirable to retain some measure of real sanction against the conduct – at minimum, a commitment not to honor or glorify it – in order to limit the temptation to expand drone strikes and undermine the rules governing them.

The current US drone program in practice falls well short of these ideals. Protocols for the US drone program are not publicly known. For the foreseeable future, no plausible scenario exists whereby the strikes themselves might be subject to any form of retrospective public review. This lack of accountability has led to an expanded US policy of targeted strikes that frequently kills and maims noncombatants and instills an atmosphere of fear in areas where strikes are most common. One Pakistani man, who lost his legs in a drone strike, poignantly describes the human toll of current US policy: “Everyone is scared all the time. When we’re sitting together to have a meeting, we’re scared there might be a strike. When you can hear the drone circling in the sky, you think it might strike you. We’re always scared. We always have

⁵⁹ For further on this point, see John Locke’s discussion of prerogative in *Second Treatise*, XIV, in *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven, CT: Yale University Press, 2003), 171-75.

this fear in our head.”⁶⁰ The severe trauma experienced in communities impacted by drone strikes makes clear the urgent need to significantly limit the scope of this policy. In the absence of dramatic reforms, the inevitable conclusion seems to be that the capabilities drones provide are too tempting to insulate from systematic abuse.

Conclusion

Confusion and incoherence (and frequently also insincerity) have characterized much of the public discussion surrounding the dirty-handed dimension of US drone policy. As we have seen, genuine dirty hands dilemmas could arise in the context of counterterrorism efforts where targeted killing by drones is available as a tactic for responding to a threat. But this possibility in particular *instances* is insufficient to justify a *policy* that regularly violates fundamental moral and legal principles. It is hard not to reach the conclusion that dirty hands justifications for the US drone program ordinarily serve as post hoc rationalizations for a policy of dubious ethical standing.

Philosophy invites us to use our imaginations: one of its greatest gifts is a tendency to draw our attention away from our ordinary experiences and assumptions and toward the frontiers of the unknown that can only be glimpsed by imagination and suspension of disbelief. Moral philosophy has this characteristic as well: it fixes our gaze on situational outliers and eccentric hypotheticals and in doing so attunes us to complexities in our moral experience that we might otherwise easily overlook. The politician dirtying her hands is such a case. But it is important when exploring these frontiers that we do not forget the distance we have traveled to arrive at them; that we do not import the ethic of the frontier to a context where it does not apply.

⁶⁰ Stanford and NYU, *Living Under the Drones*, 81.

Terrorism poses a special problem in this regard because it seeks to import some of the conditions of guerilla or concealed warfare into otherwise peaceful contexts. The appropriate ethic for responding to terrorism where we encounter it *directly* is the ethic of war: but we rarely do confront it directly, for it conceals itself. Its obscene purpose is to subdue us into retreat, to a life of flinching at the mere shadows of its terrors. If it induces us to lash out indiscriminately in response, to transpose the ethic of war to times and places of peace, all the better: that will admirably suit its end. And all the while, if it ever catches us flat-footed, it gains the chance to start the whole dreadful cycle once more.

How to respond to terrorism is a matter of genuine ethical difficulty, and the notion of dirty hands captures its family resemblance with other familiar moral challenges that pervade public life. But we must not let the genuine challenges eradicate the ethical progress we have made: in particular, the code of conduct restricting violence in the enforcement of the law and the just war principles comprising the frontier is never too far away, amidst the treacherous terrain of war. If terrorism is war concealed, it is still no *more* than war. If we know the ethic appropriate to war, terrorism cannot give us reasons to enact a policy that systematically goes *beyond* that frontier ethic. Indeed, it will require us to take one or more steps back from that ethic of extremes, to rely on the ethic of law enforcement, until such time as war itself is indisputably at hand.