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Drone Violence as Wild Justice: Administrative Executions on the Terror Frontier

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Introduction

Outside of Sana'a [Yemen], it's the Wild West.

Vivian Salama, journalist (Woods 2015, 209)

On 12 October 2000, seventeen US Navy sailors were killed when the USS *Cole*, a guided missile destroyer, was attacked in the Yemeni port of Aden by suicide bombers in a small boat laden with explosives. More than eighteen years later, US President Donald Trump confirmed that a man accused of organising this attack had recently been killed in a US airstrike (probably a drone strike) in Yemen. Trump tweeted in early January 2019 (Browne and Starr 2019):

Our GREAT MILITARY has delivered justice for the heroes lost and wounded in the cowardly attack on the USS Cole. We have just killed the leader of that attack, Jamal al-Badawi. Our work against al Qaeda continues.

Soon afterwards, US Central Command, which oversees military operations in the region, tweeted confirmation that al-Badawi was killed in the strike while driving a vehicle alone in the Marib Governorate. A military spokesman later explained that in 2003 al-Badawi had been indicted by a federal grand jury, charged with fifty counts of various terrorism offences, including murder of US nationals. Before the 2019 strike, al-Badawi had been on a list of 'most wanted terrorists' maintained by the Federal Bureau of Investigation, and the US State Department's Rewards for Justice Program had

offered up to \$5 million for information leading to his arrest (Browne and Starr 2019).

Although much remains to be discovered about the circumstances surrounding the killing of al-Badawi, it is reasonable to suppose that he was deliberately targeted in a so-called 'personality strike'. Based on what little is known publicly about the US government's use of armed drones, the purpose of this kind of drone strike is to eliminate named individuals. Personality strikes are thus distinct from 'signature strikes' against 'individuals who are unidentified but behaving in a manner considered by military and government officials to resemble the actions of combatants' (Cronin 2018, 108–9). For the purposes of this chapter, there are four features of al-Badawi's killing worth highlighting: (1) Yemen is not a place where the United States is party to an armed conflict; (2) it is ambiguous, from the known circumstances and the language used by Trump, whether al-Badawi was regarded by the US government as a criminal or a combatant, or both; (3) it is likewise unclear whether the strike against al-Badawi was a preventive response to anticipated wrongdoing (terrorism) or a punitive response to past wrongdoing (the attack on the *Cole*), or both; and (4) the killing of al-Badawi was apparently done without judicial sanction.

These features of al-Badawi's killing are similar to those of the killing of Ali Qaed Senyan al-Harthi, another man allegedly involved in the 2000 attack on the *Cole*. In early November 2002, Yemen was the site of the US government's first personality strike outside a war zone and the first reported instance of an armed drone being used lethally by the civilian Central Intelligence Agency (CIA). On that occasion, anonymous US government sources claimed that six suspected al-Qaeda members (including al-Harthi) died when the vehicle they were travelling in (on a road to the east of Yemen's capital, Sana'a) was hit by a missile fired from a Predator drone (BBC 2002; Hoyle and Koch 2002). In a television interview on 5 November 2002, US Deputy Defense Secretary Paul Wolfowitz effectively acknowledged US responsibility for the drone strike: 'it's a very successful tactical operation . . . And one hopes each time you get a success like that, [you] not only have gotten rid of somebody dangerous, but [you] have imposed changes in their tactics and operations and procedures' (Crawley and Svitak 2002). On the same day, however, Sweden's foreign minister Anna Lindh condemned the strike as 'a summary execution that violates human rights' (Crawley and Svitak 2002). Ever since, disagreement has persisted about the status, morality and legality of drone strikes conducted against named individuals located outside war zones.

Ethicists, lawyers and policy analysts have fiercely debated whether lethal acts of this kind should be judged and governed according to either

of two moralities of state violence: the morality of the war paradigm, or the morality of the peacetime paradigm of law enforcement. Depending on one's viewpoint (which depends, in turn, upon one's view of what counts as 'war' and 'law enforcement'), drone-based personality strikes such as those carried out by the US government are seen either as permissible acts of killing in war, or as impermissible homicides (unlawful acts of lethal law enforcement) outside war. This chapter's contribution to that debate, focusing on the law enforcement paradigm, is to explore the potential for drone violence of this kind to become permissible. It begins by discussing the difficulty of conceptualising personality strikes outside war zones as acts of war, and it then proposes regarding them instead as a rough practice of lethal, punitive law enforcement: 'wild justice' conducted on a US-designated 'terror frontier'. In this vision, personality strikes arguably feed an appetite for the idea of redemptive violence in US popular and political culture. The US government has claimed that it takes great care in placing named individuals on targeting lists and accordingly conducting what amount to drone-based 'administrative executions'. However, drone violence of this kind will remain wild (and thus impermissible as a law enforcement practice) for as long as it lacks the fairness required in a proper criminal justice process. This presents a governance challenge: to tame personality strikes by making the authorisation process fairer or, if this cannot be done, to prohibit them.

Drone Violence as Non-War

Over the last two decades, the state use of armed drones has received scholarly examination from a variety of disciplinary perspectives: historical, strategic, sociological, legal and ethical. Almost all these studies have proceeded from the assumption that violence of this kind is, in essence, war. Among scholars who address the topic from an ethical perspective, the dominant approach is then to frame armed drones as ushering in a new, militarily revolutionary kind of warfare that occasions the novel application and development of Just War theory (Killmister 2008; Strawser 2010; Boyle 2013; Schulzke 2017). The discourse of 'drone warfare' similarly dominates current political thinking, giving primacy to the notion that drone use in general can and should be governed using laws of war that derive from Just War principles. However, there are a variety of circumstances in which states have used and might use an armed drone, and not all uses can plausibly be assigned to the paradigm and morality of war. Sometimes, the conceptualisation of drone violence as war is easier and the applicability of military ethics seems clearer: for example, where an armed drone is used to provide

close air support in defence of friendly troops who are in contact with (and immediately threatened by) enemy troops. Here, the morality of drone violence is wrapped up in the morality of a broader war effort being pursued by various military means. By contrast, the exclusive use of armed drones as a method of individualised and uncontested violence – in a place where the state using them is not a party to an armed conflict – is harder to conceptualise and judge as the stuff of war. In these circumstances, drone violence might instead more closely resemble (or be better regarded as) a practice of lethal law enforcement.

Circumstances and conceptualisations matter because these determine the applicability of certain kinds of rules and, in turn, the degree of operational flexibility that is legally available to a drone-using state. When state violence is exercised in world affairs, there are two distinct and established sets of rules that might apply: humanitarian law, which applies in wartime and is more permissive regarding the taking of human life; or human rights law, which generally applies in peacetime and is more restrictive. Applying the first *or* second set of rules is critically dependent, however, upon differentiating drone violence as warfare from drone violence as law enforcement respectively. Various international organisations have passed ‘motherhood’ resolutions calling upon states to use armed drones ‘in compliance with international law’ (UNGA 2013; European Parliament 2014; UNHRC 2014; Parliamentary Assembly 2015), but these resolutions have not resolved the uncertainty about *which* international laws are applicable to drone use in certain kinds of circumstances.

In the case of personality strikes conducted against named individuals located in places where the United States is not at war, the US government under President Barack Obama asserted that the law of war is nonetheless applicable. In early 2013 a Justice Department memo was leaked to NBC News that had been sent the previous year to members of the US Senate’s Intelligence Committee and Judiciary Committee. The document addressed ‘the circumstances in which the U.S. Government could use lethal force in a foreign country outside the area of active hostilities against a US citizen who is . . . an al-Qaida leader actively engaged in planning operations to kill Americans’. Among the conditions under which, the memo argued, such a lethal operation would be legal was that: ‘the operation would be conducted in a manner consistent with *applicable law of war principles*’ (Jaffer 2013, emphasis added). Against this assertion, however, some scholars have suggested that the US government has sometimes wrongly characterised its drone violence as war in order to avail itself of the greater permissiveness of the war paradigm (Alston 2010, 3; Wuschka 2011, 905; Schaller 2015, 195; Meloni 2016, 47).

If the question of whether a condition of war exists is not merely a subjective matter, at least three kinds of objections could be raised against the categorising of US personality strikes as war. One objection (quantitative) is that this form of violence is of insufficient intensity and/or is too small-scale to count as war. Rather, it is a kind of force short of war (*vim*) (Brunstetter and Braun 2011). Another objection (legal-territorial) is that, as the condition of war exists only in places where a state is party to an ongoing armed conflict, personality strikes against individuals located outside those places do not count as acts occurring in war (Warren and Bode 2015, 186; Brookman-Byrne 2017, 4).¹ A third objection (essentialist) focuses on the radical asymmetry of immediate physical risk (as between killer and victim) inherent in personality strikes conducted remotely across vast distances. If war by its nature involves mutual exposure to risk, and if neither the remote operators of armed drones nor any friendly troops in the vicinity of a strike location are at risk, this kind of drone violence does not count as war (Whetham 2013; Enemark 2014; Chamayou 2015, 17; Gusterson 2016. See also Kahn 2002).

Where it is more difficult to conceptualise a state's violence as war, the permissive morality of war is less obviously available. That violence is then more open to condemnation as impermissible homicide unless there is instead a non-war basis for potentially legitimising it. In the case of personality strikes, perhaps that basis is law enforcement. As an alternative to the paradigm of war, the paradigm of lethal law enforcement comprises two sub-paradigms: preventive (the use of violence by police to neutralise imminent or current threats to public safety) and punitive (the use of violence by executioners to punish criminality). This chapter focuses on the latter sub-paradigm in which there are strong, rights-based restrictions on killing. The most important of these, based on the right to life, is the prohibition on killing arbitrarily. This prohibition exists in international law, for example in the 1966 International Covenant on Civil and Political Rights, which provides (Article 6) that 'sentence of death . . . can only be carried out pursuant to a final judgement rendered by a competent court' (ICCPR 1966). And it exists in the domestic law of many states, for example in the US Constitution, which provides (Fifth Amendment) that 'No person shall be . . . deprived of life . . . without due process of law' (Kim 2017). In practice, when the punitive law enforcement model applies to non-war violence, respect for the right to life and due process involves the presumption of an accused person's innocence and the conduct of a fair trial (Ramsden 2011, 395).

To follow legal processes carefully is to adhere to the principle of legalism which, in matters of criminal justice, helps to avoid arbitrariness in the

killing of human beings who bear a presumptive right to life. The essential characteristic of legalism is orderliness. Through the conscientious and thorough application of modern law's myriad rules and customs, the practitioners and observers of criminal justice processes can achieve a high level of certainty about the correctness of decision-making. By contrast, in the absence of a fair trial and conviction preceding an execution, it is more difficult to be confident that an executed individual really was criminally culpable and deserving of death. A common criticism of the US government's drone-based personality strikes outside war zones is that they are done without recourse to legalism (Lee 2015, 434; Shane 2011), in which case they are difficult to justify as acts of punitive law enforcement. One way of thinking about this problem is to conclude that the US government, outside the paradigm of war, wilfully perpetrates impermissible homicides (murders). However, this chapter takes a different approach, allowing that there may be scope to conceptualise and perhaps legitimise personality strikes within the law enforcement paradigm. Arguably, these strikes currently count neither as war nor as outright homicide. Rather, it is better to regard them as continuing a US tradition of sometimes inflicting flawed methods of violent law enforcement ('wild justice') upon suspected criminals.

Wild Justice and Frontier Violence

In their 2010 book *Revenge versus Legality*, Katherine Maynard and her colleagues explore the contrast and relationship between legal and wild justice. On the one hand, they argue, there is 'extralegal, vigilante, or "wild" justice based upon revenge and driven by passion and grief' and, on the other hand, there is 'tamer, cooler, more rational and institutional legal justice' (Maynard et al. 2010, 3). As a form of law enforcement violence, wild justice is pursued self-righteously and vengefully. It tends to be untamed by adherence to formal legal constraints, and its wielders typically judge this wildness to be more effective in achieving just outcomes than is the practice of non-wild (legalistic) justice. Moreover, for these reasons wild justice is more likely to occur in situations and territories where the rule of law is weak. In the United States, we can discern an appetite for wild justice driven by a 'myth of redemptive violence' which runs deep in its popular and political culture (Maynard et al. 2010, xii). This is revealed by historical or fictional circumstances in which there are certain 'crimes or injuries that appear so mystifying or disturbing that ordinary, conventional legality – the usual, normative police procedures, judges' rulings, lawyers' motions, and jury verdicts – seems inadequate'. Instead, 'a Dirty Harry is needed to solve or avenge such a crime; cruel or unusual procedures or punishments are

called for; the law must be bent, broken or at least supplemented to achieve a just revenge' (Maynard et al. 2010, 5).

To the extent that the idea of redemptive violence is an appealing one in the United States, its appeal can be traced back to the country's early history. In the time of the American Old West (or Wild West), pioneering settlers were extending the US frontier westward. Across this vast and under-governed territory, law enforcement was generally a more violent and disorderly enterprise than that which obtained in the more established, urban settings in the east. Frontier justice was delivered by US government 'lawmen' like Wyatt Earp (1848–1929), who, in the Arizona Territory town of Tombstone, took part in the famous 'Gunfight at the O.K. Corral' during which lawmen shot and killed three outlaw cowboys (Marks 1989). Such real-life episodes from early American history have since been emulated abundantly in US popular culture. Loren D. Estleman's 2018 novel *Wild Justice*, for example, tells the story of Deputy US Marshal Page Murdock, whose job is 'bringing justice to a wilderness' on the 'untamed' American frontier (Estleman 2018).

Between the 1930s and 1960s, Hollywood script writers frequently set narratives of violence in spaces 'where legality is so weak or non-existent that a good gunfight (or fistfight) is the only credible way to resolve differences or achieve justice' (Maynard et al. 2010, 167). In 'westerns', set in Wild West desert environments, justice was portrayed as most likely to be achieved by characters (played by actors like John Wayne) armed with revolvers or rifles (Maynard et al. 2010, 167). Later, characters played by Clint Eastwood, Charles Bronson and Sylvester Stallone were variously depicted in popular US-made films as 'heroic avengers ridding the world of punks, thugs, rapists, homicidal maniacs, and other evildoers'. These films contained the clear message that, in confronting evil-inspired dangers, the heroes' tactics sometimes needed to be 'ruthless and lawless' (Maynard et al. 2010, 170). Moreover, this preference for lawlessness sometimes extended to a contempt for legalism as something that gets in the way of true justice. For example, in the 1971 Eastwood film *Dirty Harry*, the eponymous hero has to contend with criminal *and* non-criminal antagonists. The latter include 'a variety of liberal twits and wusses, city and police officials, who . . . castigate him for not following proper legal and police procedures' (Maynard et al. 2010, 172–3).

The likely influence of popular culture valorising wild justice should not, however, be overstated when it comes to US politics and foreign policy. It is important to acknowledge that the US government has historically acted as a champion of legalistic approaches to law enforcement, in contrast to other states (including enemies of the United States) that

have sometimes preferred to reject legalism. When Hermann Göring was appointed (by Adolf Hitler) as Prussian Minister of the Interior in 1933, he boasted: 'my measures will not be crippled by any legalistic hesitation' (Conot 1993, 121). And in Nazi-ruled Germany more generally, due process and the rule of law were swiftly replaced by the straightforward *Führerprinzip*, the principle that a leader's commands equate to law. After the end of the Second World War, when justice needed to be served in respect of alleged war crimes, the US government insisted upon restraint and legalism despite urgings to the contrary by its allies. Josef Stalin, for example, had wanted simply to kill up to 100,000 Nazis in revenge for what they had done to the Soviet Union (Maynard et al. 2010, 186). And the British foreign secretary, Anthony Eden, had favoured summary executions of top Nazi leaders, claiming: 'The guilt of such individuals is so black' that 'they fall outside and go beyond the scope of any judicial process' (Bass 2000, 185). Regardless, under American leadership, the Nuremberg tribunals proceeded to apply legalism and the judicial method to Nazi defendants (three of whom were acquitted).

A major shift in the US government's attitude to legalism appeared to occur after 11 September 2001, when political violence of external origin came to the US mainland for the first time since the American–British 'War of 1812'. America's people and politicians reacted to al-Qaeda's '9/11' terrorist attacks with shock and fear, and the political mood that descended upon the United States drew upon the cultural legacy of its frontier era. The popularly appealing myth of redemptive violence surged to the fore as the country set about confronting dreaded enemies inhabiting disorderly settings of civil war, state failure and insurgency in North Africa, the Middle East and Central Asia (Motlagh 2005; Reuters 2008; BBC 2019). One such 'terror frontier' is the Federally Administered Tribal Areas of Pakistan, in the northwest of the country bordering Afghanistan, where the national government has little control or meaningful authority over the population or territory. Eventually this became the setting for extensive US use of drone strikes (including personality strikes) against suspected terrorists. For example, in August 2009 the leader of the Pakistani Taliban, Baitullah Mehsud, was killed (along with eleven other people) in a US drone strike in the remote and mountainous region of South Waziristan. Mehsud had allegedly been the organiser of suicide bombings across the border in Afghanistan and of the 2007 assassination of former Pakistani Prime Minister Benazir Bhutto (Reuters 2009; Mazzetti and Walsh 2013).

From the beginning of the 'war on terror', a dominant political attitude was that American counterterrorism would be more effective if it were conducted aggressively and ruthlessly. In a television interview on

16 September 2001, US Vice President Dick Cheney declared (White House 2001, emphasis added):

I think the world increasingly will understand what we have here are a group of barbarians, that they threaten all of us . . . We also have to work, though, sort of *the dark side*, if you will. We've got to *spend time in the shadows* . . . That's the world these [terrorist] folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.

A few days later, President George W. Bush promised the US Congress: 'whether we bring our enemies to justice, or bring justice to our enemies, justice will be done' (McCaleb 2001). The bringing of enemies to justice implied the use of legal processes such as arrest and trial, but the alternative of bringing justice to enemies seemed to threaten the use of non-legalistic (wild) methods. The president subsequently made clear his conviction that the formal justice system lacked the capacity to adequately address the problem of terrorism. In his 2004 State of the Union speech, Bush acknowledged: 'some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments.' But he insisted: 'After the chaos and carnage of September 11th [2001], it is not enough to serve our enemies with legal papers' (Bush 2004). Legalism was largely rejected in favour of wild justice, and so the Bush administration and its successors proceeded ruthlessly to achieve retribution for 9/11. In zealous pursuit of al-Qaeda globally over nearly two decades, suspected terrorists have been indefinitely detained by the US government, sometimes tortured, or sometimes apparently executed without trial. For the last of these, armed drones have been the preferred method, not least because of the capacity they afford to strike an individual in a remote and faraway location and hence to make that strike more secret.

Personality Strikes as Administrative Executions

In early 2011 the US Joint Special Operations Command authorised a squadron in control of drones flying over Yemen to kill Anwar al-Awlaki. At the time, 'Most Wanted' posters of this US citizen were displayed inside every ground control station at Cannon Air Force Base in New Mexico (home to the 3rd and 33rd Special Operations Squadrons) (Woods 2015, 119). On 30 September 2011 the drones were flown from a base in Saudi Arabia into northern Yemen, where they fired missiles at a car carrying al-Awlaki (Mazzetti et al. 2011). Not until May 2013 did the US Attorney General confirm publicly that al-Awlaki was among four named US citizens who had been killed

'outside areas of active hostilities' in US drone strikes (Woods 2015, 137). More than a year prior to this killing, CIA director Leon Panetta had used a television interview to identify al-Awlaki as a terrorist who posed a threat to the United States. In explaining the man's placement on a 'terrorist list', Panetta said: 'You can track Awlaki to the Detroit bomber. We can track him to other attacks in this country that have been urged by Awlaki' (ABC 2010).² This highlighting of past wrongdoing suggests that, when al-Awlaki was subsequently killed in a US drone strike, the killing was at least partly punitive in purpose. If so, this personality strike in a non-war setting is an example of drone violence manifesting as wild justice.

In 2012 President Obama's chief counterterrorism adviser, John Brennan, insisted that US use of lethal force was 'not about punishing terrorists for past crimes; we are not seeking vengeance' (Brennan 2012). And in 2013 Obama himself claimed that drone strikes in particular are not undertaken 'to punish individuals – we act against terrorists who pose a continuing and imminent threat to the American people' (Obama 2013). However, the very phrase '*continuing* and imminent threat' implies that, when such an individual is targeted for a drone strike, their *past* actions are at issue. It is a phrase founded on the notion of 'elongated imminence', reportedly developed by US State Department legal adviser Harold Koh, which he compared to 'battered spouse syndrome'. In the same way that a spouse does not have to wait until a hand is being raised to strike before acting in self-defence *if there is a pattern of past abuse*, Koh argued, the US government does not have to wait to strike at terrorists (Klaidman 2012, 219–20). If such was the thinking behind personality strikes conducted during the Obama administration, there is scope to regard these as instances of punitive drone violence within the law enforcement paradigm. Moreover, the *way* in which the US government reportedly made personality strike decisions at that time further suggests its application of a law enforcement mentality (albeit a wild one).

Wild justice involves a rejection of legalism, but sometimes this rejection manifests as a parodying or mimicking of legalistic approaches to criminal justice. Most obviously, there is the phenomenon of the show trial. In the Soviet Union, for example, the government would often stage public 'trials' in which defendants were coerced to make confessions and guilty verdicts (to be used for propaganda purposes) were a foregone conclusion (Maynard et al. 2010, 164). In the case of the Obama administration and its personality strikes, the mimicking of legalism instead involved un-shown quasi-trials. The drone strikes resulting from these secret proceedings could thus be described as administrative executions. The US government under Obama apparently regarded personality strikes as requiring less permissiveness than would be

allowed in the war paradigm, but not the high degree of restriction on state violence that accompanies full commitment to legalism within the law enforcement paradigm. The White House chief of staff, William Daley, explained in 2011: 'The president accepts as a fact that a certain amount of screw-ups are going to happen, and to him, that calls for a more judicious process' (Becker and Shane 2012). And in 2012 John Brennan suggested that the right to life loomed large in Obama's thinking about personality strikes: 'the president, and I think all of us here, don't like the fact that people have to die. And so he wants to make sure that we go through a rigorous [pre-strike] checklist' (Becker and Shane 2012).

Administrative decisions to authorise a drone strike against named individuals (suspected terrorists) located outside war zones were reportedly made only after lengthy deliberation and extensive consultation with officials across the US government. As such, these personality strikes could not be called 'summary' executions in the sense of executions performed without delay and hesitation. Even so, they were undoubtedly extrajudicial decisions to kill, despite their bearing a resemblance to a judicial criminal justice process: the involvement of lawyers, the weighing of 'evidence', the rendering of a 'verdict' and, if a person was 'convicted', the imposing of a punishment to fit the crime. In 2012 the *New York Times* first revealed what it called 'the strangest of bureaucratic rituals' in which more than 100 national security officials gathered via videoconference on a weekly basis 'to pore over terrorist suspects' biographies and recommend to the president who should be the next to die' (Becker and Shane 2012). In contrast to the predictability of a Soviet-style show trial, the *New York Times* reported that 'participants do not hesitate to call out a challenge, pressing for the evidence behind accusations of ties to Al Qaeda' (Becker and Shane 2012). Prior to each of these meetings to consider lists of potential targets, the 'résumés' of individual terror suspects were put through a process of vetting, validation and evaluation. Then, at the White House, a committee chaired by the president would vote on who, where and when to strike (Cronin 2018, 116). In a 2014 article, Gregory McNeal (2014, 708) described this administrative process as 'complex and time intensive, usually involving dozens of analysts from different agencies'. To illustrate the high degree of care taken, he noted that 'target folders are continuously updated to reflect the most recent information regarding a target's status, [and] the compiled data is independently reviewed by personnel not responsible for its collection' (McNeal 2014, 721).

The occurrence of these practices was largely confirmed towards the end of Obama's presidency by the 2016 publication of the US government's drone 'playbook': 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active

Hostilities' (Ackerman 2016; Currier 2016).³ As a basis for conducting personality strikes beyond the paradigm of war, these detailed procedures were possibly intended to be followed also by Obama's successor, in the hope that she or he might continue his careful approach. And it could be argued that 'playing' by the playbook prevented greater injustices that might otherwise have resulted from the US government's use of armed drones on its terror frontier. Even so, a rigorous administrative approach can still only mimic a legalistic process of guilt-determination and sentencing, and thus Obama's approach still impoverished drone violence as an exercise in punitive law enforcement. Critically, this was violence controlled entirely by the executive branch of government, allowing for none of the impartiality and fairness that is expected of decision-making by an independent judiciary. This is fundamentally why personality strikes outside war zones amount to wild justice, and it raises the question of whether drone-based law enforcement can or should be 'tamed' by involving the courts.

Taming Drone Violence

After Donald Trump became president, he quickly sought to distance himself from his predecessor's approach to global counterterrorism. Whereas Obama had always insisted that his government's use of force against terrorists was not essentially punitive, in 2017 Trump appeared enthusiastically to favour the exercise of redemptive violence (Trump 2017):

Terrorists . . . are nothing but thugs and criminals and predators, and that's right – losers. . . . These killers need to know they have nowhere to hide, that no place is beyond the reach of American might and American arms. Retribution will be fast and powerful as we lift restrictions and expand authorities.

The president's clear implication here was that legal and/or administrative restraints would only make US retribution for terrorist acts less effective. Accordingly, senior officials in the Trump administration have reportedly pursued changes to the way drone strikes are conducted, although the secrecy surrounding US drone use makes it hard to know if these changes have been implemented. In contrast to the Obama-era approach, Trump's reported preferences include expanding the geographic scope for drone strikes to occur 'outside of areas of active hostilities', and lowering the evidential thresholds required to conduct strikes against terrorism suspects (Stohl 2018, 5; Jaffe and de Young 2017). If these changes have been enacted in order better to achieve 'retribution', the wild justice of US drone

violence might have become even wilder under Trump than it was under Obama. Moreover, the leaders of some other drone-using states have demonstrated a keenness to emulate the president's conspicuous adoption of vengeful rationale (Johnson 2018; Gibson 2019).

One possible approach to taming that wildness is to prohibit the use of armed drones in non-war settings for a punitive law enforcement purpose (execution). However, such a prohibition could be hard to enforce internationally, as state compliance would be practically difficult to verify. Drone use is generally more conducive to secrecy than is the use of manned aircraft, because no pilot is placed at risk of capture in a foreign territory, and the invisibility of drone violence is deepened when (as is currently typical) drone strikes are conducted in remote parts of the world. In such circumstances, a global prohibition might simply be ignored with impunity by some drone-using states. An alternative approach, then, is to accept that drone violence will sometimes be wielded for a punitive purpose and to allow states to restrain it themselves on law enforcement terms. To the extent that the extrajudicial character of personality strikes is the problem, perhaps the solution is to arrange for judicial sanctioning of such killings. In countries like the United States that already allow the death penalty, judges who are impartial (that is, independent of the executive arm of government) could conduct trials *in absentia* if an accused terrorist were unable to be extradited. These trials would aim fairly to establish whether the defendant (adequately represented in court) is guilty and, if so, a judge could then sentence that individual to be targeted in a drone strike if no other method of execution were available. In this way, genuine legalism would afford greater public confidence in the probity of drone-based, punitive law enforcement: that the verdict was correct and the punishment was deserved, and that the risk of arbitrariness in the taking of human life was greatly reduced.

In a 2013 speech on counterterrorism, President Obama raised the idea of 'a special court to evaluate and authorize lethal action' (Obama 2013). And the idea of a 'drone court' has attracted some support in the United States as an alternative to what Senator Angus King has described as 'the executive being the prosecutor, the judge, the jury and the executioner all in one' (Shane 2013; see also Guoira and Brand 2015). One objection (feasibility) is that courts are not institutionally equipped to be involved in fast-paced military decisions (Katyal 2013; Epps 2013), but this argument is strongest when contemplating drone violence in the war paradigm. Where personality strikes against individuals located outside war zones are instead treated as a law enforcement matter, decisions on whether to authorise placing someone on a target list would not necessarily need to be made quickly. Moreover,

it could be advantageous from a justice perspective to take the time necessary for the conduct of a fair trial. By going to trial publicly, the government of a drone-using state would effectively put an accused terrorist on notice that they might be targeted. And, while the trial process was under way, that defendant would have a lengthy opportunity to surrender themselves and attend court. Subsequently (if convicted of a capital offence), she or he would be available for execution by conventional means and the possibility of a personality strike would be avoided.

Another way of avoiding this possibility would be for the prosecuting government to capture an alleged terrorist, so a judge conducting a 'drone court' trial would need to remain satisfied about the continued infeasibility of capture. On this point, however, the government might have to account for the extent to which it is *responsible* for the infeasibility of capture by *arranging* for its agents (military, intelligence or police) to be kept at a distance from the area where the accused terrorist is located. If, after all, an individual were unable to be tried in person, the principle of fairness would require that they had access to adequate representation, so a judge would need also to remain satisfied that a secure line of communication was in place between the absent accused and their in-court lawyer. Then, if the court's verdict was to convict and if capturing the convicted terrorist remained infeasible, a judicially authorised drone strike could be carried out on the condition that this method of punishment would not harm any innocent bystanders (see McMahan 2012, 135–6). Even under such strict conditions for the judicial authorisation of personality strikes outside war zones, there might still be lingering concerns that trials *in absentia* are not sufficiently fair and that the bystander risk is too high. Arguably, however, these concerns are possibly outweighed by the human rights benefit of reducing the risk of arbitrary killing. As a state's court system consumed whatever time were needed to maximise confidence in the fairness of a trial, a government acting in accordance with this approach to drone violence would probably itself be unable to conduct personality strikes as frequently as would be the case if these executions were the results of non-judicial (executive) decisions.

Conclusion

Drone violence in the form of personality strikes against individuals located outside war zones is difficult to categorise as war, so it cannot easily be justified and governed by reference to war's moral standards. A better approach is to take seriously the non-war status of that violence. From a law enforcement perspective, US experience on its terror frontier suggests that the redemptive

violence of personality strikes is itself in need of redemption. Without recourse to genuine legalism, punitive drone use against suspected terrorists will only ever amount to wild justice, and the associated moral problem of arbitrary killings will remain unresolved. If a simple prohibition on this form of drone violence is unlikely to succeed internationally, an alternative worth trying is to consign that violence to a state's own courts. In operating according to strict rules of legal procedure, a drone-using state is likely to find that judicial killings are less expedient and far more difficult to bring about than extrajudicial ones. However, the countervailing advantage of this non-wild approach to justice is that it would occasion governments to legitimise drone use for a non-war purpose. Instead of behaving secretly and trying to pretend that personality strikes count as war, the governments of drone-using states could (with the help of independent courts) conduct such strikes openly and carefully as permissible acts of punitive law enforcement.

Notes

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1. This viewpoint counters the claim that, in the US-led 'war on terror', the battlefield can be anywhere and, therefore, potentially everywhere.
2. The 'Detroit bomber' is Umar Farouk Abdulmutallab, a Nigerian man convicted of attempting to detonate explosives hidden in his underwear while on board a flight from Amsterdam to Detroit, Michigan, in late 2009.
3. The word 'playbook', used in the context of American football, refers to a document containing descriptions of the different offensive and defensive plays used by a football team.

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