




DRAWING ON AN ARRAY OF PERSPECTIVES, A NEW PENN LAW CENTER CONFRONTS THE ULTIMATE WARTIME QUESTION: HOW CAN WE COMBAT TERRORISM WITHOUT SUFFERING ETHICAL CASUALTIES?

THE PERILS OF PUSH BUTTON WAR



BY RICK SCHMITT

As a tool of warfare in the 12th Century, the crossbow stretched the established limits of armed conflict. Devastatingly effective even at long distances, it could pierce the body armor of a knight at 200 yards, and compared with the English long bow, was easy to operate. Untrained soldiers and even peasants could master the craft in days or weeks.


In the stratified world of Medieval Europe, however, noblemen and the church saw the weapon as a threat. Pope Innocent II banned Christian-on-Christian use of the crossbow, calling it “the deadly art, hated by God.” A clause banishing “foreign crossbowmen” from England was included in the Magna Carta.

Today, technology continues to change the face of warfare, again testing legal and ethical boundaries.


Unmanned aerial drones have become central to the Obama Administration’s anti-terrorism policy. A new kind of Cold War has erupted in cyberspace, accounting for daily attacks on private and public networks around the globe, not to mention a story line in the latest James Bond thriller. Serious people are studying “human enhancement” technologies that use drugs and implantable devices to increase soldier performance.

But what are the legal and ethical considerations of conducting a war where the combatant is sitting at a desk in an office half a world from the battlefield? Is a safe and sterile war necessarily a just and ethical one?

THE PERILS OF PUSH BUTTON WAR



What are the legal and ethical considerations of conducting a war where the combatant is sitting at a desk in an office half a world from the battlefield?



When does a cyber attack constitute an act of war? Is it legal and ethical to respond with lethal force if the damage inflicted by such an attack is only economic?

When should the law of war, with its permission to kill, rather than capture, cede to the civil law that favors arrest and due process?

Such questions are all the more complex in a world where conventional ideas about the identity of the enemy and the contours of the battlefield have broken down.

A new institute at Penn Law School, the *Center for Ethics and the Rule of Law*, or CERL, seeks to address such questions with a novel interdisciplinary approach that brings legal academics together with philosophers, political scientists, economists, as well as practitioners such as military lawyers, journalists, members of the defense and intelligence communities, and public policy analysts.

Its director, Claire Finkelstein, Algernon Biddle Professor of Law and Professor of Philosophy, first conceived the new center while attending a 2010 legal conference at West Point, where she was struck by the diversity of opinion on anti-terror policies between civilian and military lawyers. She proposed a conference at Penn on the legal and ethical implications of the then-nascent idea of targeted killings.

That timely April 2011 conference—followed in a few short weeks by the successful operation targeting Osama bin Laden—led to a well-received book that Finkelstein co-edited and ultimately to the creation of CERL. Additional conferences on the topics of governmental secrecy, cyber war, the logic of deterrence, and the scope of executive privilege soon followed.

Today CERL is attracting attention as a unique endeavor among law schools: Its mission, Finkelstein explains, is “to promote rule of law values in the face of the changing nature of national security.” Such changes, including the rise of non-governmental combatants and new precision technologies, are posing new legal and ethical challenges and exposing gaps in the old rules of warfare.

CERL has attracted some influential and enthusiastic supporters, including William Craven, a Morristown, N.J., defense contractor who has worked on weapons and intelligence systems for the military, and his wife, Pam Craven L’77, the chief administrative officer of Avaya Corp., and member of the Penn Law board of overseers.

Craven said he has long seen a need for a top-rank institute that focused on the ethical and legal consequences of defense system advances.

While hardly oblivious to ethical and legal concerns, he said, contractors tend to focus on performance issues and protecting the warfighter. “At the end of the day, you have questions of ethics in the back of your mind, but quite frankly, you go about doing your job and assume others are worrying about these things,” Craven said, adding that “it was refreshing to find an academic who was talking to people in the field who were experiencing the fear and terror of war to understand their perspectives.”

While such debates have been around for about as long as there have been weapons systems, history suggests there are no easy solutions.

“Look at the development of nuclear weapons. It took us most of the late ‘40s, all the ‘50s, into the late 60s to develop Mutual Assured Destruction,” said James Cartwright, retired Vice Chairman of the Joint Chiefs of Staff, and former commander of the U.S. nuclear force, alluding to the doctrine that governed Cold War relations between the U.S. and the Soviet Union. “We ended up using them in Japan for what we thought was a morally appropriate purpose and even today the debate on what is acceptable and what is not and when would we use such a weapon is still going on.”

“We find ourselves in this quandary as we often do with disruptive technologies. ‘Where is this going? How would I start to set norms?’” said Cartwright, who was a featured speaker at the CERL roundtable on cyber war last fall. “My sense is that we are trying to figure out what is technically possible, and what is culturally and morally appropriate. The art of what is possible is still in the very early stages.”

One controversial trend has been the expanding role of executive discretion in the pursuit of national security goals, which Finkelstein sees as one of the most enduring post-9/11 challenges to the rule of law. Enhanced interrogation policies developed in the George W. Bush administration that declared both the Geneva Conventions and federal statutes obsolete as a limiting force on executive authority have also been offered by

the Obama Administration to justify targeted killing. The legal underpinnings of these policies have been developed in classified memoranda that find their way to the public through leaks, if at all.

“The reluctance of the executive branch to allow elected leaders, members of the judiciary, and ultimately the public, to subject war-related policies and their legal justifications to public scrutiny, represents a significant alteration of the terms of political engagement around military matters,” Finkelstein said. “It also signals a shift in the traditional conception of the balance of powers among the three branches of government. These trends are forcing academics and policy makers alike to return to fundamental questions about the value of transparency and public accountability in democratic politics.”

Finkelstein points out, however, that as a weapons system, there’s a lot to like about drones. They are more precise than traditional aerial bombs, better able to pinpoint targets, and therefore have the potential to dramatically reduce civilian casualties. Remotely operated drones also minimize U.S. casualties. A CBS News Poll found that 70 percent of Americans support using drones to kill suspected terrorists in foreign countries.

“You can loiter around for hours and hours whereas an F-16 cannot do that. It gives you more time to ensure that you have the intelligence right. You are more certain that what you have in the cross hairs is a bad guy,” said U.S. Army Brigadier General Tom Ayres L’91, the commander and chief judge of the U.S. Army Court of Criminal Appeals. “You often have better

awareness on the part of the person who is going to make a decision.”

Ayres pointed out that the deployment of drones and the command decision to fire on a target are subject to rigorous standards. While the word drone might connote something that is making decisions without human input – the military prefers the term unmanned aerial vehicle – Ayres said the process is overseen by “someone trained in the law of war whose decisions are subject to review and ultimately to investigation if something goes wrong.”

Still, the growing use of technologies that increasingly remove humans from the battlefield is concerning to some experts. Finkelstein cites the story, popularized in a recent book, of a young Jewish orphan about to be shot by a Latvian SS unit during World War II who is pulled out of line and spared by a sympathetic Nazi commander after asking for a piece of bread. “The more distance, the less interaction; the less interaction, the weaker the tug of humanity that can, on occasion, lead to spontaneous acts of mercy,” Finkelstein said, noting that the use of drones preempt such opportunities.

Even more controversial is how the technology is being deployed, such as in the case of Anwar al-Awlaki, a senior operative of al Qaeda in the Arabian Peninsula (AQAP) who was targeted and killed in a U.S. drone attack in southeast Yemen in September 2011.

Al-Awlaki was an American citizen who, while dubbed the “bin Laden of the Internet,” was not believed to be involved



© AP Photo/Steve Halber

A Navy X-47B drone is launched off the nuclear powered aircraft carrier USS George H. W. Bush off the coast of Virginia. The plane isn't intended for operational use, but it will be used to help develop other unmanned, carrier-based aircraft.

THE PERILS OF PUSH BUTTON WAR

in an imminent attack against the U.S. He was also killed in a country that is considered outside the “zone of hostilities.”

“Here we have an American citizen, killed by our government without the opportunity for trial, in a country that, while certainly sympathetic with our enemies, was not part of the war zone,” Thomas Graham, retired U.S. diplomat and veteran arms-control negotiator, observed at the 2011 targeted-killings conference. “Is Yemen all that much different than Canada? Suppose it had been done there? ... There has to be some deference paid to the fact that we do have a Constitution.”

The legal and ethical landscape for cyber attacks is even more uncharted than that for targeted killings.

Jens Ohlin, a law professor at Cornell, and a member of CERL’s advisory board, said that the presence of an al Qaeda branch in Yemen with an avowed intent of engag-

ing Americans more than justified the invocation of war powers there.

He said it has never been the case that American citizens taking up arms against the U.S. get special treatment on the battlefield. Nazis with dual American and German citizenship were killed fighting in World War II, he said, and every Confederate soldier in the U.S. Civil War was “a prima facie American citizen” because the Union had never recognized the southern secession as legitimate.

Another board member, Kevin Govern, law professor at Ave Maria Law School, and a former Army Judge Advocate, said that al-Awlaki might be compared to Nazi propaganda chief Joseph Goebbels. “There is ... precedent in the U.S. under national security law ... that propagandists are continually contributing to the combat function,” extending wars by sending false signals and messages or through other acts of sedition, said Govern.

The legal and ethical landscape for cyber attacks is even more uncharted than that for targeted killing, even as they are becoming more ubiquitous. Earlier this year, the intelligence community ranked cyber at the forefront of global threats, ahead of terrorism, transnational organized crime and WMD proliferation.

The Pentagon now has an official cyber command, and is developing offensive and defensive cyber capabilities, using computer programs in ways previously reserved for bombs and

other conventional weapons. In a celebrated case, President Obama, in his first months in office, accelerated a program begun during the Bush Administration of using a series of bugs to attack control systems for Iran’s nuclear program.

The military is also in the process of revising its official Rules of Engagement for when U.S. forces may deploy cyber force. But setting specific ground rules – such as deciding what kinds of attacks justify retaliation and against whom—will be hard.

While the economic costs of cyber attacks are huge – some \$100 billion a year – no one so far has died from one. Knowing the enemy is also tough: adversaries are no longer strictly defined by their manufacturing heft and bomb-making prowess.

Some experts believe cyber weapons may be most effective as a tool to head off war. Historically, so-called soft-power tools, such as economic or trade sanctions, often take too long to have an impact. A cyber weapon, by contrast, could shut down a power grid or banking system in an instant.

“It is really that ability to undermine confidence which plays well into your ability to convince an adversary, ‘You do not want to go down this path,’” Cartwright said, adding that the preemptive nature of cyber is one of its “key opportunities.”

Some acceptable norms of behavior are starting to be identified. George Lucas, professor of philosophy and public policy at the Naval Postgraduate School, Monterey, Calif., has written that a cyber attack is morally justified when the underlying issue in conflict is so grave that war is justified, only military assets are targeted, and every effort short of war has been made to resolve the dispute.

“We have always been challenged by new developments—be it the crossbow or the drone—to do what lawyers and philosophers do, which is to extrapolate from the known to the unknown, to take what we know, to develop appropriate metaphors and similes that try to capture the essence of the new challenges and relate them to the things we know how to do,” Lucas said on a panel with Finkelstein at the University of Utah Law School in February on the ethics of technological warfare. “We are in the midst of that transformation with our new technologies. They do pose challenges to a state-centric system of law, to our conventional ways of thinking about combat, but they do not completely transform them and make it impossible for us to reason reasonably about them.”

RICK SCHMITT HAS COVERED LEGAL AFFAIRS FOR THE WALL STREET JOURNAL AND THE LOS ANGELES TIMES. HE IS CURRENTLY A FREELANCE WRITER LIVING IN MARYLAND.

BRIGADIER GENERAL NAVIGATES MORAL MINEFIELDS OF WAR

BY ART CAREY

WHEN THOMAS AYRES L'91 began studying law at the University of Pennsylvania, he had an engineering degree from West Point and three years' experience as an infantryman and airborne rifle platoon leader in Italy.

"I was used to the Army experience where there's always a right and wrong answer," he says.

After studying hard his first semester, Ayres was chagrined when he received a low grade in one of his courses. He knew the material cold, and couldn't understand why, so he went to see the professor.

"The whole point of the law is that everything is gray," the professor told him. "You need to see both sides of the facts and to realize that every law can be read in at least two ways."

The experience made an impression on Ayres. "It was a valuable lesson in what a lawyer's job is," he says, "to see the shades of gray in all situations."

That lesson has been immensely helpful to Ayres, now a brigadier general who commands the U.S. Army Legal Services Agency and is chief judge of the Army Court of Criminal Appeals.

Ayres, who is stationed at Fort Belvoir, Va., oversees more than 100 Army lawyers on site, as well as more than 25 military trial judges around the world.

Identified as an officer with promising leadership potential, he studied for a year at the Army War College in Carlisle, Pa., and afterward, from June 2005 to July 2007, served two years at the Pentagon as deputy legal counsel to General Peter Pace, then chairman of the Joint Chiefs of Staff.

Ayres served tours in Afghanistan and Iraq. As senior counsel to the operating commander in Afghanistan, he offered guidance about the rules of engagement and soldiers' obligations under the Hague and Geneva conventions.

He also advised a two-star commander who was responsible for 18,000 soldiers during the invasion of Iraq, and returned



THOMAS AYRES L'91 advised a two-star commander during the invasion of Iraq. Here he is during a precious moment of down time.

“ You have to have the moral courage to stand up to aggressive personalities and say, ‘This is the edge, and you can’t go over.’ You have to ensure that commanders are knowledgeable and disciplined enough to follow the law themselves and also that all soldiers abide by the law,” AYRES SAID.

when the insurgency gathered strength.

His advice centered on the proper use of air power and heavy artillery in support of U.S. troops versus the likelihood of civilian casualties and collateral damage. In other words, he concerned

THE PERILS OF PUSH BUTTON WAR

himself with the ambiguous or “gray” area of what the military calls “proportionality.”

Ayres never fired a shot at the enemy, but in his travels he was always subject to attack and the ubiquitous danger of improvised explosive devices (IEDs). He was also close enough to the action that he knew in a visceral way the stresses and strains of battle.

“What goes on in the mind of a soldier in the heat of battle is hard to comprehend,” Ayres says. “So that’s why we lay out boundaries and conduct training in abiding by the laws of war.” Part of Ayres’ job was to supervise that training.

On numerous occasions, Ayres dealt with issues arising from “fire bases” or small forward operating bases on the border between Afghanistan and Pakistan, where U.S. soldiers tried to stop the flow of enemy fighters between the two countries.

In one instance, a U.S. patrol spotted a group of men who in the dark of night appeared to be burying rocket-firing devices that launched a daily barrage of rockets automatically. The young leader of the U.S. squad called headquarters for legal advice about the proper rules of engagement. Did the men have weapons? Were they bad guys? It was impossible to tell.

“These kinds of situations arise all the time,” says Ayres. “You’re thinking about when and how to follow the rules, you’re thinking about tactical matters and the consequences of action both legally and morally, and what it does to the mission. It took a while in both Iraq and Afghanistan to realize that sometimes using less force is better than more.

“If we know they’re bad guys and we kill them all, it means we have made enemies. If family members and relatives were on the sidelines before, now we’ve made enemies of them. So there are tactical questions, and mission-success considerations, legal considerations and moral considerations.

“Similar kinds of calculations are involved in deciding whether to call in the Air Force to bomb a building or house or stretch of desert. Is it legally right? Is it morally right? What are the consequences? ... How important is it militarily? How sure are we of the intelligence about who the bad guys are and how bad they are? What’s the right and wrong thing to do?”

Warfare, Ayres says, is “not a rational action.”

“Soldiers do not want to kill unless they have to. It’s not rational to fight to the death or to put yourself in harm’s way.”

On the other hand, Ayres adds: “You don’t want to be engaged in a fair fight. Your enemy has immunity to kill you, and you have immunity to kill him. It’s not a war crime to kill a soldier on the opposite side in battle, or to take advantage of superior weaponry.”

Nonetheless, commanders responsible for writing condolence letters home to the parents of casualties, says Ayres, can become aggressive, eager to tread the very limit of what’s legal because they know if they’re not using all the force they can legally, it could cost the lives of U.S. soldiers.

“What that means as a legal advisor is...you have to have the moral courage to stand up to aggressive personalities and say, ‘This is the edge, and you can’t go over.’ You have to ensure that commanders are knowledgeable and disciplined enough to follow the law themselves and also that all soldiers abide by the law.

“I routinely witnessed incredible discipline and restraint by commanders and soldiers under remarkable stress, but I’ve also seen instances where soldiers have lost their perspective and done things that would amount to war crimes. We prosecute them to reinforce that abiding by the laws of armed conflict is essential.”

ART CAREY IS A FREELANCE WRITER AND COLUMNIST/CONTRIBUTOR TO *THE PHILADELPHIA INQUIRER*, WHERE HE HELD A NUMBER OF EDITORIAL POSITIONS FOR 34 YEARS.

CUTTING THROUGH THE ETHICAL FOG OF WAR

BY LARRY TEITELBAUM

RICHARD SHEPHARD has learned a great deal about moral hazard, but not in the classroom. His lessons came in Iraq where he transported guns and ammunition, water and food across lonely – and dangerous – stretches of desert to military bases.

A noncommissioned officer in the Marines, Shephard, like most soldiers in Iraq, did not see combat. Nonetheless, he found himself in constant peril and at risk of losing his life to roadside bombs and snipers while riding in convoys, or to mortar attacks and suicide bombers when on base. He witnessed too many civilian deaths and lost buddies, but managed to come back in one piece. Still, he suffered the wounds of war, and has been left to ponder, years later, the moral dimensions of modern warfare.

“I am torn,” admits Shephard, a rising 2L. “I kind of like the idea of drone warfare where you are not putting American lives at risk. On the other hand, I do understand that... you almost lose the understanding of what life is worth, when it becomes so easy to take someone out with the push of a button.”

Unlike manned aircraft, drones are operated from remote locations by controllers who sit behind a video screen and guide missiles to their targets as if playing a lethal Wii game. Shephard worries that push button war threatens to make conflict too abstract and removed from reality, creating the potential for military forces to kill civilians by mistake and “see every enemy combatant as less than human.”

Shephard sees military service in moral terms as well. He decided to enlist after his father, a Vietnam veteran, suffered a serious heart attack that rendered him incapable of paying for his son’s college education. Truth to tell, Shephard had wanted to serve anyway, since he felt an obligation to defend his country.

He arrived in boot camp at Paris Island, in South Carolina, about a month before 9/11. The attacks lent purpose – and urgency – to his training. Nearly two-and-a-half-years later, after postings around the world, Shephard got the call to Iraq, for which he had volunteered.



RICHARD SHEPHARD 2L (right) with a buddy in Iraq. Shephard manned convoys that transported supplies to forward operating bases.

Push button war threatens to make conflict too abstract and removed from reality, creating the potential for military forces to kill civilians by mistake and “see every enemy combatant as less than human,” WORRIES SHEPHARD.

“If people were going to be put at risk, I had no problem with it being me,” says Shephard, who did not have a wife and children. “A lot of people in our unit had kids. They were married. There really was no reason for me not to go.”

It was a critical period in the war. The U.S. military had been losing its position in southwest Iraq. The Marines were put in charge of the volatile Anbar region and told to build a base as a foothold. Shephard was stationed at a base near the hotspot of Fallujah, site of fierce battles between U.S. and Iraqi forces, and another base near the Syrian border. During seven months in Iraq, where he transported supplies to four operating bases in

THE PERILS OF PUSH BUTTON WAR

western Iraq on 16-to-20-hour-a-day runs, Shephard endured days of 110-degree heat in full military gear. The lack of running water at the smaller bases left him drenched, fatigued and with no means of relief. He also experienced a range of emotions.

He remembers poor and hungry Iraqis who came from miles away to shower him with gifts, such as teapots and rugs, out of gratitude for his participation in the removal of Saddam Hussein. He saw rundown cities without running water, schools, or hospitals spring to life after the Army Corps of Engineers came in and built these much-needed facilities.

But he also witnessed more civilian and military casualties than he cares to remember. "It's one of those things that, at the moment, you can't process," Shephard says. "You have to be immune to it. Long term any death affects any person. It's one of the things you have to deal with."

He did lose a number of friends, and it was gut-wrenching. "To know that some of the most amazing people to walk this earth lost their lives in Iraq haunts me to this day."

Shephard eventually attended and graduated college before spending two years in Camden in the Teach for America pro-

gram. Now in law school, Shephard reflects on the rules of engagement. He says it's natural to question the validity of undeclared wars in an era where they don't end in classic surrender on a battleship, just as it's important to temper academic theory and opinion with the recognition that the heat of battle requires real-time decisions that sometimes fall short of the ideal.

So while he understands the urge and the need to conduct reviews and to rail against improper military conduct, Shephard asks noncombatants to put themselves in a soldier's boots.

"A lot of times we do lose sight of what actually happens on the ground, on the battlefield. It is hard to understand the implications and the terms of engagement from an academic office."

LEADING VOICE ON NATIONAL SECURITY CALLS FOR NEW LAWS GOVERNING USE OF DRONES AND OTHER MODERN WEAPONRY

BY JAY NACHMAN

THE FEDERAL AVIATION ADMINISTRATION predicts that there will be 30,000 drones flying over domestic airspace in the next decade. Will law enforcement be able to fly a drone over Los Angeles or Topeka at will? If a drone overhears a conversation in a private home, can the information be used in court without an individualized warrant?

What about the use of drones abroad? Why are there safeguards regarding communications for Americans abroad but no safeguards for killing them?

“The fact is, as threats, technologies and tactics have evolved, the law has not kept up,” SAID HARMAN.

These are a few of the provocative questions posed in April by Jane Harman, president, director and CEO of the Woodrow Wilson International Center for Scholars, who delivered the Leon C. & June W. Holt Lecture in International Law. She addressed what she called the extrajudicial use of drones and the need for a new post-9/11 legal framework.

The fact is, said Harman, a former nine-term congresswoman from California, “As threats, technologies and tactics have evolved, the law has not kept up.”

She called for two steps to counter the new threats: a comprehensive counterterrorism strategy across the U.S. government and for the U.S. Congress to pass legislation governing the application of twenty-first century weapons.

“The total absence of international rules of drone use is scary and the U.S. must take the lead and develop a strict legal framework for drones internationally and domestically,” she said.

In addition to drones, there are other new domestic surveillance capabilities from satellites and cell site simulators, the latter of which allows the collection of cell phone serial numbers and locations.

Harman said Congress should adapt the Foreign Intelligence Surveillance Act, or FISA, to provide guidance for the use of offensive cyber weapons and the targeted killings of U.S. citizens abroad. Congress should also review the operational framework for new declarations of armed conflict if a group poses a threat to the United States.

“Using new tools, particularly lethal ones, without public debate or clear legal authority, is a mistake and a slippery slope,” HARMAN SAID.

“Using new tools, particularly lethal ones, without public debate or clear legal authority, is a mistake and a slippery slope,” she said.

Harman said the reduction in the core of al Qaeda, the rise of al Qaeda affiliates and new networks between al Qaeda and a range of extremist groups, the U.S. drawdown in Iraq and Afghanistan and the civil war in Syria have changed what she called the “threat landscape.”

These circumstances, she said, have created safe havens for terrorists all over the place, taking advantage of power vacuums and failed states. In her talk two weeks before the Boston Marathon bombings, Harman predicted these conditions will lead to an increase in smaller-scale terrorist attacks.

Hezbollah, which she called more an army than a terror group, has the capability of carrying out crude cyber attacks, as do tech-savvy “digital natives.”

“The evolution in threat means we can and should increasingly rely on a combination of law enforcement and counterterrorism cooperation with other countries and limited use of kinetic power to mitigate terror threats,” Harman said.

As the United States develops its counterterrorism and “remote control warfare policies,” Harman said it must take into account that more than 70 countries also have drones.

“A full debate about this framework will be crucial if Congress acts and the public should be included. That debate will likely be painful. But without it we have no hope of addressing the concerns of both sides of the aisle. We need clear rules of the road.”



In talk at Penn Law School, Jane Harman, former congresswoman and current head of the Woodrow Wilson International Center for Scholars, pushes for an updated counterterrorism strategy and new post-9/11 laws covering the use of modern weapons.