

THE GYGES EFFECT:
AN ETHICAL CRITIQUE OF LETHAL REMOTELY PILOTED AIRCRAFT

A thesis presented to the Faculty of the U.S. Army
Command and General Staff College in partial
fulfillment of the requirements for the
degree

MASTER OF MILITARY ART AND SCIENCE
Strategic Studies

by

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2017

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REPORT DOCUMENTATION PAGE				Form Approved OMB No. 0704-0188	
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1. REPORT DATE (DD-MM-YYYY) 09-06-2017		2. REPORT TYPE Master's Thesis		3. DATES COVERED (From - To) AUG 2016 – JUNE 2017	
4. TITLE AND SUBTITLE The Gyges Effect: An Ethical Critique of Lethal Remotely Piloted Aircraft				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) Matthew D. Pride, Major, U.S. Army				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) U.S. Army Command and General Staff College ATTN: ATZL-SWD-GD Fort Leavenworth, KS 66027-2301				8. PERFORMING ORG REPORT NUMBER	
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION / AVAILABILITY STATEMENT Approved for Public Release; Distribution is Unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT The U.S. Army pledges to defend the country against all enemies, foreign and domestic, in a manner that upholds national values. One such way recent presidential administrations make good on their pledge to protect the American people is by authorizing military strikes using the Remotely Piloted Aircrafts (RPA). If RPA do act as a political deposit on the sacred oath sworn by our leaders to protect and defend the constitution, does the policy likewise uphold the traditional norms associated with justice in war (<i>jus in bello</i>)? In other words, does the U.S. Government violate <i>jus in bello</i> in its use of RPA to conduct military strikes? To examine this question further, it is necessary to explore three broad areas. The first, and most substantial, is the moral basis for justifiable military action. The second area is legal precedence for RPA strikes. The final area deals in the consequences of such action within today's operational environment (OE) and the effects it has on the future of warfare. This thesis critiques the morality, legality, and military ethics of the United States' RPA Policy.					
15. SUBJECT TERMS Military Ethics, Just War, <i>Jus in bello</i> , Remotely Piloted Aircraft, Drones					
16. SECURITY CLASSIFICATION OF: UNCLASSIFIED (U)			17. LIMITATION OF ABSTRACT (U)	18. NUMBER OF PAGES 124	19a. NAME OF RESPONSIBLE PERSON
a. REPORT (U)	b. ABSTRACT (U)	c. THIS PAGE (U)			19b. PHONE NUMBER (include area code)

Standard Form 298 (Rev. 8-98)
Prescribed by ANSI Std. Z39.18

MASTER OF MILITARY ART AND SCIENCE
THESIS APPROVAL PAGE

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

ABSTRACT

THE GYGES EFFECT: AN ETHICAL CRITIQUE OF LETHAL REMOTELY PILOTED AIRCRAFT, MAJ Matthew D. Pride, 124 pages.

The U.S. Army pledges to defend the country against all enemies, foreign and domestic, in a manner that upholds national values. One such way recent presidential administrations make good on their pledge to protect the American people is by authorizing military strikes using the Remotely Piloted Aircrafts (RPA). If RPA do act as a political deposit on the sacred oath sworn by our leaders to protect and defend the constitution, does the policy likewise uphold the traditional norms associated with justice in war (*jus in bello*)? In other words, does the U.S. Government violate *jus in bello* in its use of RPA to conduct military strikes? To examine this question further, it is necessary to explore three broad areas. The first, and most substantial, is the moral basis for justifiable military action. The second area is legal precedence for RPA strikes. The final area deals in the consequences of such action within today's operational environment (OE) and the effects it has on the future of warfare. This thesis critiques the morality, legality, and military ethics of the United States' RPA Policy.

ACKNOWLEDGMENTS

Every few years, I receive an opportunity to recognize individuals who had an impact on me during my tenure at different assignments. Usually the opportunity manifests as an awards ceremony or a hail-and-farewell—those who served will be familiar with these functions. My remarks are always spontaneous at these events. On two earlier occasions—once in 2010 and a second occasion in 2013—I had an opportunity to give a speech at my change-of-command ceremonies. Those addresses now exist only as buried files on my private computer, heard only once and now long forgotten. Upon this thesis’ acceptance and my graduations from the Masters of Military Arts and Science program at the Command and General Staff College (CGSC), I have the privilege of preserving my gratitude as a matter of public record, which is not a privilege lost on me.

This thesis is of course about one thing—love. It is a work of love, a matter of love, and it is out of love that I labored over its content, its composition, and its structure. Many military professionals and colleagues guided and encouraged me to pursue this work out of their own sense of love of service and for our Nation. My family, which I will mention again later in closing, tolerated my absence at times, whether physically or mentally absent, out of love. As I now skim through the pages of this thesis, I cannot imagine how I completed it, save for the love and support of all those who pressed me onward.

Dr. Jack Kem, my committee chair, is one such individual who constructively pressed me to do more. I thank him for his confidence, his guidance, and his example. Large portions of this work developed after reflecting over deep conversation with him

publically in class or privately in his office, always on subjects such as ethics and morality, the laws of war, the nature of justice, and the proper use of military force. Having observed him for much of CGSC's common core joint and interagency curriculum, Dr. Kem's passion for ethics and joint warfare stamped itself on my professional life and filled me with a desire to learn. He is a remarkable person and a true value to our nation.

I owe a deep gratitude to LTC Dave Rapone and Mr. Matthew Bonnet, two exemplary professionals who agreed to compose my committee and shaped this work's composition. They have each challenged my thoughts, pressed my understanding of complex topics, and advised ways to strengthen this thesis by delving further into relevant material. Mr. Bonnot, my leadership instructor, brought relevant topics to bear on my thesis through course instruction and personal conversation. LTC Rapone dissected my writing and the ideas therein with scalpel precision, carefully reviewing my work to preserve my ideas while simultaneously recommending ways to improve upon its presentation. For each, I am truly grateful.

I thank my staff group—Christine Sheehan, Bryan Smith, Patrick Rood, Jon Murray, Matthew Martinez, Tural Asadbayli, Matthew Brown, Dan Gilmore, Miro Celecic, Adam Katz, Chris Kim, Julia Johnson, (Chaplain) Patrick Devine, and Allen Coones—who, perhaps without realizing it, built substantially upon the strength of my work. They each contributed to course discussions in amazing ways throughout our time at CGSC. My thesis took a firmer form immediately following thought-provoking dialogue with one or more of these great Americans.

I would like to thank Chaplain (MAJ) Jeff McKinney, ethics instructor for the Department of Command and Leadership, who organized an exception ethics symposium and allowed me an opportunity to present my thesis during the symposium on four occasions. Individuals who signed up to attend the breakout sessions did so out of interest and intrigue, which led to lively discussion concerning the substance of my thesis. The attendees provided keen feedback, constructive criticism, and sound advice on ways to improve its composition and argumentation. I am indebted to each of them for the professional curiosity and generous contributions.

Finally—though certainly not least of all—I thank my family. We have a saying in the U.S. Army: the NCO Corps is the backbone of our army. I include this now because I believe it is true; but if true, it bears mentioning that while the NCO corps may be the Army’s backbone, the military family is its heart. An organism can stand upright with a strong backbone, but it can only survive with a healthy heart. The military family pumps vitality, life, and love into our profession so that our sacrifice has special meaning. My family is my life, and my life of sacrifice only has meaning because of my family. My wife, Christina, contributed tremendously to my thesis as we discussed the cardinal virtues, morality, ethics, and self-less service. Herself a graduate of a respected postgraduate theology program—*magna cum laude*—she challenged my thesis and helped to shape my ideas as I tackled difficult topics related to moral theology. I remain humbly in her debt and hope to repay by devoting my life and love to her.

I am blessed with so many good friends and family. I am pleased to give rightful credit to them for advising all that is strong in this thesis, while admitting to whatever lackluster there is as being my own stubbornness to accept their recommendation.

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ACRONYMS

ACLU	American Civil Liberties Union
ADRP	Army Doctrine Reference Publication
AI	Artificial Intelligence
AOR	Area of Responsibility
AUMF	Authorized Use of Military Force
USCENTCOM	U.S. Central Command
CIL	Customary International Law
COA	Course of Action
OE	Complex Operational Environment
DDE	Doctrine of Double Effect
DoD	Department of Defense
DoS	Department of State
ECFs	Early (Christian) Church Fathers
FM	Field Manual
GPU-12	Guided Bomb Unit-12
HPT	High Payoff Target
HVT	High Value Target
IAF	Israeli Air Forces
IDF	Israeli Defense Forces
IHL	International Humanitarian Law
IOLD	International and Operational Law Department
ISIL	Islamic State in Iraq and Syria
ISR	Intelligence, Surveillance, and Reconnaissance

JAG	Judge Advocate General
LOAC	Law of Armed Conflict
LOCUST	Low-Cost UAV Swarming Technology
MDMP	Military Decision-Making Process
MoD	Ministry of Defense
NATO	North American Treaty Organization
NSC	National Security Council
NSS	National Security Strategy
POW	Prisoner of War
PPG	Presidential Policy Guidance
PTSD	Post Traumatic Stress Disorder
RPA	Remotely Piloted Aircraft
START	Study of Terrorism and Responses to Terrorism
UAV	Unmanned Aerial Vehicles
UCMJ	Uniform Code of Military Justice
UK	United Kingdom
UN	United Nations
USAF	United States Air Force
USSR	Union of Soviet Socialist Republics

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PREFACE

The Eminians keep a very orderly society, and actual war is a very messy business. A very, very messy business. I had a feeling that they would do anything to avoid it, even talk peace.

— Captain James T. Kirk, Captain, Federation Starship Enterprise

The Ethics of a Clean War: A Sci-Fi Scenario

At the outset of research for this thesis, it seemed intuitive that human experience and normative moral reasoning would certainly uphold the ethics of a weapon that could eliminate, or at the very least mitigate, the ugly and destructive reality of war. Likewise, it appeared obvious that if a military leader could avoid having to subject his or her soldiers to the peril of potential loss of life or serious bodily harm while performing a voluntary patriotic duty or service obligation, they would. In other words, if the U.S. could invent a way to fight wars cleanly—a “clean” war—it would hasten to that end. Suppose America invented a weapon that could deliver all the effects of war without actually endangering the lives of its soldiers or citizens. It is conceivable that the Remotely Piloted Aircraft (RPA) is the precursor to just such a weapon, one that would place combatants far back from the combat zone that future soldiers may not need to fight in an actual war.

Far from the forefront of the public mind is the debate on the science and efficacy of the RPA. The area where most attention focuses is on the debate of whether America could, or should, remove “trigger pullers” from combat while preserving the “moral obligation” for someone to “pull a trigger” that kills. In other words, war will forever remain a human endeavor, but it may no longer be a mutually shared human experience

between warring parties. While pilots who operate RPA indeed report combat fatigue after spending long hours in windowless rooms, undoubtedly, those windowless rooms are comfortable, air-conditioned quarters. The “combatant” likely sits in ergonomically designed chairs. Indeed, waging war may someday become a clean sport, rather than the messy business it is, more like a remote controlled international manhunt, rather than mutually shared bloodshed.

There are signs that America indeed seeks a cleaner way of war. In 2015, the Pentagon announced it would pursue the low-cost UAV swarming technology (LOCUST) program, a weapon system designed to fire 30 synchronized, foldable drones out of a tube launcher (Tucker 2017). In September 2016, the LOCUST program passed an important milestone when contract officials successfully launched a quick succession of 30 Raytheon demonstration drones (Tucker 2017). Since the test, top military officials classified the program, leaving many to wonder how far the program has since progressed (Tucker 2017).

As the U.S. advances technologically to improve the efficiency of war, many of its near-peer competitors will follow in pursuit. In 2012, then Assistant to the President for Homeland Security and Counterterrorism John Brennan, in a speech to the Woodrow Wilson International Center for Scholars, stated, “The United States is the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict. Other nations also possess this technology. Many more nations are seeking it, and more will succeed in acquiring it” (Brennan 2012). Then, in a solemn tone, Brennan added, “President Obama . . . [is] very mindful that as our nation uses this technology, we are establishing precedents that other nations may follow, and not all of them will be nations

that share our interests or the premium we put on protecting human life, including innocent civilians” (Brennan 2012).

On March 23, 2017, Russian officials announced that the Kremlin is researching technology that will allow a soldier to shoot a reconnaissance drone from a hand-held grenade launcher (Tucker 2017). This announcement may in fact hasten the day “when Russia and U.S. drone swarms may meet each other over the skies of distant battlefield” (Tucker 2017). RPA and other drones may someday replace troops altogether from the combat environment. What conditions would keep the U.S. from waging war if combat only occurred between droids and RPA?

A clean war fought between droids and RPA may seem farfetched, but science fiction writers imagined its possibility fifty years ago (Atkinson and Myers 2009). Imagine in fifty or seventy-five years where the major military powers of the world improved artificial intelligence and proliferated smart-RPA and other droids and drones capable of delivering destructive power greater than what exists today. Suppose America resigned itself to sign an armistice along with other great military powers, a ceasefire that staves off mutually assured destruction at the hands of remotely piloted war-crafts. Further, suppose that the treaty required a human cost for peace. How might that future look? On February 23, 1967 at the height of the Cold War and under the threat of mutually assured nuclear destruction, writer Robert Hamner and director Joseph Pevney posed such a reality in Star Trek’s season 1, episode 23 *Taste of Armageddon* (Atkinson and Myers 2009).

To summarize the episode’s plot, Captain James T. Kirk and the crew of the Federation Starship Enterprise, escorts Ambassador Robert Fox to the planet Eminiar

VII. The Ambassador's mission is to open diplomatic relations with the Federation and to broker a peace treaty to cease a five-hundred year war between Eminiar VII and its rival neighboring planet Vendikar. The planet's inhabitants detain Kirk and his crew after violating Eminiar VII's sovereign airspace. In detention, Kirk meets Mea 3, a female Eminian official, who leads the crew to Anan 7, head of the High Council. During the initial meeting, Kirk and his crew learn that three million lives are lost each year from Vendikian strikes, a casualty count decided entirely by a central computer simulation. To Kirk's horror, he learns that after every simulated attack, casualties are mathematically calculated, and the men and women who "died" in the simulation must report within twenty-four hours to a disintegration chamber in accordance with treaty obligations between the two warring planets.

Anan 7 explained to Captain Kirk, "I lost my wife in the last attack. Our civilization lives. The people die, but our culture goes on."

In horror Kirk replied, "You mean to tell me your people just walk into a disintegration machine when they're told to?"

"We have a high consciousness of duty, Captain," Anan 7 replied.

Kirk later learned that the computer simulation declared Mea 3, along with Kirk and his crew, as casualties in a recent strike and they must all report to a disintegration chamber by noon the following day. When confronted about the absurdity of the obligation, Mea 3 appeared strangely at peace and attempted to assure Kirk by saying, "My life is as dear to me as yours is to you, [but] if I refuse to report, and others refuse, then Vendikar would have no choice but to launch real weapons. We would have to do

the same to defend ourselves. More than people would die then. A whole civilization would be destroyed. Surely you can see that ours is a better way.”

Toward the end of the episode, Kirk attempted to reason with Anan 7 the absurdness of their clean war by saying, “Death, destruction, disease, horror. That’s what war is all about, Anan. That’s what makes it a thing to be avoided. You’ve made it neat and painless. So neat and painless, you’ve had no reason to stop it. And you’ve had it for five hundred years. Since it seems to be the only way I can save my crew and my ship, I’m going to end it for you, one way or another.”

With this, Kirk destroyed the war simulator, prompting Anan 7 to exclaim in fury and horror, “Do you know what you’ve done?”

“I’ve given you back the horrors of war,” Kirk replied.

This thesis is an attempt to reinsert the horrors of war, the physical, emotional, and moral injury, endured by just combatants and by innocent noncombatants back into the discourse on future conflict. It analyzes only one aspect of all that we must consider concerning the moral and ethics of limited, clean wars, but the subject is an important one.

CHAPTER 1

INTRODUCTION

If it remains true that “the strongest is never strong enough to be always the master, unless he transforms his strength” into virtue, we may ask ourselves the following question: what kind of right or virtue is needed by these modern Gyges?

— Grégoire Chamayou, 2015

Overview

U.S. elected officials and military professionals pledge to defend the country against all enemies, foreign and domestic, in a manner that upholds national values and principles. One such way in which the executive branch of government makes good on their pledge to protect the American people is by authorizing military strikes using the Remotely Piloted Aircrafts (RPA). If tactical strikes using RPA do act as a political deposit on the sacred oath sworn by our leaders to protect and defend the constitution, does the policy likewise uphold the traditions of U.S. military service and justice in war (*jus in bello*) writ large? In other words, does the United States government violate the ethical principles that comprise *jus in bello* in its use of RPA to conduct military strikes? To examine this question further, it is necessary to explore three broad areas. The first, and most substantial, is the moral basis for justifiable military action. The second area is legal precedence for RPA strikes. The final area deals in the consequences of such action within today’s operational environment (OE) and the effects it has on the future of warfare.

Doctrine comports that for the U.S. Military “to maintain legitimacy as a profession while protecting the interests of the American people, it cannot violate the

rights of others when using lethal force to protect our own rights” (DA 2015, 3-4). This need ties explicitly to the self-evident, unalienable rights denoted in the U.S. Declaration of Independence. On its surface, however, the legitimate use of force to end life appears contradictory with the moral obligation to protect life. As such, legitimate military action presupposes a rigorous internal examination, particularly since the gravity of such a decision subjects it to a moral inquiry. As it were, the legal and moral grounds in Western society for killing in war stems from Just War traditions.

At its core, Just War theory (*jus bellum iustum*) deals with the “right” or “law”—*jus* being the Latin root for justice—of human activity in a state of conflict. *Jus bellum iustum* requires certain conditions to exist in order for a legitimate authority to choose the option of military force to impose one’s will on another sovereign entity. The conditions are: the damage inflicted by the aggressor must be lasting, grave, and certain; all other means of putting an end to imminent threat must be impractical or ineffective; there must be serious prospects of success; and the use of force must not produce evils and disorders graver than the evil to be eliminated (The Holy See 1995, 615).

Generally, *jus bellum iustum* is comprised of two main parts, justice for war (*jus ad bellum*) and justice in war (*jus in bello*). Under *jus ad bellum*, nation-states establish a just cause for conflict as the burden for war, publically proclaimed as a formal declaration by a legitimate authority. Under *jus in bello*, military commanders discriminate between civilians and combatants, use proportionality against adversaries, minimize unnecessary suffering, prohibit illegal weapons, and oblige to accept terms of surrender without slaughter. The separate treatments of *jus ad bellum* and *jus in bello* begs the question whether the categories necessarily function in separate domains. This is

not a correct assumption. “[T]he so-called ‘separation’ between *jus ad bellum* and *jus in bello* is mainly for focusing attention on different issues. It does not denote a complete split between the two, as if they had nothing to do with each other” (Orend 2006, 105).

To examine the relationship between RPA and *jus in bello*, one must start at first the internal structure of *jus in bello*, which deals with the moral dilemma of whether it is ever acceptable to kill. “The decriminalization of warrior homicide presupposes the structure of reciprocity. The killing is allowed only because it is a matter of killing each other” (Chamayou 2013, 161). The U.S. RPA policy, on its surface, invalidates this premise. Political scientist Sarah Kreps and contemporary philosopher John Kaag observed that “remote-controlled machines cannot suffer the consequences [of their actions] and the humans who operate them do so at a great distance; the myth of Gyges is more a parable of modern counterterrorism than it is about terrorism” (Chamayou 2013, 96). In other words, one may kill without the risk of being killed himself. Put another way, one may kill his victim without the victim having the chance to self-defend.

The “Gyges” effect—when individuals accept as legal and moral the targeted killing of enemy combatants unseen, with impunity, and with zero risk to their person—harkens back to the tale of the “Ring of Gyges,” from book II of Plato’s *The Republic*, written circa 360 B.C. In life, Gyges was a real person—he was the king of Lydia, an ancient kingdom that once existed in the western region of modern day Turkey. Plato used Gyges’ unusual ascension to power as a way to explore the nature and origin of justice. According to Plato, Gyges started life as a poor shepherd. One day, after an earthquake, he stumbled across a cave and found a magical ring on the finger of a dead giant. He soon discovered the ring could cloak his appearance so others could not see him

when he wore it. With the power to do whatever he pleased without fear of capture, Gyges seduced the queen, slew the king, and seized power.

In light of this ancient tale, contemporary French philosopher Grégoire Chamayou asked, “If it remains true that ‘the strongest is never strong enough to be always the master, unless he transforms his strength’ into virtue, we may ask ourselves the following question: what kind of right or virtue is needed by these modern Gyges” (Chamayou 2013, 97)? U.S. military doctrine’s solution to the Military professional’s susceptibility to the Gyges effect is strict moral and legal observance of the military ethic. According to the Army’s doctrinal publication on the Army Profession, “The Army professional’s moral awareness and sensitivity is required for *legally and morally justifiable action*” [emphasis added] (DA 2015, 4-2). Upon this essential burden, all military professionals must understand and frame their actions in both moral and legal terms to uphold national values. This thesis examines the nature of the Army professional’s obligation to take legally and morally justifiable action based upon a moral structure founded by the same religious tradition that conceived *jus bellum iustum*—namely, Judeo-Christian theology. Moreover, this thesis examines the morality, legality, and military ethics of the United States’ RPA policy. Its aim is to serve as a primer for a more substantial conversation military professionals and political leaders must have concerning the constraints we ought to place on the prosecution of modern and future warfare.

Background

The United States Military bears a responsibility that no other military force has previously bore in the history of the world. Nations rely on the U.S. to defend their sovereignty through military alliances like the longest, most successful military alliance

in world history, the North American Treaty Organization (NATO). The U.S. has tens of thousands of Soldiers deployed across the globe to conduct security forces assistance and foreign internal defense training. The 2015 *National Security Strategy* (NSS) outlined that the U.S.' strength lies in its capacity and willingness to defend democracy and human rights, values that are intertwined with every enduring national interest (Obama 2015, 25). As a champion of human rights, our nation's leaders expect military professionals who restrain excessive action and fight with virtue, respecting the inalienable rights of all people.

The President of the United States plays a special role in policy formulation. He bears a constitutional obligation as the Chief of State and Commander-in-Chief. His actions are reflective of American values and his office personifies American will. It has been a longstanding belief that national leaders bear a special responsibility in representing their States in their decisions and actions, "that in each of us there are the same principles and habits [that] are in the State" (Plato 360 B.C., 151). As such, the President's decision to use "drones" in traditional combat roles indeed raises a moral and ethical question concerning U.S. legitimacy as a moral force for good that bears on our nation's core identity, and for us as citizens.

U.S. Army doctrine considers drones to be any land, sea, or air vehicles that remotely or automatically operate. Drones are not exclusively aircrafts or air vehicles. The word "drone" is a colloquial description of uninhibited aerial vehicles; recently, the U.S. military has adopted the term remotely piloted aircrafts (RPA) as the formal term to describe armed, remotely piloted aerial vehicles.

In a *New York Times* Article published in September 2016, Michael S. Schmidt describes how the U.S. Government now hires contractors in a controversial move to offset the shrinking number of available RPA pilots (Schmidt 2016). Schmidt described “drones” as having steadily increased since the military first used them for reconnaissance in the Balkans in the 1990s. By the mid-2000s, the Air Force was flying more than a dozen reconnaissance and some fire missions across (U.S. Central Command’s (USCENTCOM) area of responsibility (AOR) to combat both conventional and unconventional forces (Schmidt 2016).

Increasingly the President uses RPA to target non-state actors and transnational terrorist organizations, such as the militants of the Islamic State of Iraq and the Levant (ISIL) in Iraq and Syria. The stakes raised as strikes occurred within foreign sovereign borders without direct collaboration with those states’ governments. To highlight two cases, the President ordered strikes in September 2015 in Yemen and September 2008 in Pakistan. In both cases, victim nations were either unable or unwilling to track down and capture or kill those who perpetrate acts of international terrorism from within their borders. More recently in March 2017, the U.S. military admitted to airstrikes in northern Mosul targeting Islamic State militants that unintentionally killed over 100 civilians. If confirmed, the March 17 strike will mark the greatest loss of civilian life since the U.S. began its air campaign against the Islamic State militants in Iraq and Syria (Morris and Ryan 2017).

Furthermore, many of the pilots who operate RPA report combat fatigue and even post-traumatic stress disorder (PTSD) from long work hours in windowless rooms thousands of miles away and, surprisingly, witnessing the combat effects of their actions

through monitors. “The experience of remote-control war is deeply intense and sometimes disturbing—evidence of stress and possibly post-traumatic stress disorder (PTSD) among United States Air Force (USAF) operators has emerged, along with speculation that the ‘intimacy’ of spending hours and days observing targets, as well as that in the aftermath, is taken a psychological toll” (Rogers and Hill 2014, 70). Laura A Dickinson, a law professor at George Washington University, is concerned that, “With drones, this is a new area where we already do not have a lot of transparency, and with contractors operating drones there’s no clearly defined regime of oversight and accountability” (Schmidt 2016). For its part, the USAF explicitly states that contracted RPA are legally prohibited from being the traditional “trigger pullers” when delivering high explosive munitions to a target. However, this fact further blurs what constitutes a lawful combatant according to traditional norms of war and combat.

The previous administration was keenly aware of the moral and ethical issues that RPA present. The most problematic of the issues arises in the selective targeting of individuals by the United States government, a policy that all too much appears like assassination. In the 2015 National Security Strategy (NSS), President Barack Obama stated that the U.S. had an obligation to defend its national interests, with force if necessary, while simultaneously upholding national principles and values inherent to American identity. He wrote:

To succeed, we must draw upon the power of our example—that means viewing our commitment to our values and the rule of law as a strength, and not an inconvenience. That is why I have worked to ensure that America has the capabilities we need to respond to threats abroad, while acting in line with our values—prohibiting the use of torture; embracing constraints on our use of new technologies like drone; and upholding our commitment to privacy and civil liberties. (Obama 2015, 3)

In March 2010, as a legal advisor to the DOS, Harold Koh delivered a speech to the American Society of International Law, in which he proffered legal justification for killing individual leaders of Al Qaeda and the Taliban. Koh argued:

Individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of the enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects. (Carter 2011, 75)

Later, Koh refined RPA use for such missions. “Under domestic law,” Koh argued, “the use of lawful weapon systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute ‘assassination’” (Carter 2011, 76). In a criticism of Koh’s argument, Yale Law professor Stephen L. Carter noted:

It is appropriate . . . to use missile strikes to get the leaders, even when they are away from the battlefield, because we are acting in self-defense (or as part of an armed conflict), and, therefore, the ‘targets’ (that is, the leaders) are not entitled to warning or trial. It is important to note how few actual limits this argument places upon the presidential prerogative. Let the President believe that he is acting to defend the nation, and he can evidently target anyone in the world. (Carter 2011, 77)

Certainly, President Obama’s notion that American success is contingent on its commitment to national values at home and abroad carries some weight in light of historical precedence and past policy positions. As such, the U.S. strives to embrace restraint—a principle of joint operations—in its use of new technologies like RPA and other drones.

Primary Research Question

U.S. freedom to employ military capability largely unimpeded by foreign governments is itself explicably linked to its legitimacy, restraint in its use of military force, and trust in American decision-making. The restraint of military force is a form of limited warfare. The U.S. Government protects the rights and interests of the American people by conducting limited warfare as directed by civilian leaders in a manner that also respects the basic rights of others (DA 2015, 3-4). RPA represent the continuance of limited warfare within the global security environment.

Limited warfare—wars of necessity that militaries conduct with limited means—is how the U.S. fulfills its self-imposed obligation to secure the international liberal order. Rather than bring to bear the full destructive force of unlimited war onto the world, the U.S. chooses instead to use its military might in a limited capacity to cleanly wage war. The U.S. stands to gain more from a liberal world order secured by international democratic institutions. In modern times, RPA represent one such way in which the U.S. delivers on its longstanding promise to utilize limited means to secure its interests and to achieve global stability.

However, RPA present a potential conundrum as the U.S. expands their use, which threatens to redefine the traditional rules of combat and the roles of combatants. The primary research question is: Does the US Government violate *jus in bello* in its use of remotely piloted aircrafts to conduct military strikes? If a lawful combatant pilots an aircraft remotely to strike a high payoff target using proportional force under a congressional authorization to use military force, and the operation stands a reasonable

chance of success in achieving a valid military objective, then the intrinsic moral quality of the act itself upholds.

However, remote pilots who operate RPA challenge the traditional notion of who constitutes a lawful combatant. Historically and traditionally, combatants are mutually susceptible to harm. Combatants engage one another in the physical domain of warfare. Yet, this condition does not hold true for RPA pilots. The validity to designate an RPA pilot as a lawful combatant weakens with the U.S. continuing to hire government contractors as RPA pilots. Another area of concern deals with what constitutes legitimate targets. “International media including BBC, CNN, and news agency AFP variously reported that rescuers had been targeted in five occasions between May 24 and July 23, 2012, with a mosque and prayers for the dead also reportedly bombed” (Friedersdorf 2013). Is an individual a legitimate target for an RPA strike at all times, even when he or she is not actively involved in hostile acts against the United States? Does their activity matter to a modernized *jus in bello*?

Do RPA use proportional force to destroy the target, particularly if the target is unarmed or has no capacity to defend him or herself? Is the authorization to use military force (AUMF) legally justifiable for present-day RPA strikes? Do RPA strikes represent a reasonable chance of success or do the acts themselves unnecessarily degrade U.S. legitimacy? These are all important questions policy makers must consider as they deliberate RPA strikes, all of which vary in slight degree from the primary research question: Does the US Government violate *jus in bello* in its use of remotely piloted aircrafts to conduct military strikes?

Secondary Research Questions

To investigate the primary research question, “Does the US Government violate *jus in bello* in its use of remotely piloted aircrafts to conduct military strikes?” this thesis addresses secondary questions outlining an ethical critique topic of “drones” in warfare. The subjects delve more fully into the parameters of international law, authority to act, and legal definitions.

The secondary questions aiding in answering the primary research question are:

1. How does Drone warfare meet / fail to meet criteria required to uphold:
 - a. Principle of military necessity
 - b. Principle of distinction
 - c. Principle of proportionality
 - d. Principle of unnecessary suffering
2. What is the appropriate moral framework to analyze the RPA policy?
3. How will a modernized Just War theory under a “just peace” framework affect the future outcome of the ethical question of tactics, techniques, and procedures of modernized warfare – namely the use of RPA in combat?
4. How has the just war tradition evolved over time to modern international law on land warfare?

Assumptions

The assumptions to the primary research question, “Does the US Government violate *jus in bello* in its use of remotely piloted aircrafts to conduct military strikes?” deal with the nature of war as a fixed interplay of politics and violence. This thesis

handles war theory primarily as being a human endeavor wrought with ethical and moral considerations.

A second assumption is that an authorization for the use of military force (AUMF) carries the same legal authority as congressional declarations of war. This particular matter is further set forth in detail in chapter 4; but this thesis assumes that the U.S. is in fact at war for a just cause—self-defense.

The third assumption is that international customary law (CIL) and the law of armed conflict (LOAC) are universally applicable. This is true even as some nations have chosen not to adhere to their statutes or are not signatories.

The fourth assumption is that good faith is due to U.S. policy makers and legal advisers who routinely explore the legal and ethical considerations of modern warfare programs in light of current data and information not accessible for open source research. Because the decision-making surrounding RPA use is highly classified, this thesis will not be able to explore these issues in depth. As such, this thesis incorporates the spirit of good faith that military leaders and national policymakers value American ideals enough to balance the seriousness and moral weightiness of just war tradition in pursuance of modern day strategies to confront the threats against national interests.

Definitions and Terms

The following key definitions and terms provide fidelity and clarity when used in the context of this thesis. They provide a common understanding of certain concepts presented to the reader:

Customary International Law (CIL): CIL are nonbinding aspects of international law dealing with longstanding traditions and norms amongst nation-states. According to

the Legal Information Institute of the Cornell University Law School, “Customary International Law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international [norms].”

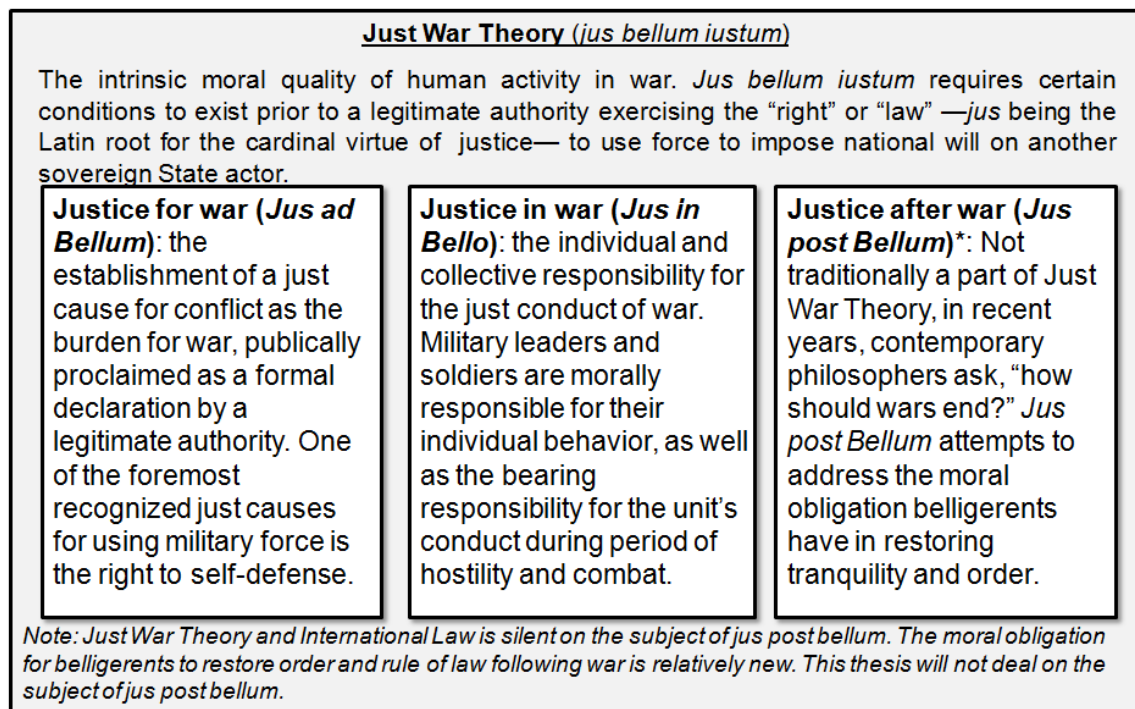


Figure 1. Just War Theory (*Jus Bellum Iustum*)

Source: Developed by author.

Just War: Moral judgments concerning war fall into two discrete areas: reasons for going to war in first place; and the conduct of the war itself. The reasons nations may go to war is known as *jus ad bellum*, while nations’ military conduct of war is known as *jus in bello*. Traditionally speaking, *jus ad bellum* is a responsibility principally for a nation and its political leaders, whereas *jus in bello* is an individual responsibility, which in most cases also includes units and their commanders. However, in few cases, *jus in*

bello is a responsibility of the nation itself. For the purpose of this thesis, the employment of RPA is treated as a mark of *jus in bello*, seeing that the RPA is a policy decision reserved by the Commander-in-chief, acted upon on behalf of the State, and bearing tactical consequences. A fuller treatment of the *jus bellum iustum* follows in Chapter two of this thesis.

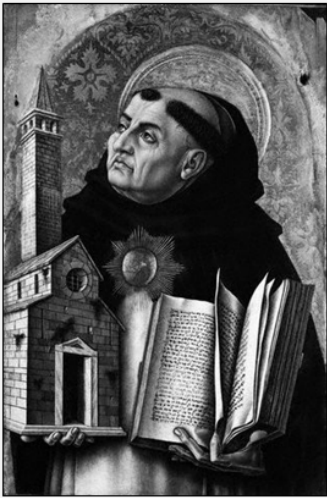
<u>Just War Theory (<i>jus bellum iustum</i>)</u>		
The intrinsic moral quality of human activity in war. <i>Jus bellum iustum</i> requires certain conditions to exist prior to a legitimate authority exercising the “right” or “law”— <i>jus</i> being the Latin root for the cardinal virtue of justice—to use force to impose national will on another sovereign State actor.		
<i>Jus ad Bellum</i> (1) A just cause; (2) Legitimate authority; (3) Public declaration; (4) Just intent; (5) Proportionality; (6) Last resort; and (7) Reasonable hope of success		<i>Jus in Bello</i> (1) Principle of Distinction (2) Principle of Military Necessity (3) Principle of Proportionality (4) Principle of Unnecessary Suffering

Figure 2. Criteria for *Jus ad Bellum* and *Jus in Bello*

Source: Developed by author. Image from Carlo Crivelli, *St. Thomas Aquinas*, 1476, the Demidoff Altarpiece in the Church of San Domineco, Ascoli Piceno, Italy.

Jus ad bellum: Traditionally wars necessitate a just cause, particularly in Western culture. Rulers and politicians argue for why a war is justified in order to kindle their people’s passion for war. Using Figure 2, one can see with internal to *jus bellum iustum*,

theologians and philosophers have set certain criteria to justify war: (1) a just cause (2) legitimate authority; (3) public declaration; (4) just intent; (5) proportionality; (6) last resort; and (7) reasonable hope of success (Cook 2012, 221). Scholars may label the criteria differently, but the necessary conditions prior to war have largely unchanged since their earliest conceptions.

Jus in bello: In contrast to *jus ad bellum*, where nation-states are responsible for determining the just cause for war, *jus in bello* holds the individual responsible for just conduct in war. More specifically, soldiers and military leaders are responsible for their individual behavior and group conduct during conflict. Examples of these responsibilities follow: discipline and training; types of munitions and methods of delivery; discrimination between combatants and non-combatants; treatment of POWs; and medical aid to friendly and enemy wounded soldiers (Cook 2012, 223). Martin Cook narrows *jus in bello*'s scope to two fundamental areas: discrimination and proportionality. "Together," Cook asserts, "they set limits in the conduct of war—limits on who can be deliberately attacked and on how war can legitimately be conducted" (Cook 2012, 220).

Commanders have a special role in ensuring strict observance of *jus in bello* for themselves and their formations. Under customary international law, commanders are legally responsible for violations of *jus in bello* when any one of three circumstances applies. The first is if the commander ordered the commission of the act. The second is if the commander knew of the act, either before hand or during its commission, and did nothing to prevent its occurrence. The third and final circumstance is if the commander should have known through reports received by him or through other means that troops

subject to his control were liable to commit violations of customary international law (IOLD 2015, 39).

Moral Obligation: Morality, simply put, is judgment between what constitutes an inherent good and what constitutes a wrong or evil. Morality springs forth from natural law, which provides the necessary framework inside which humans discern just acts from unjust acts. Theologians and philosophers have long held that the intrinsic morality quality of human acts consists of three principal elements; they are the object, the intent or ends, and the circumstance. A more thorough treatment of these three elements follow in chapter two, but civil society rests upon the basic and foundational principal that individuals ought to achieve good and to avoid evil. It is, in fact, a moral obligation. An obligation is any act to which a person is morally or legally bound. Obligations typically equate to a duty or commitment. The Profession of Arms codifies moral norms in the Uniformed Code of Military Justice (UCMJ), which is a collection of myriad cultural and legal precedents from across the United States. Doctrine states, “Adherence to the Army Ethic, a moral obligation, is a force multiplier in all operations. Leaders are role models and must communicate and set the example for living the Army Ethic for their Soldiers and Army Civilians. By living and upholding the Army Ethic, we strengthen the essential characteristics of the Army Profession” (DA 2015, 3-4).

Principle of Distinction: The principle of distinction requires discrimination between lawful combatants and noncombatants (DA 2015, 3-5). The latter includes civilians, civilian property, prisoners of war, and wounded personnel who are unable to resist. International norms informed by Just War traditions requires that parties to a conflict direct their operations against legitimate military targets and avoid targeting

civilians or civilian infrastructure. Stemming from Augustine's and Aquinas' Just Law Theory, the principle of distinction came from a desire to distinguish between a lawful combatant and an unlawful combatant. This is pertinent as we inquire those who deliver effects using remotely piloted aircraft. This investigation includes whether the pilot of an RPA can distinguish between a lawful target and an unlawful target, and if so, does the RPA pilot's remote location in relation to the target impair his or her judgment?

Principle of Military Necessity: This principle requires combat forces to engage in only those acts essential to secure a legitimate military objective (DA 2015, 3-5). The principle of military necessity is a centuries-old code of ethics dating back to the earliest times of human warfare. Recently, this principle justifies measures "not forbidden by international law, [but are] necessary to accomplish the mission" (DA 2015, 3-5). "The principle of military necessity is explicitly codified in Article 23, paragraph (g) of the Annex to Hague IV, which forbids a belligerent 'to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'" (IOLD 2015, 10). The question of whether the employment of RPA is necessary given the nature of the threat posed by the target comes under scrutiny. In other words, is the opportunity to destroy the target a military necessity in spite of the consequences of ordering the strike if preservation of civilian life, infrastructural integrities, and even foreign national sovereignty is ultimately violated.

Principle of Proportionality: In accordance with this principle, the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained (DA 2015, 3-5). "Proportionality is not a separate legal standard as such, but provides a means by which

military commanders can balance military necessity and unnecessary suffering in circumstances when an attack may cause incidental damage to civilian personnel or property” (IOLD 2015, 11).

Principle of Unnecessary Suffering: This principle is often times referred to as humanity or superfluous injury (DA 2015, 3-5). One consideration here is whether the method of delivery mitigates large-scale human suffering by way of second and third ordered effects. For instance, would the effects of RPA delivered munitions have an undue second or third ordered effect within the collateral damage zone? When determining this principle, “it is especially forbidden . . . to employ arms, projectiles, or material calculated to cause unnecessary suffering. This principle applies to the legality of weapons and ammunitions themselves as well as to the methods by which such weapons and ammunition are employed” (IOLD 2015, 11-12).

Limitations and Delimitations

The United States Army has delayed modernizing its law of land warfare manual. This delay might be due in some small part to the changing character of war and the insidious reach of modern technologies into domains previously thought off-limits for strict military action (e.g. space, cyber). Whatever the reason, this leaves the U.S. Army without an updated manual to handle military action the present-day OE. Currently, the updated field manual on the Law of War will release in spring 2017. In lieu, the manual commanders use to assess legal matters within the OE is the 2015 Operational Law Handbook. With a changeover in presidential administrations and the expanding scale of manned and unmanned aerial vehicles into international and national airspace, it is difficult to imagine how one might interpret legal constraints on future warfare.

This thesis focuses its study exclusively on the ethical consideration in the employment of RPA. It does not take into consideration other technologies that allow for the replacement of friendly combatants far from the point of engagement, such as indirect fire weapons, aircrafts, and navy destroyers. It is possible that conclusions can be drawn that confer judgment in other areas, but this is not the point of this thesis. The work deals only with the ethical question of whether the RPA policy potentially violates *jus in bello*.

This is an unclassified study.

Chapter Conclusion

The primary research question has driven the research into important areas of morality and legality facing all military professionals. In the following chapter, this thesis discusses the historical foundations of Just War Theory; customary international law; the U.S. as a legitimate authority to wage war, the intrinsic moral quality that U.S. Army professionals bear in serving the American people; just war implications on U.S. National Security, and U.S. RPA policy.

CHAPTER 2

LITERATURE REVIEW

Compared to war, all other forms of human endeavor shrink to insignificance.

— General George S Patton Jr.

Chapter Introduction

This thesis handles the delicacy of war theory as being a human endeavor wrought with ethical and moral considerations. To answer the primary research question, “Does the US Government violate *jus in bello* in its use of remotely piloted aircrafts to conduct military strikes?,” the researcher conducted a literature review to gain a more complete understanding of war theory. All leaders and commanders in some way link ends, ways, and means, while accounting for risk, in order to achieve military objectives in support of national interests. However, the character of war changes over time as technologies and ways to employ means evolve. What does not change is a nation cannot actualize war without committing some form of violence against an adversary as an act of policy. Therefore, war’s nature comprises two elements. They are policy and violence. In international relations, policy that exists between nation-states devoid of any violence is diplomacy, whereas violence devoid of policy is formless barbarism. As such, the nature of war is fixed; war is violence rationalized as national policy.

Chiefly among the considerations of war is how humans participate. Many philosophers have sought ways to understand the nature and character of war from a moral and legal standpoint, with each tradition bearing forth slightly different considerations. Chinese General Sun Tzu, whose writings date back to 400 B.C.,

provided the earliest known moral code to war (Christopher 1990, 83-95). Roman politician and prolific writer Cicero also contributed to the tradition of ethical warfare (Christopher 1990, 83-95). However, the early Christian Church fathers formulated the most prominent ethical framework for warfare called Just War theory. This thesis will deal exclusively in the tradition of Just War Theory as the foundation upon which CIL rests. The following sections of this thesis, discusses the historical foundations of Just War Theory; customary international law; the U.S. as a legitimate authority to wage war, the intrinsic moral quality that U.S. Army professionals bear in serving the American people; just war implications on U.S. National Security, and U.S. RPA policy.

Just War Theory: A Summary

The primary early Christian theologians who supplied the foundational precepts of Just War doctrine are the 5th Century Milan, and the 13th Century Saint Thomas Aquinas. The background to *jus bellum iustum* within Western society has largely to do with the influence of the Christian concept of the four cardinal virtues, expounded upon by the Early Church Fathers (ECFs). “A virtue is a habitual and firm disposition to do good” (The Holy See 1995, 495). “As developed within the Thomist tradition, the virtues constitute real sources of human action, working in both efficient and final causality” (Cessario 2001, 128). The four cardinal virtues are prudence, justice, fortitude, and temperance. In light of prudence, good men choose the right means of doing greater good over evil (The Holy See 1995, 496). In light of justice, good men give to others their due (The Holy See 1995, 496). In light of fortitude, good men ensure firmness in difficulty and constancy in the pursuit of good (The Holy See 1995, 496-497). In light of temperance, good men moderate their attraction to pleasure and balance their uses of

created goods (The Holy See 1995, 497). Sts. Augustine, Ambrose, and Aquinas drew upon these virtues to conclude on certain realities pertaining to a just cause for war and a just conduct during war. The various principles of *jus ad bellum* and *jus in bello* can certainly each boil down to one or all of these four cardinal virtues, being that the “four virtues play a pivotal role and accordingly are called ‘cardinal’; all the others are grouped around them” (The Holy See 1995, 495).

St. Ambrose (338–397 A.D), Bishop of Milan, considered justice paramount particularly as it relates to his views on *jus bellum iustum*. He wrote:

We read, not only in the case of private individuals but even on kings . . . if anyone gains the people’s favor by advice or service, by fulfilling the duties of his ministry or office, or if he encounters danger for the sake of the whole nation, there is no doubt but that such love will be sown him by the people that they all will put his safety and welfare before their own. (Christopher 1990, 101-102)

St. Ambrose wrote of the sovereign state and its king as being moral agents. In war, St. Ambrose emphasized that soldiers have a duty to the innocent even when it means risking their own lives. This duty extended even to citizens of enemy nations. St. Ambrose considered there to be a moral equality among all soldiers (Christopher 1990, 103).

A contemporary and student of St. Ambrose, St. Augustine (354 – 430 A.D) built extensively upon the ideas set forth by the Bishop of Milan. Augustinian Just War theory is challenging because it is a collection of various works instead of a single, coherent treatise. Nevertheless, St. Augustine provided the early Church with a rich, theologically and philosophically sound doctrine on the just reasons for waging war. Like St. Ambrose, St. Augustine concerned himself with moral acts and discerning right or wrong in accord

with God's divine plan for Mankind, the chief agent of His sovereign will. St.

Augustine's best treatment of justice and peace is found in his work, *City of God*.

Set in the context of the clash between the inhabitants of the *civitas dei* and the inhabitants of *civitas terrena*, two cities which "coexist and whose inhabitants commingle," St. Augustine unveils the framework for *jus bellum iustum* (Christopher 1990, 112). Augustine's cities are not literal municipal boundaries as much as being supernatural communities that extend into the natural world. The two cities came into being with the beginning of time when God created all things (Christopher 1990, 112). The inhabitants of *civitas dei* include supernatural beings as well as natural beings, and are "motivated by unselfish love of God (*caritas*) which gives them the strength to exercise their will in always choosing the lesser over greater evil" (Christopher 1990, 113). The citizens of *civitas terrena* are concerned merely with selfish desires, lust for wealth, glory, and power. "Both earthly groups are infected with the curse of original sin and are 'slaves to sin'" (Christopher 1990, 113).

Augustine argued that all who existed on earth sought hope for justice and absolute righteousness. Yet, the inhabitants of *civitas terrena* imposed their own form of peace and justice in accordance with their selfish desires for power, honor, and pleasure. Augustine believed that the faithful inhabitants of *civitas dei* would experience perfect peace and righteousness at the end of time when God's Kingdom comes (Christopher 1990, 115). Until such time, Mankind will experience only justice of a sort so long as they nurture their proper virtues and remain in right relationship to one another and to God. For his part, St Augustine derived the notions *jus ad bellum* and *jus in bello* to explain how peace and justice could be preserved on *firma terra* between *civitas dei* and

civitas terrena. That is an important aspect many miss concerning *jus bellum iustum*—the desire for peace and tranquility.

When conflict does arise between the two sovereign states, St Augustine's underlying notions of *jus ad bellum* and *jus in bello* provide a just and ethical framework for the conduct of hostilities. Those who renounce violence and bloodshed and, in order to safeguard human rights, “make use of those means of defense available to the weakest, bear witness to evangelical charity, provided they do so without harming the rights and obligations of other men and societies” (The Holy See 1995, 614-615).

Just War evolved to a Western Christian tradition in the 800 years between Sts. Augustine and Aquinas. The informal rules of *jus ad bellum* and *jus in bello* became the basis of just practices between warring armies and principalities. Under *jus ad bellum*, kings and rulers shouldered the burden for expressing a just cause for conflict through publically proclaimed formal declarations. Under *jus in bello*, field commanders practiced the principle of discrimination between civilians and combatants, prohibited weapons causing unnecessary suffering, and outlined the obligation to accept terms of surrender without slaughter. St. Aquinas further defined these categories, adding to them something he termed the Doctrine of Double Effect (DDE). In *Just and Unjust Wars*, Michael Walzer described St Thomas Aquinas' original intent, meaning, and purpose for DDE:

1. The Act is good in itself or at least indifferent, which means, for our purposes, that it is a legitimate act of war.
2. The Direct effect is morally acceptable—the destruction of military supplies, for example, or the killing of enemy soldiers.
3. The intention of the actor is good, that is, he aims only at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends.

4. The good is sufficiently good to compensate for allowing the evil effect.
(Walzer 1977, 153)

One such case in which DDE manifests to implicate an act of policy is with the March 2017 airstrikes in northern Mosul that resulted in the unintentional deaths of over 100 civilians. U.S. policy makers cite DDE as the consequence of legally and morally justifiable military action, and as such, CIL accepts the civilian deaths upon that principle. However, if not handled delicately, one might potentially distort DDE. Walzer argued states use DDE principle as “a way of reconciling the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity” (Orend 2006, 116).

In the sixteenth and seventeenth centuries, Spanish theologians Francisco de Vitoria (1480-1546), a Dominican Priest, and Francisco Suarez (1548-1617), a Jesuit Priest, were concerned with the practical and legal application of the just war theory on the expanding colonial system (Wakin 1986, 228). Establishment figures in Spanish society, these clergymen respectively examined the Spanish government’s ventures into new lands, which led Suarez to establish a “triad of situations that would justify war: defense of life, defense of property, and aid to a third party who is unjustly attacked (Taylor 1970, 228).

Soon after, known as the father of international law and writing as a Protestant who invoked personal conscience over Church authority, as well as a jurist rather than a clergyman, Hugo Grotius, a Dutch lay scholar and diplomat (1583-1645), sought to secularize *jus bellum iustum* after the European continent suffered through the Thirty Years’ war (1618-1648). Historians recount the Thirty Years’ War for its stunning

brutality and dramatic casualty rate given the time era, but principally note the war as being a contest of religious ideology between Catholics and Protestants. However, what began as a religious conflict morphed into a contest between the great European powers of that era. Monarchs justified war as being a religious endeavor sanctioned by divine providence, which provoked monarchs to expend unprecedented resources. Belligerents pursued military activities they believed to be the will of the Almighty, leading to hardened resolve that transpired into unprecedented violence. The Thirty Years' War reached such destructive proportions that by its end in 1648 political elites in Europe hoped to secure an enduring peace through the Treaty of Westphalia. Grotius, among many others at the time, sought a way to prevent religious ideology from becoming the primary cause of international conflict. He is the establishment figure in history to which modern day scholar refer to consult the original purpose and design of the LOAC (Taylor 1970, 228).

While the international community today ensconced *jus in bello* and *jus ad bellum* into international norms and formal treaties such as the Hague and Geneva Conventions, the international community continues to struggle over the basic questions on the morality for the justification and conduct of war. Martin Cook warned, "Morally conscientious military personnel need to understand and frame their actions in moral terms so as to maintain moral integrity in the midst of the actions and stress of combat. They do so to explain to themselves and others how the killing of human beings they do is distinguishable from the criminal act of murder" (Cook 2012, 217).

In recent times, the Obama Administration invoked just war traditions to justify American military policy in Afghanistan. In his Nobel Peace Prize acceptance speech in December 2009, President Obama argued:

Over time, as codes of law sought to control violence within groups, so did philosophers and clerics and statesmen seek to regulate the destructive power of war. The concept of a “just war” emerged, suggesting that war is justified only when certain conditions are met: if it is waged as a last resort or in self-defense; if the force used is proportional; and if, whenever possible, civilians are spared from violence. (Carter 2011, 22)

In outlining these conditions, President Obama laid the ethical foundation to wage war in Afghanistan using the same historical traditions of Sts. Augustine, Ambrose, and Thomas Aquinas. He invoked various measures as outlined both in international norms and historical just war traditions that translated directly into the 2015 NSS.

Customary International Laws and War

There are a myriad of CIL concerning conflict and war that policy makers must consider when seeking a legal framework to justify the use of RPA. The burden is greater as RPA target non-state actors within foreign sovereign state boundaries. To be fair, CIL has not evolved to consider the rapid pace of technological development surrounding RPA nor incorporate the role of the non-state actor. An important consideration to this thesis is whether a State is willing or able to deal with non-state actors who reside within their borders. If the state is not, what actions other states can take to ensure their security? Increasingly, modern scholars determine that cross border RPA strikes are legal if the host State is unwilling or unable to deal with the non-state actors who are launching armed attacks from within its territory. However “some scholars have posited that a cross border response into a host State requires the victimized State to meet a higher burden of

proof in demonstrating the criteria that establish the legality of a State's use of force in self-defense" (IOLD 2015, 7).

The international law of war regulates the conduct of armed hostilities. It is often termed the law of armed conflict (LOAC) and sometimes called international humanitarian law (IHL). The LOAC is the compilation of all formal treaties and international agreements to which the U.S. is a signatory. The UN Charter (Article 51)—self-defense—and the UN Security Council (Article 2(4))—aid victims of aggression—are two universally accepted just causes for war. The U.S. Department of Defense (DoD) policy is to comply with the LOAC "during all armed conflicts, however such conflicts are characterized, and in all other military operations" (IOLD 2015, 11).

According to the International and Operational Law Department (IOLD) at the Judge Advocate General's (JAG) Legal Center and School, the fundamental purposes of the LOAC are humanitarian and functional in nature.

A. The humanitarian purposes include (IOLD 2015, 11):

1. Protecting both combatants and noncombatants from unnecessary suffering;
2. Safeguarding persons who fall into the hands of the enemy; and
3. Facilitating the restoration of peace.

B. The functional purposes include (IOLD 2015, 11):

1. Ensuring good order and discipline;
2. Fighting in a disciplined manner consistent with national values; and
3. Maintaining domestic and international public support.

The LOAC applies to all cases of armed conflicts that arise between the United States and other nations, even if a formally declared state of war does not exist as directed in accordance with the constitutional powers vested in the U.S. Congress (IOLD 2015, 11). This threshold is codified in Common Article 2 of the Geneva Conventions (IOLD 2015, 16). Additionally, Hague law guides two choices in combat: (a) the means, that is, the weapons used to fight; and (b) the methods, that is, the tactics of fighting. In the case of RPA, the aircraft itself is the means, whereas the delivery of munitions to destroy enemy targets serves as a method of war fighting (IOLD 2015, 16). The regulations include prohibitions to the use of biochemical weapons, failure to warn civilian population before a bombardment, and unlawful military occupation.

Legitimacy—*Jus ad bellum*

In the wake of the terrible events of September 11, 2001, President George W. Bush faced a decision unlike that of any of his predecessors since President Franklin D. Roosevelt's "Day of Infamy." Americans reeled from an attack and President Bush did not know whether another imminently followed. He wrote of that day:

When I woke up on September 12, America was a different place. . . . The psyche of the nation had been shaken. Families stocked up on gas masks and bottled water. Some fled cities for the countryside, fearing that downtown buildings could be targets. Others who worked in skyscrapers couldn't bring themselves to go back to work. Many refused to board a plane for weeks and months. It seemed almost certain there would be another attack. (Bush 2010, 140)

One of the most firmly established provisions of CIL, IHL, and LOAC is the right of self-defense. *Jus ad bellum* allows nations to defend themselves with the use military force in the wake of imminent danger. In the weeks and months following the attack,

President Bush and his national security council (NSC) conceived four tenets to a doctrine that would later bear the name of the President. Bush wrote in his memoir:

After 9/11, I developed a strategy to protect the country that came to be known as the Bush Doctrine. First, make no distinction between the terrorists and the nations that harbor them – and hold both to account. Second, take the fight to the enemy overseas before they can attack us again here at home. Third, confront threats before they fully materialize. And fourth, advance liberty and hope as an alternative to the enemy’s ideology of repression and fear. (Bush 2010, 396-397)

The first three tenets of his doctrine set forth a new course for the U.S. and the international community in terms of justice for the use of military force. The President claimed exclusive right to strike preemptively not only those who might be responsible for international terrorism, but also sovereign nations who are unwilling or unable to deal with the threats that exists within their borders. Both the 2002 NSS and the 2006 NSS took unprecedented steps toward a significant expansion of the use of force doctrine. The Bush Doctrine of preemption re-casted the right of anticipatory self-defense based on a different understanding of *imminence*. The Bush Doctrine, simply put, is to strike one’s enemy first, in full view of an *imminent* national security threat, before the enemy’s first strike.

For the first time in NATO’s fifty-two year history, the members of the alliance voted to invoke the NATO Charter’s Article 5, commonly stated as, “An attack on one is an attack on all.” Additionally, on September 12, the UN Security Council passed UNSCR 1368, which explicitly recognized the United States’ inherent right of individual or collective self-defense pursuant to Article 51 of the UN Charter against the terrorists (non-state actors) (IOLD 2015, 7). The Obama Administration adopted the policies that stem from the Bush Doctrine. Although expressed in less assertive terms, the 2010 NSS, stated, “The United States must reserve the right to act unilaterally if necessary to defend

our nation and our interests, yet we will also seek to adhere to standards that govern the use of force” (IOLD 2015, 7).

On September 14, 2001, Congress passed Public Law 107-40, which authorized President George W. Bush:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. (Elsea and Weed 2014, 14)

The congressional Authorization to Use Military Force (AUMF), while short of a declaration of war, granted President Bush wide latitude to prosecute a war against those who perpetrated the acts on 9/11, as well as states that harbored terrorists within their borders. The AUMF is not a new convention. Congress used the AUMF as early as the Adams administration in 1798 (Elsea and Weed 2014, 5). The most notable difference between declarations of war and an AUMF is the former recognizes that a “state of war” exists between the United States and some other nation, whereas the latter limits force “to enable the United States to protect its interests from predatory actions by foreign powers” (Elsea and Weed 2014, 1, 5). In the past few decades, due in large part to an expansive interpretation of the President’s constitutional authority as Commander-in-Chief, the Administration welcomed support from Congress through an AUMF, but has not explicitly stated such approval was required (Elsea and Weed 2014, 5).

Americans might equate the AUMF to declarations of war, but they are quite different. Article I, Section 8, of the Constitution vests power in Congress to declare War. The AUMF, in contrast, follow on the heels of a public request by the President to Congress to recognize executive branch authority to use military force to accomplish a

national objective or protect a national interest. The U.S. has only enacted 11 declarations of war during the course of American history relating to five different wars (Elsea and Weed 2014, 1).¹ For all other hostilities and conflicts not formally part of a declaration of war, including the legal authority for the RPA policy, Congress passed AUMFs approving the employment of U.S. combat forces to defend U.S. national interests.

Some international law scholars argue over whether that a declaration of war, in and of itself, creates a state of war and changes the relationship between belligerents from one of peace to one of war or whether a declaration is a prerequisite before a state of war can ever exist (Elsea and Weed 2014, 20). Nevertheless, it is clear that CIL, historical tradition, and *jus bellum iustum* view the public declaration by a legitimate authority as “creating the legal status of war . . . [and giving] evidence that peace has been transmuted into war, and that the law of war has replaced the law of peace” (Elsea and Weed 2014, 20).

Ultimately, what lies at the heart of the discussion concerning the RPA policy is whether the U.S. is a legitimate victim with just cause to prosecute the war against international terrorist organization. Furthermore, one may question whether the proper authorizations to use of military force to target “enemy overseas before they can attack us again here at home,” as Bush argued, is legal and is in keeping with *jus ad bellum*. One scholar expressly challenges the legality and morality of the U.S. campaign against international terrorism. Chamayou asserted:

¹ The 11 declarations of war were the War of 1812 with Great Britain, the War with Mexico in 1846, the War with Spain in 1898, the First World War, and, the most recent one, the Second World War.

To sum up, the only two possibilities turned out to be unworkable, either (1) the strikes were a law enforcement activity, in which case they ought to conform to the restrictions that applied to them, one of which called for gradation in the use of force—something that was impossible for a drone—or (2) they were covered by the laws of war, although these laws do not apply in zones that are currently not experiencing armed conflict, such as Pakistan or Yemen, where they nonetheless operate at present. (Chamayou 2013, 171)

However, the Obama Administration argued differently. President Obama argued in his Nobel Peace Prize acceptance speech that, “All nations—strong and weak alike—must adhere to standards that govern the use of force. I—like any head of state—reserve the right to act unilaterally if necessary to defend my nation.” The President adds, “The world rallied around America after the 9/11 attacks, and continues to support our efforts in Afghanistan, because of the horror of those senseless attacks and the recognized principle of self-defense” (Carter 2011, 195).

Legitimacy—*Jus in bello*

U.S. Joint Doctrine requires all commanders and members of its military forces to exercise legal and moral authority in the conduct of operations (DoD 2017, A-4). The amount of violence commanders and soldiers can bring to bear on the adversary is constrained by a moral obligation to uphold national principles. Cook boils the moral requirements of *jus in bello* down to two broad categories: discrimination and proportionality (Cook 2012, 224). However, joint doctrine truncates *jus in bello* down further into a single, overarching principle—legitimacy.

Legitimacy is one of the twelve principles of joint operations. The completed list of principles include the traditional nine principles of war, along with three additional principles—restraint, perseverance, and legitimacy. The inclusion of the latter three communicate to the American people that U.S. military action is bounded by national

values (DoD 2017, A-1). “Restricting the use of force, restructuring the type of forces employed, protecting civilians, and ensuring the disciplined conduct of the forces involved may reinforce legitimacy” (DoD 2017, A-4).

The U.S.’ moral strength and freedom to act is explicitly tied to core values. The military professional protects the rights and interests of the American people by conducting military operations as directed by civilian leaders in a manner that also respects the basic rights of others. “Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences” (DoD 2017, A-4).

President Obama, in a speech at West Point in May 2014, said the following:

[W]e must be more transparent about both the basis of our counterterrorism actions and the manner in which they are carried out. We have to be able to explain them publicly, whether it is drone strikes or training partners. . . . Our intelligence community has done outstanding work, and we have to continue to protect sources and methods. But when we cannot explain our efforts clearly and publicly, we face terrorist propaganda and international suspicion, we erode legitimacy with our partners and our people, and we reduce accountability in our own government. (Obama 2014)

The capacity for commanders and soldiers to uphold legitimacy is paramount to success. In March 2003, U.S. Army officials reported that soldiers of the 372nd Military Police Company and members of the American intelligence community committed numerous instances of “sadistic, blatant, and wanton criminal abuses” at Abu Ghraib (Hersh 2004). To date, there is no reliable intelligence figure reporting the number of insurgents and armed militants who joined the international terror fight against the West as a result of the scandal. However, the Abu Ghraib scandal led a masked insurgent, believed to be Abu Musab al-Zarqawi, to behead a 26 year old American Pennsylvanian in a recorded assassination that shocked the world in 2004 (Fox News 2004). Other

examples of illegitimacy that sparked international outrage and degraded U.S. military standing were incidental Qu'ran burnings and U.S. Marines urinating on dead Taliban fighters, both having occurred in Afghanistan in 2012.

Commanders and soldiers have a moral obligation in war to take legally and morally justifiable action that upholds U.S. legitimacy. “Because of this weight of responsibility, the officer at all levels must thoroughly incorporate thought about the *jus in bello* side of just war into standard operating procedure” (Cook 2012, 224). For its part, the U.S. Joint Staff reminds military professionals that “the accountability, credibility, and legitimacy of a joint operation, the success of the overarching mission, and the achievement of US strategic objectives depends on the joint forces’ ability” to integrate principles of *jus in bello* into its war-fighting calculations (DoD 2017, III-42).

Moral Obligation

Nation-States are moral agents. The United States explicitly intertwines moral obligations with national interests as an act of policy. For instance, the NSS outlines that U.S. strength to “defend democracy and human rights is related to every enduring national interest” (Obama 2015, 25). Army doctrine explicitly states that the Army Professional must adhere to the Army ethics, a duty that is a moral obligation. According to the regulation, “The Army professional’s moral awareness and sensitivity is required for legally and morally justifiable action” (DA 2015, 4-2). In order to understand the nature of the Army professional’s obligation to take legally and morally justifiable action whenever necessary, one must define a moral act.

For Western Society, the earliest forms of moral study pertaining to human behavior stems from the Greek philosophical writings of Socrates and Aristotle. The

ECFs used divine teaching (*sacra doctrina*) to preserve written and oral traditions, and infused Judeo-Christian theology with Greek philosophy to generate a mature moral theology centered upon the intrinsic moral quality of human action. Ethicist Romanus Cessario wrote in *The Theological Virtues and Theological Ethics* that “classical virtue theories depend to a considerable degree upon the work of ancient and, therefore, non-Christian philosophy” (Cessario 1991, 19) However, this does not necessarily equate to theologians having co-opted an otherwise secular invention of ethics and morality. On the contrary, both Greek philosophy and Christian moral theology point to the same intrinsic moral quality of non-materially derived transcendent virtues and morality. Furthermore, Cessario pointed out the following:

As long as Aristotle contends that ‘human good turns out to be the soul’s activity that expresses virtue,’ the exercise of the moral virtues inescapably brings the person into relationship with others. This happens either directly, as in the obvious case of justice, or indirectly, as when others benefit from one who possesses the virtues of personal discipline, temperance, and fortitude. (Cessario 1991, 20)

The Church “insists upon a morality that takes seriously the intrinsic quality and nature of each human action” (Cessario 2001, 151). Humans are free to act. While natural law implicitly—that is, through conscience— informs right conduct, practical reason and normative experience dictates that we should seek the good and avoid evil. However, before intrinsic moral critique is possible, the individual whose action is in question must be free to act on his or her own cognizance. Natural law provides the framework inside which humans discern right acts from wrong acts in accordance with functional mental faculties empowered through logic and reason. As previously stated, the ECFs taught, “A virtue is a habitual and firm disposition to do the good” (The Holy See 1995, 495). In a similar fashion, the Army profession provides a moral, ethical, and just framework to do

good and avoid wrong-doing. Just as the Church teaches that the human agency is complicit in moral and immoral acts, the Army officer freely accepts his or her obligation to uphold the values and traditions of the Profession of Arms. This is further clearer in the third part of the officer's oath of service: I take this obligation freely without any mental reservation or purpose of evasion.

Christian theologians understand the moral good to possess a concrete form, namely three principal elements that shape and explain human activity. The moral act comprises the object, the intentionality (also known as the moral ends meant by the act), and the circumstance. "A morally good act requires the goodness of the object, of the end, and of the circumstances together. An evil end corrupts the action, even if the object is good in itself (such as praying and fasting 'in order to be seen by men')" (The Holy See 1995, 486).

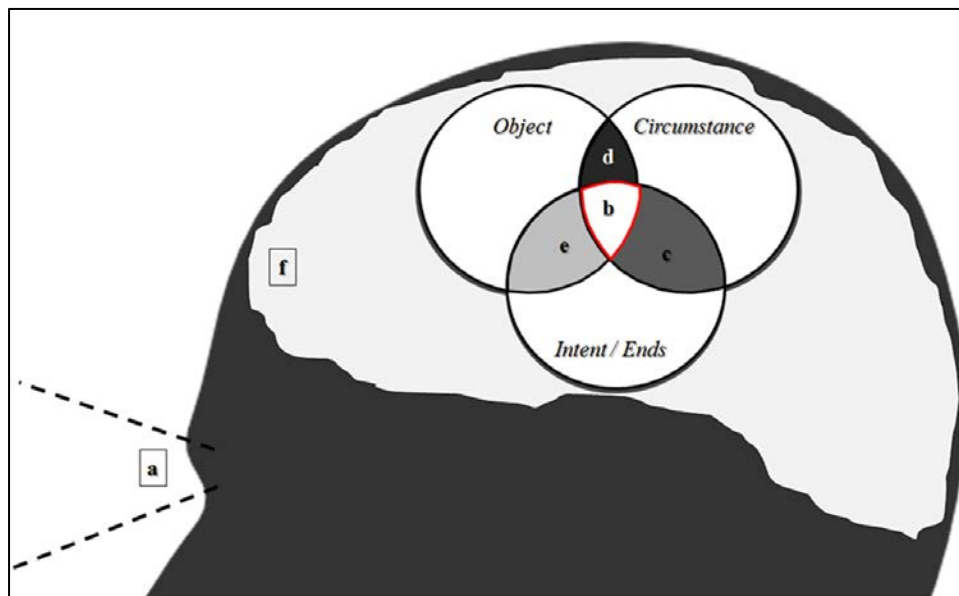


Figure 3. The Three-Part Model of Moral Acts

Source: Developed by author.

For an action to possess the full intrinsic moral quality of inherent goodness, each of the three elements must be present and upheld, as depicted by the area labeled *b* in the figure. “In any human action, the complete form of moral goodness derives from the interplay of these three constitutive elements which determine the action’s moral character” (Cessario 2001, 159). An act’s intrinsic moral quality diminishes if one of the three elements is short of being good. For instance, acts that fall within areas *c*, *d*, and *e* as depicted in the figure would all have a diminished intrinsic moral quality. Examples follow in subsequent paragraphs, but suffice to say that all object, intent, and circumstance must uphold for an act to be moral. It is, therefore, erroneous to judge the morality of human acts in light of only the intention that inspires them or the circumstances that supply their context (The Holy See 1995, 486-487).

Before providing examples, it is noteworthy that not every aspect of human acts can be perfectly knowable. Therefore, understanding the individual's perspective who reports the details of an act will lend itself more fully to the discerning the intrinsic moral quality of the act. The area labeled as *a* indicates the important role perspective plays in moral judgment. Everyone views events differently. It bears weight to consider the perspective of the individual who reports the details of any act before passing moral judgment. The area labeled by the letter *f* indicate that humans can discern moral and immoral acts to the extent that they exercise sound reason and judgment, informed by a mature conscience, and deliberated upon through the lens of human tradition. Long-standing traditions associated with war converge with the framework and structure of the Profession of Arms. The Army professional obliges to take legally and morally justifiable action in times of peace and at war.

The *object* refers to the human action that takes place. In order to determine whether the object for an action is legally and morally justifiable, an individual must choose good acts. An example of an objectively good act is working for an employer to make money. Earning money to sustain an affordable, upright way of life is generally a good act. Stealing money is inherently evil, since the money one steals is not their due out of merit or work. Referring to Figure 1, area *c*, there are cases in which the intention and circumstance may lead to good, but the act itself is inherently evil. For example, if a man robs a bank, no matter what he intends to do with the money or how much good he may achieve by spending the money, the act of bank robbery itself is morally and legally wrong.

The intention of an act is what an individual means in doing the act; it is what gives personal meaning to an action. The Intent is the movement of the will toward the thing we want to do. When considering the moral ends of a legally and morally justifiable action, one must consider an individual's intentionality in conducting the act. St. Thomas Aquinas articulated in *Summa Theologiae*, I-II Question 20, a.3 "an act in itself cannot be accurately evaluated as moral or immoral apart from considering the intention of the person acting" (Aquinas 1265, Q20, a.3). It is worth noting that this particular element of a moral act is difficult to assess given that it resides internal to the actor.

It is often impossible to know for certain what an individual intends by an act, particularly in the case of employing high explosive munitions to destroy a target, as in the case with certain acts of war. Determining this fact becomes more difficult if the target is human. Referring to Figure 1, area *d*, there are certain cases in which the object and circumstance may lead to good, but the intentions of the actor diminishes the intrinsic

moral quality of the act. For example, an executioner assigned to a firing squad may execute a prisoner who the State legally sentenced to death. Human tradition has long held that legitimate governments can legally and morally sentence violent criminals to death provided due process, the punishment is proportional to the crime, and the sentence upholds the rule of law for the common good of society. However, if the executioner learned the prisoner's violent crimes before he carried out the sentence, and as a result desired personally to kill the individual for reasons other than duty, the intrinsic moral quality of the executioner's act diminishes, leading ultimately to a moral wrong in killing the criminal.

The final element of a legally and morally justifiable action is the *circumstance*. The circumstances include the foreseen consequences of an act. Consequences help lead to a determination for whether an act is properly proportionate to intention by considering the action in context of an overall situation. Admittedly, the *circumstance* is perhaps the most difficult of the three elements to examine in a multicultural, pluralistic society.

Cessario wrote:

It is impossible for the theologian to evaluate any moral action without reference to the divine saving instruction, which is one with 'the eternal reasons in the mind of God.' This means that every moral agent is also a practitioner of the *sacra doctrina*, and so must situate, ultimately through the particular determinations of prudence, each one of his or her moral actions within the comprehensive setting of the eternal law, natural law inclinations, and the determinations of common moral wisdom, as these latter may bear upon a specific course of action. (Cessario 2001, 154)

Consider the intrinsic moral quality that circumstances bring to human action and events in the light of language used by the American Founding Fathers to justify the circumstances surrounding their succession from the British Empire in 1776:

When in the *course of human events* it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the *Laws of Nature and of Nature's God entitle them*, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness” [*emphasis added*]. (Jefferson 1776).

It is clear the American Founding Fathers found intrinsic moral quality in the circumstances leading them to dissolve the political bands that connected them to the British Empire. Moreover, they found good cause to consider their legal and moral act to be in keeping with the Laws of Nature and of Nature’s God, as well as the decent respect to the opinions of Mankind. Natural law and divine providence has always been at the heart of U.S. legal and civil institutions, even as the American Founding Fathers included the Establishment and Free Exercise clauses in the first amendment to the U.S. Constitution. This all means that moral acts do not occur in isolation, but rather occur within a larger context of “the course of human events.”

To understand how circumstances lead to diminished intrinsic moral quality, one must evaluate the overall effect of the act on the situation, along with the foreseen consequences. For circumstance to be moral, the act cannot bring about a graver evil than the good the agent intended. Referring to Figure 1, area *e*, there are situations where the object and intention may be good, but the overall outcome of an act leads to a graver evil. For example, if a bombardier dropped high explosive munitions on an industrial plant that made enemy war equipment, the intrinsic moral quality of the act under Just War traditions upholds (e.g. principle of distinction and proportionality). However, if the bombardier possessed a foreknowledge that civilians were in the factory, the

bombardier's decision to proceed with the bombardment diminishes the intrinsic moral quality of his act.

The notion that human law derives from natural and eternal law is not a new notion. St. Thomas Aquinas argued extensively that true human laws have intrinsic moral quality that derives from natural law, or, as Thomas Jefferson termed the Laws of Nature and of Nature's God. In the *Summa Theologiae*, the Angelic Doctor, as St. Augustine is oft referred, argued that, "Human law is law inasmuch as it is in conformity with right reason and thus derives from the eternal law. But when a law is contrary to reason, it is called an unjust law; but in this case it ceases to be a law and becomes instead an act of violence" (Aquinas 1265, Q93, a.2). More recently, Pope Emeritus Benedict XVI, posed the following question to the German Bundestag, "How do we recognize what is right?" He answered, "In history, systems of law have almost always been based on religion; decisions regarding what were to be lawful among men were taken with reference to the divinity... It pointed to nature and reason as the true source of the law – and to the harmony of subjective and objective reason, which naturally presupposes that both spheres are rooted in the creative reason of God" (Pope Benedict XVI 2011).

Implications to National Security

As stated previously in the introduction to chapter one, the United States' military bears a responsibility like no other military force has ever bore in the history of the world, a responsibility that at times causes it to overextend its role as the international law enforcer. The United States' role in the world is a unique one, dating back to the end of the Second World War. The U.S. emerged from WWII as a great super-power that ushered in an era of global dominance built upon the principles of liberal governance and

free market capitalism. In the aftermath of the war, Western Europe remained susceptible to exploitation by an internal and external progressive communist threat. Concern over Soviet motives in Europe further exacerbated tension over the exact policy to adopt in Post-WWII Europe. In a speech delivered before a joint session of Congress on March 12, 1947, President Truman “established that the United States would provide political, military, and economic assistance to all democratic nations under threat from external or internal authoritarian forces” (DoS 2017). This shift in policy, known as the Truman doctrine, pivoted the U.S. away from its tradition stance of isolationism to one of foreign intervention outside the western hemisphere, particularly to preserve the political integrity of democratic nations whose stability was an interest to the United States. At this time, the U.S. took an interest in foreign affairs through security force assistance and foreign aid programs, like the Marshall Plan. This later expanded into significant foreign military intervention, the sort that evolved into today’s RPA programs.

The spread of democratization under the Truman Doctrine flourished best in a stable, liberal world order and required that the U.S. defend its interests to stave off Soviet influence. Maintaining a liberal world order is unquestionably a U.S. national interest, though the flourishing of democratization was not a guarantee. Noted historian Robert Kagan wrote:

Those who live in this remarkable world tend to assume that both the global explosion of democracy and the liberal economic order of free trade and free markets that have spread prosperity these past sixty years were simply a natural stage in humankind’s upward progress. We like to believe that the triumph of democracy is the triumph of an idea and the victory of market capitalism is the victory of a better system, and that both are irreversible. It’s a pleasant thought, but history tells a different story. (Kagan 2012, 20-21)

The U.S. Government's self-imposed responsibility to secure the liberal order necessitates a freedom to act on the international stage. "International order is not an evolution; it is an imposition. It is the domination of one vision over others—in this case, the domination of liberal principles of economics, domestic politics, and international relations over other, non-liberal principles" (Kagan 2012, 97).

With the collapse of the Soviet Union in 1989, a temporary era of global stability allowed liberal international governance to flourish, which ushered in an accelerated period of globalization. However, the stability and relative period of peace did not last long, as the turn of the century bore witness to a period of unmitigated violence at the hands of violent international extremists. According to the National Consortium for the Study of Terrorism and Responses to Terrorism (START) in 2014 alone, more than 16,800 terrorist attacks took place worldwide, causing more than 43,500 deaths and 40,900 injuries, while terrorist took more than 11,800 people hostage in terrorist related attacks (START 2015). This spike in non-state perpetrated violence has forced American administrations to expand ways to keep the liberal order stable and secure, while simultaneously eradicating an unconventional threat. RPA have become a primary tool in the U.S. fight against terrorism.

In light of the sobering reality behind the statistics reported in START's report, the Obama Administration drastically expanded its RPA policy to target violent extremists, as shown in table 1, an expansion that continues under the current administration.

Table 1. Predator / Reaper Combat Operations

	CY10	CY11	CY12	CY13	CY14	CY15	CY16
Troops in Contact	432	310	336	212	208	84	51
Raids	1,986	2,014	919	277	209	73	53
Hellfire Shots	202	432	361	525	1,158	1,994	2,882
GBU-12 Strikes	41	19	6	2	3	48	132
Buddy Lase	12	57	16	22	251	645	616
ISR Targets	19,005	28,259	21,725	22,822	23,314	22,941	27,360
Flight Hours	206,948	222,592	164,081	164,869	180,682	209,819	222,994
Sorties	11,364	12,137	9,449	10,036	11,141	12,325	12,187

Source: Capt. Mark B. Schriener, Deputy Chief, AEW Intelligence, 432 OSS/WOC, from an unclassified brief on RPA operations, approved use of chart provided on May 11, 2017.

In August 2016, under legal pressure from the American Civil Liberties Union (ACLU), the Obama Administration released an 18-page redacted Presidential Policy Guidance (PPG) on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Area of Active Hostilities (Horowitz and Reed 2016). The document contains six screening criteria to authorize the Government to use military force overseas, not within active hostile areas, but within combatant commander's AOR. The six standards are:

1. "Lethal action should be taken . . . only when capture of an individual is not feasible and no other reasonable alternatives exist to effectively address the threat" (Obama Administration 2013, 1).

2. Near certainty that the HVT "being targeted is in fact the lawful target and located at the place where the action will occur" (Obama Administration 2013, 1)

3. "Near certainty that the action can be taken without injuring or killing non-combatants" (Obama Administration 2013, 1)

4. All relevant information regarding the decision to take direct action will pass through an internal interagency process as prescribed by the PPG to “ensure that decisions on operational matters of such importance are well-informed and will facilitate de-confliction among department and agencies addressing overlapping threat streams (Obama Administration 2013, 2).

5. If direct action is taken against a U.S. person, additional requirements and legal analysis will “ensure that such action may be conducted against the individuals consistent with the laws and Constitution of the United States” (Obama Administration 2013, 2).

The Administration redacted the fourth criterion from the PPG’s public release.

In addition to these guidelines, the administration took additional steps as an act of policy to ensure the President’s approval for an RPA strike upheld *jus in bello*. These steps are as follows (Obama Administration 2013, 2):

1. An assessment that capture is not feasible at the time of the operation
2. An assessment that the relevant government authorities in the country where action is contemplated cannot or will not effectively address the threat to the U.S. persons; and
3. An assessment that no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons.

In the 2015 NSS, President Barack Obama stated that the US. leads “over 60 partners in a global campaign to degrade and ultimately defeat the Islamic State of Iraq and the Levant (ISIL) in Iraq and Syria, including by working to disrupt the flow of foreign fighters to those countries, while keeping pressure on Al Qaeda” (Obama 2015, 3). Furthermore, the document sets forth a concept for how the U.S. sees itself waging

war into the next decade. The U.S. has “shifted away from a model of fighting costly, large-scale ground wars in Iraq and Afghanistan” to pursue “a more sustainable approach that prioritizes targeted counterterrorism operations, collective action with responsible partners, and increased efforts to prevent the growth of violent extremism and radicalization that drives increased threats” (Obama 2015, 22). RPA certainly provide the U.S. with an easy, inexpensive, and smaller option to the large leviathan force represented by the number of troops committed to Iraq and Afghanistan from 2003-2011.

Although RPA certainly challenge traditional notions of warfare and Just War theory, their reluctant acceptance among the international community illustrates the need for a response to the insidious and growing threat posed by non-state actors. Political pressure, classified programs, and varying international interpretation of CIL lead to a particular difficulty when promulgating unified action as a response to the threat. As such, Just War theorists are undergoing a certain shift in to focus more on maintaining peace and tranquility within the liberal world order, while simultaneously seeking ways to eradicate threats to peace. In recent months, a discussion amidst religious theologians and secular CIL scholars focuses on a notion of Just Peace—preservation of tranquility and order within the international system. As Martin Cook noted:

Just war would be returning to its origins: rather than seeing war as a conflict among sovereign states in response to aggression, the international community might see itself once again (as Augustine did in the 5th century) as defending a “tranquility of order” in the international system against incursions of alien systems and ideologies whose sole purpose is a disruption and displacement of that order. In other words, the globalized civilization grounded in democracy, human rights, free trade, and communication, technology and science may be defending its civilization itself against forces that seek its complete destruction. (Cook 2011, 217)

This latter point is clearer upon reflection of past presidential addresses that underline the developing notion of Just Peace. In his commencement address to the graduating West Point class of 2002, President George W. Bush unveiled a doctrine that came to bear his name when he stated:

Our nation's cause has always been larger than our nation's defense. We fight as we always fight, for a just peace. A peace that favors human liberty. We will defend the peace against threats from terrorists and tyrants. We will preserve the peace by building good relations among the great powers. And we will extend the peace by encouraging free and open societies on every continent. (Carter 2011, 112)

In his Nobel address, President Obama continued in the same vein as that of his predecessor when he said, "Only a just peace based on the inherent rights and dignity of every individual can truly be lasting" (Carter 2011, 114).

Remotely Piloted Aircrafts

The emergence of aerial "drone" technology started in the earliest days of human flight. U.S. and British pilots sought ways to remove pilots from the carnage of war and strategic bombing mission during the two World Wars, though the ability to control the crafts effectively remained underdeveloped until well into the 1960s and 70s (Rogers and Hill 2014, 7). Unmanned Aerial Vehicles (UAVs) increased in use under American Administrations that countered Union of Soviet Socialist Republics (USSR) surveillance and reconnaissance missions. Ann Rogers and John Hill pointed out in their recent book on RPA, titled *Unmanned: Drone Warfare and Global Security*, that "[t]he attempts to produce high-flying long-range drones for [Intelligence, Surveillance, and Reconnaissance (ISR)] missions were highly expensive and of limited success, operating under black budgets controlled by intelligence services rather than the military" (Rogers

and Hill 2014, 7). However, the nature of unmanned ISR led to a special kind of deniability if the equipment was lost or destroyed, while the technology led to an increase in the amount of imagery and data collecting possible by intelligence officials. Furthermore, the time that a UAV can loiter overhead extends to a far greater distance vis-à-vis a manned ISR platform.

As America and the USSR increased their usage and technological advancements of UAVs, other countries took notice and joined the effort for their own purposes. The United Kingdom (UK) and Israel are two other countries that see great opportunities for the UAV within their national military strategies. Rogers and Hill point out that, “UAVs helped address particular challenges in Israel’s local security environment – for example, their disposability meant they could be used to suppress enemy air defenses in conventional wars with neighboring states” (Rogers and Hill 2014, 7). Israel expanded their use to provide ISR coverage of their entire region to aid the Israeli Defense Forces (IDF) its borders and suppress its enemies. The reality of Israel’s geopolitical predicament as the world’s sole Jewish state in the heart of the Arab Middle East has led the IDF to invest extensively in ways to increase the efficiency of security operations while avoiding excessive amounts of imminent peril to its soldiers. UAVs have provided many opportunities to achieve such a difficult balance. UAV operations increased in the 1970s, as Israel faced wave after wave of attacks by bordering hostile Arab nations. Lieutenant Colonel Ido, Commander of the Israeli Air Forces (IAF) UAV training center, indicated that, “A large percentage of the IDF’s operational flight hours are performed by UAVs, sometimes even most of them. At any given time, 24 hours a day, seven days a

week, there are drones in the air performing activities that IDF forces are engaged in” (Rogers and Hill 2014, 42).

In March 2011, the UK Ministry of Defense (MoD) issued a report entitled, “The UK Approach to Unmanned Air Systems.” In it, the UK MoD asserted, “Unmanned aircraft now hold a central role in modern warfare and there is a real possibility that, after many false starts and broken promises, a technological tipping point is approaching that may well deliver a genuine revolution in military affairs” (Rogers and Hill 2014, 48). Such a notion is at the heart of the UK national military strategy. UK military doctrine in the same year went as far as to claim UAVs “will become more prevalent, eventually taking over most or all of the tasks currently undertaken by manned systems” (Rogers and Hill 2014, 49).

While the majority of platforms within most governments’ arsenals remain ISR platforms, the most controversial of these RPA platforms are strike vehicles, like the Predator and the Reaper. In an article published to the official U.S. Air Force website, the Secretary of the USAF Public Affairs report that, “RPA are in demand and Air Force RPA operate on a 24/7 basis. Thru December 2014, the Air Force has flown MQ-1B Predators and MQ-9 Reapers more than 2,208,985 hours” (The Secretary of the Air Force Public Affairs 2015).

The operational environment remains ripe for as expansive growth of RPA due in large part to rapidly increased RPA capabilities, reduced costs to manufacture, and new sensor technologies that emerge in the modern digital and technological age. In the next chapter, we will begin to tackle the various issues with respect to the primary research

question, “Does the US Government violate *Jus in bello* in its use of remotely piloted aircrafts to conduct military strikes?”

Chapter Conclusion

The extensive literature review to cover area ranging from Administrative policy, Just War theory, moral philosophy, U.S. Army regulation and doctrine, and customary international law documents leads directly to providing sufficient information to address the secondary questions. The previous sections in chapter 2 covered the historical foundations of Just War Theory; Customary International Law; U.S. legitimacy, the intrinsic moral quality that U.S. Army professionals bear in serving the American people; U.S. National Security, and the RPA policy. In the next chapter, we will review the research methodology and consider certain threats to validity and evaluation criteria.

CHAPTER 3

RESEARCH METHODOLOGY

Chapter Introduction

This chapter sets forth the research methodology channeled upon to answer the primary research question; “Does the US Government violate *jus in bello* in its use of the remotely piloted aircraft to conduct military strikes?” Overall, the methodology is a step-wise approach, which begins with the primary research question and moves into a literature review, evaluation against six carefully selected criteria, data presentation, followed finally by recommendations and conclusions. As shown in the following sections—the research methodology, evaluation criteria, and threats to validity—the reader will have an opportunity to understand the structure and background leading to what follows in chapter 4 and chapter 5.

Research Methodology

This thesis began with the primary research question; “Does the US Government violate *Jus in bello* in its use of remotely piloted aircrafts to conduct military strikes?” Using figure 4, the U.S. Government assumes that if a lawful combatant pilots an aircraft remotely to strike a high payoff target using proportional force under congressional authorization to use military force, and the operation stands a reasonable chance of success, then the intrinsic moral quality of the act itself as being legal and moral upholds. As example, in accordance with the principle of military distinction, the target of an RPA strike must be a legitimate target, either a combatant or an object tied explicably to an adversarial military function or capability. If the pilot of an RPA is a noncombatant, if

targets are unlawful, if the force is not proportional, if the AUMF is illegitimate, if the operation itself is unreasonable, or the strike leads to an inordinate amount of civilian casualties, then the intrinsic moral quality of the act, or the policy itself, diminishes. It only requires one condition to fail in order for the moral quality of the act or policy to diminish.

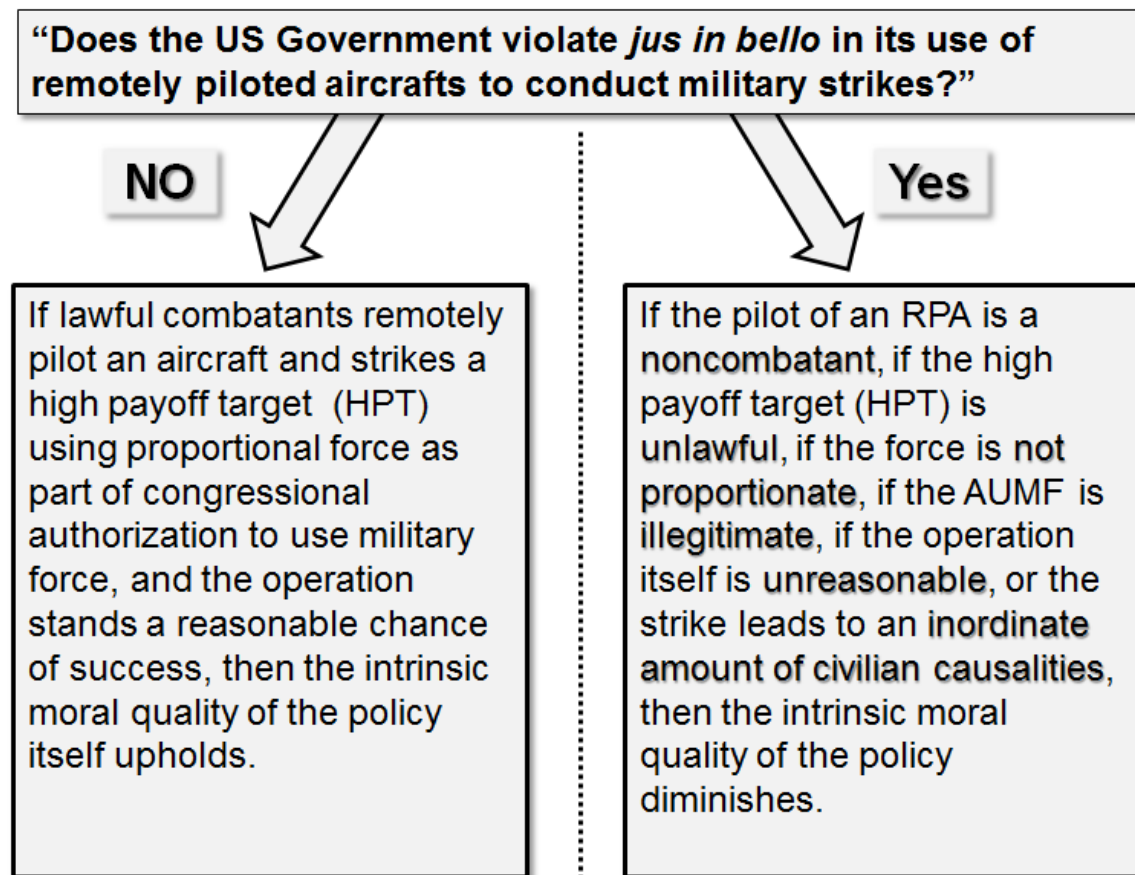


Figure 4. Deriving Evaluation Criteria

Source: Developed by author.

At its core, the primary research question is concerned with whether the U.S. takes legally and morally justifiable action when it employs RPA as a means and method to combat international terrorism. The Three-Part Model of Moral Acts (figure 1), which appears in chapter 2, informs the intrinsic quality of moral action, while Just War theory, CIL, and IHL informs legal action.

To answer the primary and secondary research questions, the researcher conducted a qualitative meta-analysis and reviewed literature on the subject in question. Next, the researcher developed six evaluation criteria from components that are required to answer whether the RPA policy itself is legal and moral. The six evaluation criteria in effect act as screening criteria to determine whether the RPA policy uphold moral or legal integrity for the Administration and for Military professionals who use the technology to prosecute the war on international terrorism. The research addresses all 6-evaluation criteria in an effort to answer the primary research question.

The secondary research questions helped to add depth and understanding to the subject surrounding the primary research question. In understanding how Just War doctrine evolved over time to modern day international law of land warfare, we can anticipate how international law might change next to account for new technologies and the forces of globalization. As Just War theory continues to undergo academic and theoretical restructuring using perhaps a just peace framework, among other competing ideas, it will be helpful to determine how these changes would affect the future war-fighter who struggles with ethical questions of tactics, techniques, and procedures with respect to modernized warfare – namely the use of RPA in combat.

Evaluation Criteria

To begin, it is necessary to distinguish how military planners define evaluation criteria and how this thesis defines evaluation criteria. The third step in MDMP—develop courses of action (COA)—involves the development of criteria to measure the validity of a solution to a problem on the one hand, and differentiation on the other hand. In military parlance, a criterion is a “standard, rule, or test by which something can be judged—a measure of value” (DA 2014, 4-3). Military planners develop two types of criteria: screening and evaluation. Screening criteria define the limits of an acceptable solution. Commanders and staff planners often times reject means and methods aimed at solving military problems based solely on screening criteria.

Planners then develop evaluation criteria in order to differentiate courses of action. When evaluating the moral implications of whether the U.S. Government should use RPA to conduct military strikes, this thesis treats evaluation criteria in the same vein as military planners who employ screening criteria to validate a COA. Since evaluation criterion has an established usage in academia, this thesis stays within the given norms of academic study. Functionally speaking, the six evaluation questions below are screening criteria. Yet, the questions help the reader to evaluate whether the U.S. government uses RPA to conduct military strikes in a legally and morally justifiable manner, as viewed through the lens of the Three-Part Model of Moral Acts (Ref: Table 2).

The U.S. Government assumes that if a lawful combatant pilots an aircraft remotely to strike a high payoff target using proportional force under a congressional authorization to use military force, and the operation stands a reasonable chance of success in achieving a valid military objective, then the intrinsic moral quality of the

policy itself upholds. If, however, the pilot of an RPA is a noncombatant, if HVT is unlawful, if the force is not proportional, if the AUMF is illegitimate, if the operation itself is unreasonable, or the strike leads to an inordinate amount of civilian casualties, then the intrinsic moral quality of the act, or the policy itself, diminishes. This thesis incorporates this as the basis to develop evaluation criteria, understanding the intrinsic moral quality of the RPA policy hinges upon the three principal elements that shape and explain human activity, as shown in the Three-Part Model of Moral Acts. As such, table 2 bears the evaluation criteria.

Table 2. Evaluation Criteria

Question	Moral Element	Yes	No	Uncertain
1. Is the pilot of an RPA a lawful combatant?	Object			
	Intentionality			
	Circumstance			
2. Is the high payoff target a lawful combatant at the time of his/her death?	Object			
	Intentionality			
	Circumstance			
3. Does the RPA employ proportional force compared to that which the threat poses at the time of the strike?	Object			
	Intentionality			
	Circumstance			
4. Is the strike part of a legal authorization for the use of military force (AUMF)?	Object			
	Intentionality			
	Circumstance			
5. Can a reasonably thinking individual determine the strike as having a hopeful chance of success?	Object			
	Intentionality			
	Circumstance			
6. Do combatants preserve innocent life to the greatest extent possible in the use of RPAs for targeted strikes?	Object			
	Intentionality			
	Circumstance			

Source: Developed by author

If the research leads to affirmative answers to the evaluation criteria, then the statement is a valid, and the answer to the primary research question will be an “no.” However, there may be areas where the research is not clear on whether the evaluation criteria are “yes.” There are likely to be answers such as “yes, but under certain conditions” or “yes, but not always.” In such a case, the answer to the evaluation criteria will be uncertain.” An answer of “uncertain” is not quite a “yes.” Rather, it is an admission that the answer is not clearly “yes” for every case. While an “uncertain” answer weakens the overall assessment of whether the U.S. Government violates *Jus in bello* in its use of RPA to conduct military strikes, it will help future researchers to explore ways to strengthen the policy where moral-ethical considerations are weakest.

However, answering all or one question with a categorical “no” automatically invalidates the assumption that an RPA pilot can morally pilot a remote-controlled aircraft that strikes a lawful target using proportional force under an acceptable legal framework. If the assumption is not a valid, then the answer to the primary research question, “Does the US Government violate *Jus in bello* in its use of remotely piloted aircrafts to conduct military strikes?” is “yes,” as seen by figure 4.

Finally, as discussed in Chapter 1, it is likely that necessary information required to determine a categorical “yes” or “no” is either unavailable or classified. In such a case, the answer will remain “uncertain,” which tips the scale more in favor of affirming the primary researching question. An underlying assumption described in Chapter 1 is that some credence ought to go to U.S. policy makers and legal advisers who deliberate the legality and ethical considerations of modern warfare programs in light of relevant data and information not accessible for open source research.

Threats to Validity and Biases

The research for this topic is constrained to open source information and unclassified data. However, the nature of the topic delves primarily into classified programs. As such, threats to validity for this study are potential. Still, facts are widely reported by legitimate sources. David Garson explained that, “A study is valid if its measures actually measure what they claim to, and if there are no logical errors in drawing conclusions from the data” (Garson 2016). Content validity “is concerned with whether the items measure the full domain implied by their label” (Garson 2016). The reality is that content presented in this thesis does not fully represent the completed body of knowledge on the topic, particularly given that considerable bits of information remain highly classified. While notable that there is information unavailable for open source research, what information is available does lead responsible researchers to draw logical conclusions that will aid U.S. and international leaders toward formulating moral and ethical policy that advances human rights.

Additionally, this thesis author’s personal biases bear mentioning. Internal validity “has to do with defending against sources of bias arising in research design, which would affect the cause-effect process being studied by introducing covert variables” (Garson 2016). The personal worldview of this thesis’ author does bear on its composition, as denoted by area *a* and *f* of the Three-Part Model of Moral Acts. The perspective (military officer) and personal beliefs (Roman Catholic) lends itself to the opinion herein. This is, of course, an important detail when dealing with a subject as multifaceted as morality and war.

Chapter Conclusion

The goal for using the research methodology set forth in the second section of this chapter aim for answering the primary research question, “Does the US Government violate *jus in bello* in its use of the remotely piloted aircraft to conduct military strikes?” The review of literature, along with the development and application of evaluation criteria help to answer the secondary research questions, which shed further light on the morality, efficacy, and legality of the RPA policy. In the following chapter, we will examine the evidence that leads to a sufficient answer to the primary research question.

CHAPTER 4

DATA PRESENTATION AND ANALYSIS

Fellow-citizens, we cannot escape history. . . . We shall nobly save or meanly lose the last best hope of earth. Other means may succeed; this could not fail. The way is plain, peaceful, generous, just—a way which if followed the world will forever applaud and God must forever bless.

— President Abraham Lincoln, December 1, 1862

Chapter Introduction

This chapter contains a presentation of the data collected in this study in order to answer the primary research question, “Does the US Government violate *jus in bello* in its use of remotely piloted aircrafts to conduct military strikes?” Each step of the research methodology follows, with individual treatments of the evaluation criteria in steps 2-7 of this chapter prior to an aggregated data presentation in step 8 that answers the primary research question.

Step 1: Results of the Literature Review

The literature on RPA struggles with direct answers to whether the U.S. Government's policy is an evolution in modern warfare that is in keeping with moral and legal norms of *jus in bello*, or if the policy is a wholly different approach to warfare that violates *jus in bello*. Moreover, the literature is absent a coherent moral standard by which one judges the morality of military acts. Most scholars attempt one of two moves on the topic of setting objective moral standards. Some assume away the moral standard, arguing that “the moral world of war is shared not because we arrive at the same conclusions as to whose fight is just and whose unjust, but because we acknowledge the

same difficulties on the way to our conclusions, face the same problems, talk the same languages” (Walzer 1977, xxviii). Michael Walzer, whose study of *jus bellum iustum* has widely influenced contemporary interpretations of the theory, admitted that a “common morality is the critical assumption” of his work. He further admitted, “were I to begin with the foundation [of morality], I would probably never get beyond them; in any case, I am by no means sure what the foundations are” (Walzer 1977, xxix). He did, however, assert, “the study of judgments and justifications in the real world moves us closer, perhaps, to the most profound questions of moral philosophy, but it does not require direct engagement with those questions” (Walzer 1977, xxix). This thesis disagrees; rather, it aims to utilize a credible moral framework to judge right conduct from wrong, morality from immorality.

A second and more substantial group of scholars and contemporary philosopher equate morality to legality, forcing morality to conform to legal standards. This position quite understandably derives from the legal mind of Hugo Grotius, who titled his hallmark work, *Concerning the Law of War and Peace* (Taylor 1970, 230). For instance, modern writers argue that *jus in bello* governs the way force is applied, and finds its legal expression through international humanitarian law, particularly in the Geneva Conventions, as well as associated laws, conventions, and treaties” (Rogers and Hill 2014, 103). They go further to argue *jus bellum iustum* “is not grounded in firm moral positions, but in conventions that are open to widely divergent interpretations that change over time and circumstance” (Rogers and Hill 2014, 104, 114). It bears mentioning that this thesis contends quite differently. It rather argues that *jus bellum iustum* grounds firmly upon a fixed moral position, that morality has objective standards that are

knowable to the intellect and available for critique and study. Objective moral standard is accessible using the Three-Part Model of Moral Action, which supplies the necessary (historical, traditional, and theological) framework for judging human acts.

This thesis extends even beyond the U.S. Army Ethic, which, regarding the latter appears to identify more with the pervasive “morality as legality” argument. According to ADRP 1, the Army Ethic is “the *evolving* set of laws, values, and beliefs, embedded within the Army culture of trust that motivates and guides the conduct of Army professionals bound together in common moral purpose” [emphasis added] (DA 2015, 1-2). According to doctrine, the morality of the U.S. Army Professional must conform to the UCMJ, Army regulations, and policies, which “set the minimum standards for ethical conduct. Right decisions and actions are an expectation based on the moral principles of the Army Ethic,” an ethic which supposedly evolves “with changes in the practice of warfare and our societal norms” (DA 2015, 1-3). In contrast, this thesis holds to an objective, unchanging moral standard. Nevertheless, the U.S. government contends that the RPA policy conforms to both legal and moral standards and reflects the historical norms of warfare, a position for which this thesis agrees.

In defense of RPA, Bradley J. Strawser, an assistant professor at the US Naval Postgraduate School argued in his book, *Killing by Remote Control: the Ethics of an Unmanned Military*, that RPA provide maximum protection to just agents who pursue a just cause, and therefore, the State’s use of RPA is morally obligatory. “His thesis is based on what he calls the ‘principle of unnecessary risk,’ according to which it is ‘wrong to command someone to take on unnecessary potentially lethal risk’” (Chamayou 2013, 137). Strawser sides with the reasonable notion that the field commanders and policy

makers are morally obligated to wage a “clean” war when possible. Strawser’s wrote, “[I]t is wrong to command someone to take on unnecessary potentially lethal risks in an effort to carry out a just action for some good; any potentially lethal risk incurred must be justified by some strong countervailing reason. In the absence of such a reason, ordering someone to incur potentially lethal risk is morally impermissible” (Strawser 2010, 344)

Strawser justified his claim in the following way:

I argue that there is an ethical obligation to use UAVs . . . I argue that remotely controlled weapons systems are merely an extension of a long historical trajectory of removing a warrior ever farther from his foe for the warrior’s better protection. UAVs are only a difference in degree down this path; there is nothing about their remote use that puts them in a different ethical category. My argument rests on the premise that if an agent is pursuing a morally justified yet inherently risky action, then there is a moral imperative to protect this agent if it [is] possible to do so, unless there exists a countervailing good that outweighs the protection of the agent. Thus, I will contend that, as a technology that better protects (presumably) justified warriors, UAV use is ethically obligatory, not suspicious. (Strawser 2010, 343)

However, a critical flaw with Strawser’s argument deals in the moral quality of the intent and circumstance behind the principle of unnecessary risk. For instance, Strawser argued that protecting national combatants is a moral imperative for the state when confronting the army of an unjust nation, while dismissing the moral equality of combatants under *jus in bello*. Combatants are not morally culpable for their participation in an unjust war if they possess “invincible ignorance”—a complete ignorance of whether their state satisfactorily met all criteria for *jus ad bellum*. Combatants are not morally culpable for the reasons their nations go to war, particularly if they are not privy to the intelligence and information available to the political leaders, but they are accountable for how they fight a war. Strawser dismissed the moral equality of combatants, which we will show in step 3 of this chapter, but suffice to say the intent for the principle of

unnecessary risk is to mitigate risk to practically nothing for “just” combatants, while capitalizing on the death of “unjust” combatants who have no moral equality, thereby making it a principle of riskless slaughter. Strawser wrote, “[T]he warrior fighting for a just cause is morally justified to take the life of the enemy combatant, whereas the unjust fighter is not justified, even if they follow the traditional principles of *jus in bello*” (Strawser 2010, 356). This thesis contends differently, arguing rather that the principle of unnecessary risk as it stands is morally unacceptable and if adopted, will cause otherwise moral agents to pursue immoral ends and diminished moral circumstance.

Israelis Asa Kasher and Major General Amos Yadlin aim similarly to analyze the established principles of *jus bellum iustum* to create space for RPA in modern military ethics by incorporating observations and lessons from the IDF. The two authors argue for “combatant immunity” (Chamayou 2013, 131). Their argument runs along the lines of the state’s moral obligation to preserve the life of its citizens—combatant and noncombatant alike—over and above a moral obligation to protect the lives of noncombatants of other states. In this case, the lives of national soldiers have greater regard to the state than those of noncombatants who are citizens of other states. Their argument, set forth in *Military Ethics of Fighting Terror* follows:

A new model of warfare—the counter-terrorism war—requires a new set of rules on how to fight it. The other side is fighting outside the rules and we have to create new ethical rules for the international law of armed conflict, in keeping with the traditional IDF concept of ‘the purity of arms’. . . The duty of the state is to defend its citizens. Any time a terrorist gets away because of concerns about collateral damage, we may be violating our main duty to protect our citizens. We look for alternatives so as not to cause collateral damage, or to cause the minimum amount of collateral damage, but the main obligation is to defend our citizens. (Yadlin 2004)

Military professionals who hold to the principle of “Combatant immunity” would utilize RPA to eliminate threats without regard to civilian casualties, or, at the very least, noncombatant consideration would be an afterthought. It should be understood that this thesis upholds that “non-combatant immunity” is an essential criterion of *jus in bello*, represented in U.S. Army doctrine as “the principle of military distinction.” The principle of combatant immunity is objectively immoral. If adopted, it will cause unnecessary suffering and lead to graver evils than whatever good its authors intend to achieve through its practice.

A third theory concerning the morality of “drone warfare” centers on the eventual move to autonomous unmanned systems. Ronald C. Arkin argued in a 2010 article published in the *Journal of Military Ethics* that in light of the continuing investment, research, and development companies and countries, military professionals should embrace autonomous unmanned systems as a morally superior option to human activity in warfare. Arkin posited, “As robots are already faster, stronger, and in certain cases smarter than humans, is it that difficult to believe they will be able to treat us more humanely on the battlefield than we do each other? . . . Fortunately for a variety of reasons, it may be anticipated, that in the future, autonomous robots may be able to perform better than humans” (Arkin 2010, 333). Arkin provided compelling argument that autonomous unmanned systems present a better moral alternative to human activity and builds upon the notion that autonomous unmanned systems are more conservative, dispassionate, focused, and clear when confronted with the fog of war.

However, Arkin fell short in that autonomous “drones” cannot act morally. Drones are extensions of human activity. Drones cannot act save for how humans

program them to act, and therefore, their performance on the battlefield is an extension of the moral values of those who created and employed their use. Humans behave morally or immorally. As such, autonomous unmanned systems will never perform “better” than humans with respect to moral action. Autonomous “drones” are only the object of the moral form of human acts, and in and of themselves cannot have intent or ends in mind as they execute their program. No matter how humans might incorporate autonomous AI and RPA into warfare, war will not cease to be a human endeavor, an endeavor wrought with weighty moral, ethical, and legal considerations that is not transferable to autonomous systems.

One can clearly see how RPA adds complexity to the legal and moral discernment within in the context of *jus bellum iustum*. Strawser, Kasher, Yadin, and Arkin all stretch the tradition norms of *jus bellum iustum* to accommodate modern war tools and strategies around the notion that unmanned systems are moral weapons. To sharpen our focus of morality in war, we will need to use the Three-Part Model of Moral Acts (ref: ch. 2, fig 1) to analyze precisely how the U.S. government’s policy for RPA uphold the moral and legal norms of *jus in bello*. The moral object again refers to the human action that actually takes place, in this case, the use of RPA to conduct military strikes. In such a case as RPA, the object would be the actual employment of the RPA to destroy designated targets that threaten national interests. In accordance with the principle of military distinction, the target of an RPA strike must be a legitimate target, either a combatant or an object tied explicably to an adversarial military function or capability. The U.S. may employ an RPA to destroy a bomb-making facility, weapons cache, or a terrorist agent. An individual acting independent of legal mandate or apart from

legitimate authority may not take the liberty of employing an RPA under any circumstance. Using an RPA to conduct legal warfare is properly a sovereign state right, not an individual right. The U.S. Government's moral standing to employ the RPA is legitimate so long as the principles of military necessity, discrimination, and proportionality uphold.

When considering the moral ends of the employment of RPA, one must weigh the intent behind the policy itself, as well as the individual intent of the pilots who decide to destroy the target. If a properly deputized military official remotely pilots an aircraft and employs high explosive munitions to destroy an enemy target, inadvertently killing innocent bystanders in the process, the end is justified so long as the military professional intended to minimize collateral damage to the great extent possible. Of course, this condition requires a great deal of scrutiny. Nonetheless, if the pilot's intent was to destroy the target, though inadvertently killing civilians, the principle of unnecessary suffering may uphold. In the aforementioned case, so long as the military professional did not intend to target the innocent non-combatants, the act itself may be a legally and morally justifiable, difficult though it may seem. Although acts of war often lead death, the aim of killing must not primarily be to kill for the sake of killing. The annihilation of enemy combatants might be the only way to achieve a lasting peace, but, for war acts to be moral, the death of enemy combatants when necessary must be a secondary or tertiary end, not the primary.

The final element of a legally and morally justifiable action is the circumstance. The U.S. may employ an RPA to destroy a bomb-making facility, weapons cache, or a terrorist agent, and by doing so, may kill non-combatants as legally and morally

justifiable collateral damage. However, the removal of that one bomb-making facility, weapons cache, or terrorist agent, while legitimate, legal, and moral itself, may not achieve enough of a measured impact on the overall war effort as compared to the consequences of the many non-combatants who would lose their lives in the attack. As such, the non-combatants' death might be used as an enemy recruiting tool or as anti-war propaganda, thereby threatening the overall just cause of the war.

As previously discussed in chapter 3, the U.S. Government assumes if a lawful combatant pilots an aircraft remotely to strike a high payoff target using proportional force under congressional authorization to use military force, and the operation stands a reasonable chance of success, then the intrinsic moral quality of the act itself upholds. However, if the pilot of an RPA is a noncombatant, if the High Value Target (HVT) is not lawful, if the force is not proportional, if the AUMF is illegitimate, if the operation itself is unreasonable, or the strike leads to an inordinate amount of civilian casualties, then the intrinsic moral quality of the act diminishes. In the following six sections, we will examine the legality and morality of RPA using six evaluation criteria to distinguish whether the US Government violates *jus in bello* in its use of remotely piloted aircrafts to conduct military strikes.

Step 2: Question 1 – Lawful Combatant

Table 3. Legal Combatant Evaluation Criterion

Question	1. Is the pilot of an RPA a lawful combatant?		
	Yes	No	Uncertain
Object			X
Intention	X		
Circumstance			X

Source: Developed by author

Questioning whether the RPA pilot is a lawful combatant might appear simple enough on its surface. However, the reality is that the RPA pilot stretches the traditional notion of what constitutes a lawful combatant. Moreover, the RPA pilot's status has caused demonstrable controversy as USAF RPA pilots decrease in quantity while the combatant command's demand for RPA missions increase (see table 2). RPA operations related to ISR targeting and lethal strikes increased annually, while the number of available operators diminished. This condition created a tension that the USAF had to confront. Moreover, it takes time for the USAF to increase the available pool of pilots who can sustain the rate of RPA operations. According to the USAF, "New pilots of RPA undertake a very intense training program . . . [that] lasts approximately one year, and many current Air Force RPA pilots and trainers have already completed undergraduate

pilot training in manned aircraft as well” (The Secretary of the Air Force Public Affairs 2015).

As a growing number of RPA pilots suffer from PTSD, the USAF has conditionally hired contractors to operate RPA. Does this practice violate *jus in bello* if RPA are legitimate instruments of a state at just war against international terrorism. To begin, a lawful combatant, according to Brian Orend, is “anyone . . . engaged in harming. All non-harming persons, or institutions, are thus ethically and legally immune from direct or intentional attack by Soldiers and their weapon systems” (Orend 2006, 107). The U.S. Army JAG defined lawful combatants as “military personnel lawfully engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless hors de combat, that is, out of combat status—captured, wounded, sick or shipwrecked and no longer engaged in hostilities. Combatants also are privileged belligerents, i.e., authorized to use force against the enemy on behalf of the State” (IOLD 2015, 16).

This thesis contends that a lawful combatant is one who is complicit in all legitimate acts of war, whether he or she carried the act out him or herself. A lawful combatant does not have to be actively hostile using firearms to bear the status “combatant,” (i.e. vehicle drivers, military staffs), but he must consent his will toward accomplishing the lawful activities of war to qualify. Lawful combatants are entitled to carryout acts of war and are likewise subject to attack by enemy personnel. It is notable to highlight that according to this definition, a lawful combatant includes all members who are employed by the legitimate authority that prosecutes the war. As such, their privilege as lawful combatant entitles them to “bear no criminal responsibility for killing

or injuring enemy military personnel or civilians taking an active part in hostilities, or for causing damage or destruction to property, provided their acts comply with the LOAC” (IOLD 2015, 17). Whether the RPA pilot is a USAF service member or a civilian contractor, the USAF must acknowledge that he or she is lawfully complicit in the act of war intended by the RPA, and further that the intent of that activity must support a legitimate military end state. Otherwise, the policy falls short of *jus in bello*. If the USAF contracts RPA operations, it must at least tacitly acknowledge that their contractors are combatants.

However, there is some reluctance to acknowledge this point, since the USAF has explicitly stated that contractors who operate RPA are legally prevented from being “trigger pullers” (Schmidt 2016). Furthermore, the IOLD posits that “Civilians who accompany the armed forces in the field in time of armed conflict are protected from direct attack unless and for such time as they take a direct part in hostilities” (IOLD 2015, 21). One might argue that contractors who pilot RPA do not accompany armed forces to the field or participate bodily in combat, challenging whether they are in fact lawful combatants according to historical norms and traditional (and current) definitions.

French philosophy professor Chamayou asserted, “If one has the right to kill without crime, it is . . . by reason of a right to self-defense in the face of imminent peril” (Chamayou 2013, 163). He concluded that if imminent peril disappears, the combatant is no longer at risk and can no longer claim the argument “self-defense.” The underlying condition to Chamayou’s premise is that imminent peril and the natural right to self-defense is necessary for the combatant status; to remove peril is to remove one’s legal right to kill with impunity. An essential curb to the war option has traditionally been the

dangerous and unappealing prospect that all warring parties reciprocate violence and death. The lives of those belonging to the nation are not expendable, but neither are enemy lives. In contrast, Strawser argued, “if the actual removal of the warrior from the theater of combat represents a truly new level of asymmetry in combat (and perhaps it does), this alone is still no argument against doing it. This is because if one combatant is ethically justified in their effort, and the other is not, then it is good that the just warrior has the advantage and is better protected” (Strawser 2010, 356). If killing in combat becomes a riskless activity, it likewise becomes harder to imagine what factor(s) will keep military commanders from utilizing force and violence at will. RPAs are risk-free to the friendly combatants, “they remove an important moral brake on war fighting: by reducing the risk taken by the attacker, they lower the threshold for action” (Rogers and Hill 2014, 104).

As is shown by Table 3, the simplest category for which we can be comfortable is with the RPA pilot’s intent to be a combatant. Assuming the actor who operates the RPA does so out of a sense of professional duty, and not out of some perverse desire to destroy human life, one can assume the intent is morally justifiable. Moreover, the administration’s intent behind the policy to use remote pilots to mitigate harm to their Soldiers and to minimize further instability to volatile regions of the world is moral. The President and all public officials took an oath of office pledging to defend the constitution of the United States; yet, ends never justify the means.

However, at first glance, it appears the pilot of an RPA benefits from all the same legal and moral status of being a lawful combatant, with zero the amount of inherent risk or peril, or even physical discomfort, or personal sacrifice that goes along with traditional

military service. This is not entirely accurate, for we will shortly explore ways that RPA operators in fact do experience the effects of combat emotionally and psychologically, arguably perhaps to a degree greater than what combatants who operate on the battlefield might endure. Nevertheless, it is categorically uncertain whether the USAF pilot who operates an RPA is point to fact a lawful combatant.

To claim that RPA pilots are not subject to imminent risk, thereby inadequate to merit moral equality, is fallacious argumentation at best. Still, there is substance to the notion that America's military capabilities do impose a significant degree of asymmetry within the OE that reduces at least one, if not more, criterion of *jus ad bellum*. Still, near-peer adversaries will soon develop the capability to target RPA operation sites, which, according to the principle of military distinction, are legitimate military targets. For the moment, this thesis upholds that the object in this case—the individual who operates the RPA—is uncertain, as long as the practice remains that civilian contractors or uniformed service members may operate the RPA, but only uniformed service members can engage targets. The line between who is and is not a combatant is too thin in this procedure.

More importantly, the overall consequence of the policy is uncertain. An area requiring further study is on the effects standoff has on the combatant's psyche, particularly dealing with the repercussions of "remote killing." Lt. Col. Dave Grossman provided perhaps the best exposition on the topic of remote killing and standoff, and the psychological effects it has on just warriors. In *On Killing: The Psychological Cost of Learning to Kill in War and Society*, he argued that the closer in range a human target is to his killer, the greater the initial response needs to be for the killer to overcome the resistance of killing, particularly if the killer acts in accordance with the cardinal virtues

(Grossman 1995, 98). Conversely, the greater the distance, the less difficult it is to kill. RPAs however, through advanced, sophisticated imagery and detailed biometrics, reduces the sensory range of killing to within inches while physically separating the target by thousands of miles. This has caused a degree of cognitive dissonance in the minds of just agents who carry out the business of killing for their country.

“Militaries that use drones to fight rely on technologies to carry out their will. Killings are carried out on computer screen: the only suggestion of the 7,000 miles that separates the soldier and the target is a 1.7 second delay between the operator’s command and the aircraft’s response” (Rogers and Hill 2014, 69). This experience makes killing too easy, particularly since the soldier experiences no inherent risk against his or her person, while the intimacy of killing the target is as if they are inches apart. “Distant violence becomes at once strange and familiar, intimate and remote, present and yet not really here,” which has forced upon the RPA pilot a form of cognitive dissonance that is uncertain. For the moment, the extent of moral injury the RPA practice inflicts on military professional is unknowable. This is problematic, thereby forcing its moral integrity to be uncertain.

Step 3: Question 2 – Legitimate Target

Table 4. Legitimate Target Evaluation Criterion

Question	2. Is the high payoff target is a lawful combatant at the time of his/her death?		
	Yes	No	Uncertain
Object	X		
Intentionality	X		
Circumstance			X

Source: Developed by author

To begin, when the United States targets human beings for RPA strikes, those individuals are labeled high value (HVT) or high payoff targets (HPT). The Joint Staff defined a HVT as being “a target the enemy commander requires for the successful completion of the mission,” while an HPT is one “whose loss to the enemy will significantly contribute to the success of the friendly course of action” (DoD 2013, GL-6). “The emphasis of targeting is on identifying [critical] resources the enemy can least afford to lose or that provide him with the greatest advantage, then further identifying the subset of those targets which must be acquired and engaged to achieve friendly success” (DoD 2013, I-5). An HPT might be engaged in acts other than those that are actively hostile to the U.S. as he faced demise from an RPA strike, but his death is properly within the context of war, and the intent for his death is to bring about peace.

In April 2012, John Brennan defended the President's RPA policy and the legality of targeting violent members of international terrorist organizations. "Yes," Brennan unapologetically asserted, targeting HVTs is "In full accordance with the law—and in order to prevent terrorist attacks on the United States and to save American lives" (Brennan 2012). Brennan ensured to add that President Obama intends to carry the fight to the enemy "while upholding our laws and our values and that he would work with allies and partners whenever possible" (Brennan 2012). He defended the efficacy of "drone" warfare, expressing that in documents recovered from the May 2009 raid in Pakistan that resulted in demise of Osama Bin Laden, The terrorist leader warned his leaders to flee the tribal regions, and go to places, "away from aircraft photography and bombardment'" (Brennan 2012).

The burden for designating a combatant as legally and morally targetable for an RPA strike ultimately rests with the President, as shown by the PPG. The Obama Administration considered a combatant to be "an individual who is targetable as part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense" (Obama Administration 2013, 2). One can reasonably conclude that since the use of the PPG, the 335 total raids involving RPA, 6,034 hellfire shots, and 183 GBU-12 strikes (ref: table 1) all met the policy requirements laid out in the document.

However, Strawser argued that the U.S. does not require a stringent policy like the PPG to enforce treat unjust (implicitly unlawful) combatants. Strawser claimed, "the warrior fighting for a just cause is morally justified to take the life of the enemy combatant, whereas the unjust fighter is not justified, even if they follow the traditional

principles of *jus in bello*” (Strawser 2010, 356). In other words, just combatants have a legal and moral right to kill unjust combatants, whereas an unjust combatant has no legal or moral right to kill.

However, Just War theorists argue for a principle of moral equality between combatants to as a way to separate the national reason for going to war (*jus ad bellum*) from the individual responsibility to take legal and moral justifiable actions in war (*jus in bello*)—a principle Strawser rejects. As previously discussed, combatants are not morally culpable for their enlistment to fight in an unjust war if they possess “invincible ignorance.” A poor farmer drafted to war simply does his duty as a citizen and member of society by enlisting the fighting in a war, regardless of why the nation is in fact at war. His responsibility is to choose “good” and to avoid “evil” in the conduct of his service obligation. “It is permissible for a combatant fighting for an objectively unjust cause (an unjust combatant), to fight against a combatant fighting for an objectively just cause (a just combatant), as long as they do not violate the principles of *jus in bello*. (Galliot 2012, 61).

Therefore, the moral object—the direct action using RPA to target a lawful combatant—is morally and legally defensible as both a policy of the state and individual action. In addition, given the strict conditions outlined in the PPG, the Obama Administration intended only to take action against those individuals who “activities pose a continuing, imminent threat to U.S. persons,” aligning the intention with moral and legal justification (Obama Administration 2013, 11). However, it is difficult to distinguish whether the overall good achieved by the death of an HPT using RPA strikes

outweighs the graver evils possible by the strike itself. For this reason, circumstance remains uncertain.

Step 4: Question 3 – Proportional Force

Table 5. Proportional Force Evaluation Criterion

Question	3. Does the RPA employ proportional force compared to that which the threat poses at the time of the strike?		
	Yes	No	Uncertain
Object	X		
Intentionality	X		
Circumstance			X

Source: Developed by author

On its surface, one might argue that a hellfire missile is not proportional to any threat posed by the enemy combatant at the time the RPA pilot marks and destroys the target. To recall, the principle of proportionality is the loss of life and damage to property incidental to a military strike must not exceed the concrete military advantage gained by the strike (DA 2015, 3-5). “Proportionality is not a separate legal standard as such, but provides a means by which military commanders can balance military necessity and unnecessary suffering in circumstances when an attack may cause incidental damage to civilian personnel or property” (IOLD 2015, 11).

Proportionality weighs heavily on both *jus ad bellum* and *jus in bello* with regard to the legality and morality question of the RPA policy. From the perspective of *jus ad bellum*, proportionality forces military professionals and administration officials to consider the harm likely to occur with regard to proposed military action and to weigh it against the avoidance of undue harm. From the perspective of *jus in bello*, proportionality presses military professionals and administration officials to consider the harm likely to incur in situations where U.S. capabilities so vastly outmatch an opponent's capability, creating a condition of asymmetry.

The RPA has the distinct advantage of eliminating the threat posed by HVTs in a way soldiers cannot without incurring excessive costs to the nation. While RPA might appear to deliver excessive force against defenseless targets, the capture of HVTs using traditional military capabilities would incur significant costs in to the U.S. in blood and treasure and regional relations. The deployment of large military forces to instable regions of the world would gravely deteriorate tranquility and stability within the international order, not to mention sending early warning to potential targets, making it more difficult to prosecute targets. The RPA offers the administration an alternative to deploying "boots-on-ground."

Brennan argued that RPA direct action is a prudent policy choice for military professionals and administration officials to pursue. He stated:

Remotely piloted aircraft in particular can be a wise choice because of geography, with their ability to fly hundreds of miles over the most treacherous terrain, strike their targets with astonishing precision, and then return to base. They can be a wise choice because of time, when windows of opportunity can close quickly and there may be just minutes to act. They can be a wise choice because they dramatically reduce the danger to U.S. personnel, even eliminating the danger altogether. (Brennan 2016)

In the same address, Brennan made the case that RPA sufficiently takes international law and the principle of proportionality into careful consideration. He asserted that RPA strike “individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity,” making it “hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft” (Brennan 2016).

In contrast, there does seem to be something inherently unfair—disproportionate—when the U.S. targets and intentionally kills a single combatant from 20,000 feet above ground using a hell-fire missile. In the case of targeting individuals, and not military functions or capabilities, the act, on its surface, appears extreme. Some scholars argue that “when the level of asymmetry in war reaches a certain level, a state may be in violation of the *jus ad bellum* convention” (Galliot 2012, 63). In other words, America so vastly outmatches its adversaries in the global war on terror, in terms of technology and advanced security capability, that it seems implausible that it truly has reached a last resort in the recourse of war. Dropping hundreds of pounds of explosives on a living target, who has no means of self-defense, appears by its very essence to be a complete slaughter. “Where the technological imbalance is extreme, it seems that the harm that the technologically superior state hopes to thwart will in many cases be so insignificant that it would present problems for the proportionality calculus. (Galliot 2012, 63).

In light of the evidence, the object in the case of proportionality appears moral inasmuch as the U.S. uses minimal force to target “individuals [whose] activities pose a continuing imminent threat to U.S. persons” (Obama Administration 2013, 11). Defining

minimal force is a burden for the administration, one the Obama Administration met in the PPG. Likewise, the administration appears intent on only taking action if there is “near certainty that the action can be taken without injuring or killing non-combatants” (Obama Administration 2013, 1). The intent behind the use of proportional force as such appears morally sound. The President will only approve the strike if “the relevant government authorities in the country where action is contemplated cannot or will not effectively address the threat to the U.S. persons; and . . . no other reasonable alternatives to lethal action exist” (Obama Administration 2013, 2). In this light, the President intentionally balanced military necessity and unnecessary suffering with the likelihood of incidental damage to civilian personnel or property.

However, circumstance yet again is uncertain. There is yet to be a sufficient argument in support of the moral quality of America imposing a vast military asymmetry as compared to its adversaries, while maintaining that military force is “a last resort.” Just War theory is silent on whether militaries must have “equal footing” in combat, a notion that on its surface appears nonsensical. Yet it does impose the “last resort” criteria of *jus ad bellum* as a burden for a defending state to meet prior to waging war. RPAs may be a legitimate instrument of war, but it is uncertain whether it is a proportionate use of force.

Step 5: Question 4 – Lawful Use of Force

Table 6. Lawful Use of Force Evaluation Criterion

Question	4. Is the strike part of a legal authorization for the use of military force (AUMF)?		
	Yes	No	Uncertain
Object			X
Intentionality	X		
Circumstance	X		

Source: Developed by author

This section focuses on the legality and morality of the RPA policy as directed by a publically declared state of conflict between the U.S. and some other entity. On the surface, the question appears somewhat simple to answer. Point of fact, the U.S. Congress has not formally declared war against the Islamic State, or Al Qaeda, or any other international terrorist organization. Yet, as previously stated in chapter 2, Congress passed Public Law 107-40 on September 14, 2001 authorizing the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. (Elsea and Weed 2014, 14)

Since its passage, the Executive branch uses PL 107-40 to justify its use of RPA military strikes as an act of policy, which has an unprecedented provision of authorizing military force against not only nations, but also against non-state actors linked to the September 11, 2001 (Elsea and Weed 2014, 15). This provision is a first of its kind since “legitimate authority” first became a criterion in “just war” rationale. In a letter to the Speaker of the House in June 2016, President Obama stated the following:

I have directed the participation of U.S. Armed Forces in all of these operations pursuant to my constitutional and statutory authority as Commander in Chief and as Chief Executive (including the authority to carry out Public Law 107-40 and other statutes), as well as my constitutional and statutory authority to conduct the foreign relations of the United States. (Obama 2016)

Even as a declaration of state of war does not exist for the global war on terrorism, PL107-40 is an acceptable measure to employ military capability worldwide. While the AUMF might appear outdated, the provisions contained within it are unprecedented, and provide the President a wide swath of authorities to prosecute the war on international terrorism against state and non-state actors.

Referencing table 6, the intention for the administration to connect the RPA policy to AUMF 107-40 is an attempt at legal and moral justification concerning the RPA policy. Additionally, seeing that the U.S. makes public its rationale, legal framework, and justification for its continuing use of force through direct action against non-state actors, rationale that is wholly consistent with *jus bellum iustum*, it is fair to determine the overall good that could come from the Administration’s effort to be transparent as potentially outweighing graver evils. However, whether the current day RPA policy requires its own AUMF, rather than to stretch PL 107-40 to cover present-day hostilities

is a question that forces the object—the formal declaration for the RPA Policy itself—to be uncertain.

Step 6: Question 5 – Reasonable Chance of Success

Table 7. Reasonable Chance of Success Evaluation Criterion

Question	5. Can a reasonably thinking individual determine the strike as having a hopeful chance of success?		
	Yes	No	Uncertain
Object	X		
Intentionality	X		
Circumstance			X

Source: Developed by author

Since all forms of military force inevitably lead to destructiveness and deaths, the administration’s decision to use force must have a reasonable chance of success of reclaiming peace. Otherwise, the death and destructiveness of the war, once unleashed on society, would be purely gratuitous. Generally, history and tradition upholds that once war is unleashed, it can often get out of control and take on its own destructive power, with devastating consequences. President Abraham Lincoln, in his second inaugural address, admitted as much concerning the Civil War when he said the following:

On the occasion corresponding to this four years ago all thoughts were anxiously directed to an impending civil war. All dreaded it, all sought to avert it. . . Both parties deprecated war, but one of them would make war rather than let the nation survive, and the other would accept war rather than let it perish, and the war came. . . Neither party expected for the war the magnitude or the duration which it has already attained. Neither anticipated that the cause of the conflict might cease with or even before the conflict itself should cease. Each looked for an easier triumph, and a result less fundamental and astounding. (Lincoln 1865)

Lincoln's words are a testament to the reality that war must be a last resort, for the war-genie, once freed from its bottle, wields an unforgiving destructive force separate from the aim of the politicians or rulers who provoked the conflict. Any intention to conform to the norms of *jus ad bellum* and *jus in bello* must build upon the important foundation that the use of military force of any kind must have a reasonable chance of successfully ending the conflict.

The Obama Administration made a considerable effort to defend publically the RPA policy. In 2010, State Department Legal Adviser Harold Koh contended that "U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war" (Brennan 2016). Over the following years, the administration publically advocated for the policy. Jeh Johnson, former general counsel at the Department of Defense, Stephen Preston, former general counsel at the CIA, and John Brennan, former Assistant to the President for Homeland Security and Counterterrorism, all agreed the policy as being the nation's best way to achieve victory against Al Qaeda and other international terrorist organizations.

Brennan claimed that RPA employment was having a detrimental impact on Al Qaeda's ability to operate in the field. He reported that strikes have removed a large number of enemy combatants from "the battlefield," thereby diminishing Al Qaeda's military capability.

[W]hen we assess the al-Qa'ida of 2012, I think it is fair to say that, as a result of our efforts, the United States is more secure and the American people are safer. Here's why: In Pakistan, al-Qa'ida's leadership ranks have continued to suffer heavy losses. This includes Ilyas Kashmiri, one of al-Qa'ida's top operational planners, killed a month after bin Laden. It includes Atiyah Abd al-Rahman, killed when he succeeded Ayman al-Zawahiri as al-Qa'ida's deputy leader. It includes Younis al-Mauritani, a planner of attacks against the United States and Europe—until he was captured by Pakistani forces. (Brennan 2012)

Individual RPA military strikes to some might appear unreasonable, but, according to Al Qaeda's own leadership, they are highly effective. Brennan described the brutalizing effect the RPA policy and the Administration's counterterrorism program had on Al Qaeda's capacity to operate freely.

The object in this case—the hope for success using RPA—is morally good. The intention behind the policy, to apply constant pressure against violent international terrorist organizations that intend to inflict harm and destabilize global order, appears firmly on moral ground. Certainly, Brennan made the case that morale within these groups is low, “with intelligence indicating that some members are giving up and returning home, no doubt aware that this is a fight they will never win” (Brennan 2012). However, it is impossible to know exactly what impact and consequences of “drone” warfare has on the overall prosecution of the war against international terrorism. In other words, for every civilian incidentally killed by an RPA, even if their demise is consistent with the laws of war, might it be that twice as many violent actors join the fight against the U.S. The RPA policy, in and of itself, does not appear to be a satisfactory solution to end conflict. Rather, it appears to do precisely the opposite. As such, it is uncertain whether the RPA policy is morally good on the basis that it brings forth a greater good in light of the grave evils it may incidentally inflict on the world.

Step 7: Question 6 – Collateral Damage

Table 8. Collateral Damage Evaluation Criterion

Question	6. Do combatants preserve innocent life to the greatest extent possible in the use of RPAs for targeted strikes?		
	Yes	No	Uncertain
Object	X		
Intentionality	X		
Circumstance			X

Source: Developed by author

The ugly reality of war is that innocent civilians die from combatant activity. In some cases, such as the March 17 airstrike in Mosul, Iraq, many innocent civilians die as collateral damage (Fiske and Hennigan 2017). Non-combatant immunity is an essential criterion of *jus in bello* for the reason that mitigating innocent bloodshed is a moral imperative. Judeo-Christian theology states clearly, “thou shalt not kill.” This fifth commandment from the Jewish Decalogue is the *prima facie* of Judeo-Christian teaching on the sacredness of human life. The moral basis in western culture for human laws that prohibit murder stem from Judeo-Christian belief that human life is inherently valuable. This is because, theologians argue, “from its beginning [human life] involves the creative action of God and it remains forever in a special relationship with the Creator, who is its

sole end. God alone is the Lord of life from its beginning until its end: no one can under any circumstance claim for himself the right directly to destroy an innocent human being” (The Holy See 1995, 602).

The U.S. Military’s principle of distinction—discrimination between lawful combatants and noncombatants—attempts to incorporate this imperative into its wartime calculations (DA 2015, 3-5). Non-combatants, according to doctrine, include civilians, civilian property, prisoners of war, and wounded personnel who are unable to resist. The Obama Administration reinforces this notion in the PPG, stating non-combatants cannot be the object of attack under LOAC (Obama Administration 2013, 2). Still, to conscientious objectors, it seems military professionals simply accept that war inevitably leads to innocent deaths, that spilling innocent blood is unavoidable. Pacifism becomes the de facto substitute to what appears as warmonger’s realist “last resort.”

Los Angeles Times reporters Molly Hennesey Fiske and W.J. Hennigan reported on the unintended consequences of war, indicating that “coalition warplanes have carried out 20,205 strikes in Iraq and Syria since 2014,” which independent human rights watch groups believe has led to at least 3,111 civilians deaths, if not more (Fiske and Hennigan 2017). While an accurate number of civilian casualties is unknown, coalition forces have admitted to committing “mistakes” in the prosecution of airstrikes against Islamic State militants (Fiske and Hennigan 2017).

While the *prima facie* for the sacredness of life is the strict prohibition of killing, combat deaths (to include those of non-combatants), deaths as a direct result of combat can nevertheless be justified in light of other supreme considerations. Essential to the argument is the principle of legitimate defense and Aquinas’ Doctrine of Double Effect

(DDE). Theologians who study under the same tradition that conceived *jus bellum iustum* argued, “Legitimate defense can be not only a right but a grave duty for someone responsible for another's life. Preserving the common good requires rendering the unjust aggressor unable to inflict harm. To this end, those holding legitimate authority have the right to repel by armed force aggressors against the civil community entrusted to their charge” (The Holy See 1995, 604). In other words, a just conflict presupposes a legitimate authority having just intent and just cause in order to kill others in pursuit of peace. Proportionality brings to bear the fact that the just killing of an individual in war must be a measured calculation. If a just agent “uses more than necessary violence, it will be unlawful: whereas if he repels force with moderation, his defense will be lawful” (The Holy See 1995, 604). So long as military professionals have just intent to pursue good (peace) and avoid evil (intentional killing), the act of killing in war to bring about peace is just.

However, author Jeffrie G. Murphy tacitly agreed that self-defense is a legitimate ground for killing. “With respect to nations, the whole idea of self-defense is strongly in need of analysis,” Murphy wrote (Wakin 1986, 350). “What, for example, is it for a state to die or to be threatened with death? Can nations, like individuals, fear death and act compulsively on the basis of that fear? And, insofar as the death of a state is not identical with the deaths of individual human beings, why is the death of a state a morally bad thing” (Wakin 1986, 344)? While reluctantly conceding that self-defense may be the one just cause for war, Murphy’s argument nonetheless appealed to the pacifist and to those who wished to outlaw war. Yet, it fell short of incorporating the state’s moral obligation to “establish justice, insure domestic tranquility, provide for the common defense,

promote the general welfare, and secure the blessings of liberty” (Constitution 1789). The state’s inability to survive and defend itself to protect its citizens and uphold its constitutions is arguably as great, if not greater, than an individual’s legitimately moral love toward oneself.

While traditionally the principle of legitimate defense does lend the combatant legitimacy to kill other combatants, and so long as the activity comports with *jus in bello*, it does not sanction the deaths of innocent civilians. As long as the military professional’s act is a legitimate act of war, his or her intention is good, and the good sufficiently compensates for the evil effect, then the death of non-combatants and innocent civilians is morally permissible (Walzer 1977, 153). Moreover, DDE framework places an incredibly heavy burden on military professionals to defend the military necessity of RPA strikes if they possess foreknowledge that civilians and non-combatants will be near the target.

The Obama Administration placed an incredibly high standard to use RPA to target civilians. The President approved strikes only if his staff possessed “near certainty that the action can be taken without injuring or killing non-combatants” and only after an assessment showed that relevant government authorities in the country where the action will take place cannot or will not effectively address the threat (Obama Administration 2013, 1). As such, it appears the object—the death of civilians in war—stands on moral grounds, as does the intent behind the Executive branch’s policy to approve RPA strikes and military professionals who carry the strikes out.

However, the circumstances of civilians casualties rests on shaky grounds, particularly in light of recent reports of negligent military planning, imprecise targeting,

and faulty intelligence. “In past wars, U.S. troops on the ground helped provide targeting information and intelligence. But in the battle against Islamic State, commanders rely chiefly on airborne surveillance, captured communications chatter, signals intelligence and images captured by drones circling overhead” (Fiske and Hennigan 2017). U.S. Congressional Representative Ted Lieu sent a letter to Defense Secretary James N. Mattis, in which he wrote, “The substantial increases in civilian deaths caused by U.S. military force in Syria and Iraq brings into question whether the Trump administration is violating the Law of War. The large number of civilian casualties also suggest a possible breakdown in target selection, intelligence gathering, or operational execution” (Fiske and Hennigan 2017).

While it is uncertain at the present moment whether the RPA policy necessarily fails the moral test in light of civilian casualties, individual wartime acts that involve civilian deaths resulting from RPA military strikes have certainly diminished the moral quality of the policy overall. The Trump Administration must internally structure a heavy burden on commanders who authorize RPA strikes in the field to ensure the execution of RPA strikes is morally grounded, even if the results of the strike inadequately includes civilian casualties.

Step 8: Aggregation of Evaluation Criteria

Table 9. Aggregated Evaluation Criteria

Question	Moral Element	Yes	No	Uncertain
1. Is the pilot of an RPA a lawful combatant?	Object			X
	Intentionality	X		
	Circumstance			X
2. Is the high payoff target a lawful combatant at the time of his/her death?	Object	X		
	Intentionality	X		
	Circumstance			X
3. Does the RPA employ proportional force compared to that which the threat poses at the time of the strike?	Object	X		
	Intentionality	X		
	Circumstance			X
4. Is the strike part of a legal authorization for the use of military force (AUMF)?	Object			X
	Intentionality	X		
	Circumstance	X		
5. Can a reasonably thinking individual determine the strike as having a hopeful chance of success?	Object	X		
	Intentionality	X		
	Circumstance			X
6. Do combatants preserve innocent life to the greatest extent possible in the use of RPAs for targeted strikes?	Object	X		
	Intentionality	X		
	Circumstance			X

Source: Developed by author

Does the US Government violate *Jus in bello* in its use of remotely piloted aircrafts to conduct military strikes? If, as we have shown, a lawful combatant pilots an aircraft remotely to strike a high payoff target using proportional force under a congressional authorization to use military force, and the operation stands a reasonable chance of success in achieving a valid military objective, then the intrinsic moral quality of the policy itself upholds. However, it only requires one condition to fall short of moral or legal precedence for the policy itself, or individual acts to violate *jus in bello*. If the pilot operating the RPA is a noncombatant, if the target is not lawful, if the force is not proportional, if the AUMF is illegitimate, if the operation itself is unreasonable, or the

strike leads to an inordinate amount of civilian casualties, then the intrinsic moral quality of the policy diminishes beyond being morally good policy. In effect, the policy or individual RPA military strikes would be evil, not because the policymaker himself is evil, but because it fails to conform to objective moral standards, as outlined by The Three-Part Model of Moral Acts (figure 1).

The aggregated data, however, shows that while the policy is moral— for no answer to an evaluation criteria resulted in a “no”—the policy is nonetheless on weak ground. There is considerable room for individuals or future administrations to take either immoral or illegal action if restraints on future policies relax or the threat to the nation evolves.

Chapter Conclusion

Does the US Government violate *jus in bello* in its use of the remotely piloted aircraft to conduct military strikes? Simply put, no. However, while the policy itself is moral, there is considerable room for policy makers, field commanders, and even the President of the United States, to abuse the policy for immoral ends. It is notable that for all six criteria, intent morally upholds, but either the object or the circumstance is uncertain. This creates a precarious situation for the President and military professionals potentially to allow the end to justify the means, something morally impermissible. The ends never justify immoral means, no matter the good an agent intends. Nevertheless, this thesis concludes that upon application of the evaluation criteria, the RPA policy has legal and moral sufficiency.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

This they affirm to be the origin and nature of justice—it is a mean or compromise, between the best of all, which is to do injustice and not be punished, and the worst of all, which is to suffer injustice without the power of retaliation; and justice, being at the middle point between the two, is tolerated not as a good, but as the lesser evil, and honored by reason of the inability of men to do injustice.

— Glaucon, *The Republic*, 360 B.C.

Chapter Introduction

Over 2400 years ago, Plato posed whether a just man would act unjustly if he knew he could do injustice unobserved, maintaining his just reputation. He questioned the nature of justice; whether it could keep the just man from committing evil if such a man possessed the power to do evil with impunity. “And this we may truly affirm to be a great proof that a man is just, not willingly or because he thinks that justice is any good to him individually,” Plato’s Glaucon snubbed, “but of necessity, for wherever anyone thinks he can safely be unjust, there he is unjust” (Plato 360 B.C., 48). Quite differently, the United States military asserted that, “the Army professional’s moral awareness and sensitivity is required for legally and morally justifiable action” (DA 2015, 4-2).

This thesis sought to demonstrate that national values and Army Ethic lie as bedrock for American leadership and decision-making. Furthermore, it sought to defend national policy, particularly the use of RPA, as legally and morally justifiable action. In other words, the U.S. Army Ethic—and more broadly, national values and U.S. military ethos—guides just men and women in their pursuance of moral and just actions. The

Army Ethic and national values keep them from succumbing to the Gyges effect, so long as they continually strive to master the profession. As long as Army professionals continue to learn mastery of ethical applications of Landpower, they will certainly not fall prey to the Gyges effect.

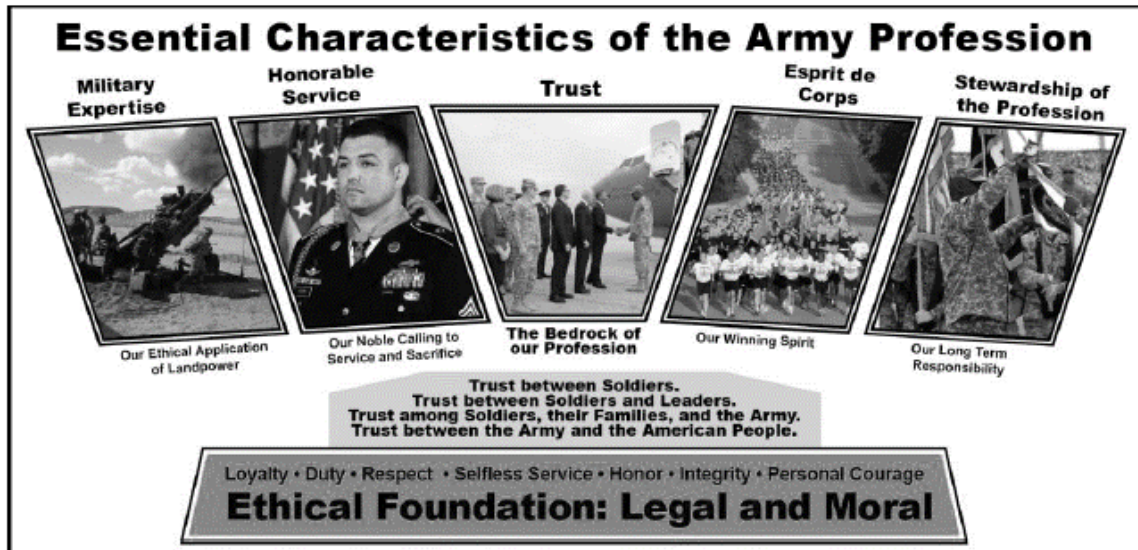


Figure 5. Army Ethic Foundation: Legal and Moral

Source: Department of the Army, Army Doctrinal Reference Publication (ADRP) 1, *The Army Profession* (Washington, DC: Government Printing Office, June 2015), 2-2.

U.S. military doctrine adds the following:

The framework for the Army Ethic shows the rich and varied legal and moral sources of its content; it reflects our national values and moral principles. By our oath of service, we commit ourselves to these time-honored and enduring ideals. . . . Motivated by both the legal and moral foundations of the Army Ethic, Army professionals adhere to all applicable laws, regulations, or rules in the accomplishment of every mission, particularly in combat or in any application of lethal force. (DA 2015, 2-2)

What follows are conclusions we may draw from the study, as well as recommendations for future study.

Conclusions

While in the previous chapter this thesis show that the RPA policy itself is moral—all answers to evaluation criteria resulted in either a “yes” or “uncertain” response—RPA acts of war remain problematic. The RPA challenges the warrior ethos. Modern day philosophers argue that RPA and future autonomous systems represent a sort of “death,” or natural end to the warrior ethos. “An army that exposes the lives of its troops is bad;” Chamayou argues, “one that preserves them at all costs is good. Exposure to risk is to be condemned; killing without danger is to be commended. Dying for one’s country was certainly a fine thing, but killing for it, given that it now offers us a dispensation from the heavy toll of our own death, is finer by far” (Chamayou 2015, 101). Just as in other sectors of society where autonomous technology threatens traditional means of employment, such as industrial and unskilled labor, the soldier might find himself replaced by autonomous systems, his ethos supplanted by what humans program into artificial intelligence (AI).

Other ethicists argue that no matter how humans might incorporate autonomous AI and RPA into warfare, war will not cease to be a human endeavor. They argue that “drones,” RPA, and AI will conform to the same rules, ethics, and law as humans. They see no end to the warrior ethos. Rather, they equate the protection afforded by the RPA to that of the introduction of breastplates in antiquity, created for better protection, or the

crossbow, which allowed unskilled mercenaries to kill skilled knights with ease at greater ranges.

The RPA pilot might stretch the traditional notion of lawful combatants, but asymmetry is contingent on other nation gaining technological parity with the U.S., a reality rapidly approaching. An HPT might be engaged in acts other than actively hostile to the U.S. as he faced demise from an RPA strike, but his death is within a context of war, and the intent for his death is to bring about peace. The RPA might appear to deliver excessive force against defenseless targets, but the cost of capture using large military forces would gravely deteriorate regional tranquility and stability. The AUMF might appear outdated, but the provisions contained within are unprecedented, providing for the President a wide swath of authorities to prosecute the war on international terrorism against state and non-state actors.

Individual RPA military strikes to some might appear unreasonable, but, according to Al Qaeda's own leadership, they are highly effective. Finally, it might seem an inordinate amount of civilian casualties suffer from RPA strikes, but the Judeo-Christian *prima facie*, "Thou shalt not kill," is overcome by other weightier moral imperatives inherent to *jus bellum iustum*. The policy, as it appears, is moral, but to wield its power may prove to be unwise. It may convince our just military professionals that they could commit an injustice free of accountability, yet uphold a false just image and reputation. The Gyges effect is a slippery slope, and human nature appears all too willing to embrace easier wrongs over the harder and more difficult moral-ethical and legal rights.

Recommendations

Future research may pose the question of whether Congress intended Public Law 107-40 to recognize unprecedented authority in the President to wage persistent conflict against non-state actors, as interpretation of the law presently allows. An exposition on the AUMF, its history, authorities, and precedence is wanting, not as to curb the President's power, but to bind it as legal and moral justifiable action. Certainly, it is not the opinion of this thesis that the President acts immorally or illegally, for the thesis supports that as it stands, the intent and circumstance appear moral. Still, it bears mentioning that the object—the law itself in light of how it is used—does require further investigation to ensure the government uphold legal and moral norms.

There is considerable debate for whether the asymmetry of the U.S. military as compared to its enemies forces jurists and theorists to modify or altogether discard *jus bellum iustum* in exchange for another moral framework to judge contemporary conflict. While this thesis rejects the determinists' argument that one must either modify or discard *jus bellum iustum*, it bears further study to identify ways to refocus the theory in light of new policies like U.N. General Assembly resolutions on the Responsibility to Protect. Additionally, the Catholic Church has begun work to revise *jus bellum iustum* in light of the state's responsibility to maintain peace and tranquility. The "Pontifical Council for Justice and Peace and the international Catholic peace organization Pax Christi have strongly called on Pope Francis to consider writing an encyclical letter, or some other 'major teaching document,' reorienting the church's teachings on violence" (McElwee 2016).

In light of the findings of this study, it would be prudent for the current administration to revisit the RPA policy to ensure it firmly sets on a solid moral and legal foundation. While this thesis contends that the policy, as it exists, is morally and legally justifiable, the position must be stronger. This is particularly true as other nations develop the capability that the U.S. already possesses, and, as Brenner reminded, may not share our interests or the premium we put on protecting human life, including innocent civilians” (Brennan 2012). Table 2 and figure 3 of this thesis provides a useful framework to judge moral action in light of legal statute, and might be a helpful tool to military professionals and public officials to adapt for their own purposes.

Seeing that the conclusions drawn by this thesis leaves the legal and moral action of military professionals who employ RPA for military strikes on shaky ground, further studies will lead to meaningful reform to set the military ethical legal and moral foundation more firmly. As the thesis already discussed, further study is necessary on the subject of standoff and the combatant’s psyche. To recall, RPA sophisticated imagery and sensors have reduced the sensory range of killing while keeping the combatants thousands of miles apart. This has led to a form of PTSD and moral injury that for the moment is morally uncertain. To protect our warriors, we must confront and mitigate the cognitive dissonance this causes in the mind, not by improving cognitive exercises to make the experience easier, but by understanding and forming moral judgment on whether the practice altogether is wise.

Final Thoughts

In many ways, *jus bellum iustum* is an impossible standard. “Too often,” critics argue, “the 'just war theory' has been used to endorse rather than prevent or limit war. Suggesting that a 'just war' is possible also undermines the moral imperative to develop tools and capacities for nonviolent transformation of conflict” (McElwee 2016). At this point, one must bear in mind the tradition from which *jus bellum iustum* and the three essential elements of moral action derive. Christianity itself, with its idyllic moral precepts and its call of perfect conformity to natural and eternal law, is an impossible standard to meet on our own. Yet, it is precisely in view of such an impossible standard that clergymen and theologians, particularly those who formulated *jus bellum iustum* in the first place, compelled men to pause and reflect, to examine the source of human value and the value of a just society, and to ponder man’s ultimate fulfillment. Upon such deep reflection, it becomes clear that human life is sacred, a just society is beyond value, and the defense of both against a darkness that seeks to destroy it is just.

St. Augustine’s *civitas dei*, the perfect peace and righteousness promised at the end of time, is worth the brief journey through the mire and muck of *firma terra*. All individuals pursue true happiness, an inalienable right correctly identified as self-evident in the U.S. Declaration of Independence, even if true happiness lies beyond grasp in our time. Aristotle knew the cardinal virtues were indispensable habits to humankind’s pursuit of happiness. The ECFs defined true happiness as perfect unity with God in heaven—the beatific vision—something by its very essence unable to be gained as temporal occupants of *firma terra*. Yet, they urged men through their preaching and writings that the just pursuit of heaven’s glory was not one of folly. The framers of the U.S. Constitution left

the interpretation of happiness open, but subtly incorporated the cardinal virtues, along with “the laws of Nature and Nature’s God,” into other aspects of civil society. All three knew that legal and moral action aimed ultimately for order, peace, and tranquility. In light of the contributions by all three, one may argue that criticism levied against *jus bellum iustum* is misplaced. “The fact that the constraints of just war are routinely overridden is no more a proof of their falsity and irrelevance than the existence of immoral behavior ‘refutes’ standards of morality: we know the standard and we also know human beings fall short of that standard with depressing regularity” (Cook 2004, 22). Moreover, the deeper reality missed by those who routinely criticize *jus bellum iustum* is one that springs forth from its inner core as a beacon of faith and hope; *jus bellum iustum* is a doctrine of peace.

As our leaders review national policies coming off the heels of the recent election, we ought to pursue true legal and moral action that ultimately and quite purposefully leads to order, peace, and tranquility. While the RPA policy is legal and moral, one is compelled to question whether it is wise. Can it lead to the sort of habits necessary for military professionals and administration officials to lead just lives, to make just decisions, to pursue just ends? This author fears the policy leaves military professionals and administration officials too easily susceptible to the Gyges effect, even as it upholds *jus in bello*. As such, it is the fixed opinion of this author that strict observance of *jus bellum iustum* is precisely the impossible task to undertake to force our eyes to heaven in search of the spirit of prudence, justice, temperance, and fortitude, to fill us with the strength to do the impossible. It is, therefore, an indispensable framework, one rich in moral quality. We ought to approach with caution and suspicion any opinion to dispense

with it. Just War supplies all that our military professionals need to take legally and morally justifiable action to avoid being victim of the Gyges effect.

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