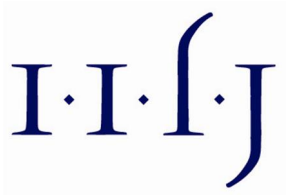

Institute for International Law and Justice

IILJ International Legal Theory Colloquium Spring 2011
Convened by Professor Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

February 9	Yitzhak Benbaji, *Bar-Ilan University* "The Moral Power of Soldiers to Undertake the Duty of Obedience"
February 16	Michael Walzer, *Institute for Advanced Study in Princeton / Tikvah and Straus Fellow at NYU School of Law* "Can the Good Guys Win"
February 23	No Colloquium
March 2	Doreen Lustig, *NYU School of Law* "Doing Business, Fighting a War: Non-State Actors and the Non State: the Industrialist Cases at Nuremberg"
March 9	Gabriella Blum, *Harvard Law School / Tikvah Fellow at NYU School of Law* "States' Crime and Punishment"
March 16	No Colloquium – SPRING BREAK
March 23	Matthew C. Waxman, *Columbia Law School* "Regulating Resort to Force: Form and Substance of the UN Charter Regime"
March 30	Paul Kahn, *Yale Law School* "Imagining Warfare, or I know It When I See It"
April 6	David Kretzmer, *Hebrew University of Jerusalem and Academic Center of Law and Business, Ramat Gan* "The Inherent Right to Self-Defense and Proportionality in Ius ad Bellum"
April 13	Andreas Zimmermann, *University of Potsdam,* and Philip Alston, *NYU School of Law* "Enforcing International Humanitarian Law in Asymmetric Armed Conflicts - the Case of Gaza"
April 20	No Colloquium
April 27	J.H.H. Weiler, *NYU School of Law* "Not So Quiet on the Western Front: Reflections on the Bellicose Debate Concerning the Distinction between Ius ad Bellum and Ius in Bello"

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Imagining Warfare

Paul W. Kahn

Sometimes a small shift can reveal large patterns. We think we are making adjustments at the margin, but we discover that we have changed the nature of the enterprise. We can no longer reach a reflective equilibrium between our intuitions and our principles. The old rules seem incapable of providing guidance in the new situation, but new norms are not settled. The more we consider the matter, the more we realize that we have lost our way. Something like this is happening with respect the methods and means of warfare.

The revolution in military affairs has normalized into steady, incremental advances in accuracy, information, and artificial intelligence.[1] These incremental changes have led us to a place that no longer looks like war. Neither, however, does it look like law enforcement. Without a third category, we borrow in an ad hoc manner: sometimes the target appears as the enemy, sometimes as the criminal.[2]

Representative of contemporary developments in the technology of warfare is the drone, increasingly the weapon of choice in the war on terror. Technologically, the drone is an incremental change, for we have long had the ability to deliver weapons from stand-off platforms and to gather intelligence electronically. It does these things better, combining accurate targeting capability with real-time intelligence. It targets with minimal collateral damage, making it particularly useful in urban and residential areas. The drone has become the

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[1] See M. Ignatieff, *Virtual War* 164-176 (2001)

[2] International law speaks of "armed conflict" not war, and of "combatants," not the enemy. The failure of legal discourse to map political discourse contributes to our present uncertainties.

hoped-for technological "game changer" that can produce an unsurmountable, asymmetrical advantage: the capacity to kill anywhere without exposure to risk.[3]

This new, high-tech weaponry disrupts many of our traditional expectations about warfare. Gone are long-established ideas about the place or time of combat. Gone too is the traditional idea of the combatant. The drone targets a particular individual, not a class or category of combatants. The victim is targeted for what he has done or is planning to do, not for his status. A person identified in this way has been eliminated; he may have been targeted while he was engaging in the most ordinary activities of private life. The drone is the technological equivalent of the assassin, but without the risk of personal presence.[4] That absence means that the drone operates in a zone of asymmetrical violence. The operator kills, but is so removed from battle that he is unlikely even to think of himself as a combatant. He may work a desk job in an office building in an American suburb.

Cumulatively, these three categories of disturbance canvas the basic elements of the political imaginary of warfare. Borrowing from Kant, we can call the first category the "aesthetics" of warfare: the spatial and temporal frame of the experience. We can call the second, the subjectivity of the combatant: is the combatant an individual or a corporate subject? The third category is that of the internal morality of combat. Traditionally, combat established a

[3] Director of the CIA, Leon Panetta, has described the drone as "the only game in town." Cited in R. Vogel, "Drone Warfare and the Law of Armed Conflict," 39 Denver J.Int'l. Law & Policy 101, 104 (2010).

[4] If the drone operates in place of the assassin, it is worth remembering that assassination has had a troubled history, politically and legally. In the law of armed combat, assassination has often been considered "treacherous," bringing it under the prohibition of Article 23(b), Hague Convention IV, annex. In his ASIL speech, Harold Koh, State Department Legal Advisor, specifically denied the charge that American targeting policy amounted to "assassinations."

relationship of reciprocal risk – killing was linked to a willingness to be killed. Does the combatant's privilege of killing depend upon some such reciprocity?

At issue in these three categories are the where, the who, and the ethos of political violence. These categories locate us in a common world of meaning. Responding to these categories one way located us in world of warfare; answering them another way located us in a world of law enforcement. Each has been its own world. These worlds, however, are intersecting in contemporary conflicts. One consequence of that intersection is that we don't know what body of law to apply: international humanitarian law or criminal procedure.

Each of these dimensions – the aesthetics, subjectivity, and ethos of combat – must be investigated. That is a large task that can only be sketched here. The problem we confront is not the absence of norms with respect to violence, but rather a surfeit of norms that are not well ordered with respect to each other. There is not one right way to kill and be killed for the sake of political ends. Elsewhere and at other times practices have been different. We can only proceed by examining our own political imaginary as it constructs an image of the ends and means of responding to violence.

The Modern Frame of Political Violence

Criminal or enemy made literally a world of difference. Entire bodies of law, substantive and procedural, turned on this distinction. More important, our understanding of ourselves – who we are and what we are doing – continues to turn on it.[5] Are we defending the state or enforcing the law? Are we killing the enemy or punishing the criminal? Despite the importance of the distinction, there is no formal check list and no single characteristic by which we can determine whether the object of our violence is criminal or enemy. We are long past the

[5] See P. Kahn, "Criminal and Enemy in the Political Imagination," 99 Yale Review 148 (2011).

time when the declaration of war might have marked the difference.[6] We cannot even confidently rely on the presence of the military to tell us that we confront the enemy.[7] Especially in a democracy, the question is one of perception: do we see a criminal act or an act of war? Before there is legal distinction, there is an act of the imagination.

Getting this distinction right, then, has less to do with law than with popular perception. It is a political decision – some might say *the* political decision.[8] A government that sees criminals where the populace sees the enemy will be judged ineffective or weak. If it sees enemies where the populace sees criminals, it will be judged illegitimate and authoritarian. Governments, of course, are not merely passive in this regard. They try to shape public opinion, but they do not control it.

Criminal and enemy amount to different, even opposing, ways of ordering elements within what Clifford Geertz called "webs of significance."[9] Those elements range across the three categories of aesthetics, subjectivity, and ethos. All of these factors are related through habits of thought and perception; all of them are contestable, for we deal here with matters of interpretation. A change in any one factor can lead to a different weighting of the others. Where we once saw an enemy, we may come to see a criminal – and vice versa.

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[6] The U.S. has not formally declared war since World War II. Are we at war today with Libya? How would we answer that question?

[7] Marking this distinction through the instrument of enforcement was the strategy behind the Posse Comitatus Act (18 U.S.C. 1385).

[8] See C. Schmitt, *The Concept of the Political* (G. Schwab trans. 1986); G. Agamben, *Homo Sacer: Sovereign Power and Bare Live* (D. Heller-Roazen trans. 1998).

[9] C. Geertz, *The Interpretation of Cultures* 5 (1973)

Max Weber can help us to begin to frame the inquiry as one that juxtaposes law to sovereignty, which will in turn provide the broad foundation for the distinction of the criminal from the enemy. Weber famously defined the state as a community that successfully claims a monopoly on the legitimate use of violence within a territorial jurisdiction.[10] His definition drew on several centuries of imaginative political framing, beginning with Hobbes's idea of exit from the state of nature. The state of nature is precisely the situation in which there is no successful monopoly on violence. Without that, individuals and groups may be stronger or weaker, they may win or lose over some period of time, but they constantly confront the explicit or implicit threat of violence from others. Only a common belief in legitimacy brings stability.

Hobbes believed the emergence of the polity is made possible by the concession to the sovereign of a monopoly on legitimate violence. This concession is the function of the social contract, which marks the end of the state of nature and the origin of the state. Different social contract theorists have written different terms into this contract. They take different views of the nature of the sovereign – one or many – and of the specification of citizen rights and responsibilities. With respect to violence, however, the operative contract is always the same: every legitimate use of violence must have its ground, directly or indirectly, in the sovereign. Private militias, answering only to the leadership of a political faction, have no part in this tradition. War is a sovereign decision. Similarly, private revenge must give way to law enforcement. The sovereign claims the power to decide on both defense (war) and punishment (law).

[10] M. Weber, "Politics as a Vocation,"

The ideal content of the social contract, however, does not tell us who are the parties to the contract: it does not define its own reach. Weber, accordingly, explicitly links the idea of legitimacy to a territorial claim: a state has a monopoly on violence within a bordered territory. Some sort of border must precede the contract because without borders we would not know to whom the contract applies. Recognizing a border simultaneously introduces an idea of plurality: the state is always one among many.[11] The ethos of the border is always potentially that of the state of nature, for just here, where communities meet, the social contract has no force. Hobbes is, accordingly, the philosopher of internal order as well as the founder of the realist school of international relations. The sovereign function is necessarily, i.e., structurally, both law and war.

Political identity, on this view, is simultaneously normative (the social contract) and territorial (the border). The normative perspective, which speaks with the universality of law, must be linked to an existential perspective, which speaks of facts. The terms of the social contract are worked out in the abstract, but the border is explained only by narrative. Liberal theory has largely been a succession of attempts to work out the former. The goal is to produce an ideal type – *the* social contract – which is to be the measure of legitimate political authority anywhere.[12] This ambition for universality continues today in the project of human rights law, which also knows no borders. The territorial claim of the state is just the opposite: there is no abstract account of the border. There is only a particular narrative that relates this community to this space. Here, the model is not Hobbes's theorizing, but God's grant of the territory of Israel

[11] See Arendt on pluralism.

[12] Hobbes, for example, says "When I shall have set down my own reading orderly, and perspicuously, the pains left another will be only to consider, if he also finds not the same in himself." Hobbes, *Leviathan* 83 (C.B. Macpherson, ed., [1651] 1968).

to the descendants of Abraham. Every state combines both the universal and the particular, norms and narrative.

The narrative is an account of how the border has been wrested from other contestants, and defended against invasion. The border comes into being through sacrificial acts; it is marked in blood. It is never just a matter of geography. There is no abstract drawing of borders according to some principle of justice. There was no world conference at which geographical territories were assigned through a neutral process. The border has the same necessity about it as a person's own life: there is nothing abstract about this necessity. Finding myself in one family rather than another is not a matter of justice, but neither is it a merely arbitrary fact about me. The border literally proclaims the existence of the community as a quantum of power. This community will exert itself – it will defend itself -- within this space. Thus, states attach immense significance even to unproductive or empty land.

When we put these two foundational claims together – the abstraction of the social contract and the narrative of the border – we have gone a long way toward capturing the basic structure of the social imaginary of the modern state. On the one hand, its internal normative order is a product of reason. Hobbes thought his account of the social contract had the status of a scientific demonstration. So have many of the theorists – political and legal – who have followed him. On the other hand, every state makes an existential claim that has nothing to do with reason. The state's existence is not a matter of science, but of political will. The first element is captured by the idea of the rule of law; the second, by the idea of sovereignty. Justice does not bring a political community into being. Justice alone will not defend the state. The state is a product of reason and will, of law and sovereignty.

Both of these aspects of the modern state challenged earlier understandings of the nature of the polity. The social contract tradition challenged a political theology that located the normative grounds of the polity in revelation, not reason. Political authority had to be continuous with religious authority. There were many different ways of negotiating the relationship between state and church, but the end was to bring both within a single theological understanding of God's relationship to His created world.[13] Similarly, the geography of the modern state displaced a sacral idea of the King's body.[14] The relevant geography had been proximity to the King – thus, the importance of ritual around the body of the monarch.

The shift to geography from a form of Chirstology signified a reconstruction of the nature of the community just as significant as the shift from revelation to reason. Map and constitution become the visible texts of the modern political community. The two shifts were obviously deeply related, but not quite the same. Hobbes led the way in the shift from revelation to reason, but he still imagined the sovereign as the king. Hobbesian geography is famously represented on the cover picture of *The Leviathian*. By the time we get to the French Revolution, we find that mapping the state is as important a project as drafting a constitution.[15] Both map and constitution are representations. When we ask of what are they representations, the answer in

[13] See M. Lilla, *The Stillborn God* (2007); M. Gillespie, *The Theological Origins of Modernity* (2008).

[14] See E. Kantorowicz, *The King's Two Bodies*.

[15] See K. Adler, *The Measure of all Things: The Seven-Year Odyssey and the Hidden Error that Transformed the World* (2005).

both cases is the popular sovereign. This relationship of representation to identity provides the fundamental structures of the modern political imagination.[16]

Unless we keep both dimensions of the modern state in mind, we will be at a loss to understand its deeply paradoxical character. The state promised individual well-being under the rule of law, but it also made a total claim on the lives and property within its jurisdiction. The Hobbesian sovereign ended one state of nature only to establish another. The war of individuals ended, while that of states began. It is not at all clear which should be thought of as the more dangerous condition: to be murdered in the state of nature or to die for one's country. The state was simultaneously the vehicle for peace and war, for life and death. The logic of law pointed to individual well-being as the ground of legitimacy, while sovereign presence depended upon citizens willing to sacrifice themselves. The modern state has been this curious combination of well-being and sacrifice. We hear echoes of this duality today when the American war on terror is simultaneously criticized for its failure to comply with law and for its failure to call on the entire population to share in sacrifice.

Political identity in the modern state has been a negotiation of these basic categories. The double character of the state as both an inward order and an outward threat is seen in the multiple pairings of our basic political concepts: law and sovereignty, peace and war, well-being and sacrifice. Carl Schmitt was standing within this tradition when he identified the friend/enemy distinction as the defining political conception.[17] That pairing, however, is no more basic than any of the others, including criminal and enemy.

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[16] Out of it will come our concern with language and law, on the one hand, and sacrifice and authenticity, on the other.

[17] Schmitt, *The Concept of the Political* 26 (G. Schwab trans. 2007).

The distinction of criminal and enemy is readily available to the popular imagination, deeply rooted in the theory of the modern state, and operates as an organizing principle of institutions and actions. Intuitively, we know that law enforcement and war are not the same. Organizationally, we distinguish the police from the army. Legally, we distinguish the criminal from the enemy.

Criminals are to be punished; enemies are to be killed. The enemy can be killed even when he is literally doing nothing at all. If he is killed, that act is hardly "capital punishment." When he does act, destroying persons and property, he ordinarily breaks no law.[18] Even when he is taken prisoner, he is not punished. The criminal, on the other hand, is to be punished for what he has actually done, and, for the most part, he is not to be killed. Rehabilitation is an appropriate goal for the criminal, but not the enemy. Indeed, to attempt to rehabilitate the enemy is to engage in prohibited indoctrination.

The criminal is protected by a web of legal procedures that do not extend to the enemy, who may be killed or captured.[19] These procedures, by extending rights, recognize the personhood of the criminal.[20] He can demand of the state that it justify its actions against him. That, after all, is the meaning of the most basic right to habeas corpus. The enemy, on the other hand, is fundamentally not a person at law. He is figuratively, if not literally, outside of the jurisdiction. Ordinarily, the courts are not open to him, because he makes no claim of legal

[18] IHL sets limits, but does not go to the basic point.

[19] Of course, the enemy can become a criminal as well, in which case legal rights do extend to him.

[20] Arendt made this point with respect to the political advantage of the criminal over the stateless in Europe before World War II. H. Arendt, *The Origins of Totalitarianism*.

right.[21] These basic categories are subject to a number of exceptions. The war criminal for example, shows us that they are not mutually exclusive; so does the legal category of treason. We should not, however, allow the exceptions to obscure the fundamental dualism of criminal and enemy.

Getting this distinction of criminal from enemy right may or may not bear on the safety of the state, but it is critical to the imagination of the state. Disagreement on the identity of the enemy is as basic a political disagreement as there can be. A state that imagines enemies within has fractured into civil war or what today is more likely to be called a "dirty war." Conversely, a state that no longer sees the enemy but only the criminal may no longer occupy the modern category of a nation-state. A world without enemies would be one without an effective conception of sovereignty. International criminal courts would step into the place of national armies. A world without criminals, on the other hand, is Hobbes's state of nature.

Criminal and enemy both destroy property and life. The meaning of the act, however, depends on how we perceive it. The achievement of the modern nation-state was to separate law from sovereignty, such that there could emerge a stable distinction of criminals from enemies. The enemy threatens the sovereign; the criminal violates the law. Before the modern era, the distinction tended to collapse in the direction of enemies. Violation of the king's law had the taint of treason and, more deeply still, of heresy. The spectacle of the scaffold – the visible deployment of the king's violence – was as much defeat of the enemy as punishment of the criminal. Pain produced confession, which was a form of surrender.[22] We still hear religious

[21] *Boumediene v. Bush*, 553 U.S. 723 (2008) does not challenge this basic point concerning the norm.

[22] See P. Kahn, *Sacred Violence*, chap. 1.

resonances in the term "surrender." In our increasingly post-modern era, the pressure toward collapse is in the other direction: enemies become criminals. Today, many believe that wars are to end with trials, and warfare should be permitted only as an extension of law enforcement. This shift in the imagination has no doubt been aided by the development of a technological capacity to target individual wrongdoers wherever they might be.

This imaginative shift from enemies to criminals fits within a larger vision of the development of public international law as a project seeking the juridification of international relations. This project moved from a late 19th century idea of peace through law (states would be bound to each other through a legal regime of trade and communication)[23] to a mid-20th century idea of peace as a requirement of law (a legal prohibition on state use of force),[24] to a late 20th century idea of individual accountability under a global legal regime (criminal prosecution of political leaders who deploy force).[25] Legal academics, in particular, read the move from the League to the Charter to the ICC as a single story of the progressive realization of a global legal order in which the idea of an enemy, who is not a criminal, ultimately has no place.

In the United States, however, these ideas have yet to figure significantly in the political imagination, except to be viewed with extreme suspicion.[26] There has been little support for the effort to subject the Guantanamo detainees to criminal trials, little support for normalizing their detention within the US prison system, and little political support for the extension of habeas

[23] Cite Hague Convention of 1899; Universal Postal Convention (1874).

[24] See Kellogg-Briand Pact (1928); UN Charter, article 2(4).

[25] On this view, the Rome Statute is the endpoint of a process that began at Nuremberg and then moved through a number of ad hoc tribunals.

[26] The concern for "lawfare" is one expression of this suspicion. See C. Dunlap, "Law and Military Intervention: Preserving Humanitarian Values in the 21st Century."

jurisdiction to Guantanamo – despite the Supreme Court's repeated decisions.[27] Similarly, there has been little political support for joining the International Criminal Court, and virtually no support for assertions of universal jurisdiction. There remains a deep belief that there are enemies and a deep fear of attack. Sovereignty, in short, remains a vital concept.

That Americans continue to hold to the distinction of enemies from criminals does not mean that the categories are easy to apply or uncontested. Just the opposite. Violent acts don't come with labels. Much of the contentious character of the "war on terror" is a consequence of this difficulty of categorization: enemy or criminal? Our controversies over the use of drones arise out of this same difficulty: weapon of war or instrument of law enforcement?[28]

The Aesthetics of War

In Schmitt's terms, war is the exception. This has nothing to do with the frequency or length of wars, but with the frame of understanding. War is declared; it is a political act spoken in the sovereign voice. War is never a judicial conclusion founded on a claim of right. The converse point holds as well: a court cannot enjoin a turn to arms. Justice Brewer famously observed that "it would savor somewhat of the puerile and ridiculous to have read a writ of injunction to Lee's army during the late Civil War."[29] Brewer continued with a well known quotation from Cicero: "*inter arma enim silent leges*." We need not go that far to recognize that the ordinary rule of law no longer applies in war. The state can conscript without compensation and it can destroy without due process. Conscription is not slavery, and destruction is not theft.

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[27] *Boumediene, supra*; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[28] For a summary of these controversies, see R. Vogel, "Drone Warfare and the Law of Armed Conflict," 39 Denver J.Int'l. Law & Policy 101 (2010).

[29] *In re Debs*, 158 U.S. 564, 597 (1895).

Criminal or enemy marks, then, a distinction between law and exception. The sovereign decision tells us which side we are on. In an era of popular sovereignty, that decision is not a function of any one individual's declaration, but of shared perception. The people decide for the enemy when they imagine the political world one way rather than another. This is neither the conclusion of an argument, nor an arbitrary act. It is a way of making sense of experience, beginning with a distinctive imagination of time and space.

Space: Territory or Property?

The modern state occupies two different geographical regimes: territory and property. From an external point of view, the state is a bordered territory. One is either inside or outside the border. Internally, the geographical regime is that of property. Property moves according to law: we trace title. For every geographical area within the border, we can identify an owner. The state itself can be another property owner. Its property claims are subject to the same legal rules of specification, transfer, and ownership. The state may have a legal right to take ownership, but it must pay just compensation and follow due process. A property regime is precisely a way of avoiding contestation becoming warfare: conflicts over property are resolved by adjudication.

The map of the territory is not that of the tax assessor. It does not register distinctions of ownership. Modern borders are not determined by tracing title of ownership of a ruling family. A property owner has no right to secede, even if his geographical claim is very large.[30] War between states is a relationship between territorial regimes, not between property owners. Similarly, when the terrorist attacks a building, it is not the ownership interest that matters, but

[30] He may not even have a right "to defend" his property from transgression.

the manner in which the target is both a part of, and stands for, the territory. If we see the attack only through the lens of ownership, it is a crime.[31]

These categories are quite stable, at least in American life. The citizen can be asked to sacrifice for national territory, not for property entitlements. Even a substantial violation of property does not make an enemy out of the criminal. Prosecuting someone for property destruction under domestic law ordinarily excludes the possibility of imaging him as the enemy. Indeed, we lack the category of a "political crime." Similarly, the figure of the enemy is constructed from a particular perspective on territory: the enemy penetrates the border. This transgression makes someone an enemy, even if he does relatively little damage and regardless of whether he damages public or private property.[32] Territory, unlike property, is not subject to a comparative valuation.[33]

Borders represent the integrity of the state.[34] Borders in the pre-modern regime tended to be frontiers, where authority was unclear and contested. If the geography that mattered was that of the King's body, then enemies could appear from anywhere and occupy any place. Their threat was literally to him. In the modern state, there is no singular act of killing that signifies the

[31] Much of international humanitarian law has been an effort to negotiate the relationship between these two different geographical regimes: what property claims must a belligerent respect? Under IHL, property is protected under a regime of necessity rather than one of private right and market value.

[32] The problem of the illegal alien is complicated in just this way: his transgression of the border can lend him the character of the enemy.

[33] One way to think about the Israeli problem of the settlement is that they have created property rights before they have established territory.

[34] Metaphorically, the threat of the enemy is rape. The enemy of the sacral monarch was imagined differently: the operative metaphor was patricide.

death of the sovereign. To eliminate the modern state means to erase its borders. Thus, wars begin with a border penetration; they end when the enemy is driven back across the border.

The border has become a geographical representation of national existence. It signifies more than a traditional homeland for an ethnically or religiously defined group. Indeed, claims for an ethnic homeland have an archaic sense about them. They represent a failure of a regime of popular sovereignty to realize an autochthonous political presence. This is often characterized as a failure of law: an ethnic minority might be denied rights, including property rights. More importantly, however, there is a failure in the existential dimension: to link territory and ethnicity is to exclude others within the border from the popular sovereign. They can, in that case, be imagined as the enemy, which can lead to policies of ethnic cleansing. As the enemy, they are to be driven across the border. Because the failure is existential, the effort to "cure" the problem by the extension of legal rights may not succeed – at least not without significant third party intervention.

The modern configuration of an autochthonous, territorial politics of sovereignty begins in the revolutions of the 18th century. Revolutionaries proclaim the rights of man, but as the French Declaration tellingly expressed it, rights of man "and of the citizen."[35] The universal is, thereby, linked to a particular space. Whatever their dreams of universality, revolutions have not generally achieved solidarity across borders. Rather, they produce a symbolic investment in borders. Revolutionary regimes set about mapping the state.[36] This modern connection of borders to popular sovereignty reached its fullest expression in the post-war decolonization

[35] The same point is implied in the American Declaration of Independence when it states, "*We* hold these truths to be self-evident." The truths may be universal, but the We is the nation.

movement. "Uti possidetis" was the governing territorial principle, even though colonial borders failed to map preexisting ethnic communities. Nationhood followed upon statehood, because the popular sovereign brings itself into being by its revolutionary act of self-expression. This actor, the popular sovereign, has become everyone living within the border.[37] That moment of self-creation changes the meaning of the colonial border from historically contingent to politically necessary. The border now marks a kind of sacred space, for here the popular sovereign revealed, and thus created, itself.[38]

This is the territorial regime enshrined in the UN Charter. Every state has the right to defend itself against armed attack.[39] An attack is imagined as a cross-border penetration. The Charter text contains no suggestion that a cross-border penetration is any less of an attack if it is done for humanitarian reasons – unless pursuant to Security Council action. Self-defense is not about justice, but about protecting the political space of sovereignty. If it is the case that we are entering an era in which sovereignty is an outdated notion, or in which it is conditioned on the justice of a regime, then we should expect to see a reduction in the symbolic power of the border. Europe is just such an example: the citizens of the EU cannot be enemies of each other for they

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[36] George Washington was trained as a surveyor. The French revolutionaries also empowered the geographers.

[37] More precisely, this is the implicit ideal in a modern territorial regime of popular sovereignty. Exceptions – starting with American slavery – are frequent, but are generally seen as pathologies in need of reform.

[38] There is an accompanying doctrine of "abjection" as the colonialists are expelled across the border.

[39] See UN Charter, article 51.

have the right freely to cross borders.[40] A global regime in which all borders could be freely crossed would be one in which the concept of the enemy no longer figured. Territory would give way to property and the enemy to the criminal.

The border, accordingly, gives us a geographical representation of the enemy: the enemy transgresses the border. Claims that borders are not just or that they are the product of a history of power do not make the enemy less of an enemy. Under the Charter regime, borders are imagined as forever, because the protection of the border is imagined as the elimination of war. It follows that no state can shift its borders – annex territory – through the use of force, regardless of how just the change might be. A world of perfectly respected borders would be one that ["saves] succeeding generations from the scourge of war." For the same reason, the Charter regime has dealt much more awkwardly with claims of secession and civil war, viewing them within the paradigm of third party – i.e., cross-border – effects and participation.[41]

The logic I have traced has predictable political consequences. A cross-border threat, regardless of how limited, motivates an extreme response. The United States has been in a frenzy of border protection since the penetration of 9/11. Conversely, the enemy must be linked to a threat of border penetration. Thus, President Bush had to claim that Iraq had weapons of mass destruction capable of reaching the United States. Short of that, how could Iraqis be the

[40] Europeans, however are arguably moving the symbolic site of investment in territory to the borders of the Union, where they are frenetically trying to block immigrants.

[41] See, e.g., E. Luck, *U.N. Security Council Practice and Promise*, 37 (2006) (on Chapter VII/2 operations).

enemy? That Iraqis are behaving badly toward each other is not a ground for Americans to sacrifice themselves.[42] They might be criminals, but they would not be enemies.

Of course, as the example of Iraq demonstrates, the enemy is not always met at the border. Nevertheless, every identification of the enemy must be built on the idea of penetration. We construct a chain of causality that ends at the border. Thus, we hear repeatedly that this threat of penetration justifies our presence in Afghanistan: better there than here. Timothy McVeigh is not the enemy, but a criminal. He crossed no border. The enemy/terrorist seems equally well attuned to the symbolic geography of the modern nation state. Thus, the fascination with the airplane as the vehicle of delivery, despite multiple alternatives. Many of those alternatives might be easier to use given the substantial investment in airline security, but none better symbolizes penetration.

Time: Linear or Cyclical?

Property sets geography within a temporal frame of law: one property claim derives from another through a chain of ownership. Territory sets geography within a different temporal frame: a narrative of state creation and defense. Together, these present the twofold temporality of the modern state – the progress of law and the presence of sovereignty.

A legal claim is always bound to a past act.[43] A law must have been passed; a precedent must have been decided. Legal argument explains what the law is by interpreting these authoritative, past acts. This does not mean that there is never any place under law for an

[42] Without a border penetration like the attack of 9/11, the British have had an even more difficult time justifying their participation in the Iraq intervention.

[43] See R. Dworkin, *Law's Empire*; Kahn, *The Reign of Law*.

all-things-considered judgment about what would be best under the circumstances – a discretionary judgment. It does mean that the legal aspect of that decision lies elsewhere – for example, in the grant of authority to a decision-maker, the specification of factors to be considered, the reach of jurisdiction, or the process of review. Moral decisions may be temporally unbound; legal decisions are not. A crime is not necessarily a morally bad act; it is a violation of an already established law.

The American idea of the rule of law offers a continuous past up to a singular point of discontinuity, which is the Constitution.[44] Asking about the legality of the Constitution itself would be a category mistake, for it rests directly on the exceptional, constitutive power of the sovereign people. It is what Kelsen referred to as a "ground norm."[45] The rule of law envisions a continuous future up to a similar point of discontinuity. At that point, the sovereign people reappear. Within this span of discontinuous appearances of the popular sovereign, the law "unfolds."[46] The narrative of continuity, accordingly, sits within a larger temporal narrative that is not continuous but cyclical: the periodic reappearance of the popular sovereign. The distinction is a modern replay of a far older relationship of profane to sacred time.[47]

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[44] On the way in which constitutional amendments fit within this temporal scheme see Kahn, id at _____.

[45] H. Kelsen, *Introduction to the Problems of Legal Theory* p. 25-30 (B. Paulson and S. Paulson trans. 1992).

[46] This bounded, temporal character of law stands in contrast with a common law understanding of legal temporality. On the dual structures of political time generally, see P. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* 69-74 (1997).

[47] See M. Eliade, *The Sacred and the Profane: The Nature of Religion* 88-89 (W. Trask trans. 1959).

The popular sovereign is not constrained by a before: its appearance always marks a possible, new beginning. This lack of constraint works in a double sense. The appearance of the popular sovereign is not determined by any causes. Revolution is, for this reason, always unpredictable. Similarly, the popular sovereign acts with the same authority whenever it appears; it acts outside of any legal limits. Outside of casual sequence and legal order, the popular sovereign knows only one temporal mode: the present. Whenever it appears, it is fully vested in the present. Its action of making law is correspondingly without limit. Thus, constitutions do not contain sunset clauses. They last until the next appearance of the popular sovereign.

The linear time of law makes constant, if implicit, reference to the cyclical time of the popular sovereign. This legal perspective, however, is not our only point of access to the sacred time of sovereign presence. Wherever we see through an individual act to the popular sovereign, we move from linear to sacred time. The paradigmatic point of "seeing through" is the sacrificial act. Revolution is the founding sacrificial act, the giving up of finite concerns and live for the realization of sovereign presence.[48] Every subsequent sacrifice is a sort of reenactment of that founding act. At Gettysburg, Lincoln captured this directly when he linked the soldier's "ultimate sacrifice" to rebirth of the nation. "Rebirth" borrows a religious metaphor of being "born again" to refer to the cyclical time of sovereign presence.

Whenever the popular sovereign appears, there is a displacement of the finite individual. This has nothing to do with majoritarianism, as if popular sovereignty were a voting rule. Rather, it is a way of seeing the state whole in a reified subject. There is a direct line of identity

[48] Thus the Declaration of Independence ends with an invocation of "Divine Providence" and a "pledge to each other of our Lives, our Fortunes, and our sacred Honor."

from the sacrifices of the Revolutionary War, to those of the Civil War, to those of the 20th century battlefields, and finally to "Ground Zero." These events are memorialized; they are remembered as points at which the finite give way to the transcendent. The memorial is "for all time."

Sacrifice is always beyond law. Law can impose risks, but it cannot demand a sacrifice.[49] If law is founded on sacrifice, then law cannot account for its own origin. For that, we need a narrative of foundations that can bind through time, even as people and laws change. That narrative speaks of sacrifice to defeat enemies. Those against when sacrifice is required are always the enemy, not the criminal. Thus, we do not get to the enemy simply by increasing the degree of damage or threat.[50] We get there when we respond to a threat by accepting the possibility of sacrifice.[51] The sacred calls forth the enemy. A war that cannot fit within this narrative of sovereign presence is one in which citizens "sacrificed in vain," which means they did not sacrifice at all.[52]

This account of sovereign presence and cyclical time clarifies a number of characteristics of the enemy. First, we cannot identify the enemy by law. The enemy appears only as long as we stand within the exception of sovereign presence. Second, the enemy has no before or after. The enemy has the same temporal character as the sovereign. Once the time of the exception

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[49] One speaks here of supererogatory acts.

[50] Schmitt's quantitative idea of the enemy is inadequate for this reason. See P. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* 11 (2011).

[51] As I write this, acts of self-immolation, that is self-sacrifice, are disrupting normal space and time across northern Africa.

[52] Parallel to our description of an unconstitutional law as one that is "under color of law," we can speak of a non-sacrificial war as one that is only "under color of war."

ends, we can no longer perceive the enemy. Thus, enemies regularly become friends – and in relatively short order. At that point, we can no longer imagine how it was that we were killing each other. Americans know this in the rapid change of attitudes toward Germany and Japan. Third, just as there is a transtemporal identification of the sacrificial citizen with the popular sovereign, there is a reciprocal transtemporal identification of the enemy: they are all the same.[53] In the face of a perceived existential threat, all particularity disappears.[54] Fourth, one has to wonder whether the eschatological threat of mutual assured destruction is not somehow rooted in this idea of sacred time. The idea of the end of history has the same double sense of tragedy and promise that characterizes every act of sacrifice.

The terrorist attacks of 9/11 easily fit within this democratic, political aesthetic of space and time. There had been penetration of a border, which wrenched citizens out of the ordinary temporality of law. Those who died were not murdered, but sacrificed. Not surprisingly, we heard countless narratives of them giving themselves up in a free act: they call home; they announce their love to family members; they jump. Similarly, we imagine first responders as taking up the burden of sacrifice. We construct the event not as one of passive victimization but as a free act of sacrifice. Especially symbolic of this transformation are the passengers on United Flight 93, who are effectively conscripted into the war on terror. The ubiquity and timelessness of the popular sovereign is acted out at that moment. Their plane becomes the extraordinary space of battle, as they reenact the founding, sacrificial myth of the state: from this violent act of

[53] This creates the asymmetrical character of the memorial: we memorialize sacrifice, but do not draw the enemy into that memory. We don't want to perpetuate a memory of emnity toward a particular other. This absence of representation is another expression of the transtemporal identity of the enemy.

[54] Perhaps a modern iteration of the idea of the enemy as Satan.

killing and being killed will come a "new birth of freedom." At that point, we imagine the enemy, not the criminal. These new sites of sacrifice will be memorialized, just as battlefields have been memorialized. Those memorials record the breaking into ordinary time of the exception; they record sacrifice as the presence of the popular sovereign.

The Subject: Corporate or Individual?

Complementing the spatial and temporal aesthetic of war is an idea of the subject. Who is it that can kill and be killed outside of the ordinary norms of law? International humanitarian law speaks of the combatant's privilege, as if it were a matter of extending certain rights to an individual who meets a list of formal qualifications.[55] This gives us only a negative view of what is at stake: the combatant's privilege protects the individual from legal prosecution for the injury he causes. The celebration of the combatant is not, however, grounded in his legal immunities. Rather immunity is a formal reflection of a positive quality: the combatant has about him something of the quality of the sacred. His acts are not entirely his own. They generate awe and respect incommensurate with law.

The combatant is not individually responsible for his actions because those acts are no more his than ours. Legally, we construct this as a matter of agency and hierarchy of command. The combatant's role is generally to follow orders.[56] For this reason, responsibility lies at the top of a chain of command. Classically, the chain was followed all the way to the point at which legal responsibility ends: the head of state who spoke in the sovereign voice. The legal mind railed against the paradox that came from linking the superior orders defense to head of state

[55] See Geneva Convention III, art. 4 (on qualifications of lawful combatant).

[56] Disobedience is excused only when the order is manifestly illegal.

immunity. The paradox, however, was well founded for just as the combatant's acts cannot be grasped as his alone, the actions of the head of state are not his alone. Behind the paradox is an intuition that warfare is a conflict between corporate subjects, inaccessible to ordinary ideas of individual responsibility whether of soldier or commander.

The citizen combatant acts not just under the legal authority of the state or as a representative of the state. This could be equally true of mercenary. It fails to capture the citizen's political identity. We need, in addition, to recognize here a corporate form of personhood. At war, states confront each other as historical actors. They are the victors and losers; their history is being written. Warfare is the suffering of the sovereign body.

The relationship here is not that of means to end, nor of part to whole, but of microcosm to macrocosm. The individual is not just a representation of the whole, but instantiates the whole. Here, we see the nation as a single corporate subject. This does not make an individual's death less tragic or killing less horrendous. That, however, is not where its political meaning lies. The citizen-combatant's death is always a sacrifice. Dying for the state is not a negation, but an affirmation. To return to theological language, it is "life through death" – the life of the nation.

Corporate identity has informed both sides of modern war. The enemy is not killed as an individual. He remains the enemy even if he has done nothing wrong – indeed, even if he disagrees with the policies of his government. Friends can become enemies because the category has nothing to do with personal subjectivity. The enemy is always faceless because we don't care about his personal history any more than we care about his hopes for the future. Once there is a return to the normal, one-time enemies can come to see each other as uniquely bound to each other; they have shared an extraordinary experience. We see this today in the gatherings of

veterans from both sides of the Second World War. Nothing need be forgiven, for despite the killing and destruction no one did anything wrong. In some deep sense, no one did anything at all.

The corporate character of the popular sovereign stands opposed to the individualism of the rule of law upon which so much of our liberalism is based. Neither is it adequately captured by speaking of the "status" of the combatant. Status is a way of distinguishing combatants from noncombatants, not a way of capturing the nature of political identity at stake in the life and death of the state.

The popular sovereign is the direct successor to the mystical corpus of the sacral monarch. The metaphysics here is Christological – the mystical body of the Church – but the phenomenon has broader roots.[57] The erotic character of the political community is expressed in this notion of corporate identity.[58] In and through the popular sovereign, we are one with those who came before and those who will come after. Corporate identity lies behind the intergenerational sense of responsibility that informs much of our political ethos: the nation is responsible for its past wrongs just as it responsible to those not yet living.

Contemporary theorists are likely to dismiss the idea of the corporate subject as merely psychological – a matter of emotion rather than reason. That dismissal, however, no less indulges a metaphysical assumption: one of individual subjectivity. When we look at the history of our politics, as well as of our faith, it is not clear why we should prefer that metaphysical

[57] At the yearly Passover Service, the Jews recite that each was present with Moses when God led the Jews out of Egypt. We might also think of the two-become-one of love that figures not just in *Genesis*, also in Plato's *Symposium*.

assumption over the competing idea of corporate subjectivity. In truth, both ideas occupy the political imaginary, giving us a politics that embraces both the rule of law and popular sovereignty. We cannot stand outside of this experience and declare one claim to be true and the other false. We make judgments about who we are and how to regard others from within our political practices and beliefs. Distinguishing criminals from enemies is one such judgment: the criminal is always an individual; the enemy is not.

Keeping these competing forms of subjectivity in a stable relationship to each other is an endless task of managing the political imagination. In war, whenever the individual breaks through, we find ourselves deeply uncertain about what to do or how to judge acts of killing and being killed. Every war spawns stories of the outbreak of personal comradery between enemies, as they momentarily recognize that they have much in common and "no reason" to kill each other.[59] They have become individual subjects in a world that only appears to the corporate subject. If this attitude persists, the war is over, for the exception has passed. At the other end, corporate personhood is policed by the idea of war crimes. These acts are not attributable to the sovereign body, but only to the individual.

This figure of corporate personhood helps to explain the extraordinary character of modern warfare. Popular sovereignty unleashed a seemingly limitless potential for mass violence by making every citizen an equal moment within the corporate body. Any citizen can pick up arms and claim to act as the sovereign. Government may make no better claim to speak in the sovereign voice than the lone resistor. Out of this arises the informal warfare of the

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[58] See Kahn, *Putting Liberalism in its Place*, chap. 6; see also S. Freud, *Civilization and its Discontents* (on eros as the source of community).

[59] Famously, there was the Christmas truce of World War I.

partisan and the guerilla: each claims to act as the people. A similar account can be given of weapons of mass destruction, which are a kind of objectification of corporate personhood. To defeat the popular sovereign, one has to eliminate the possibility of the sovereign claim arising anywhere. There are, however, no limits on where it can arise. It is no longer enough to cut off the king's head – or any other. Warfare can become a project of national elimination. Modernity is the age of liberalism and genocide.

Whatever else modernity produced, it brought about an extraordinary willingness to kill and be killed. There was an almost unfathomable carelessness with lives. This occurred in the same states that were building legal regimes of social welfare. We simply cannot understand this within any calculation of individual well-being. We can describe it as inefficient and unjust, but still it is. To understand the existential character of the modern state, we need a political theology of popular sovereignty as corporate agency.

Everything we know about warfare in the era of popular sovereignty tells us that it is not easily contained by law. No one gets a pass from revolution or war. Indeed, the fundamental distinction in IHL between combatants and noncombatants has a deeply problematic relationship to the corporate character of popular sovereignty. That distinction is quite inconsistent with the revolutionary tradition of modernity. It is also quite inconsistent with the way in which citizens – combatants and noncombatants – understand the stakes of modern warfare. When Churchill spoke of meeting the invader "in the fields and in the streets," he was not directing his remarks to uniformed combatants. Can the American people imagine a moment of surrender? Is not that imagined resistance what a policy of mutual assured destruction rests upon?

Predictably, the IHL project broke down in the face of both the threat of weapons of mass destruction between the superpowers, and the tactics of terrorism in the wars of decolonization. These, however, have been exactly the forms of warfare of the post-War era. Both expose IHL as a project with uncertain democratic roots.[60] It would oppose a law of individual responsibility to a corporate phenomenon. This problem continues, for the terrorist attack is a political spectacle of the corporate body. There is nothing personal in the choice of target. The message conveyed is that political identity alone is a ground for killing and being killed. Sending that message is the contemporary form of the declaration of war. Perception of the message turns the victim into the sacrificial body of the state, and the terrorist into the enemy. Terrorism, thus, falls easily within the metaphysics of popular sovereignty. It produces a form of democratic suffering that overflows the formal distinction of combatants from noncombatants. The corporate character of the victim creates the politics of memorialization that played out after 9/11: "We are all New Yorkers."

The corporate character of the terrorist also helps us to understand why the paradigmatic terrorist act is the assault by a "suicide bomber." Suicide is always an act beyond law's reach. It resists the legal forms of individual responsibility and criminality.[61] These qualities of alegality put the meaning of the act in the control of the actors, or at least tend to undermine the state's response. Declarations of illegality sound hollow when there can be no prosecution. It was, for example, an act of suicide that set off the recent Tunisian revolution.

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[60] See Kahn, *Sacred Violence*, chapter 2.

[61] See Agamben, *Homo Sacer* 136-37.

On the other hand, characterizing the terrorists' act as suicide rather than sacrifice is itself a way of trying to control its meaning. It amounts to a refusal to see corporate agency. In part, this is an expression of power – an effort to reduce political agency to crime. More important may be the religious character of corporate agency at work here. The liberal state begins, after all, with the vanquishing of the corporate presence of the Church as a political actor. Religion is, for us, necessarily a matter of individual faith. Accordingly, if the attack is motivated by religious belief, the actor must be an individual. He is a criminal, not an enemy. To think otherwise would encourage an irrational Islamophobia. It makes no more sense, we say, to hold Islam responsible for these violent acts than to hold Christianity responsible for the diverse acts of westerners. Yet, individual diversity is true of every corporate subject. The issue is not what makes sense in the abstract, but what makes sense to us.

We are left, therefore, with a profoundly ambiguous situation. The problem of political violence that we confront is more than our notions of criminal responsibility and individual psychology can bear. Sometimes, we try to capture the collective nature of the enterprise with the legal idea of conspiracy.[62] We construct a group effort – that of Al Qaeda, for example – but not a corporate subject. This, however, does not bring clarity, for the terrorist is more than a criminal, even if he is less than an enemy. He acts in the space and time of the enemy; he is resisted by the corporate agency of the nation. But we construct his agency as that of an individual. We resist construction of a corporate enemy, even as we construct a corporate subject as the victim. We are left wondering if we can be at war with a criminal. This asymmetry leads to another.

[62] Similar problem of command responsibility in international criminal law.

The Ethos of Killing: Symmetrical or Asymmetrical?

Of all of things that organized communities do, going to war is surely the most difficult to understand. Familiarity does not make the cognitive task any easier. War depends upon a willingness of individuals to imagine themselves performing the two most difficult acts: killing and being killed. The close and intimate relationship between these two acts suggests that we should think of warfare as reciprocal acts of self-sacrifice.[63] Each side believes it must kill, just as each is willing to die. Figuratively, it is the willingness to die that creates the license to kill; formally, the reciprocity of threat grounds the doctrine of the combatant's privilege; politically, every war is justified as one of self-defense.

The internal ethos of modern warfare arises out of the imagined reciprocal imposition of risk.[64] Where reciprocity clearly ends, humanitarian concerns arise. Thus, combatants can surrender. They can also find themselves "hors de combat," when they are incapable of posing a further threat – e.g., from injury or shipwreck. Of course, the normative idea of reciprocity is only a rough approximation of the actual situation, for it is not the actual threat of the particular combatant that matters. A cook behind the lines may be targeted in the same way as an infantryman on the battlefield. The reciprocity of threat cannot detach itself entirely from the idea of corporate subjectivity.

The ethos of reciprocity operates independently of the ends of war. The justice or injustice of those ends does not tell us who can kill or be killed. War has been imagined, instead, as an existential condition. A state will defend itself; it does not first ask whether it is worth

[63] See Kahn, *Putting Liberalism in its Place* 230-41.

[64] See Walzer, *Just and Unjust War*; P. Kahn, "The Paradox of Riskless Warfare."

defending. Indeed, once war begins – regardless of the reasons for its beginning – it may rapidly become a war of self-defense. Because every war can tend toward the extreme issue of life and death for the state, every war can tend toward a limitless use of force. The modern project of IHL can be understood as an effort to moderate the existential impulse to transgress every limit.[65]

The ethos of reciprocity is given formal expression in IHL's creation of the combatant's privilege. Only those who expose themselves to a reciprocal risk of injury are legally protected for their own acts of violence. The basic norm here builds on the practice of the duel. Consent is constructed through the reciprocal exposure to each other's act of intentional violence. This ethical norm of reciprocity, however, runs deeper than IHL's formal expression of its limits. Thus, a person who targets the military may fall outside of IHL's protection by failing to wear a uniform, but he is in a different ethical position from the person who targets civilians in order to avoid risk. We are often not sure whether to call the former a terrorist.[66] At war's end, he may be entitled to the respect of an adversary.

What is rarely acknowledged is that the contemporary suicide bomber acts within a similar ethos of reciprocity. He too acts out the basic idea that it is the willingness to die that creates the license to kill. His act is the site of a reciprocal exchange of life for life. This is one ground of his effectiveness: he insists that he is the enemy, not a criminal. If war ends with surrender, the suicide bomber forecloses that possibility.

This ethos of reciprocal sacrifice always stands in tension with the tactics of warfare. Tactically, each side seeks to transcend any effective reciprocity. Wars cease when one side

[65] Clauswitz theorized the tendency of force to move to an extreme, but did not think law could be much of a moderating force.

stands in an insurmountable, asymmetrical relationship to the other. At that point, it can inflict injury without suffering a symmetrical threat. War proceeds as an effort to create and exploit such asymmetries. In the absence of any possibility of creating such an asymmetry, wars don't begin. We describe this as a balance of power. Similarly, if the asymmetry is clear and overwhelming from the start, wars don't begin. We call this hegemony. Wars occupy the middle range of uncertain tactical success. There, we find, an ethos of reciprocity, bounded by the struggle to achieve asymmetry.

The struggle for asymmetrical advantage gives us one way to think about the revolution in military affairs in the latter part of the 20th century: it was a shift from quantity to quality. The immediate post-war period was marked by dramatic, quantitative increases in destructive power. This was most evident in the rise of nuclear and then thermonuclear weapons. The effectiveness of these weapons to achieve an unsurmountable asymmetry, in at least some circumstances, had been demonstrated at Hiroshima and Nagasaki. They ended the war without any further, significant loss of American lives. Those circumstances, however, were not capable of repetition once the Soviet Union became a nuclear power. Increasing the destructive power of these weapons did not make them more useful. Arguably, it made them useless for anything other than deterrence.[67]

One response to the reappearance of asymmetry might have been simply to turn away from the possibility of military engagement: deterrence all the way down. This was not the response of the United States. It sought instead a qualitative advantage where quantitative

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[66] Examples: ANC, French partisans, spies.

[67] See J. Schell, *The Seventh Decade: The New Shape of Nuclear Danger* (2007).

advantage was no longer possible. This required advances in weapons design, delivery accuracy, and useful intelligence. Dramatic improvements in targeting capacities brought a shift of focus from population centers to defense installations. In some bizarre way, the end was to make war safe again, that is safe enough to be an imaginable practice.

Qualitative improvements in the latter part of the 20th century were so dramatic that they outpaced any need to be linked to nuclear weapons, although thousands of tactical nuclear weapons were produced and deployed.[68] Indeed, the promise was that quality could effectively displace quantity: nuclear destruction would no longer be necessary. These new, smart weapons were, however, expensive. This arms race was not for everyone. By the end of the millennium, the defense budget of the United States amounted to nearly half of all global expenditures on defense.[69]

The war on terror is showing us yet again the nature of the competition for asymmetry in light of the revolution in military technology. This war has demonstrated its own ethos of reciprocity within a competitive search for asymmetries. Each side understands the confrontation as one of killing and being killed; each pursues its own form of asymmetrical advantage. The terrorist seeks a vivid asymmetry by asserting a capacity to threaten anyone, at any place and at any time. He claims the tactical advantage of invisibility, fluidity, and surprise against what may appear as the slow-moving, vulnerable institutions of the modern state. He appears as if from nowhere. The suicide bomber is a low tech response to a modern military. This tactical asymmetry achieved by the terrorist has been met by the high tech war of the West,

[68] The effort to link qualitative change to nuclear weapons themselves continued as well. See id. at 95-96.

[69] Statistics.

which seeks first to secure the border and then to accomplish a kind of regime of disappearance. In response to the threatened spectacle of suicide, the alleged terrorist is to be simply eliminated out of view of any public. This is the contemporary form of the arms race.

A war is not a duel with ground rules that equalize the parties. We don't handicap to create the conditions of fairness. Nevertheless, an innovation, technological or otherwise, that promises riskless warfare threatens the ethos of reciprocity. Without the possibility of a reciprocal response, the moral situation changes.[70] A perfected and insurmountable tactical asymmetry takes us beyond the ethos of warfare.[71] When one side is in a position to enforce a set of norms against the other, the relevant question becomes that of the justice of the norms and the fairness of the process of application. *Jus in bello* requires a *bellum*. Without that, we have moved from the ethos of warfare to that of law enforcement on one side, and criminality on the other.

The combatant and the police officer operate under entirely different self conceptions and within entirely different normative frameworks. The ethos of policing is perfected when it achieves asymmetry. The criminal has no right to use force against those seeking to enforce the law. He cannot defend himself against the police. Similarly, policing is risky, but it is not a practice of sacrifice. If the risk is too great, a police officer can withdraw. He can even resign. He acts, moreover, under a strict rule of discrimination; we do not speak of acceptable collateral damage with respect to policing. Law enforcement targets the wrongdoer and him alone. The

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[70] See Kahn, "The Paradox of Riskless Warfare," supra note ___.

[71] Of course, a technological innovation cannot be judged in the abstract. A vehicle for long distance delivery of ordinance can operate risklessly when viewed in isolation. This is the ordinary sort of tactical asymmetry that each side seeks to achieve. It is also the sort to which terrorism offers the reciprocal response.

corporate body makes no appearance, on either side, in this violence. Consider Blackstone's formulation: "Better that ten guilty persons escape than that one innocent suffer." This is not the rule of proportionality governing collateral damage at war.

Paradoxically, the safer the nation becomes the more the ethos of law enforcement will be deployed to measure the use of force. There will be suspicions of racism in the selection of targets. There will be worries about the ideological biases of our own government. Similarly, worries will arise concerning procedural protections to insure against errors. As the law enforcement model prevails, collateral damage will become unacceptable. All of these responses are now visible in our own political debates over the conduct of the war on terror. The louder these voices become, the more difficult it will be to claim that the war on terror is a war.

Drones at War?

What I have described should be thoroughly familiar, at least to an American audience. I have not attempted to discover something hidden, but rather to expose the character of the social imaginary.[72] That imaginary exists in and through its public constructions. It is quite literally all around us: in political rhetoric, in news accounts, in historical narratives, in films and on television. Given the scope of this project, my description unavoidably works at a very high level of generalization. Imaginative construction is not technical production; variation and contestation are constant. Nevertheless, interpretive disagreement is only possible within a shared universe of meaning. I have offered a sketch of the central elements of that universe.

[72] On the concept of the social imaginary in general, see C. Taylor, *Modern Social Imaginaries* (2004).

The exception, I have argued, is no less a construction of the imagination, than the normal. It is marked not by the absence of order, but by a different order. Each element of that order is set in opposition to an element in the construction of the normal. Not property, but territory; not progress, but presence; not the individual, but the corporate subject; not enforcement of a norm, but a reciprocity of killing and being killed. Out of these doubles, we construct law and sovereignty which, in the field of violence, brings us the criminal and the enemy.

The threat of the enemy is to sovereign existence, not to law. That threat begins from a fear of a cross border penetration. It calls forth a sacrificial response. Sacrifice is not just a means to an end, but a making present of the popular sovereign. Enemies appear to each other as corporate agents making existential claims. Each expresses the necessity of its own existence, in attempting to negate the other. Out of this confrontation comes the ethos of reciprocity, along with a tactics of asymmetrical advantage.

Now let us turn to the contemporary war on terror, and in particular to the use of drones, increasingly the weapon of choice in the war on terror. This choice has been deeply criticized in a report by a UN Special Rapporteur.[73] It has also been the subject of domestic controversy.[74] Both domestic and international critics see the policy as a practice of "extra judicial killings." Of course, war itself is a practice of extra judicial killings. The deepest issue, then, is whether a war on terror remains a war, once the drone becomes "the only game in town."[75]

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[73] Philip Alston, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions" (May 28, 2010).

[74] See Hearing before U.S. House Subcommittee on Nat'l Security & Foreign Affairs, 111th Cong.2 (Apr. 22, 2010), testimony of M. O'Connell and of A. Romero. See also *Al Aulaqi v. Obama*, (D.D.C. 2010).

[75] See supra note _____ .

The categories I have described, while not a checklist, can guide the analysis. Begin with the idea of a cross border penetration. Certainly, the contemporary war on terror begins with such an act of penetration. Just as certainly, there remains a fear of penetration. Indeed, we are told that the drone protects the border, by "taking the war to the terrorist." This is already a difficult concept to sustain in the absence of a visible threat. Generally, the more distant the target is from the border, the more difficult it is to imagine this threat. Bad people exist all over the world, but what makes them an enemy? At what point does someone who harbors bad intentions become the enemy? We will ask, "Why him?" This is the traditional problem of anticipatory self-defense.[76]

More important may be the way in which our high technology draws upon an archaic image of space. The drone treats the target as if he occupies a pre-modern, disorganized space beyond the border. This was a space in which no state made an effective territorial claim. Thus, the drone's locus of activity is largely within failed states – areas of Pakistan, Afghanistan and Yemen. We cannot imagine its use in a non-failed state, for the drone poses exactly the problem of border penetration that always arises when an act of self-defense is also an act of aggression. Spatially, the drone constructs the terrorist less on the model of the enemy, than on that of the pirate: stateless, he is unprotected by any law. Outside of law, he can be killed but he is not a criminal.

Similarly, the drone is not easily placed within the temporal narrative of the exception. At the moment of its use, can we see the reappearance of the popular sovereign? Indeed, apart from the victim is there anyone there at all? Will this act be memorialized? Will it be

[76] See M. Doyle, *Striking First: Preemption as Prevention in International Conflict* (2011).

remembered through a rhetorical construction that links it to the "rebirth" of the popular sovereign. Quite the opposite. The drone kills silently, with no announcement, or public visibility. Deniability is more important than responsibility.

A high tech war on terror falls outside the aesthetic of warfare. Is it, then, a matter of law enforcement. That claim is certainly awkward, given the absence of process or transparency. Neither warfare nor law enforcement, the new form of violence is best thought of as the high tech form of a regime of disappearance. States have always had reasons to eliminate those who pose a threat. The practice of assassination goes all the way back. In some cases, doubtless the victims got what they deserved. There has always been a certain fascination with these secret acts of state, but they do not figure in the publicly celebrated narrative of the state. The use of drones signals a zone of exception to law that cannot claim the sovereign warrant. It represents statecraft as the administration of death. Not Clauswitz and not Kant, but Machiavelli is our guide.

The story is the same when we turn to corporate agency. This is the most difficult idea properly to analyze. It resists reason, operating in a world of symbolism, myth and faith. Still, unless we take it seriously, we will fail to understand our politics of popular sovereignty. There is little doubt that the assault of 9/11 was experienced as an assault on the corporate subject that is the popular sovereign. The response immediately invoked sacrifice against an enemy. The corporate agency of this enemy, however, was never fully constructed. Countries were invaded,

but neither Afghanistan nor Iraq was the enemy. Claims of the corporate character of the agency of Al Qaeda and the Taliban were deliberately avoided.[77]

The drone symbolizes a technical response to this ambiguity in the construction of the corporate subject. It puts in place a regime of disappearing the terrorist who is both criminal and enemy, and yet neither. We simply lose our bearings here. When we focus on the threat and the repeated efforts to attack across the border, we respond as if to an enemy. When we deny corporate agency, and target identifiable subjects, we respond as if to a criminal. We want to know what the target did to deserve this fate. That is a question asked of the criminal, not the enemy. Assassination, however, is not a tool of law enforcement. We can try to apply IHL, making arguments about proportionality, discrimination, and necessity.[78] But IHL assumes a faceless combatant. It is a regime policing the boundaries of corporate agency. It has, for this reason, traditionally had a problem with targeted assassination of individuals.[79] To send the assassin borders on perfidy. Uncomfortable with IHL, we see efforts to make the administrative process of target selection more robust.[80] This is a miming of criminal procedure, but without taking on its full burden. We are using the tools at hand to accomplish ends in view, but we no longer know how to think about what we are doing.

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[77] We increasingly confront a reciprocal set of problems with respect to our own conduct. Substantial aspects of the military effort are now performed by individuals working for private corporations – quite the opposite of the corporate body of the sovereign. But see M. Taussig, "Outsourcing Sacrifice: the Labor of Private Military Contractors," 21 Yale J.L. & Humanities 103 (2009).

[78] See Vogel, supra note ___.

[79] See note ___ above.

[80] Koh, supra note ___; see also Barak opinion.

We find similar ambiguities when we consider the ethos of reciprocity that characterizes warfare. Our new forms of surveillance and attack respond to the asymmetry created by the suicide bomber who attacks civilian targets. Replacing the human by the technological, we too have claimed the capacity to target anyone, anywhere, at any time. Through new forms of intelligence gathering, we seek an omniscient, artificial intelligence that can be used to target in real time. By bringing death from nowhere, the drone denies the terrorist access to public acknowledgment of his death as a sacrifice. Thus, the technological promise of the drone is that of ending reciprocity.

To believe in this promise of asymmetry is to move beyond warfare. This is just what we have been seeing, as the deployment of drones is held to a standard of no collateral damage and no false positives. These are not the measure of warfare, but of law. If the operator of the drone exists in a world apart from risk and sacrifice, what is he doing? Administering death? If he becomes the paradigmatic actor in the war on terror, this is no longer a war. Yet, it is not law enforcement. Can we imagine the prosecution of a drone operator for failing to meet these standards of care? Would such a prosecution be for violation of the laws of war, of human rights, or due process?

Conclusion:

There is a banal question that the United States often faces with respect to military deployments around the world. Who, we are asked, made you the policeman to the world? The answer is no one. Communities should be free to make their law for themselves and to struggle with issues of enforcement. The history of nations is not a story of progress, but of struggle. If we believe that national politics is of value, then it is their struggle. We are remarkably obtuse to

the lessons of our own history, if we fail to recognize this. What if Britain, prior to the Civil War, had invaded the United States in order to end the practice of slavery? Despite the justice of the end, would the nation have united in resistance? As I argued above, every war can become one of self-defense. Of course, as with any principle, there are exceptions. Nevertheless, our own practices suggest how narrow they are.[81]

Acknowledging that we are not the world's policeman, however, does not answer the question of whether we can or should deploy violence abroad. The United States has been more than willing to go to war against its enemies. Indeed, America has been at war or preparing for war for most of the last 100 years. War is not to be explained in terms of justice – the end of law – but in terms of existence. It is the response to the perception of an existential challenge to the popular sovereign. As long as such threats are imagined, war will shape our politics.

War and law enforcement are not just formal categories. They refer to structures of the political imaginary before they refer to structures of law. I have tried to delineate the basic categories through which this framing takes place: the aesthetics of war, the subjectivity of the combatant, and the ethos of war. Together, these elements produce a picture of what war is, what it is about, and what norms should govern it. Today, however, we are in an uncertain time. The old pattern of war between sovereign states is breaking apart in the face of new threats. The different elements no longer exist in relationships of mutual support.

The balance among the technology of violence, the politics of war, and our normative understanding of the character of the practice no longer holds. Political violence is no longer between states with roughly symmetrical capacities to injure each other; violence no longer

[81] See Walzer, supra note _____ on the limits of intervention.

occurs on a battlefield between masses of faceless combatants; and those involved no longer seem morally innocent. The drone is both a symbol and a part of the dynamic destruction of what had been a stable imaginative structure. It captures all of these changes: the enemy is not a state, the target is not innocent, the engagement occurs in a normalized time and space, and there is no reciprocity of risk. We can call this situation "war," but it is no longer clear exactly what that means.

If terrorism is with us to stay, we are going to have to have to move beyond criminal or enemy. The confrontation with terror will evolve its own norms, borrowing from the traditional categories of both law enforcement and war. We will need to imagine violence organized around forms of administrative rationality. This is something we have been reluctant to do, given the history of administrative death in the 20th century. Perhaps this time the need will make us more responsive to international institutions than our practice of sacrifice of the corporate body. We simply don't know. We cannot know, for it is not up to us alone. The terrorist who is presently neither criminal nor enemy will have a good deal to say about this.