
Imagining Warfare

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Abstract

War and law enforcement refer to structures of the political imaginary before they refer to legal norms. In this article, I delineate the basic categories through which this framing of political violence takes place: the aesthetics of war, the subjectivity of the combatant, and the ethos of battle. Together, these elements produce a picture of what war is, what it is about, and what sort of rules should govern it. Today, however, the different elements no longer exist in relationships of mutual support. Political violence is no longer between states with roughly symmetrical capacities to injure each other; violence no longer occurs on a battlefield between masses of uniformed 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 engagement occurs in a normalized time and space, the enemy is not a state, the target is not innocent, and there is no reciprocity of risk. We can call this situation 'war', but it is no longer clear exactly what that means. The use of drones signals a zone of exception to law that cannot claim the sovereign warrant of war. It represents statecraft as the administration of death. Neither warfare nor law enforcement, this new form of violence is best thought of as the high-tech form of a regime of disappearance. Neither Clausewitz nor Kant, but Machiavelli is our guide in this new war on terror.

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 to 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

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¹ See M. Ignatieff, *Virtual War: Kosovo and Beyond* (2000), at 164–176; P.W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (2009).

to a place that no longer looks like war. Uniformed troops do not confront each other on a defined battlefield with each side executing a strategy under the control of an established hierarchy of command. We do no better if we try to think of this contemporary use of state violence as a form of law enforcement. There is neither judge nor jury; there is no legal process prior to the application of force. Without a third category, we borrow in an *ad hoc* manner: sometimes the target appears as the enemy, sometimes as the criminal.

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. The drone does these things better, combining accurate targeting capability with real-time intelligence. Its supporters argue that it targets with minimal collateral damage, making it particularly useful in urban and residential areas. For many, the drone promises to be the technological 'game changer' that can produce an insurmountable, asymmetrical advantage: the capacity to kill literally anywhere and at any time without exposure to risk.²

This new, high-tech weaponry disrupts our traditional expectations about warfare in at least three dimensions. First, gone are long-established ideas about the place or time of combat. Secondly, gone is the traditional idea of the combatant. The drone targets a particular individual. He is targeted for what he has done or is planning to do, not for his status as a member of an organized military. He may be targeted while engaging in the most ordinary activities of private life; the drone is opportunistic, waiting for the 'right moment'. A person treated in this way is the object of a decision to eliminate him. Thirdly, gone is an idea of combat as reciprocal risk. The drone is the technological equivalent of the assassin; it does the assassin's work but without the risk of personal presence.³ The drone 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. This does not necessarily mean that he fails to exercise due care.⁴ Careful as he may be, we are not certain how to understand what it is that he is doing. Is he killing an enemy or executing a criminal?

² CIA Director Leon Panetta has described the drone as 'the only game in town'. Cited in Vogel, 'Drone Warfare and the Law of Armed Conflict', 39 *Denver J Int'l L & Policy* (2011) 101, at 104.

³ If the drone operates in place of the assassin, it is worth remembering that assassination has had a troubled political and legal history. In the law of armed conflict, assassination has often been considered 'treacherous', bringing it under the prohibition of the Hague Convention IV: Convention Respecting the Laws and Customs of War on Land (Hague IV), Annex, Art. 23(b), 18 Oct. 1907. The US has operated under an executive order prohibiting assassination since 1976: Exec. Order No. 11,905, para. 5(g), 3 CFR 90 (1977) followed by Exec. Order No. 12,333, para. 2.11, 3 CFR 200 (1981). In an address to the American Society of International Law, Harold Koh, State Department Legal Advisor, specifically denied the charge that American targeting policy amounted to 'assassinations': Koh, Legal Adviser, US Dep't of State, Keynote Speech at the Annual Meeting of the American Society of International Law, 'The Obama Administration and International Law' (24 Mar. 2010), available at: www.state.gov/s/l/releases/remarks/139119.htm.

⁴ Philip Alston, former Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, has suggested that drone operators are at risk of developing a 'Playstation' attitude towards killing: 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Study on Targeted Killings', Human Rights Council, UN Doc A/HRC/14/24/Add. 6 (28 May 2010), at para. 84.

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? Finally, we can call the third category the internal morality of combat. Traditionally, combat established a relationship of reciprocal risk – killing was linked to a willingness to be killed. Does the combatant's privilege of killing without legal liability depend upon some such reciprocity?

At issue in these three categories are the where and when, the who, and the ethos of political violence. These categories served to locate us in a common world of meaning.⁵ Responding to these categories in one way located us in a world of warfare; answering them in another way located us in a world of law enforcement. While each has been its own world, that may no longer be true of contemporary conflicts. One consequence is that we do not know what body of law to apply: international humanitarian law (IHL) 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 out 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.

1 The Modern Frame of Political Violence

Criminal or enemy have literally made a world of difference. Entire bodies of law, substantive and procedural, turn on this distinction. More importantly, our understanding of ourselves – who we are and what we are doing – continues to turn on it.⁶ 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 checklist or single characteristic by which we can determine whether the object of our violence is the criminal or the enemy. We are long past the time when the declaration of war might have marked the difference.⁷ We cannot even confidently rely on the presence of the military – our own or that of another state – to tell us that we confront the enemy.⁸

⁵ On the general idea that a legal order should be investigated as a common world of meaning see P.W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (1999).

⁶ See Kahn, 'Criminal and Enemy in the Political Imagination', 99 *Yale Rev* (2011) 148.

⁷ The US has not formally declared war since World War II. Were we at war with Libya? Was the attack on Osama bin Laden an act of war against Pakistan? How would we answer these questions?

⁸ Marking this distinction through the instrument of enforcement was the strategy behind the Posse Comitatus Act, 18 USC § 1385 (2010). Today, of course, the traditional roles of the armed forces are often carried out by private contractors or non-military agencies – e.g., the CIA. On the other hand, the military often takes up responsibility for policing, particularly in 'post-conflict' situations.

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. The distinction rests on a political decision – some might say *the* political decision.⁹ A government that sees criminals where the populace sees the enemy will be judged ineffective or weak. A government that sees enemies where the populace sees criminals will be judged illegitimate or 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’.¹⁰ Those elements range across the three categories of aesthetics, subjectivity, and ethos. All of these factors are related to each other through habits of thought and perception. Thus, a change in any one factor can lead to a different weighting of the others. Moreover, all of them are contestable, for we deal here with matters of interpretation. Change is to be expected: where we once saw an enemy, we may come to see a criminal – and vice versa.

Max Weber can help us to begin to frame the inquiry as one that juxtaposes law against 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.¹¹ 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 a monopoly on violence, individuals and groups may be stronger or weaker, they may win or lose over some period of time, but they constantly confront explicit and implicit threats of violence from others.

Hobbes believed that 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. Theorists take different views on the nature of the sovereign – one or many – and of the specification of citizens’ rights and responsibilities. With respect to violence, however, the operative contract is always the same: every legitimate use of violence must be grounded, 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 defence (war) and punishment (law).

The ideal contents of the social contract, whatever they may be, do not tell us who the parties are to the contract. The contract does not define its own reach. Weber,

⁹ G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. D. Heller-Roazen, 1998); C. Schmitt, *The Concept of the Political* (trans. G. Schwab, 1996), at 26.

¹⁰ C. Geertz, *The Interpretation of Cultures* (1973), at 5.

¹¹ Weber, ‘Politics as a Vocation’, in H.H. Gerth and C.W. Mills (eds), *From Max Weber: Essays in Sociology* (1991).

accordingly, 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. The ethos of the border is always potentially that of the state of nature, for it is here, where communities meet, that 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 a 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. It imagines a social contract for mankind. 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 to the descendants of Abraham. Every state combines both the universal and the particular, norms and narrative.

The narrative is often an account of how the border has been wrested from other contestants; it always includes a sub-narrative of defence of the border against threats. The border is represented as coming into being through sacrificial acts; it is never just a matter of geography. There was no world conference at which geographical territories were assigned through a neutral process. There is no abstract drawing of borders according to some principle of justice. 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. A state that will no longer assert power to defend its borders is unlikely to continue as a state. If it were wholly indifferent to the distinction between itself and other states, we would suspect some sort of political pathology – for example, the border as a remnant of a dying or dead colonial regime.

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 towards capturing the basic structure of the social imaginary of the modern state.¹³ On the one hand,

¹² Hobbes, e.g., says, '[W]hen 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* (ed. Macpherson, 1968) (1651), at 83.

¹³ On the general concept of the social imaginary see C. Taylor, *Modern Social Imaginaries* (2003).

the state's internal normative order is to be a product of reason.¹⁴ 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 claim 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. Legitimate 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.¹⁵ Similarly, the geography of the modern state displaced a sacral idea of the King's body.¹⁶ 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 Christology 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 in the cover picture of *The Leviathan*. By the time we get to the French Revolution, we find that mapping the state is as important a project as drafting a constitution.¹⁷ Both map and constitution are representations. When we ask what they represent, the answer in both cases is the popular sovereign. This relationship of representation to identity provides the fundamental structure of the modern political imagination.

Unless we keep both dimensions – representation and identity – 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

¹⁴ J. Rawls, *A Theory of Justice* (1981), at 11 ('[W]e are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established').

¹⁵ See M. Gillespie, *The Theological Origins of Modernity* (2008); M. Lilla, *The Stillborn God: Religion, Politics, and the Modern West* (2007).

¹⁶ See E. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (1957); L. Marin, *Portrait of the King* (trans. Houle, 1988), at 12–15.

¹⁷ See K. Adler, *The Measure of All Things: The Seven-Year Odyssey and Hidden Error that Transformed the World* (2002).

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 being willing to kill and be killed. 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.

The political imagination in the modern state continually negotiates these basic categories of law and sovereignty.¹⁸ 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: 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.¹⁹ That pairing, however, is no more basic than any of the others, including criminal and enemy.

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 military. Legally, we distinguish the criminal from the enemy. The organizing thought behind the distinction is that criminals are to be punished for their violation of law, while enemies are to be killed as threats to the sovereign.

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.²⁰ Even when he is taken prisoner, he is detained, 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. The criminal is protected by a web of legal procedures that do not extend to the enemy, who may be killed or captured.²¹ These procedures, by extending rights, recognize the personhood of the criminal.²² The criminal 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. His status determines all that we need to know of him. He is figuratively, if not literally, outside the jurisdiction. The courts are

¹⁸ See P.W. Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (2008), at ch. 5.

¹⁹ Schmitt, *supra* note 9.

²⁰ International humanitarian law (IHL) seeks to limit the effects of armed conflict by protecting certain classes of persons and restricting the means and methods of warfare. But the very formulation of these restrictions accepts the destructive character of war.

²¹ Of course, the enemy can become a criminal as well, in which case legal rights do extend to him.

²² Arendt made this point with respect to the political advantage of the criminal over the stateless refugee in Europe before World War II: H. Arendt, *The Origins of Totalitarianism* (1994) (1951), at 286 ('[s]ince [the stateless person] was the anomaly for whom the general law did not provide, it was better for him to become an anomaly for which it did provide, that of the criminal. The best criterion by which to decide whether someone has been forced outside the pale of the law is to ask if he would benefit by committing a crime. . . . As a criminal even a stateless person will not be treated worse than any other criminal, that is, he will be treated like everybody else. Only as an offender against the law can he gain protection from it').

not open to him, because he makes no claim of legal right.²³ These basic categories are subject to a number of exceptions. The concept of 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 over 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. Conversely, a state that no longer makes use of the category enemy, but only that of 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. In such a world, international criminal courts and mechanisms of law enforcement would step into the place of national armies. A world without criminals, on the other hand, would be Hobbes's state of nature in which everyone is potentially an enemy.

Criminal and enemy both destroy property and life. The meaning of the destructive 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.²⁴ We still hear religious 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 recent imaginative shift from enemies to criminals fits within a vision of the development of public international law as a project seeking the juridification of international relations more generally. This project moved from a late nineteenth-century idea of peace through law (states would be bound to each other through a legal regime of commerce and communication)²⁵ to a mid-20th century idea of peace as a requirement of law (a legal prohibition on state use of force),²⁶ to a late 20th century idea of individual accountability under a global legal regime (criminal prosecution of political leaders who deploy force).²⁷ Legal academics, in particular, read the movement

²³ *Boumediene v. Bush*, 553 US 723 (2008), does not challenge this basic point. The cases from Guantanamo arise from the question whether a detainee is properly considered an enemy.

²⁴ See Kahn, *supra* note 18, at ch. 1; E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985), at 29–30.

²⁵ E.g., Hague Convention for the Pacific Settlement of International Disputes, 29 July 1989, 32 Stat. 1779; Universal Postal Convention, 9 Oct. 1874, 19 Stat. 577.

²⁶ See Kellogg-Briand Pact, 27 Aug. 1928, 46 Stat. 2343, 94 LNTS 57; UN Charter, Art. 2, para. 4.

²⁷ On this view, the Rome Statute represents the endpoint of a process that began at Nuremberg and evolved through a series of *ad hoc* tribunals.

from the League to the Charter to the International Criminal Court 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.²⁸ 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 corpus jurisdiction to Guantanamo – despite the Supreme Court’s repeated decisions.²⁹ Similarly, there has been little political support for joining the International Criminal Court, and virtually no support for assertions of universal, criminal jurisdiction. There remains a deep belief that there are enemies and a deep fear of attack. Sovereignty, in short, remains a vibrant concept.

That Americans continue to hold on to the distinction of enemies from criminals does not mean that the categories are easy to apply or uncontested. Just the opposite. Violent acts do not come with labels. Much of the contentious character of the ‘war on terror’ is a consequence of this difficulty of categorization: enemy or criminal? The idea of the enemy remains, but the concept is difficult to apply when war is no longer between organized state militaries. Our controversies over the use of drones arise out of this difficulty: are they a weapon of war or an instrument of law enforcement?³⁰

2 The Aesthetics of War

In Schmitt’s terms, war is the exception.³¹ 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’.³² 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 under

²⁸ The concern over ‘lawfare’ (i.e., subjugating warfare to international law) is one expression of this suspicion. See Charles J. Dunlap, Jr., Colonel, US Air Force, ‘Law and Military Interventions: Preserving Humanitarian Values in the 21st Century Conflicts’, Address at the Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, 29 Nov. 2001.

²⁹ *Boumediene v. Bush*, 553 US 723 (2008) (holding that enemy combatants detained at Guantanamo were entitled to habeas corpus and that the Military Commissions Act was an unconstitutional suspension of that right); *Hamdan v. Rumsfeld*, 548 US 557 (2006) (holding that military commissions set up by the Bush Administration to try enemy combatants detained at Guantanamo violated the Uniform Code of Military Justice and Geneva Conventions); *Hamdi v. Rumsfeld*, 542 US 507 (2004) (reversing the dismissal of a habeas corpus petition by a US citizen detained as an enemy combatant, holding that due process required that the petitioner have a meaningful opportunity to challenge his enemy combatant status).

³⁰ For a summary of these controversies see Vogel, *supra* note 2.

³¹ See C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (trans. G. Schwab, 1985).

³² *In re Debs*, 158 US 564, 597 (1895).

conditions of war. The state can conscript without compensation and it can destroy without due process. Conscription is not slavery, and destruction is not taking.

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 a shared perception. The people decide for the criminal or 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.

A 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 violent contestation: 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.³³ War between states is a relationship between territorial regimes, not between property owners. Similarly, when a terrorist attacks a building, it is not the ownership interest that matters, but 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.³⁴

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

³³ He may not even have a right 'to defend' his property from transgression.

³⁴ 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 generally protected under a regime of necessity rather than one of private right and market value: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 50, 12 Aug. 1949, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Art. 51, 12 Aug. 1949, 75 UNTS 85 (hereinafter Geneva Convention III); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Arts 53, 147, 12 Aug. 1949, 75 UNTS 287. Art. 51 of Geneva Convention I, Art. 51 of Geneva Convention II, and Art. 147 of Geneva Convention IV describe the 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' as a grave breach. Art. 53 of Geneva Convention IV stipulates that '[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations'.

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 imagining 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.³⁵ Territory, unlike property, is not subject to a comparative valuation.³⁶

Borders represent the integrity of the state. Borders in the pre-modern regime tended to be frontiers, where authority was unclear and contested.³⁷ 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 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.³⁸

The modern configuration of an autochthonous, territorial politics of sovereignty begins in the revolutions of the 18th century. Revolutionaries proclaim universal rights, but, as the French Declaration of the Rights of Man tellingly expressed it, they are 'rights of man and of the citizen'.³⁹ 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.⁴⁰ This modern connection of

³⁵ 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.

³⁶ One way to think about the Israeli problem of the settlements is that the state has created property rights before it has established territory. Palestinians, who contest the territorial claim, are not likely to be moved by property claims no matter how much value the owners place on their homes.

³⁷ See S. Ellis and R. Esser (eds), *Introduction to Frontiers and the Writing of History, 1500–1850* (2006).

³⁸ The political contestation over the Muslim presence in Europe today is following along these lines, placing legal and existential claims in tension with one another.

³⁹ 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.

⁴⁰ George Washington was trained as a surveyor. The French revolutionaries also empowered the geographers. See Adler, *supra* note 17.

borders to popular sovereignty reached its fullest expression in the post-war decolonization movement. *Uti possidetis* was the governing territorial principle, even though colonial borders failed to map preexisting ethnic communities. Nationhood could follow upon statehood, because the popular sovereign brought itself into being by its revolutionary act of self-expression. This actor, the popular sovereign, has become everyone living within the border.⁴¹ 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.⁴²

This is the territorial regime enshrined in the UN Charter. Every state has the right to defend itself against armed attack.⁴³ 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-defence 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 have the right freely to cross borders.⁴⁴ 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 a world of perfectly respected borders would be one that '[saves] succeeding generations from the scourge of war'. It follows that no state can shift its borders – annexe territory – through the use of force, regardless of how just the change might be. 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.⁴⁵

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 enemy? That Iraqis are behaving badly

⁴¹ More precisely, this is the ideal implicit 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.

⁴² There is an accompanying doctrine of 'abjection' as the colonialists are expelled across the border.

⁴³ See UN Charter, Art. 51.

⁴⁴ 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 immigration.

⁴⁵ See, e.g., E. Luck, *UN Security Council: Practice and Promise* (2006), at 37 (describing modern peacekeeping as Ch. VI 1/2 operations, embracing elements of Chs VI and VII).

toward each other is not a ground for Americans to sacrifice themselves.⁴⁶ They might be criminals, but they would not be enemies.

Of course, 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 terrorist seems equally well attuned to the symbolic geography of the modern nation-state. Thus, the fascination with the aeroplane 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.

B 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 defence. Together, these present the dual temporality of the modern state – the progress of law and the presence of sovereignty.

A legal claim is always bound to a past act.⁴⁷ 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 all-things-considered judgement about what would be best under the circumstances – a discretionary judgement. It does mean that the legal aspects of that decision lie 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.⁴⁸

The American idea of the rule of law offers a continuous past up to a singular point of discontinuity, which is the Constitution.⁴⁹ 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 '*Grundnorm*'.⁵⁰ Equally, the rule of law envisages a continuous future up to a similar

⁴⁶ 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. The interplay of the geography of enemy and of criminal in Europe tends toward a story of interaction between a community of Muslim citizens and Islamic radicalization from abroad. In US history, this same imaginative construction appeared with the fear of the Communist Party as a 'Fifth Column' in the post-war years. See Investigation of Un-American Propaganda Activities in the United States: Hearing on H.R. 1884 and H.R. 2122 Before the H. Comm. on Un-American Activities, 80th Cong. (1947) (statement of J. Edgar Hoover, Director of the FBI).

⁴⁷ See R. Dworkin, *Law's Empire* (1986), at 228–238 (comparing common law jurisprudence to a chain novel); P.W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (1997), at ch. 4.

⁴⁸ Consider the traditional common law distinction between *malum in se* and *malum prohibitum*.

⁴⁹ On the complex way in which constitutional amendments fit within this temporal scheme see Kahn, *supra* note 47, at 62–63.

⁵⁰ H. Kelsen, *Introduction to the Problems of Legal Theory* (trans. Paulson and Paulson, 1992), at 25–30.

point of discontinuity. At that point, the sovereign people will reappear. Within this temporal span, punctuated by discontinuous appearances of the popular sovereign, the law ‘unfolds’.⁵¹ Legal continuity, accordingly, sits within a larger temporal narrative that is not continuous but cyclical: the periodic reappearance of the popular sovereign. This distinction is a modern replay of a far older relationship of profane to sacred time.⁵²

The popular sovereign is not constrained by a before: its appearance always marks a possible, new beginning. This lack of constraint is imagined to work in a double sense. First, the appearance of the popular sovereign is not determined by any causes: we cannot anticipate the event or events that will bring forth the people. The popular sovereign is imagined as entirely free, which means that revolution is always unpredictable.⁵³ Secondly, the popular sovereign acts with the same authority whenever it appears; it acts outside any legal limits. Outside causal sequence and legal limits, the popular sovereign knows only one temporal mode: the present. Whenever it appears, it is fully vested in the present.

The linear time of law makes constant, if implicit, reference to the cyclical time of the popular sovereign. Law is a representation in time of what is outside time. Legal representation, however, is not our only point of access to the sacred time of sovereign presence. The paradigmatic point of access is the sacrificial act. Revolution is the founding sacrificial act, the giving up of finite concerns and even possibly of life itself for the realization of sovereign presence.⁵⁴ Sacrifice does not represent; it makes present. Every subsequent sacrifice is a sort of re-creation 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 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 sacrificial events are memorialized; they are remembered as points at which the finite gave way to the transcendent. The memorial is ‘for all time’.

If law is founded on sacrifice, then law cannot account for its own origin. For that, we need a narrative of foundations that remains constant through time, even as people and laws change. That narrative speaks of sacrifice as making present the popular

⁵¹ This bounded, temporal character of law stands in contrast with a common law understanding of legal temporality as extending to ‘time immemorial’. On the dual structures of political time generally see Kahn, *supra* note 47, at 69–74.

⁵² See M. Eliade, *The Sacred and the Profane: The Nature of Religion* (trans. W. Trask, 1959), at 88–89.

⁵³ Recently, the Tunisian revolution was ‘set off’, but hardly caused, by a rather typical instance of police abuse of a street peddler. No one before the event could have distinguished this act, as opposed to countless similar acts, as the cause of revolution. No one can use it to make claims of future cause and effect relationships.

⁵⁴ 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’.

sovereign. Those against whom 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.⁵⁵ We get there when we respond to a threat by accepting the possibility of sacrifice. The sovereign 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.⁵⁶ Instead of heroes, they were victims.

This account of sovereign presence revealing itself in cyclical time clarifies a number of characteristics of the enemy. First, we cannot identify the enemy by law. The enemy appears only when we stand within the exception of sovereign presence. Secondly, the enemy has no before or after. The enemy has the same temporal character as the sovereign. Once the temporal period of exception ends, we can no longer perceive the enemy. Thus, enemies can 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 after World War II. Thirdly, 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.⁵⁷ In the face of a perceived existential threat, all particularity disappears.⁵⁸ Fourthly, and more speculatively, one has to wonder whether the eschatological threat of mutual assured destruction is not somehow rooted in this idea of sacred time. The completely free act can be represented as the wholeness of a new beginning or the absolute character of an apocalyptic end. 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 was penetration of the 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 these citizens giving their lives freely: they called home; they announced their love to family members; they jumped. 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 were 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 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

⁵⁵ Schmitt’s quantitative idea of the enemy is inadequate for this reason. See P.W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (2011), at 11.

⁵⁶ Parallel to our description of an unconstitutional law as one that is only ‘under colour of law’, we can speak of a non-sacrificial war as one that is only ‘under colour of war’.

⁵⁷ This explains the asymmetrical character of the memorial: we memorialize sacrifice, but exclude the enemy from that memory. We do not want to perpetuate a memory of enmity towards a particular other.

⁵⁸ This may be a modern iteration of the idea of the enemy as Satan. See N. Forsyth, *The Old Enemy: Satan and the Combat Myth* (1987) (a literary history discussing the narrative role of Satan as enemy incarnate).

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.

3 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 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.⁵⁹ 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 domain of which is the ordinary and everyday. The very point of law is to normalize, which is why sacrifice is always beyond 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 role and command hierarchy: his role is to follow orders, except under extraordinary circumstances.⁶⁰ 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 defence to head of state immunity. The paradox, however, was well founded; 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 moral accounting for war was the suffering of the nation itself – not a subsequent legal response to individual actors.

The citizen combatant acts not just under the legal authority of the state or as a representative of the state. This would be equally true of a mercenary. That legal conception fails to capture the citizen's political identity. We need, in addition, to recognize 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. That is what is at stake when we imagine the killing of war as sacrifice.

The relationship here is neither 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. Through him, we see the nation as a single corporate

⁵⁹ See Geneva Convention III, Art. 4 (enumerating the qualifications for designating a person a lawful combatant).

⁶⁰ Disobedience is excused only when an order is manifestly illegal.

subject. This does not make an individual's death less tragic or killing less horrendous for those who love this person. 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 in war between modern states. 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 do not 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 World War II. 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, which rejects all guilt by association. Neither, however, is corporate character adequately captured by speaking of the 'status' of the combatant. Status is a way of distinguishing combatants from non-combatants, not a way of capturing the nature of political identity at stake in the idea of the enemy. The former certainly has legal importance, but it does not exhaust the political meaning at stake in the relationship of citizen to popular sovereign.

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 is the paradigm – but the phenomenon has broader roots.⁶¹ The erotic character of the political community is expressed in this notion of corporate identity.⁶² 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 sense of intergenerational responsibility that informs much of our political ethos: the nation is responsible for its past wrongs just as it is 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 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 this

⁶¹ At the yearly Passover Service, Jews recite that each was present with Moses when God led the Jews out of Egypt. We might also think of Artistophanes's conception of Love, in which two persons come together to become one, in Plato's *Symposium*. See P.W. Kahn, *Out of Eden: Adam and Eve and the Problem of Evil* (2007), at 107–108.

⁶² See P.W. Kahn, *Putting Liberalism in its Place* (2008), at ch. 6; see also S. Freud, *Civilization and its Discontents* (trans. J. Strachey, 2005) (discussing eros as the source of community).

experience and declare one claim to be true and the other false. We make judgements about who we are and how to regard others from within our political practices and beliefs.⁶³ Distinguishing criminals from enemies is one such judgement: the criminal is always an individual; the enemy is not.

Keeping these competing forms of subjectivity in a stable relationship with each other is an endless task of managing the political imagination. In war, whenever the individual breaks into our imaginative field, 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 camaraderie between enemies, as they momentarily recognize that they have much in common and ‘no reason’ to kill each other.⁶⁴ 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.⁶⁵ To the degree that we have trouble seeing such acts as those of the individual, we will have trouble actually deploying criminal law against the alleged offender.

This imaginative figure of corporate personhood helps to explain the extraordinary character of modern warfare. Popular sovereignty unleashes a seemingly limitless potential for mass violence by making every citizen of equal moment within the corporate body. Any citizen can pick up arms and claim to act as the sovereign. He needs no legal warrant. 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 partisan and the guerilla. This is the heroic side of the radical egalitarianism of sovereign violence. A similar, but less heroic, 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 to 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 has been the age of liberalism and nuclear weapons.

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 exists. To understand the existential character of the modern state, we need a political theology of popular sovereignty as corporate agency.⁶⁶

⁶³ See M. Oakeschott, ‘Political Education’, in Oakeschott, *Rationalism in Politics and Other Essays* (2nd edn, 1991), at 43–69.

⁶⁴ One famous example is the Christmas truce of 1914, a series of unofficial ceasefires along the Western Front.

⁶⁵ See Kahn, *supra* note 18, at 83–84 (describing scapegoats as a product of law’s inability to admit to violence committed on behalf of the sovereign).

⁶⁶ On the general shape of a modern political theology see Kahn, *supra* note 55.

Everything we know about political violence in the era of popular sovereignty tells us that it is not easily contained by law – domestic or international. No one gets a pass from revolution or war. Indeed, the fundamental distinction in IHL between combatants and non-combatants 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 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 characteristic forms of warfare of the post-World War II era. Both expose IHL as a project with uncertain democratic roots. It would oppose a law of individual responsibility to a corporate political phenomenon. This problem continues, for the contemporary terrorist attack is a political spectacle of the corporate body. There is nothing personal, nothing about the individual subject, 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. The terrorist attack, thus, falls easily within the imaginative metaphysics of popular sovereignty. It produces a form of democratic suffering that makes little contact with the formal distinction of combatants from non-combatants. The corporate character of the victim creates the politics of memorialization that played out after 9/11: ‘We are all New Yorkers.’

Arguably, a similar construction of corporate subjectivity is at stake in the imagination of the terrorist. This 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.⁶⁷ Of course, the line between suicide and sacrifice is so thin as to be no line at all. For example, an act of suicide set off the recent Tunisian revolution. That act will be remembered as a sacrifice.

Characterizing the terrorist’s 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 the other, and that denial is itself a violent political act. In part, this is an expression of power – an effort to reduce political agency to crime. Equally 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, in the West, 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. With this, we confront a basic paradox of liberalism: to respect individual autonomy can equally be to deny political agency.⁶⁸

⁶⁷ See Agamben, *supra* note 9, at 136–137.

⁶⁸ See Kahn, *supra* note 62, at ch. 4 (discussing the paradoxes of liberalism).

We are left, therefore, with a profoundly ambiguous situation. The terrorist acts in the space and time of the enemy; he is resisted by the corporate agency of the nation. Nevertheless, we construct his agency as that of an individual: suicide, not sacrifice. We resist construction of a corporate enemy, even as we construct a corporate subject as the victim. Sometimes, we try to capture the collective nature of terrorism with the legal idea of conspiracy.⁶⁹ We construct a group effort – that of Al Qaeda, for example – but not a corporate subject. We are left wondering if we can be at war with a criminal. This asymmetry leads to another.

4 The Ethos of Killing: Symmetrical or Asymmetrical?

Of all the things that organized communities do, going to war is surely the most difficult to understand. Familiarity does not make the task of understanding any easier. War depends upon a willingness of individuals to imagine themselves performing the two most difficult acts: killing and being killed.⁷⁰ The close and intimate relationship between these two acts suggests that we should think of warfare as reciprocal acts of self-sacrifice.⁷¹ Each side believes it must kill, just as each is willing to die. Figuratively, it is the willingness to die that creates the licence to kill; formally, the reciprocity of threat grounds the doctrine of the combatant's privilege; politically, every war is justified as one of self-defence on both sides.

The internal ethos of modern warfare arises out of the imagined reciprocal imposition of sacrificial risk.⁷² Where reciprocity ends, humanitarian concerns arise. Thus, under IHL, combatants can surrender. Similarly, they are protected when they find themselves 'hors de combat' – for example, from injury or shipwreck. Of course, the normative idea of reciprocity is only a rough approximation, 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.⁷³

The ethos of reciprocity operates independently of the ends of war: *jus in bello* is independent of *jus ad bellum*. The justice or injustice of the political ends of war 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 defending. Indeed, once war begins – regardless of the reasons for its beginning – it may rapidly become a war of self-defence. Because every war can tend toward the extreme issue

⁶⁹ We encounter a similar problem in the international criminal law context, which has developed a doctrine of command responsibility or hierarchical accountability to hold individuals responsible for mass atrocities. See, e.g. Damaska, 'The Shadow Side of Command Responsibility,' 49 *Am J Comparative L* (2001) 455.

⁷⁰ See D. Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (1995).

⁷¹ See Kahn, *supra* note 62, at 230–241.

⁷² See M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd edn, 2000), at 34–43; Kahn, 'The Paradox of Riskless Warfare', 22 *Phil & Public Policy Q* (2002) 2.

⁷³ Gabriella Blum challenges the idea of combatant equality, as derived from the imagined reciprocity of threat, in 'The Dispensable Lives of Soldiers,' 2 *J Legal Analysis* (2010) 69.

of life and death for the state, every war can tend towards 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.⁷⁴

The ethos of reciprocity is given formal expression in IHL's rule that 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 considerably deeper than IHL's formal expression of its limits. Thus, a person who targets the military may fall outside 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.⁷⁵ 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. Of course, he does not act within the range of the combatant's privilege set forth in IHL, for his idea of the enemy is not limited by the formal character of combatants. Nevertheless, he too acts out the basic idea that it is the willingness to die that creates the licence 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. We might think of his act as one of self-memorialization.

This ethos of reciprocal sacrifice always stands in tension with the tactics of warfare. Tactically, each side seeks to transcend any effective reciprocity in the application of force. Wars cease when one side stands in an insurmountable, asymmetrical relationship to the other. At that point, the victor can inflict injury without suffering a symmetrical threat. War proceeds tactically as an effort to create and exploit such asymmetries. In the absence of any possibility of creating such an asymmetry, wars do not begin. We describe this as a balance of power. Similarly, if the asymmetry is clear and overwhelming from the start, wars do not 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 signalled a shift from quantity to quality. The immediate post-war period had been characterized by dramatic, quantitative increases in the destructive power of armaments. This was most evident in the rise of nuclear and then thermonuclear weapons. The ability of these weapons to achieve an insurmountable asymmetry, in at least some circumstances, had been demonstrated at Hiroshima and Nagasaki. The use of nuclear weapons ended the war without any further, significant loss of American lives. Those

⁷⁴ Clausewitz theorized the tendency of force to move to an extreme, but did not think law could be much of a moderating force: C. Clausewitz, *On War* (trans. J.J. Graham, 2009), at 13–15.

⁷⁵ Examples of this ambiguity abound, such as spies, members of the French Resistance during World War II, and the military wing of the African National Congress in South Africa.

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.⁷⁶

One response to the reappearance of symmetry – the balance of power – 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 advantage was no longer possible. This required advances in weapons design, delivery accuracy, and useful intelligence. Dramatic improvements in targeting capacities brought about the possibility of shifting focus from population centres to defence 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 continue to link them to nuclear weapons, although thousands of tactical nuclear weapons were produced and deployed.⁷⁷ Indeed, the promise was that quality could effectively displace quantity: nuclear destruction would no longer be necessary. These new, smart weapons were expensive; this arms race was not for everyone. By the start of the millennium, the defence budget of the United States amounted to nearly half of all global expenditures on defence.⁷⁸

Contemporary forms of political violence are demonstrating the nature of tactical competition for asymmetry in light of the revolution in military technology. We see again an 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 advantages of invisibility, fluidity, and surprise against what appear as the slow-moving, vulnerable institutions of the modern state. Appearing as if from nowhere, the suicide bomber is a low-tech response to a modern military. The tactical asymmetry achieved by the terrorist has been met by the high-tech war of the West. The effort of the United States has been first to secure the border and then to accomplish a kind of regime of disappearance. In response to the threatened spectacle of sacrifice, the would-be terrorist is simply to be 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 do not handicap to create the conditions of fairness. Nevertheless, an innovation, technological or otherwise, that promises riskless warfare threatens the ethos of reciprocity. Without the

⁷⁶ See J. Schell, *The Seventh Decade: The New Shape of Nuclear Danger* (2007). Schell also contests the claim that it was nuclear weapons, as opposed to a Soviet threat, that accounted for the rapid end of World War II: *ibid.*, at 29.

⁷⁷ The effort to link qualitative change to nuclear weapons themselves continued as well. See *ibid.*, at 95–96.

⁷⁸ In 2001, military expenditures in the US totalled approximately \$300 billion, or about one-third of global military expenditures. In 2010, military expenditures in the US totalled almost \$700 billion, or about one-half of global military expenditures: Stockholm International Peace Research Institute, *SIPRI Military Expenditure Database* (2011), available at: <http://milexdata.sipri.org/files/?file=SIPRI+milex+data+1988-2010.xls> (containing data covering the military expenditures of 170 countries for the period 1988–2010).

possibility of a reciprocal response, the moral situation changes.⁷⁹ An insurmountable tactical asymmetry takes us beyond the ethos of warfare.⁸⁰ When one side is in a position to enforce a set of norms against the other, the relevant questions become those 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. This is not just a question of what third parties will expect, but of what we demand of ourselves as the imagination of the threat changes form.

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 legally 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 corporate body makes no appearance on either side. Blackstone's formulation of the norm of criminal-law procedure, '[b]etter that ten guilty persons escape than that one innocent suffer', 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 against those who threaten violence. 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 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.

5 Drones at War?

What I have described should be thoroughly familiar, at least to an American reader. I have not attempted to discover something hidden, but rather to expose the character of the social imaginary. That imaginary exists only 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 article, 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 possible only within a shared universe of

⁷⁹ See Kahn, *supra* note 72.

⁸⁰ Of course, a technological innovation cannot be judged in the abstract. A vehicle for long distance delivery of ordinance can operate without risk 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.

meaning. I have offered a sketch of the central elements of the universe of political violence.

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 imagined doubles, we construct law and sovereignty which, in the field of political violence, brings us the criminal and the enemy.

The threat of the enemy is to sovereign existence, not to law. Conversely, the criminal violates the law, but does not pose an existential threat. The threat of the enemy begins with 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, while attempting to negate the other. Out of this confrontation comes an ethos of reciprocity, along with tactics of asymmetrical advantage.

This imaginative construction of the forms of political violence allows us to gain some clarity on the debates over the contemporary war on terror. Illustrative of those debates is the current controversy over 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.⁸¹ It has also been the subject of domestic controversy.⁸² Both domestic and international critics describe the policy choice as a practice of ‘extrajudicial killings’. Of course, war itself is a practice of extrajudicial killings. The deepest issue, then, is whether a war on terror remains a war once the drone becomes ‘the only game in town’.⁸³ We cannot settle that issue by appealing to the categories of law, for the role of law is exactly what is contested. The issue is one of how the imagination frames political violence.

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 starts from such an act of penetration. Just as certainly, there remains a fear of renewed penetration, as anyone who approaches the border understands. Nevertheless, use of the drone is difficult to map onto that fear. Claims that the drone protects the border by ‘taking the war to the terrorist’ are not easy to sustain in the absence of a visible threat. These, however, are exactly the claims that must be made, just as they were made with respect to alleged Iraqi weapons of mass destruction.⁸⁴

⁸¹ See Alston, *supra* note 4.

⁸² See Rise of Drones II: Unmanned Systems and the Future of Warfare: Hearing before the U.S. H. Subcommittee on Nat’l Security & Foreign Aff., 111th Cong. 2 (28 Apr. 2010) (written testimony of Mary Ellen O’Connell, Professor, University of Notre Dame Law School); Anthony D. Romero, Open Letter to President Obama, Comm. on Oversight and Gov’t Reform (28 Apr. 2010). See also *Al Aulqi v. Obama*, 727 F Supp 2d 1 (DDC 2010).

⁸³ ‘U.S. Air Strikes in Pakistan Called “Very Effective”’, *CNN.com* (18 May 2009, 6:48 PM), available at: www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/ (quoting CIA Director Leon Panetta).

⁸⁴ See *supra* note 46 and accompanying text.

The problem could be met by looking to the geography of the battlefield – for example in Afghanistan. That bordered space stands as a sort of microcosm to the larger territory of the nation. Marked by the presence of the flag, it temporarily becomes the space calling forth sacrifice against the possibility of penetration.⁸⁵ But the territorial problem simply reappears here as a controversy over the use of the drone outside the space of the battlefield.

Similarly, the drone is not easily placed within the temporal narrative of the exception, although this cycle of political violence begins with the extraordinary temporality of 9/11 – a date already deeply memorialized in the narrative of popular sovereignty. At the moment of the drone’s use, however, can we see the reappearance of the popular sovereign? Indeed, apart from the victim, is there anyone there at all? Will this act be remembered, let alone memorialized? Quite the opposite. The drone kills silently, with no announcement or public visibility. Deniability is more important than responsibility. Its operator has the anonymity not of the faceless soldier who does his duty in an act of faith, but of the faceless bureaucrat who could be anyone. No one believes that the drone operator should be memorialized in the equivalent of the tomb of the unknown soldier.⁸⁶

The story is the same when we turn to corporate agency. 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 – let alone Yemen or Pakistan. Claims of the corporate character of the agency of radical Islam were deliberately avoided.⁸⁷

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

⁸⁵ This leads as well to the traditional problem of anticipatory self-defence: see M. Doyle, *Striking First: Preemption and Prevention in International Conflict* (ed. Macedo, 2008).

⁸⁶ This facelessness leads philosophical commentators on drones to imagine them as a step towards a fully automated weapon system in which the machine decides who to target: see, e.g., Sparrow, ‘Predators or Plowshares? Arms Control of Robotic Weapons’, *IEEE Tech & Society Mag.*, Spring 2009, at 25.

⁸⁷ See *supra* notes 68–69 and accompanying text. We increasingly confront reciprocal sets 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 Taussig-Rubbo, ‘Outsourcing Sacrifice: the Labor of Private Military Contractors’, 21 *Yale J L & Humanities* (2009) 103.

no collateral damage and no false positives. These are not the measures of warfare, but of law.

We simply lose our bearings in the mismatch between national suffering and response. When we focus on the experience of actual attacks and the continued threat of attack across the border, we respond as if to an enemy. When we deny corporate agency and target identifiable subjects far from the border without exposing ourselves to a reciprocal risk, we respond as if to a criminal. We want to know what the target did to deserve this fate of an extrajudicial killing. That is a question asked of the criminal, not the enemy. We can apply IHL, making arguments about proportionality, discrimination, and necessity.⁸⁸ But these arguments sound self-serving or beside the point, for the regime of IHL assumes a faceless combatant. It is a regime that polices the boundaries of corporate agency, just what is denied here. IHL has, for this reason, traditionally had a problem with targeted assassinations.⁸⁹ To send the assassin borders on perfidy. Uncomfortable with IHL, we see efforts to make the administrative process of target selection more robust.⁹⁰ This is a miming of criminal procedure, but without taking on its full burden.

As a nation, after 9/11, we longed for war: we imagined ourselves going to war. Yet, the methods of response have taken us to a point no longer recognizable as warfare. International lawyers will argue that where the law of armed conflict does not apply, that of human rights does. We have, on this view, only two choices: enemy or criminal. We send the army or the police. Each comes with its own legal regime. That, however, cannot be the end of the matter. Consider the drone operator, who is incapable of fully occupying either world. He kills but he does not live with the risk of sacrifice. He is likely not to be in military uniform, but he is not a law enforcement officer. He is not subject to the supervision of the courts; he does not participate in a criminal legal process. The drone operator is neither combatant nor law enforcer, yet he is a fact around which our norms are going to have to organize themselves – not the other way around. His ambiguous status is the reverse image of that of the terrorist who is neither criminal nor enemy.

There has been some suggestion that we look to the early modern idea of the pirate to understand this in-between state.⁹¹ Pirate and terrorist both occupy a sort of lawless space beyond the border. For the pirate, this was the sea; for the terrorist, it is the territory of failed states.⁹² Like the pirate, we might describe the terrorist as ‘the enemy of mankind’. This, however, was never more than metaphor, for the enemy of all is not the actual enemy of anyone. The metaphor signified only that the pirate was without

⁸⁸ See Koh, *supra* note 3; Vogel, *supra* note 2.

⁸⁹ See *supra* note 3.

⁹⁰ *Ibid.*; see also HCJ 769/02 *The Public Committee Against Torture in Israel et al. v. The Government of Israel et al.* [2006], available at: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM (Isr.) (Barak J.).

⁹¹ See Burgess, Jr., ‘The Dread Pirate Bin Laden,’ *Legal Affairs*, July/August 2005, available at: www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp.

⁹² We cannot imagine the use of a drone in a successful state, for the drone poses exactly the problem of border penetration that always arises when an act of self-defence crosses a border: it is also an act of aggression against the target state.

legal rights.⁹³ He certainly did not step into the place of the enemy state. No declaration of war was required to kill him; the law of armed conflict did not apply. He could be killed, but he was neither criminal nor enemy.

In an era when international legal rights ran only to states, the pirate was easily understood as a person abandoned by his state to the violence of others. He had no more claim of right than the indigenous peoples found, but not recognized, on *terra nullius*. The pirate remained essentially in the state of nature, subject to whoever had the power to eliminate him.⁹⁴ In our era, the idea of a person left without rights because his state has abandoned him is not easily expressed. It is incompatible with international human rights, which do attach directly to the individual. Thus, actual pirates are brought to trial, even as terrorists are killed.

Under a legal order of human rights, there is no longer to be a rights free zone in which states can render pirates, refugees, and the ethnically cleansed non-entities at law. That concept of a subject without rights helped to produce the worst abuses of the 20th century; it is the idea against which the human rights movement has been directed. Can we reopen that lawless space for the terrorist? Surely not on the basis of a metaphor alone.

It is not the metaphor, however, but the conflict between two imaginative constructions that are both necessary, but cannot be simultaneously acknowledged, that will continue to produce the need for a conception of a subject who is without rights. This is exactly what is at stake conceptually in the administration of deadly force through the deployment of drones. Criminal or enemy? Law or sovereignty? We simply cannot resolve the question of where the terrorist belongs. We are left then at precisely the hardest issue: can we construct the rightless terrorist, who is neither criminal nor enemy? Would such a construction be a step back to the world we had before the advent of human rights or would it be a first step into a post-human rights world?

6 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 world's policeman? 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 to win or to lose.

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 that end, would not the nation have united in resistance? Justice is a matter of law, but invasion is a matter of sovereignty. As I argued above, every war, regardless of its immediate ends, tends to become one of

⁹³ See Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 45 *Harvard J Int'l L* (2004) 183, at 235.

⁹⁴ See *ibid.* at note 38, citing James Kent for the proposition that 'every nation has a right to attack and exterminate [pirates]'.

self-defence. Of course, as with any principle, there are exceptions. Nevertheless, our own practices suggest how narrow they are.⁹⁵

Acknowledging that we are not the world's policeman, however, does not answer the question 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 formal norms. 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 battle. Together, these elements produce a picture of what war is, what it is about, and what sort of rules 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.

Political violence is no longer between states with roughly symmetrical capacities to injure each other; violence no longer occurs on a battlefield between masses of uniformed 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 engagement occurs in a normalized time and space, the enemy is not a state, the target is not innocent, and there is no reciprocity of risk. We can call this situation 'war', but it is no longer clear exactly what that means.

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. Neither warfare nor law enforcement, this 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. In some cases, the victims doubtlessly got what they deserved. There has always been a fascination with these secret acts of state, but they do not figure in the publicly celebrated narrative of the state. Neither Clausewitz nor Kant, but Machiavelli is our guide in this new war on terror.

If terrorism is with us to stay – and it looks as if it is – we are going to have to move beyond criminal or enemy. One way to move beyond these categories is simply to stay in the zone of indistinction in which we currently find ourselves. This is a zone in which our responsive act cannot be given voice. The other way forward is to attempt to organize the application of violence around forms of administrative rationality. This is something we have been reluctant to do, given the history of administrative death in the 20th century. But perhaps, step by step, we are working ourselves free of that legacy. If so, the age of human rights may already be passing. History has a way of resisting every claim to have arrived at the 'last utopia'.⁹⁶

⁹⁵ See Walzer, *supra* note 72, at 'Preface to the Third Edition' and ch. 6, on the limits of intervention.

⁹⁶ See S. Moyn, *The Last Utopia: Human Rights in History* (2010).