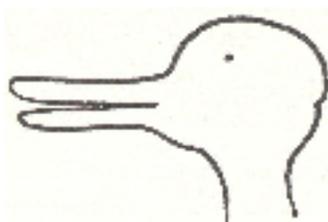


DUCK-RABBITS AND DRONES: LEGAL INDETERMINACY IN THE WAR ON TERROR

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“I shall call the following figure . . . the duck-rabbit. It can be seen as a rabbit’s head, or as a duck’s.”



—Ludwig Wittgenstein, *Philosophical Investigations* (xi)¹

INTRODUCTION	302
I. A VIOLENT RORSCHACH TEST	302
II. DUCK-RABBITS	306
III. HIGH STAKES	308
IV. ALL THE BOUNDARIES . . . WILL BE TOTALLY DESTROYED.....	312
CONCLUSION: LAW’S LIMITS	314

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1. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 194 (G.E.M. Anscombe trans., 3d ed. 1973).

INTRODUCTION

Thirteen years after the 9/11 attacks, we're still going around in circles, unable to find satisfactory answers to even the most basic legal questions. Are U.S. efforts to counter the activities of al Qaeda and its associates subject to the law of armed conflict, or not? Does the answer depend on geography? On the nature and scale of "enemy" activities? Who is the enemy? What is an "associate" of al Qaeda, and which individuals can be detained or targeted, subject to what legal limits?

This Article argues that the law cannot provide answers to any of these questions. In fact, the search for the "correct" legal answer to these questions is not only fruitless, but also counterproductive. It distracts us from the far more important question: in an era in which traditional legal constructs no longer place meaningful limits on a State's use of lethal force, what new constraints are desirable and feasible, and, going forward, how can we embed them in policy and law?

In Part I of this Article, I look back at the weeks and months following the 9/11 attacks and outline the various competing arguments about the how the attacks should, as a legal matter, be characterized. In Part II, I argue that there can be no definitive answer to most of the key "legal" questions raised by the 9/11 attacks, since different ways of conceptualizing the events of 9/11 (and subsequent events) both reflect and trigger entirely different—and to a great extent mutually exclusive—legal frameworks. In Part III, I note that the fact that there is no "correct" legal framework does not mean that the choice of legal frameworks is therefore inconsequential. Far from it: the U.S. government's decision to rely on an armed conflict framework after 9/11 has had far-reaching consequences, raising a host of new and equally unanswerable questions, and thereby dramatically reducing the ability of existing law to act as an effective check on government power. In Part IV, I note that our growing inability to draw reasonably clear lines between "war" and "non-war" has institutional as well as legal consequences. In Part V, the conclusion, I argue that we need to accept that existing law can offer little useful guidance on how the U.S. should respond to terrorism. The questions we face are currently questions of policy, not law, though how we answer those policy questions should, ultimately, lead us to create new law.

I. A VIOLENT RORSCHACH TEST

In the days and weeks immediately after September 11, 2001, the 9/11 terrorist attacks became for many the legal equivalent of a Rorschach test. While most commentators insisted that there was a manifestly correct and a manifestly incorrect way to understand the applicable legal paradigm for the 9/11 attacks, there was little agreement on just what constituted the applicable legal framework. Depending on the observer, the 9/11 attacks were variously con-

strued as criminal acts, acts of war, or something in between, thus fitting into (and triggering) any of several radically different legal regimes.

In liberal and libertarian-leaning circles, for instance, many scholars took the view that since the 9/11 attacks were carried out by non-state actors, using nothing that resembled traditional weapons, they were best understood as criminal acts. Though they were crimes of a frightening magnitude and complexity, the attacks were considered by such scholars to be appropriately addressed through an ordinary law enforcement paradigm. Such commentators roundly dismissed the notion that the attacks could trigger a “war.” French law professor Alain Pellet labeled the claim that the U.S. was at war with al Qaeda “legally false,”² for instance, and Antonio Cassese, the first president of the International Criminal Tribunal for the Former Yugoslavia, agreed, writing in 2001: “It is obvious that in this case ‘war’ is a misnomer. War is an armed conflict between two or more states.”³

James Cole, who was later appointed to a senior Justice Department position by President Obama, in a 2002 article, similarly insisted that “[f]or all the rhetoric about war, the Sept. 11 attacks were criminal acts of terrorism against a civilian population, much like the terrorist acts of Timothy McVeigh.”⁴ September 11 was a “devastating crime,” Cole continued, but one for which ordinary criminal law offered the most appropriate framework.⁵ Amnesty International took the same view, arguing in a 2003 report that under international law, “it is not possible to have an international armed conflict between a state on the one hand and a non-state actor on the other,” unless the non-state group forms “part of the armed forces of a Party to the Geneva Conventions.”⁶

More than a decade later, variants of this view continue to have strong adherents. As a recent European Council on Foreign Relations report by Anthony Dworkin notes, most European legal scholars and courts “[reject] the notion of a de-territorialised global armed conflict between the U.S. and al-Qaeda,” and believe that although a “confrontation between a state and a non-state group” can in theory rise to the level of an armed conflict, it can only do so if “the non-state group meets a threshold for organization [when] . . . there are intense hos-

2. Alain Pellet, *No, This Is Not War!*, UNITED NATIONS OFFICE ON DRUGS AND CRIME TERRORISM PREVENTION BRANCH, Oct. 3, 2001, available at https://www.unodc.org/tldb/bibliography/Biblio_Internat_Law_Pellet_2001.doc.

3. Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993, 993 (2001).

4. Michael James, *Senate Republicans Block James Cole, Key Obama Nominee at Justice Dept.*, ABC NEWS (May 9, 2011, 8:30 PM), <http://abcnews.go.com/blogs/politics/2011/05/senate-republicans-block-james-cole-key-obama-nominee-at-justice-dept>.

5. James M. Cole, *A Prosecutor Must Protect Rights of All*, LEGAL TIMES, Sept. 9, 2002, available at <http://www.law.com/jsp/article.jsp?id=900005532110>.

6. *Yemen: The Rule of Law Sidelined in the Name of Security*, AMNESTY INT’L (Sept. 23, 2003), <http://www.amnesty.org/en/library/asset/MDE31/006/2003/en/1201e721-d6a7-11dd-ab95-a13b602c0642/mde310062003en.pdf>.

tilities between the two parties . . . [and] fighting [is] concentrated within a specific zone (or zones) of hostilities [T]he default European assumption would be that the threat of terrorism should be confronted within a law enforcement framework.”⁷

But if some commentators viewed law enforcement as the “obviously” correct legal paradigm for addressing 9/11 and subsequent terrorist threats, others insisted with equal certainty on the correctness of the opposite proposition: insofar as the 9/11 attacks stemmed from overseas and caused death and destruction on a scale more commonly associated with armed conflict than with crime, they should be conceptualized as acts of war, triggering the *lex specialis* of armed conflict.

It took the Bush administration and its lawyers only hours to decide that the 2001 terrorist attacks constituted an “act of war.” On the evening of September 11, with smoke still swirling above the ruins of the World Trade Center and estimates of the dead ranging as high as 10,000, President Bush promised that America would “win the war against terrorism.”⁸ Two days later, he told reporters that on 9/11, “an act of war was declared on the United States of America.” Although his phrasing was murky, his meaning was not: the war on terror, said Bush, would be “the first war of the 21st century.”⁹

Bush Administration lawyers elaborated on the president’s words. “There is little disagreement with the conclusion that if the September 11 attacks had been launched by another nation, an armed conflict under international law would exist,” asserted Justice Department lawyers John Yoo and Julian Ho.

The attacks were coordinated from abroad, by a foreign entity, with the primary aim of inflicting massive civilian casualties and loss. . . . [T]he head of al Qaeda, Osama bin Laden, declared war on the United States as early as 1996. Finally, the scope and the intensity of the destruction is one that in the past could only have been carried out by a nation-state, and should qualify the attacks as an act of war.¹⁰

State Department Legal Advisor William H. Taft agreed: “The law of armed conflict provides the most appropriate legal framework for regulating the use of force in the war on terrorism.”¹¹

7. ANTHONY DWORKIN, DRONES AND TARGETED KILLING: DEFINING A EUROPEAN POSITION, EUR. COUNCIL ON FOREIGN REL. 7 (2013), available at http://ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

8. George W. Bush, *Bush’s Remarks to the Nation on the Terrorist Attacks*, N.Y. TIMES (Sept. 12, 2001), <http://www.nytimes.com/2001/09/12/us/a-day-of-terror-bush-s-remarks-to-the-nation-on-the-terrorist-attacks.html>.

9. George W. Bush, *News Conference*, WASH. POST (Sept. 13, 2001), http://www.washingtonpost.com/wp-srv/nation/transcripts/bushtext2_091301.html.

10. John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT’L L. 207, 211 (2003).

11. William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 320 (2003).

Although the Obama Administration has moved away from the “global war on terror” language favored by the Bush administration, its legal analysis remains strikingly similar today. As former White House counterterrorism advisor John Brennan put it in 2011, “[W]e are at war with al-Qa’ida. In an indisputable act of aggression, al-Qa’ida attacked our nation and killed nearly 3,000 innocent people.”¹² President Obama repeated the same sentiment in a May 2013 speech, leaving as little room for doubt: “Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces.”¹³

“Crime” and “war” were not the only possible ways to conceptualize the 9/11 attacks. The events of 9/11 might also have been understood as an “armed attack” of sufficient gravity to trigger an international law right to use armed force for the limited purpose of self-defense, but without triggering a full-scale “armed conflict” between the U.S. and the perpetrators of the attacks.¹⁴ At times, both the Bush and Obama administrations have appealed to the self-defense framework to explain or justify U.S. actions since 9/11, although this framework is often treated by the U.S. executive branch as either supplemental to or somehow merged with the war framework.¹⁵ “Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law,” asserted Attorney General Eric Holder in a 2012 speech—but he went on to add that, “The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And interna-

12. John O. Brennan, *Strengthening Our Security by Adhering to Our Values and Laws*, WHITE HOUSE (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (“[A]l-Qa’ida seeks to attack us again. Our ongoing armed conflict with al-Qa’ida stems from our right—recognized under international law—to self defense.”).

13. Remarks at National Defense University, 2013 DAILY COMP. PRES. DOC. 361 (May 23, 2013).

14. Understood thusly, the U.S. response to 9/11 would be shaped and constrained not by the laws of war, which permit status-based targeting, but by the somewhat different *jus ad bellum* rules relating to the use of force in self-defense, presumably in conjunction with international human rights law. See generally Laurie R. Blanc, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL LAW REV. 1655, 1667 (2012) (“[I]n many cases in which a state uses force against a non-state actor outside its own territory, it will be in the context of counterterrorism as self-defense, outside of any armed conflict. In the absence of an armed conflict, international human rights law and the principles governing the use of force in law enforcement will govern.”). Under the laws of war, notes Blanc, “targeting of individuals based on their status as members of a hostile force” is permitted, while human rights law “permits lethal force against individuals only on the basis of their conduct posing a direct threat at that time.” *Id.* at 1681.

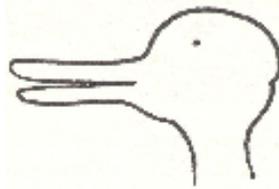
15. *Id.*

tional law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war.”¹⁶

II. DUCK-RABBITS

So who was “right”? Were the 9/11 attacks “crime,” or “war,” or something in between: isolated attacks triggering a temporary U.S. right to use force in self-defense, but not a full-fledged armed conflict? Despite the vociferousness with which they were defended, none of the positions outlined above can be said to be “clearly right” or “clearly wrong” from a legal perspective. To a significant extent, the legal status of 9/11 is effectively indeterminate.¹⁷

To understand this, consider Ludwig Wittgenstein’s famous duck-rabbit, which could equally be viewed as a representation of a rabbit or a representation of a duck:



16. See Eric Holder, U.S. Att’y Gen., Speech at Northwestern University School of Law (March 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, The Obama Administration and International Law, Address Before the Annual Meeting of the American Society of International Law, (March 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (“[A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”).

17. I made an early version of this argument in a 2004 article, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, in which I noted:

Both international and domestic law take as a basic premise the notion that it is possible, important, and usually fairly straightforward to distinguish between war and peace, emergencies and normality, the foreign and the domestic, the external and the internal. . . . [But] these binary distinctions are no longer tenable. In almost every sphere, globalization has complicated once-straightforward legal categories September 11 and its aftermath have highlighted the increasing incoherence and irrelevance of these traditional legal categories. Shifts in the nature of security threats have broken down once clear distinctions between armed conflict and “internal disturbances” that do not rise to the level of armed conflict; between states and nonstate actors; between combatants and noncombatants; between spatial zones in which conflict is occurring and zones in which conflict is not occurring; between temporal moments in which there is no conflict and temporal moments in which there is conflict; and between matters that clearly affect the security of the nation and matters that clearly do not.

Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 676-77 (2004).

Wittgenstein used the duck-rabbit to illustrate his theory of language games: to Wittgenstein, it was erroneous to imagine that words were straightforward representations of some fixed external reality. Rather, he insisted, language itself is inseparable from context: “the speaking of language is part of an activity, or a form of life.”¹⁸

As Wittgenstein put it, “The picture [of the duck-rabbit] might have been shewn [sic] me, and I never have seen anything but a rabbit in it . . . [But imagine now] I see two pictures, with the duck-rabbit surrounded by rabbits in one, by ducks in the other.” When the duck-rabbit is surrounded by images that are “clearly” rabbits, engaged in typically rabbit-like activities, one would never think to see the duck-rabbit as anything but a quickly sketched rabbit. But when the duck-rabbit is surrounded by images that are “clearly” of ducks, engaged in duck-like activities, one would be equally unlikely to see the duck-rabbit as anything other than a duck. “I do not notice that [the original duck-rabbit image is] the same,” in each of these two pictures, wrote Wittgenstein. “Does it follow from this that I see something *different* in the two cases?”¹⁹

Like Wittgenstein’s duck-rabbit, the 9/11 attacks can be seen as crime, as war, or as isolated armed attack—and just as the duck-rabbit may strike the viewer differently when surrounded by a backdrop of rabbits versus a backdrop of ducks, a great deal depends on whether one views 9/11 against a backdrop of crimes or a backdrop of military attacks. Considered alongside the Oklahoma City bombing, the murderous activities of Mexican drug cartels, or the Rwandan genocide, the 9/11 attacks look like crimes: crimes on a massive scale, even crimes against humanity, but crimes all the same. Considered alongside the 1976 hijacking of an Air France jet or the 1998 bombings of U.S. embassies in Kenya and Tanzania, the 9/11 attacks might look like isolated violent incidents that could nonetheless trigger a temporary right to respond with armed force in self-defense. Considered alongside the 1996 World Trade Center bombing, the 1998 embassy bombings and the 2000 attack on the USS Cole, the 9/11 attacks look like another stage in an ongoing armed conflict.

Ultimately, as with Wittgenstein’s duck-rabbit, it would be quite mistaken to insist that one description of the attacks is somehow “truer” than any other, and equally mistaken to insist that there is a “right” and “wrong” legal paradigm through which to make sense of the 9/11 attacks.

To say that there is neither a right nor wrong legal paradigm is not the same as saying that one might as well pick one as another, for the choice of legal paradigms is far from inconsequential. If it comes to that, the choice of “duck” versus “rabbit” is also far from inconsequential, if one is a hunter—or, for that matter, if one is a rabbit or a duck. If it’s duck-hunting season but not rabbit-hunting season, ducks are fair game but rabbits are immune from vio-

18. WITTGENSTEIN, *supra* note 1, at 11.

19. *Id.*

lence; if it's rabbit-hunting season but not duck-hunting season, the opposite is true. The lawfulness of the hunter's shot depends on whether we view the duck-rabbit as duck or as rabbit. For the duck-rabbit, survival itself is at stake.

So it is with the post-9/11 choice of legal paradigms. If the 9/11 attacks were a crime, they trigger a law enforcement paradigm that places substantial constraints on the state's ability to monitor, search, detain, and use lethal force against individuals. If the 9/11 attacks were part of an armed conflict or initiated an armed conflict, they trigger the law of war paradigm, which places far fewer constraints on the State's use of coercion and lethal force.

III. HIGH STAKES

A vast chasm lies between the law enforcement paradigm and the war paradigm. In peacetime, the willful killing of human beings is prohibited by default. Homicide is a crime, excused only under certain narrowly defined circumstances, such as self-defense. Even the state's law enforcement agents are forbidden to use lethal force except in defense of themselves or others: the police, for instance, can't decide to bomb an apartment building in which suspected criminals lie sleeping. What's more, if law enforcement agents knowingly kill innocent people as a byproduct of using force against suspected criminals, we don't simply write off those deaths as "collateral damage." In peacetime, even the intentional destruction of private property and severe restrictions on individual liberties are generally impermissible.

In wartime, almost everything changes. Many actions that are considered both immoral and illegal in peacetime are permissible—even praiseworthy—in wartime. Most notably, willful killing is permitted under the law of armed conflict, as long as those targeted are enemy combatants or others participating directly in hostilities. Under the law of armed conflict, individuals can be targeted based on their status, rather than their activities. Thus, during a war, a combatant can lob a grenade into a building full of sleeping people, as long as he reasonably believes the sleeping people to be enemy soldiers. Even actions that a combatant *knows* will cause civilian deaths are lawful when consistent with the principles of necessity, humanity, proportionality, and distinction.²⁰

20. The principle of necessity requires parties to a conflict to limit their actions to those that are indispensable for securing the complete submission of the enemy as soon as possible (and that are otherwise permitted by international law). The principle of humanity forbids parties to a conflict to inflict gratuitous violence or employ methods calculated to cause unnecessary suffering. The principle of proportionality requires parties to ensure that the anticipated loss of life or property incidental to an attack is not excessive in relation to the concrete and direct military advantage expected to be gained. Finally, the principle of discrimination or distinction requires that parties to a conflict direct their actions only against combatants and military objectives, and take appropriate steps to distinguish between combatants and non-combatants. See generally OPERATIONAL LAW HANDBOOK (Andrew Gillman & William Johnson eds., 2012), available at http://www.loc.gov/r/frd/Military_Law/pdf

Similarly, during wartime various lesser forms of coercion and intrusion are also permissible, even when the same acts would be unlawful in peacetime. In wartime, enemy combatants can be detained for the duration of the conflict, and even those determined to be civilians can be indefinitely detained for imperative reasons of security, at the discretion of the detaining power. In wartime, general speaking, private communications can be lawfully restricted or intercepted; private property can be searched and destroyed, and so on.

U.S. drone strikes nicely illustrate the high stakes involved in the choice of legal paradigms. If the United States is at war with al Qaeda and its associates, and a U.S. drone strike kills an individual suspected of being a terrorist combatant, the killing is presumptively lawful under the law of armed conflict. If the United States cannot be said to be “at war” with al Qaeda and its associates, the same act becomes an extrajudicial execution—or, to put it more bluntly, a simple murder.

What if the 9/11 attacks were considered an armed attack sufficient to trigger a right to use force in self-defense, but not construed as the beginning of an armed conflict? Here, the rules lie somewhere in between those of the law enforcement and war paradigms. Unlike the international law of armed conflict, the international law of self-defense permits states to use force only to *respond* to an armed attack or to prevent an *imminent* armed attack, and the use of force in self-defense must be both necessary and proportionate to achieving these ends.²¹ A corollary to this is that status-based targeting is not permitted under self-defense rules: an individual can be targeted only if his *activities* pose an imminent threat. Furthermore, traditional interpretations of the international law of self-defense define the term imminent quite narrowly, restricting the use of force to situations in which force is necessary to address threats that urgent and grave, rather than speculative, distant, or minor.²²

operational-law-handbook_2012.pdf; INT’L COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Rule 1, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule1 (last visited Apr. 4, 2014); INT’L COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Rule 14, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14 (last visited Apr. 4, 2014).

21. See Blanc, *supra* note 14. It should be noted, however, that the degree to which the international law governing self-defense constrains state behavior depends crucially on how certain key terms are understood. Most notably, the term “imminence” is of vital importance. This is beyond the scope of this Article, but I have discussed it at some length elsewhere. See, e.g., Rosa Brooks, *Targeted Killing and the International Rule of Law*, 28 J. ETHICS & INT’L AFF. 83 (2014), available at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=9207982&fulltextType=RA&fileId=S0892679414000070>; Brooks, *supra* note 17.

22. Consider the wide acceptance of the principle stemming from the *Caroline* affair: that a state may use preemptive force only where the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, Documents 80-121 (Hunter Miller ed., 1934) available at http://avalon.law.yale.edu/19th_century/br-

As we know, the U.S. government opted for the legal paradigm that places fewest constraints on its use of coercion and lethal force. “Our war on terror begins with Al Qaeda, but it does not end there,” President Bush told members of Congress on September 20, 2001.²³ His words proved more prophetic than perhaps even he could have realized, for once in the war paradigm, there was no principled place to “end” the war, or draw any meaningful lines between war and non-war. A global “war on terror” was a war that could, by its nature, have no boundaries: no spatial limits, no limits on who could be targeted, captured or killed, and no end.²⁴

From each seemingly “clear” legal assertion within the war paradigm, it is not a major stretch to the next. Eventually, however, one ends with a set of syllogisms so extended that one would never have recognized the conclusion at the outset.

Start with the lack of geographic boundaries inherent in a war on “terror,” or even an ostensibly more limited war on “al Qaeda and its associates.” In a war against non-state actors, there is no inherent reason for the United States to place territorial limits on its right to use force: if we are at war with al Qaeda and its associates, these individuals, whomever they may be, are presumably targetable and detainable *wherever* they may be. Following this logic, the United States has used drone strikes and other forms of targeted killings to kill suspected terrorists in Afghanistan, Iraq, Pakistan, Yemen, and Somalia, and has detained suspected terrorists as far afield as Bosnia and Nigeria.

In this war, limits on who can be targeted and detained are similarly elusive. Under the law of armed conflict, enemy combatants and civilians directly participating in hostilities are targetable and detainable, but who counts as a “combatant” in the war against al Qaeda and its associates? What constitutes “hostilities” in this non-traditional conflict, and what does it mean to “directly participate” in hostilities?

Further, it is not at all clear how the United States defines “associates” of al Qaeda: the executive branch has not offered any public explanation of which groups it considers to be “associates” of al Qaeda or the Taliban. The international law of war unquestionably permits parties to a conflict to target “co-belligerents” of the enemy. On a traditional battlefield—such as within the territorial confines of Afghanistan—it would clearly be permissible for the United States to target individuals and groups that are literally fighting alongside the Taliban or al Qaeda. It is less clear that this is the case outside such traditional,

1842d.asp. *See also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19); U.N. Secretary-General, *In Larger Freedom: Rep. of the Secretary-General*, ¶¶ 124-25, U.N. Doc. A/59/2005/Add.3 (May 26, 2005) (by Kofi Annan).

23. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2001, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001).

24. I have written about this more extensively elsewhere. *See* Brooks, *supra* note 17.

territorially limited battlefields. In this murkier context, it is far harder to determine what would constitute “co-belligerency” with al Qaeda, and executive branch officials have provided no clear criteria.

If anything, it has only grown more difficult to define our “enemies” since 9/11. “Al Qaeda Central” has largely collapsed, but it has spawned an unknown number of smaller networks and movements, loosely knit, non-hierarchical, geographically dispersed, and diverse in their methods and aims.

Given this murkiness, it is hardly surprising that recent U.S. drone strikes have reportedly killed numerous individuals whose activities and affiliations are literally unknown: although President Obama has frequently asserted that the United States only targets “specific senior operational leaders of al Qaida and associated forces” involved in the September 11, 2001 terror attacks who are plotting “imminent” violent attacks on Americans, classified CIA reports obtained by news outlets state that more than half of those killed by drone strikes in Pakistan in the year proceeding September 2011 “were not senior al Qaida leaders but instead were ‘assessed’ as Afghan, Pakistani and unknown extremists.” Similarly, “[f]orty-three of 95 drone strikes reviewed for that period hit groups other than al Qaida, including the Haqqani network, several Pakistani Taliban factions and the unidentified individuals described only as ‘foreign fighters’ and ‘other militants.’”²⁵

There is also no apparent means of ending the war against al Qaeda and its associates. In a November 2012 speech, Defense Department General Counsel Jeh Johnsons raised this question: “Now that efforts by the U.S. military against al Qaeda are in their 12th year, we must also ask ourselves: how will this conflict end?”²⁶ For the Obama administration, this question clearly causes substantial unease. “Our systematic effort to dismantle terrorist organizations must continue,” President Obama told a National Defense University Audience in May 2013, “[b]ut this war, like all wars, must end. That’s what history advises. That’s what our democracy demands.”²⁷ But how does one end a non-territorial armed conflict against an ill-defined, amorphous, protean enemy, with no leaders authorized to speak on its behalf, no set membership, and only the vaguest of goals?

25. Johnathan Landay, *Obama’s Drone War Kills ‘Others,’ Not Just Al Qaida Leaders*, MCCLATCHY DC (Apr. 9, 2013), <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#.UkiL5xZGvy9#storylink=cpy>.

26. Jeh Charles Johnson, *The Conflict Against Al Qaeda and its Affiliates: How Will It End?*, UNITED STATES DEPARTMENT OF STATE (Nov. 30, 2012), www.state.gov/documents/organization/211954.pdf.

27. Obama, *supra* note 13.

IV. ALL THE BOUNDARIES . . . WILL BE TOTALLY DESTROYED

For most of recorded history, human societies have taken pains to draw sharp lines between war and peace. Anthropology books are replete with examples. Early 20th century Liberian tribes had firm rules concerning when war was and was not permitted. For instance, as British anthropologist George Harley noted, wars could not occur while “bush school” was in session for boys and girls, and warriors wore special masks during raids that could be worn at no other time.²⁸

The Navajo Indians took similar pains to maintain the spatial boundaries between war and non-war: “On the way home from a raid,” commented one anthropologist, “a symbolic line would be drawn in the desert, the men would line up facing the enemy country, and as they sang they all turned toward home and the common language was resumed.” Navajo warriors embarking on raids literally spoke a different language after leaving their own territory, using what they described as a “twisted language” with a special vocabulary to describe even the most ordinary animals and actions.²⁹

Western cultures have long had their own versions of such rituals. Consider the elaborate uniforms worn by European armies well into the early 20th century, or the evolution of distinctly martial music. For much of the last few hundred years, Western societies have insisted that wars should be formally “declared,” take place upon territorially-defined battlefields, and be fought by uniformed soldiers operating within specialized, hierarchical military organizations.³⁰ The twentieth century law of war, typified by the Hague and the Geneva Conventions, is in a sense, nothing more than the latest iteration of this age-old human effort to draw sharp lines between war and peace.

The Bush Administration’s decision to construe the 9/11 attacks as acts of war was not clearly “incorrect” from a legal perspective—but once this hasty decision was made, a whole range of associated legal categories lost any clear boundaries. Ultimately, the 9/11 attacks destroyed more than just lives and property. They led to the destruction of the carefully constructed boundaries between war and non-war, between combatants and non-combatants, between zones of conflict and zones of peace.

All of this has institutional consequences as well as legal consequences. As our national leaders frequently remind us, the United States now faces a wide range of unconventional, asymmetric threats from an ever-changing enemy who will try to fight us in ways not traditionally recognizable as warfare. The

28. See GEORGE W. HARLEY, MASKS AS AGENTS OF SOCIAL CONTROL IN NORTHEAST LIBERIA 10 (1950).

29. See D.W. Murray, *Transposing Symbolic Forms: Actor Awareness of Language Structures in Navajo Ritual*, 31 ANTHROPOLOGICAL LINGUISTICS 117, 195-208 (1989).

30. See generally CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Michael Howard et al. eds., 1994).

enemy's weapons, we are told, will range from suicide bombs and cyberattacks to economic warfare and bio-engineered viruses. If this is so, then anything that helps us counter the enemy's activities can also be construed as part of warfare, and as appropriate activities for the U.S. military.³¹

As our understanding of what constitutes warfare expands, our understanding of what constitutes the appropriate role of the U.S. military has expanded correspondingly. Today, the U.S. military engages in everything from spying and Internet data collection to health care, economic development, and governance reform programs.

But this in turn means that we lose any clarity about what a military is for, and what, if anything, makes it distinct from other institutions. In the post-9/11 world, what is it that distinguishes the military from the intelligence community (which has itself become increasingly paramilitary in its structure and activities since 9/11)? What distinguishes the military from the State Department or USAID? When intelligence agencies carry out drone strikes and the military collects cell phone metadata of U.S. citizens and operates agricultural reform programs in Afghanistan, do we have any basis at all for drawing lines between "civilian" and "military" tasks and institutions? What will this blurring of institutional lines mean for the military itself, and for its role in domestic politics? How do we make sense of—and apply—notions of civilian control of the military when the military's role and mission has become so blurred?

It's possible, of course, that many of these changes would have occurred even without 9/11 and the unique constellation of personalities and ideologies that made up the Bush Administration. After all, the 9/11 attacks didn't come out of nowhere: the technological and political shifts that enabled them had been decades in the making.

Indeed, a small number of scholars and military thinkers had begun to speculate about the changing nature of warfare well before 9/11. In 1999, for instance, Qiao Liang and Wang Xiangsui, both colonels in China's People's Liberation Army, published a slender little book called *Unrestricted Warfare*.³² Historically, wrote Qiao and Wang, "the three indispensable 'hardware' elements of any war" have been "soldiers, weapons and a battlefield."³³ But, they warned, humanity is on the verge of an era in which all these elements will be transformed beyond recognition: in this brave new world, soldiers will be computer hackers, financiers, terrorists, drug smugglers, and agents of private corporations as well as members of organized state militaries, and weapons will

31. See, e.g., Bush, *supra* note 24 ("How will we fight and win this war? We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the destruction and to the defeat of the global terror network.").

32. QIAN LIANG & WANG XIANGSUI, *UNRESTRICTED WARFARE* (2000), available at <http://cryptome.org/cuw.zip>.

33. *Id.* at 34-59.

range from “airplanes, cannons, poison gas, bombs [and] biochemical agents” to “computer viruses, net browsers, and financial derivative tools.”³⁴

Soon, warned Qiao and Wang, warfare will “transcend[] all boundaries and limits . . . [T]he battlefield will be everywhere . . . [and] all the boundaries lying between the two worlds of war and non-war, of military and non-military, will be totally destroyed.” In consequence, “visible national boundaries, invisible internet space, international law, national law, behavioral norms, and ethical principles [will] have absolutely no restraining effects.”³⁵

Outside of some narrow military and intelligence circles, *Unrestricted Warfare* attracted very little attention at the time of its publication. Today, it looks prophetic.

CONCLUSION: LAW’S LIMITS

As Qiao and Wang warned, when the boundaries between war and non-war, military and non-military have eroded, both law and morality begin to lose their force. The boundaries between war and non-war are no less vital for being socially constructed, for if we can’t figure out whether or not there’s a war—or where the war is located, or who’s a combatant in that war and who’s a civilian—we have no way of deciding whether, where, or to whom the law of war applies.

Yet if we can’t figure out what rules apply, we lose any principled basis for making the most vital decisions a democracy can make: what is the appropriate sphere for the military? When can lethal force be used inside the borders of a foreign country? Which communications and activities can be monitored, and which should be free of government eavesdropping? What matters can the courts decide, and what matters should be beyond the scope of judicial review? When can a government have “secret laws,” and when must government decisions and their basis be submitted to public scrutiny? Who can be imprisoned, for how long, and with what degree, if any, of due process? Who is a duck, and who is a rabbit? Ultimately: Who lives, and who dies?

In the years immediately following 9/11, human rights, international law, and national security scholars argued about detention policy, interrogation policy and military commissions. Today, we debate drone strikes, targeted killing, and NSA data-mining. But it’s all the same conundrum—and at its root was the post 9/11 choice of legal frameworks. President Bush’s initial choice of the war paradigm was undoubtedly driven more by domestic politics than by any serious consideration of the likely long-term legal and policy consequences. But this legal frame, once chosen, quickly began to define and drive U.S. national

34. *Id.* at 121-31.

35. *Id.* at 1-9, 132-63.

security strategy, and the Obama Administration has proven unable (or unwilling) to change course.

Today, as in 2001, those who look to the law for guidance will search in vain. We can ask whether targeted killing via drone strike is lawful until we're blue in the face, but the law will yield no satisfying answers. The same is true if we ask whether NSA data-mining is legal, or whether cyberattacks can lawfully be viewed as triggering an armed conflict.

These are the wrong questions. After all, there is nothing magic or eternal about the legal paradigms inherited by post-9/11 America. The law of war in particular is hardly sacred. It should be viewed as what it is: a somewhat arbitrary set of legal constructs and categories created mainly by the post-World War II West. Like Liberian or Native American war rituals, the modern law of war represents only a particular society's efforts to define and constrain violence at a particular moment in time.

It's past time to start a different discussion. Rather than asking, "what does the law enable, and what does the law prohibit?" we should instead ask some very different questions: What kind of world do we want to live in? Do we want to inhabit a world in which there are no principled checks on power? In which the globe is a battlefield, in a boundariless war that can never end? If not, what kind of legal and institutional framework will best foster the kind of world we would prefer to inhabit—and how can we get from here to there?

