
Drones and Imagination: A Response to Paul Kahn

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Abstract

In responding to Paul Kahn's article, 'Imagining Warfare', in this issue, this article points out that features of contemporary drone warfare antedate the contemporary moment, especially in colonial warfare. For this reason, it is more a matter of the novel combination of these features than a fundamental shift in the nature of warfare that drones bring about.

In this brief comment, I want to begin by investigating how the new prominence of the drone, as a symbol of possible mutations in warfare, has also shifted Paul Kahn's thought in a fascinating and unexpected new direction. Then, in response to his picture, I will suggest that drones may offer more continuity with prior warfare than Kahn and others think. For two reasons: first, because their deployment resembles one dominant form of modern war – colonial war – more than Kahn realizes; and, secondly, because after a post-9/11 parenthesis, drones may prove to be central to interstate rather than counter-insurgent conflict. Finally, I will take up Kahn's provocative remarks in his conclusion, to the effect that drones should prompt a realistic theory of administrative massacre.¹

This characteristically brilliant article fits into Kahn's ongoing theoretical trajectory. His approach has always revolved around a basic dichotomy between reason and will.² In the present article, Kahn emphasizes how, from the beginning of modern politics in Thomas Hobbes's thought, reason has provided the tool for internal order of states, while leaving the space among them for their wilful contention. As his earlier work shows, however, it is not as if the basic political faculties of reason and will simply have their home turf: reason for the achievement of a domestic contract, and will for the violent world of interstate conflict. Nonetheless, for Kahn the role of will is especially obvious in external affairs. Where Hobbes and his followers introduced the social contract for the sake of safety and 'the pursuit of happiness' at home, they simultaneously unleashed the sovereign to continue to fight wars to the death beyond state borders. Now that Kahn has added Carl Schmitt to his set of privileged partners

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¹ Kahn, 'Imagining Warfare', this issue, at 199.

² Kahn, 'Reason and Will in the Origins of American Constitutionalism', 98 *Yale LJ* (1989) 449.

in dialogue, he can summarize his position by saying that modernity has generally been characterized by a strict distinction between internal and external relationships to sovereignty in which threats are posed by criminals when they occur at home and enemies when they occur abroad.³

Yet it is the very distinction between criminal and enemy on which modernity has rested that Kahn thinks is now in the process of collapsing. ‘The old pattern of war between sovereign states’, he writes, ‘is breaking apart in the face of new threats.’⁴ In his article, Kahn outlines the multifarious dimensions of this inherited difference with great elegance. He explores it across his categories of spatiotemporal ‘aesthetics’, combatant subjectivity, and situated morality and frequently summarizes his findings in striking formulations. His main point – that the drone offers up not merely a classificatory quandary for pre-existing legal doctrine, or a novelty around which new rules will need to be developed after due deliberation of legal experts, but also a symbol of deeper imaginative dilemma – is well-taken. But the shift away from the ‘old pattern’ may represent more of a transformation of Kahn’s theory of violence than a shift in violence itself.

It may be useful to emphasize, to start, that Kahn himself originally believed post-9/11 developments spoke to the continuity of old patterns rather than their destabilization for the sake of new ones. When dreams of perpetual peace and the rule of human rights law were rudely interrupted by the attacks, and the United States responded with calls for patriotic sacrifice for the sake of a move to force against a threatening enemy, Kahn’s basic response was that sovereignty had been too deeply ingrained in modern politics to go away so quickly.⁵ It is in this sense that the present article, along with his related work on film, marks a departure for him.⁶ Kahn now contends that history is not resting content with a reversion to old scripts.

After all, Kahn observes, while sacrifice did return after 9/11, in other ways its traditional logic failed to coalesce. A paradigm of ‘riskless warfare’ from the skies – one which Kahn himself initially took up in his reflections on the Kosovo campaign that Michael Ignatieff famously dubbed virtual war – turned out to anticipate a fundamentally new form of conflict, simply made even more obvious by drones.⁷ Taking the pilot out of the machine and assigning him a joystick in the American southwest or one of several other ‘virtual cockpits’ even further than 30,000 feet above the target is a fundamental novelty.⁸ And this transformation, which disrupts the mutual character of

³ P.W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (2011). Cf. D. Bates, *States of War: Enlightenment Origins of the Political* (2011), for a historically more careful but otherwise similar narrative that connects the construction of domestic rights regimes to the emancipation of ‘the political’ and the construction of external sovereignty in the early modern period, albeit explicitly theorized only in the 18th century.

⁴ Kahn, *supra* note 1, at 226.

⁵ See P.W. Kahn, *Putting Liberalism in Its Place* (2003).

⁶ Kahn, ‘Criminal and Enemy in the Political Imagination’, 99 *Yale Rev* (2011) 148; P.W. Kahn, *Finding Ourselves at the Movies* (forthcoming).

⁷ M. Ignatieff, *Virtual War: Kosovo and Beyond* (2000); Kahn, ‘The Paradox of Riskless Warfare’, 22 *Philosophy and Public Policy Q.* (2002) 2.

⁸ For the phrase ‘virtual cockpits’ see Miller, ‘Under Obama, an emerging global apparatus for drone killing’, *Washington Post*, 27 Dec. 2011.

warfare from which the political imagination and the law of armed conflict proceeded, matches changes in the aesthetics and subjectivity of antagonism. The drone helps to open up the spectre of a deterritorialized 'global battlefield' as much as it individualizes warfare in order to make it more similar to punishment.

I wonder all the same if the shift in Kahn's theory takes too seriously widespread arguments that war is changing in the face of novel threats – not because I think Kahn's original approach was right but because it omitted a big piece of modern violence in the first place. In Kahn's sketch, the move today is from one involving classic interstate conflict as a contest of 'organized state militaries' to one involving shadowy non-state actors in an environment of asymmetrical capacities.⁹ From another view, however, it is possible to narrate the modern history of warfare in ways that make current developments only new versions of continuous practices along each of the dimensions Kahn charts.

Kahn's narratives of war amongst sovereigns have always extrapolated from Cold War mutually assured destruction. In his current article, Kahn does supplement these accounts by acknowledging some early lineaments of contemporary forms of technologically assisted asymmetrical warfare – which began, he implies, as a footnote to the classic Cold War stand-off based on nuclear parity. But I wonder if the sort of warfare Kahn identifies as fundamentally novel is in fact so atypical of modern times, including Cold War history, in which the nuclear stand-off from which Kahn generalizes was never the sole or even dominant form of conflict. Kahn notes and effectively dispenses with now familiar claims that the terrorist is the new face of the age-old pirate as the *hostis humani generis* or enemy of mankind.¹⁰ Less frontally, as part of the same discussion he mentions¹¹ the separate set of rules – or more exactly, the absence of rules – that typically applied in the context of colonial conflict throughout modern history. More of a focus on that sort of conflict might lead to a more continuous story about modern war than Kahn, with his focus on interstate conflict and its alleged dissolution today, seems prepared to acknowledge, with some important theoretical consequences.

For, arguably, there is a continuum, not a break, between the aesthetics, subjectivity and morality of colonial warfare and its successors today, including in drone campaigns. In colonial governance, war was not a matter of enemies met at the border; it frequently involved shadowy groups of rebels posing a nebulous threat to a territorially informal order. And surely the identification of individual leaders for targeted death, a familiar part of such engagements in European and later American history, is not new.¹² Neither are so-called 'signature strikes'. Most important, as historians of technology would emphasize, the drone is hardly the first 'game changer' that

⁹ Kahn, *supra* note 1, at 207.

¹⁰ Kahn, *supra* note 1, at 224–225.

¹¹ *Ibid.*

¹² The parallel might lead one to question how 'individualized' targeted killing today really is. Like colonial governance, it follows a logic fundamentally different from domestic criminal law outside matters of conspiracy, in which individuals are targeted for their membership or leadership of a corporate enemy.

afforded insurmountable military asymmetry, which was rife in colonial history.¹³ At Omdurman outside Khartoum in 1898, the British took advantage of such asymmetry to kill 10,000 Africans and wound more than 10,000 more while suffering fewer than 50 combat deaths.¹⁴ And if this sort of military encounter was not a common feature of imperial rule, it is because insurmountable asymmetry generally led to rapid conquest, after which the line between policing due to criminals and pacification due to enemies was generally not established with a bright line. Even in places where the rule of law was established as an important feature of overseas governance, emergency provisions rapidly allowed the conversion of colonial pacification and policing into situations of asymmetrical warfare.¹⁵

This is not to suggest that there is nothing new under the sun. But it is to say that, if drone war ‘no longer looks like war’ to Kahn, much of global violence in modern times on the periphery of a rather small zone of interstate contest could not have looked much like war either.¹⁶ And the lessons learned by formal empires were portable to the American experience long ago, and especially once the Cold War dawned. Like the war on terror, the Cold War was also ‘global’ – perhaps more so. Its classic hot conflicts were displaced to the very sorts of zones where the United States deploys drones today (it remains tough to imagine a US drone strike in Europe, for example, to say nothing of domestic policing, at least in the foreseeable future). In its heyday, the Central Intelligence Agency operated globally far beyond the widely dispersed deployment of the US military.¹⁷ Both the military and the CIA, more notoriously, engaged in individualized killing. More generally, relying on often spectacular technologically-driven asymmetry, Americans deployed counterinsurgent techniques serially; indeed, many of them were actively revived after 9/11 from the American experience rather than generated afresh to deal with wholly novel realities.¹⁸

What exactly, one might therefore ask, is the fundamental departure involved in drone warfare compared with colonial engagements or their portable Cold War versions? No doubt the shifts in aesthetics, subjectivity, and morality in which Kahn is interested coincide with unprecedented perfection in the introduction of the drones. But individually and together they were already a major feature of modern history. I am not sure, then, that the most significant difference that the drone crystallizes is

¹³ For the classic exposition see D. Headrick, *Tools of Empire: Technology and European Imperialism in the Nineteenth Century* (1981), especially Pts 1 and 2 on gunboats and guns respectively; more vividly see S. Lindqvist, *Exterminate All the Brutes: One Man's Odyssey into the Heart of Darkness and the Origins of European Genocide* (trans. Joan Tate, 2007).

¹⁴ Consider, as exceptions that prove the rule, the interesting cases dredged up by historians of the rare instances in which Europeans were beaten in the age of empire: T. Andrade, *Lost Colony: The Untold Story of China's First Great Victory over the West* (2011) and R. Jonas, *The Battle of Adwa: African Victory in the Age of Empire* (2011).

¹⁵ See, e.g., N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003) and R. W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (2005).

¹⁶ Kahn, *supra* note 1, at 199.

¹⁷ See above all O.A. Westad, *The Global Cold War: Third World Interventions and the Making of Our Time* (2005); for the CIA see T. Weiner, *Legacy of Ashes: The History of the CIA* (2007).

¹⁸ See Feichtinger and Malinowski, ‘Transformative Invasions: Western Post-9/11 Counterinsurgency and the Lessons of Colonialism’, 3 *Humanity* (2012) 35.

to be found in the aesthetics, subjectivity, and morality of conflict. The background of peripheral and often irregular warfare might help, in fact, to isolate better what exactly is new in the drone, and the larger reimagination of war underway today. The background of persistent irregular warfare is perhaps most revealing when the most controversial precedent for targeted killing and ‘signature strikes’ today – America’s Phoenix programme of the Vietnam era – is selected, since it is so recent and because Kahn alludes to its sequels in the American presidential ban on political assassinations.¹⁹

What makes Phoenix seem like part of another world, I think, is most of all that there is a greater legalization today of warfare. Put differently, it is not the factual circumstances of conflict introduced by technological superiority in counterinsurgent circumstances, so much as that human rights norms have got so far in rescripting these conflicts in a new normative framework.²⁰ If so, it is not the loss of ‘classic interstate war’ as a real or imagined paradigm but the application of old and new humanitarian norms born in it to continuing irregular war that may mark the fundamental novelty. Where peripheral warfare was once placed below the threshold of law – before 1977, insurgent fighters were not even legitimate enemies subject to the modest requirements of the law of armed conflict – contemporary counterinsurgency finds itself newly and highly legalized. Its targets have been pushed not only into the category of legitimate subjects of the law of armed conflict but also into a rapidly evolving doctrinal area in which the law of war intersects or ‘interoperates’ with the law of human rights. If faraway enemies are afforded protections today partly undermining the distinction between them and domestic criminals, then, it is not because the scope of war is newly broad, the enemy is radically different, or even because technology introduces a novel asymmetry. It is because of a complex normative change in which a familiar form of warfare is waged under normative expectations that were once totally absent from it.

This observation may hearten contemporary advocates of the ‘humanization’ of war. But there have been troubling outcomes of that process too. For along with the imposition of norms where they once had no place, there is a corresponding willingness to view political leadership of global insurgency as implying military functions and thus legitimate target status, a novelty the contemporary legalization of war may ironically have abetted. It was not Americans in the Cold War but our contemporaries who introduced the notion of ‘targeted killing’, hewing out a new category that our ancestors did not require. The chilling fact may be that targeted killing today, much of it similarly undertaken by the intelligence branches or complex amalgams of intelligence and military services, differs from the assassinations of the Phoenix programme primarily because no one at the time felt the need to claim that the latter’s targets were not civilians or close enough to the boundary between combatant and non-combatant to be legitimate targets. The legalization of war has thus gone along with a potential

¹⁹ Kahn, *supra* note 1, at 200.

²⁰ For two very different approaches to the rise of legalism in war compare J.L. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (2007) and my ‘From Antiwar Politics to Antitorture Politics’, in L. Douglas and A. Sarat (eds), *Law and War* (forthcoming, 2013).

expansion of what an ‘active part’ in conflict (in the crucial phrase of the Geneva Conventions Common Article 3) means.²¹

Yet the point is not simply that the introduction of drones as part of counterinsurgent warfare in a globally conceived threat environment is not as practically new as many breathless commentators – and Kahn in a far more sophisticated way in his essay – suggest. For in fact a reverse set of considerations also needs to be recorded. It would be a serious mistake to generalize too hastily from the contemporary uses of still primitive drones to assume that ‘classic interstate war’ is passing from the world. It seems that the United States will imminently put the final nail in the coffin of the Al-Qaeda network, though it is another matter whether it will put its counterinsurgent traditions to rest for good. More hypothetically, the Israel/Palestine situation may be resolved, leading to the elimination of the other flagrant contemporary case of the asymmetrical use of force (including automated drones, targeted killings, and the use of the former to conduct the latter) that have featured so visibly in recent legal debates. Indeed, these two signature conflicts of the contemporary law of war may come to seem trivial as the geopolitics of America’s relative decline and the return of a multipolar world unfold – and not long from now. They may come to have pride of place mainly in explaining why, just as some romantics mistakenly believed the end of the Cold War ushered in eternal peace, a few people today prematurely suppose that some fundamental transformation of conflict is in the offing.

Drones were the brainchildren of science fiction writers long before any actually existed, and from their imaginative beginnings it has been known that they could conceivably serve conventional interstate contests – robot wars – as much as they do contemporary counterterrorist operations.²² Much discussion of the drone in security circles as well as the popular press revolves obsessively round the anxious question that once crystallized round nuclear weaponry: what happens when the others get it?²³ Military planners are surely not restricting their scenarios to the use of drones in targeted killings of non-state actors, and they would be foolish to do so. It is perfectly conceivable, in other words, that the rise of the drones may function to shore up both halves of the modern imagination of warfare, as much because of the continuing threat of classic interstate war as because of the spectacular presence today of counterinsurgent war that was its eternal – and therefore equally classic – companion.

None of the above is meant to suggest that Kahn’s portrait of where things stand currently is mistaken. It is eminently plausible that the prominence of counterinsurgency

²¹ Put another way, the need for the guidance the International Committee of the Red Cross recently offered on what counts as direct participation in hostilities by civilians was not precipitated by drones: N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).

²² The trope that drones are no longer science fiction is the central one of journalistic accounts about them, though I have not found any academic comment about how unmanned war has been imagined in so-called ‘military science fiction’ over time. While the US government only recently acknowledged its drone programme, the Air Force searches for recruits by advertising its role in bringing about a world in which the drone ‘isn’t science fiction’ but ‘what we do every day’. See www.youtube.com/watch?v=fIB3vrhPDNs (consulted 28 Dec. 2011).

²³ See, e.g., Villasenor, ‘The Drone Threat to National Security’, *Scientific American*, 11 Nov. 2011.

in a unipolar world will continue beyond its current revival to define a wholly new era of imagining war. I am certainly inclined to be a bit more tentative about how new the drone is and how far it actually or symbolically unsettles traditional frameworks, let alone ushers in the full-scale departure of interstate war in favour of counterterrorist policing of the globe. Where I differ most from Kahn, however, is not with respect to his incisive and in many ways profound analysis of contemporary moves, but instead with the unusual normative turn at end of his article – especially for a theorist who in the past has resisted prescription as a matter of principle.²⁴

In his closing pages, Kahn reacts to contemporary enterprises of providing a floor of norms for everyone around the world – notably those of the law of armed conflict to which once separate human rights norms have slowly but surely been added. Kahn suggests that the contribution of such enterprises has mainly been to generate unclarity, and he responds by calling for a new theory of administrative violence rather than a more defensible vision of humanizing the world through politics and law.

In what sounds like a prescriptive and not merely descriptive moment, Kahn's conclusion is that there will be a persisting 'need' for 'a conception of a subject who is without rights'.²⁵ Because terrorists are around to stay, Kahn surmises, it may be best to develop a regulated and well-theorized approach to 'statecraft as the administration of death'.²⁶ It is a chilling formulation. In response, I cannot help but note that administrative massacres were not simply the worst feature of the 20th century in Nazi hands but – it is now routinely emphasized by scholars – were pioneered as part of colonial governance.²⁷ Kahn, in his conclusion, cites Niccolò Machiavelli as guide to the deterritorialized war on terror, rather than Immanuel Kant for his naïve cosmopolitanism or Carl von Clausewitz for his restrictive interstate vision. But Machiavelli's realism is not the only kind to deploy in response to the unsatisfactory options Kahn is right to reject.

A more radical version of ethics than is prominent today would react to statecraft as the administration of death with horror, but need not fall back on either a naïve moralism or a traditional statism.²⁸ Of course, to say so is not to imply that some 'next utopia' is already available to put in place of departed radicalisms; it would have to be built. But if there is to be a prescriptive turn in response to the effect of drones on the imagination of warfare, perhaps the need is not simply to imagine warfare but also a world beyond it. Otherwise the drone – true to its name – will accompany the monotony of a violent history rather than spark the project of shifting it in a genuinely imaginative new direction.

²⁴ See especially P.W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (2000), with its insistence that the problem today is not too much distance from judicial guidance or policy formulation but too little.

²⁵ Kahn, *supra* note 1, at 225.

²⁶ *Ibid.*, at 226.

²⁷ See, e.g., D. Moses (ed.), *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (2008).

²⁸ R. Geuss, *Philosophy and Real Politics* (2008).