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## Carl Schmitt and the Critique of Lawfare

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## CARL SCHMITT AND THE CRITIQUE OF LAWFARE

David Luban\*

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### ABSTRACT

*“Lawfare” is the use of law as a weapon of war against a military adversary. Lawfare critics complain that self-proclaimed “humanitarians” are really engaged in the partisan and political abuse of law—lawfare. This paper turns the mirror on lawfare critics themselves, and argues that the critique of lawfare is no less abusive and political than the alleged lawfare it attacks. Radical lawfare critics view humanitarian law with suspicion, as nothing more than an instrument used by weak adversaries against strong military powers. Casting suspicion on humanitarian law by attacking the motives of humanitarian lawyers, they undermine disinterested argument, and ultimately undermine the validity of their own critique.*

*The paper then explores the vision of politics and law underlying the lawfare critique through a reading of the most significant theorist who defends that vision, the German theorist Carl Schmitt. Through a reading and critique of Schmitt, the article examines both the force of the lawfare critique and its flaws.*

### I. INTRODUCTION

“Lawfare” is the use of law as a weapon of war against a military adversary. Law can be weaponized in many ways, but easiest is accusing the adversary of war crimes, thereby subjecting him to harassment through litigation and bad publicity. War crimes accusations are not the only method of lawfare, of course. The U.S. government lawyers who wrote the torture memos, contriving legal arguments to legitimize Central Intelligence Agency (CIA) torture, were engaged in lawfare of a different sort; indeed, John Yoo, the best-known of these lawyers, indirectly boasted about lawfare by titling his memoir *War By Other Means*,<sup>1</sup> an ingenious twist on the Clausewitzian dictum that war is politics by other means. In his view, apparently, the law he practiced in his government service was war by other means, which is simply another name for lawfare. In other contexts as well, states can wage lawfare just as non-state actors can. Major General Charles J. Dunlap, Jr., who popularized the term “lawfare,” points out that lawfare “can operate as a positive ‘good,’” and details several examples in which the United States has “substitut[ed] lawfare methodologies for traditional material means.”<sup>2</sup> My chief example of lawfare, though, will be accusations by non-state actors of war crimes by a powerful, modern army. That is surely what today’s shouting is about.

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<sup>1</sup> JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* (2006).

<sup>2</sup> Charles J. Dunlap, Commentary, *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 146–47 (2008).

Although the term “lawfare” can be used purely descriptively, as General Dunlap does, it usually is not.<sup>3</sup> “Lawfare” is a pejorative and polemical word. To accuse someone of lawfare is to accuse them of something sneaky. There are two pieces to the accusation. First is the insinuation that those who wage lawfare are fighting by cowardly means. That was the implication of a much-remarked sentence from the National Defense Strategy of the United States in 2002 and 2005: “Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”<sup>4</sup> Lumping judicial processes together with terrorism as part of a “strategy” is equivalent to accusing those who take the United States government to court with lawfare of a particularly vile sort, and labeling lawfare “a strategy of the weak” is a taunt. Why doesn’t the enemy just come out and fight like real men, instead of pretending to be disinterested adherents to legality?

Second, the lawfare accusation implicitly assumes that “lawriors”—as I shall call those who engage in lawfare—are abusing the law by making unfounded accusations of illegality against their enemies. The lawrior poses as a disinterested legal actor who, more in sorrow than in anger, calls the world’s attention to war crimes by a party who, just by coincidence, happens to be the adversary. Such accusations are factually or legally baseless. So lawfare is a double affront, against both martial virtue and legal virtue.

Let me say a bit more about why lawfare offends against legal virtue. Lawfare is a species of the politicization of law. Legitimate legal claims appeal to standards that transcend the particular case and the particular parties. Legal claims are never supposed to be demands backed by nothing but the will of the parties—“give it to me because I want it!”—but rather demands backed by claims under neutral standards, taking the form “give it to me because I have a legal right to it!” Of course we are entitled to skepticism about the political neutrality of the law at all levels: legislation, access to legal institutions, judicial interpretation, and application of law to facts. But law can and does hold out the promise of at least relative neutrality and relative depoliticization—compared with partisan mud-slinging, dirty tricks, and armed conflict; and it is hard to see how law could fool so many people so much of the time if it never delivered on the promise.

The lawfare critic accuses the enemy lawrior of politicizing law, presumably for base reasons. Specifically, the lawfare critic accuses the enemy lawrior of abusing international humanitarian law and international criminal law to hamstring or at least

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<sup>3</sup> *Id.* at 146, attempts to define the term neutrally, as “the strategy of using—or misusing—law,” which treats law as “a means that can be used for good or bad purposes.” This contrasts with Dunlap’s earlier paper on lawfare, which agrees with some of the harshest lawfare critics that “too often NGO positions look like political agendas,” and that “there is an undeniable element of anti-Americanism in international law as it is developing today.” Charles J. Dunlap, *Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> [Century] Conflicts*, 2001, available at <http://www.duke.edu/~pfeaver/dunlap.pdf> (last visited Dec. 7, 2010).

<sup>4</sup> National Defense Strategy of the United States (Mar. 2005) available at [http://www.globalsecurity.org/military/library/policy/dod/nds-usa\\_mar2005.htm](http://www.globalsecurity.org/military/library/policy/dod/nds-usa_mar2005.htm) (last visited Dec. 7, 2010). See also Dunlap, *supra* note 2, at 148 (Notably, Gen. Dunlap explicitly reacted against this sentiment: “To be clear, I condemn any interpretation of lawfare which would cast as terrorists those legitimately using the courts to challenge any governmental action.”).

harass enemy military planners.<sup>5</sup> The past decade has seen two major eruptions of the lawfare critique.<sup>6</sup> The first was by the United States during the Bush Administration, and the second was by Israel and American supporters of Israel in the wake of the Goldstone Report. In the first case, the accusations were that the governments of “old Europe” and nongovernmental organizations like the International Committee of the Red Cross (ICRC) aimed to undermine U.S. tactics in the War on Terror for essentially political motives.<sup>7</sup> Here, the accusation of lawfare was indirect: no one accused the ICRC or western Europeans of intentionally aiding al-Qaeda, although some lawfare critics insinuated that the Europeans might have a geopolitical agenda of hobbling U.S. military dominance.<sup>8</sup> Rather, the accusation was that the humanitarian groups are the jihadists’ useful idiots. The reaction to the Goldstone Report was different: here, the accusation was, in the words of journalist Jeffrey Goldberg, that Richard Goldstone was “the chief of the hanging party” whose “mandate . . . was to find Israel guilty.”<sup>9</sup> This is a more direct accusation of intentional and deliberate lawfare than in the American debate.

Just as the accusation of lawfare is a species of the broader accusation of politicizing law—specifically, that lawriors politicize law for someone’s military advantage—it is also a species of ad hominem argument. By unmasking the recourse to humanitarian law as lawfare on behalf of an interested party’s military goals, lawfare critics deflects attention from the substance of the legal claims to the self-interest and sneaky motives of the person entering them. Like all ad hominem arguments, the lawfare critique has the rhetorical function of diverting attention from what classical rhetoric called the *logos* of an argument—its substance—to its *ethos*—the character of the speaker.<sup>10</sup> The *logos* in this case is the argument that soldiers have committed war crimes; the *ethos* is the insidious and militarized motives of making those accusations.

Of course, ad hominem criticism is itself the primary technique of politicized argument. Lawfare critics are themselves engaged in lawfare. Not that critiques of lawfare are necessarily a form of lawfare, just as not all war crimes accusations are a form of lawfare. Sometimes an argument is just an argument. But the most conspicuous

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<sup>5</sup> I use the term “international humanitarian law” (IHL) rather than the standard military phrase “law of armed conflict” (LOAC) for two reasons. First, I use it to emphasize that I am talking about international rather than domestic law, and second, to emphasize that a great deal of IHL grows out of the humanitarian agenda of limiting the suffering and destructiveness of warfare to the extent possible.

<sup>6</sup> By the term “lawfare critique” I mean the attack on international humanitarian law and its institutions as a form of lawfare; and I use the phrase “lawfare critic” to denote someone engaged in the lawfare critique.

<sup>7</sup> For notable accusations of lawfare made against the ICRC, see David B. Rivkin Jr. & Lee A. Casey, *Rule of Law: Friend or Foe?*, WALL ST. J., Apr. 11, 2005, at A23 (criticizing the ICRC study of customary international humanitarian law as politicized and calling for the United States to defund the ICRC); David B. Rivkin Jr., et al., *Not Your Father’s Red Cross*, NAT’L REV. ONLINE, Dec. 20, 2004, <http://crunchycon.nationalreview.com/articles/213182/not-your-fathers-red-cross/david-b-rivkin-jr> (last visited Dec. 7, 2010) (accusing the ICRC of abandoning its impartial role in favor of advocacy).

<sup>8</sup> Perhaps the paradigm text about the European agenda and its differences from that of the United States is ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (Vintage Books, 2004).

<sup>9</sup> Jeffrey Goldberg, *On That United Nations Report*, THE ATLANTIC, Sept. 2009, available at <http://www.theatlantic.com/international/archive/2009/09/on-that-united-nations-report/26777>.

<sup>10</sup> The source of the distinction is Aristotle, *Rhetoric*, in 2 THE COMPLETE WORKS OF ARISTOTLE 2152, 2155 (Jonathan Barnes ed. 1984), 1.2.1356a1-21. (The Barnes edition mistypes the marginal number as 1358a1.)

lawfare critics are suspicious of the claims of self-proclaimed humanitarian and human rights lawyers to be disinterested. Engaged in mortal combat against the lawriors, lawfare critics have no more use for disinterested inquiry than does a soldier on a battlefield.<sup>11</sup>

Some issues seem to lend themselves to politicized academic treatment because they tap into high-stakes public controversies, however indirectly. Some years ago, I was working on a law-and-literature paper about the trial scene in Aeschylus's *Oresteia*, and my research led to questions about whether there has ever been a historical matriarchy.<sup>12</sup> One famous 1861 interpretation of the *Oresteia* maintains that its legend derives from an actual conquest of a matriarchal Greek society by patriarchal Dorian invaders.<sup>13</sup> Frederick Engels accepted this interpretation in *The Origins of the Family, Private Property, and the State*, and as a result it became official dogma in the Communist world.<sup>14</sup> I discovered that it was virtually impossible to find classicists on either side of the question of historical matriarchy who were not caught up in Cold War polemics. It was difficult for an outsider to the debate, such as myself, who had no dog in the fight, to find scholarship that did not smell unreliable.<sup>15</sup> Apparently, the Cold War sucked even an obscure question of anthropology and archaeology into a political vortex, and pulled the scholars in with it. Another example is the tiresome and endless debate about punitive damages and alleged American litigiousness and runaway juries. Some years ago I attended an academic conference on punitive damages with a distinguished speaker-list that was quite balanced between the "pros," the "antis," and the "empiricists" who actually had data about the incidence of punitive damages. The morning the conference began, its dismayed organizer announced that the pro-business, anti-punitive damages speakers had pulled out. It seems that the general counsel of a major insurance company had read the papers in draft and concluded that the empirical studies were too damning to the anti-punitive damages side. Therefore the conference must be delegitimized by appearing to be one-sided business bashing. She organized corporate clients to instruct their counsel on the speaker's program to pull out of the conference. The conference organizer was flabbergasted. As I recall, only one pro-business speaker remained. Today's lawfare debate has many of the earmarks of these other debates: the scholarship always contains veiled polemical subtext that outsiders to the debate can sense even if they cannot decode it.<sup>16</sup> Ultimately, readers who honestly want to form an opinion and who come to the

<sup>11</sup> Here I have specifically in mind the "Lawfare Project," an organization that in 2010 staged one-sided "academic" conferences at major law schools to denounce the Goldstone Report and the threat lawfare supposedly poses to American interests.

<sup>12</sup> AESCHYLUS, *THE ORESTEIA*, (Hugh Lloyd-Jones, trans., 1993).

<sup>13</sup> FREDERICK ENGELS, *THE ORIGINS OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE: IN THE LIGHT OF THE RESEARCHES OF LEWIS H. MORGAN* (Ernest Untermann trans., 1902).

<sup>14</sup> JOHAN JAKOB BACHOFEN, *DAS MUTTERRECHT* (1861) (Mutterrecht translates to "Mother Right.").

<sup>15</sup> ENGELS, *supra* note 13.

<sup>16</sup> I finally found one scholarly article that actually gave a balanced presentation. Marilyn Arthur, *Review Essay: Classics*, 2 *SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY* 382 (1976). The classic Marxist interpretation is GEORGE THOMSON, *AESCHYLUS AND ATHENS: A STUDY IN THE SOCIAL ORIGINS OF DRAMA* (Lawrence & Wishart 4th ed. 1973).

<sup>16</sup> Of course, readers may wonder the same thing about this paper. To lift the veil on my own subtext, I devoted several years to criticizing the Bush administration for engaging in and legitimizing torture, and lawfare critics may regard such criticism as an instance of lawfare. See, e.g., David Luban, *The Torture Lawyers of Washington*, in DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (Cambridge Univ. Press 2007). I also criticized Bush Administration legal positions on detentions in Guantánamo, in *The War on*

scholarship for insight rather than validation of prior political positions will be disappointed. They will conclude, as I did reading the “historical matriarchy” literature, that hardly any of it is trustworthy. Not only are the legal issues politicized, but the academic debates about them are as well.

The lawfare critique is not simply that those accusing states of war crimes have ulterior motives, which would not be an interesting charge. Of course they have ulterior motives. Anyone who voluntarily has recourse to the institutions of the law has ulterior motives: nobody ever files a lawsuit out of disinterested curiosity in the answer to a legal question. In everyday litigation, we hardly think it noteworthy or morally condemnable to learn that a plaintiff has a self-interested motive for the suit; if she didn’t, we might in fact deny her standing. Undoubtedly, the ICRC has its own institutional interest in defending its interpretation of international humanitarian law. Undoubtedly, Hamas had ulterior motives in steering the Goldstone Commission to some witnesses rather than others, just as Israel had ulterior motives in hampering Goldstone’s investigation. Any competent lawyer has strategic reasons behind her choice of which legal arguments she will advance, when she will advance them, and in which forum. If strategic, goal-oriented planning behind legal arguments is the hallmark of lawfare, all litigation is like lawfare. The only difference is the specific military nature of the goal, that is, that legal success will constrain a state’s military forces by declaring some of their tactics legally off-limits. The real issue, as in domestic litigation, is not whether parties have ulterior motives, but whether the ulterior motives can be backed with valid legal arguments—whether logos underlies ethos and pathos. To insinuate that advancing such arguments is lawfare, and hence illegitimate, is to insinuate that law should never constrain armed might. Thus the radical critique of lawfare amounts to an assault on international humanitarian law and international criminal law as such.

## II. Carl Schmitt as Lawfare Critic

I am interested in the intellectual genealogy of the lawfare critique. Is there a coherent philosophy behind the mistrust of humanitarian law as a tool or pretext for disarming a state’s military? In my view, such a philosophy exists in one of the most significant and famous works of political theory of the twentieth century, Carl Schmitt’s 1932 essay *The Concept of the Political*.<sup>17</sup> Schmitt was a conservative jurist and philosopher during the Weimar Republic. He fell into eclipse after World War II because he had been a legal publicist for the Nazi Party, and had published some anti-Semitic

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*Terrorism and the End of Human Rights*, in WAR AFTER SEPTEMBER 11 51 (Verna V. Gehring ed., 2002). See also David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981 (2008) (criticizing U.S. officials for trying to undermine legal representations of Guantánamo detainees, and arguing that these efforts may have been lawfare responding to perceived lawfare by the Guantánamo defense bar). Such criticism might also fall under hostile scrutiny from lawfare critics. I respond that sometimes an argument is just an argument.

<sup>17</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (expanded ed. trans. George Schwab, 2007). This expanded edition also contains Leo Strauss’s Notes on Carl Schmitt, *The Concept of the Political* (trans. J. Harvey Lomax), and Schmitt’s 1929 paper *The Age of Neutralizations and Depoliticizations* (trans. Matthias Konzett & John P. McCormick). The latter paper is essentially a continuation of *The Concept of the Political*, and Strauss’s important comments on Schmitt refer to it. The edition also contains an extremely valuable introductory essay by Tracy B. Strong, *Foreword: Dimensions of the New Debate around Carl Schmitt*.



writings.<sup>18</sup> In the 1970s, Schmitt went through a curious revival by theorists on the left, and, after 9/11, interest in him ratcheted up again, largely because of his writings that support untrammelled executive power in the face of emergency.<sup>19</sup> Many writers noticed the “Schmittian” character of the Bush Administration’s constitutional arguments, and political theorist and commentator Alan Wolfe included in his 2009 book *The Future of Liberalism* a chapter bearing the wonderful title “Mr. Schmitt Goes to Washington.”<sup>20</sup> Schmitt lived well into his 90s and was able to witness his own rehabilitation and indeed his ultimate recognition as a major political thinker. And, like it or not, Schmitt *is* a major political thinker, as well as a powerfully seductive and stimulating writer.

The fundamental proposition of *The Concept of the Political* is that properly understood, “the political” refers solely to the friend-enemy distinction.<sup>21</sup> Furthermore, “[t]he friend and enemy concepts are to be understood in their concrete and existential sense, not as metaphors or symbols,”<sup>22</sup> and “[t]he friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.”<sup>23</sup> Schmitt does not mean that politics always involves physical warfare: “War is neither the aim nor the purpose nor even the very content of politics. But as an ever present possibility, it is the leading presupposition which determines in a characteristic way human action and thinking and thereby creates a specifically political behavior.”<sup>24</sup>

Schmitt also insists that “[t]he enemy in the political sense need not be hated personally”; but that is irrelevant to whether we will kill him if necessary.<sup>25</sup> We fight not

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<sup>18</sup> GOPAL BALAKRISHAN, *THE ENEMY: AN INTELLECTUAL PORTRAIT OF CARL SCHMITT* (Verso Sept. 26, 2002). On Schmitt’s anti-Semitic writings, see HEINRICH MEIER, *THE LESSON OF CARL SCHMITT* 151-73 (1998) (detailing and summarizing Schmitt’s most anti-Semitic statements); STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* 38-39, 50-53 (1993).

<sup>19</sup> SCHMITT, *supra* note 17.

<sup>20</sup> ALAN WOLFE, *THE FUTURE OF LIBERALISM* 126 (2009). Strong’s introductory essay to *The Concept of the Political*, *supra* note 17, offers an illuminating account of the twists and turns in the receptions of Schmitt. The connection between Schmitt, Bush Administration policies, and the lawfare critique was noted as long ago as 2005 by Scott Horton, who developed it in a terrific series of blog posts and articles: Scott Horton, *The Return of Carl Schmitt*, BALKINIZATION (Nov. 7, 2005), available at <http://balkin.blogspot.com/2005/11/return-of-carl-schmitt.html>; Scott Horton, *Carl Schmitt and the Military Commissions Act of 2006*, BALKINIZATION (Oct. 16, 2006), available at [http://balkin.blogspot.com/2006/10/carl-schmitt-and-military-commissions\\_16.html](http://balkin.blogspot.com/2006/10/carl-schmitt-and-military-commissions_16.html); Scott Horton, *Carl Schmitt, the Dolchstoßlegende, and the Law of Armed Conflict*, BALKINIZATION (Oct. 21, 2006), available at <http://balkin.blogspot.com/2006/10/carl-schmitt-dolchstoßlegende-and-law.html>; Scott Horton, *A Kinder, Gentler Lawfare*, HARPER’S MAG., Nov. 30, 2007, available at <http://www.harpers.org/archive/2007/11/hbc-90001803>; Scott Horton, *State of Exception: Bush’s War on the Rule of Law*, HARPER’S MAG., July 2007, available at <http://www.harpers.org/archive/2007/07/0081595>. Schmitt has been adopted by anti-terrorism hawks. See ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 38 (2007) (purporting to “extract the marrow from Schmitt and throw away the bones”); cf. Alice Ristroph, *Professors Strangelove* (review essay of Posner & Vermeule), 11 GREENBAG 2D 245, 248 (2008) (describing their metaphor as “probably not the best image with which to invoke a theorist associated with the Third Reich.”).

<sup>21</sup> SCHMITT, *supra* note 17, at 26.

<sup>22</sup> *Id.* at 27.

<sup>23</sup> *Id.* at 33.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 29.

out of personal hatred but because the enemy threatens our way of life. “If such physical destruction of human life is not motivated by an existential threat to one’s own way of life, then it cannot be justified. Just as little can war be justified by ethical and juristic norms.”<sup>26</sup> The fallacy of liberalism for Schmitt lies in the thought that man is intrinsically good, so if we eradicate hatred we can eradicate enmity and killing. On the contrary, “all genuine political theories presuppose man to be evil, i.e., by no means an unproblematic but a dangerous and dynamic being.”<sup>27</sup>

It follows from Schmitt’s fundamental friend-enemy conception of politics that all political groupings are oppositional—no enemies, no politics. The political world is *by definition* a world of us and them, and a political community “which embraces the entire globe and all of humanity cannot exist.”<sup>28</sup> The ancient ideal of a cosmopolis, a community of all humanity, is an apolitical fiction, and the fact that one of *them*, the enemy, is just as human, just as decent, and just as lovable as one of *us* provides no argument against killing him.

Of course people will continue to invoke the ideals of “humanity.” But in Schmitt’s view, anyone who does so operates in bad faith. As he puts it in the most memorable line in this very memorable book, “whoever invokes humanity wants to cheat.”<sup>29</sup> Not that there is anything wrong with cheating—that’s politics:

That wars are waged in the name of humanity . . . has an especially intensive political meaning. When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent<sup>30</sup>

Humanitarianism is, in Schmitt’s view, extraordinarily dangerous. Fighting on behalf of “humanity” makes your enemy “an outlaw of humanity” and allows you to do the most terrible things to him.<sup>31</sup> A war to end all war—“the absolute last war of humanity”—is “necessarily unusually intense and inhuman because . . . it simultaneously degrades the enemy into . . . a monster that must not only be defeated but also utterly destroyed.”<sup>32</sup>

And the word “humanity” is not the only polemical, political term masquerading as a lofty moral concept. “There are always concrete human groupings which fight other concrete human groupings in the name of justice, humanity, order, or peace. When being reproached for immorality and cynicism, the spectator of political phenomena can always recognize in such reproaches a political weapon used in actual combat.”<sup>33</sup>

“The political” is not a philosophical idea or indeed an idea of any sort: it is a concrete, existential reality. Political concepts have only polemical meanings. They may sound philosophical or universal, but in truth “[t]hey are focused on a specific conflict

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<sup>26</sup> *Id.* at 49.

<sup>27</sup> *Id.* at 61.

<sup>28</sup> *Id.* at 53.

<sup>29</sup> *Id.* at 54.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 36.

<sup>33</sup> *Id.* at 67.



and are bound to a concrete situation; . . . and they turn into empty and ghostlike abstractions when this situation disappears.”<sup>34</sup> Strictly speaking, then, Schmitt denies the very possibility of political philosophy. There are only political jabs and thrusts disguised as philosophy.

For Schmitt, indeed, the category of the political devours all other categories, not merely political philosophy. There is no escaping politics into a disinterested realm of any sort.

Above all the polemical character determines the use of the word political regardless of whether the adversary is designated as nonpolitical (in the sense of harmless), or vice versa if one wants to disqualify or denounce him as political in order to portray oneself as nonpolitical (in the sense of purely scientific, purely moral, purely juristic, purely aesthetic, purely economic, or on the basis of similar purities) and thereby superior.<sup>35</sup>

We can understand Schmitt’s point through a contemporary example: debates over climate change or the theory of evolution. Some people think that whether man-made greenhouse gasses cause dangerous climate change is a scientific question; so is the question of whether human beings evolved from nonhuman ancestors. But those who think that on scientific issues we should defer to science fail to understand that the concept of the political devours science along with everything else. If scientific conclusions would imply that we must change our way of life, we will reject the conclusions and, if necessary, destroy the scientists. If the scientists complain that attacks on their character, integrity, or honesty are “political,” we will (for political reasons) denounce their response as merely political.

That is what Schmitt means by saying that “the polemical character determines the use of the word political.” Even the word *political* is political: we use it to smear and undermine the claims of our adversaries. “Terminological questions become . . . highly political.”<sup>36</sup> Then, after denouncing the scientists’ defense of themselves as political, we will continue to slime them, and try as hard as we can to get them fired, defunded, and silenced. They may have thought they were answering a scientific, technical question. But in the world of politics there are no technical questions, only political questions. Hobbes recognized this when he wrote:

I doubt not, but if it had been a thing contrary to any mans right of dominion, or to the interest of men that have dominion, *That the three Angles of a Triangle, should be equall to two Angles of a Square*; that doctrine should have been, if not disputed, yet by the burning of all books of Geometry, suppressed, as farre as he whom it concerned was able.<sup>37</sup>

Of course Schmitt does not deny that that science, or art, or law, or geometry can be apolitical, provided political bodies find them harmless to their way of life; even more so if they find them useful in political conflicts. There is no denying that a state can

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<sup>34</sup> *Id.* at 30.

<sup>35</sup> *Id.* at 31–32. That includes the purely religious, as Schmitt makes clear. *Id.* at 39. God may be above politics but faith in God is not.

<sup>36</sup> *Id.* at 31.

<sup>37</sup> THOMAS HOBBS, *LEVIATHAN* 74, Ch. XI (Richard Tuck ed.).

sometimes gain political advantage by promoting a flourishing cultural scene. But politics remains primary in the sense that it is up to political actors to decide when an artist or scientist becomes politically dangerous; if they do, there will be no such thing as art for art's sake or science for the sake of knowledge. The scientists' protests of apolitical innocence will be condemned as an especially crafty political ruse.

Notice that in the paragraph quoted above Schmitt includes the "purely juristic" as one of the polemical stances enemies can take when they pretend to be nonpolitical—as a way to be political. The ICRC claims it is making impartial, "purely juristic" arguments about the laws of war.<sup>38</sup> Lawfare critics recognize that ICRC's claim to be purely juristic and nonpolitical is simply an insidious way of being political, of waging lawfare against states with powerful armies. The ICRC pretends to be neutral—one of the tell-tale signs by which we recognize the enemy. In one of most significant sentences in his book, Schmitt writes: "The high points of politics are simultaneously the moments in which the enemy is, in concrete reality, recognized as the enemy."<sup>39</sup> The lawfare critique is, in Schmitt's sense, a high point of politics.

Schmitt denounces all "neutralizations and depoliticizations,"<sup>40</sup> which for him are the hallmarks of liberalism. There are no neutralizations: if you are not with us you are against us and we will destroy you: "If a part of the population declares that it no longer recognizes enemies, then, depending on the circumstance, it joins their side and aids them."<sup>41</sup> You may not be interested in politics, but politics is interested in you.

Is there any escape from the all-consuming quicksand of politics? Not according to Schmitt: "If a people no longer possesses the energy or the will to maintain itself in the sphere of politics, the latter will not thereby vanish from the world. Only a weak people will disappear."<sup>42</sup> To retreat from politics invites annihilation; to yearn for a respite from politics is to yearn for death.

One additional idea, not very apparent in *The Concept of the Political*, comes out in some of Schmitt's later works, particularly his 1962 lectures on what we would today call terrorism, *The Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, and his 1950 book on international law, *The Nomos of the Earth*. It would be a mistake to think that Schmitt rejects the idea of laws governing warfare, or, for that matter, that he idealizes war and rejects humanitarian restraint. Rather, he believes that the ability to "bracket" war—to limit it according to the *jus in bello* principles of non-combatant immunity and avoidance of unnecessary suffering—is a historically contingent achievement of European public law, restricted to sovereigns who treat war as akin to a

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<sup>38</sup> Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Article 5(2)(c) and (g) (mandating the ICRC "to work for the faithful application of international humanitarian law applicable in armed conflicts and ... to prepare any development thereof"). See generally, Yves Sandoz, *The International Committee of the Red Cross as guardian of international humanitarian law*, ICRC Resource Centre (Dec. 31, 1998), available at <http://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm> (describing the ICRC's "guardian angel" function of "watching over the law itself to protect it from those who may undermine or weaken it").

<sup>39</sup> SCHMITT, *supra* note 17, at 67.

<sup>40</sup> See *id.* at 69, 80, and 89.

<sup>41</sup> *Id.* at 51.

<sup>42</sup> *Id.* at 53.

duel among gentlemen. The *jus publicum Europaeum* collapsed through the rise of America, the advent of air-power that detaches warfare from territory, and non-state warriors who ruthlessly wage absolute war. With it collapsed the possibility of “bracketed” warfare.

At this point, all the pieces of the argument are in place. A world divided into friends and enemies locked in existential struggle with real, non-metaphorical killing as the permanent backdrop. A critique of “humanitarianism” as a political ruse. A contempt of liberals for their weakness and their failure to recognize death struggle as man’s fate. A thoroughgoing skepticism about neutral, apolitical arguments of any sort, including legal arguments. An insistence that even those who think they can transcend politics into a more neutral, objective realm of science, law, economics, or philosophy are aiding the enemy and can be treated as enemies. An insistence that laws of armed conflict, particularly laws protecting non-combatants, depend on reciprocity among states belonging to the classical order of European public law, and that war against terrorists can never be bracketed. Schmitt has invented the critique of lawfare.

### III. Schmitt, Strauss, and the Question of Influence

Did Carl Schmitt actually exert any influence on contemporary lawfare critics? I do not know the answer—you would have to ask them. On its face, the proposition seems unlikely: Schmitt was barely discussed outside academic circles, or even much discussed within academic circles, until the middle of the millennial decade. The current edition of *The Concept of the Political* appeared in 2007; his influential *Political Theology* was out of print in English for a decade before its 2006 reprint; and the English translations of most of Schmitt’s other books appeared after 2005.<sup>43</sup> A Lexis search reveals five law review references to Schmitt between 1980 and 1990; 114 between 1990 and 2000; and 420 since 2000, with almost twice as many in the last five years as the previous five.

One possible connection, noted in 2005 by Scott Horton, is through Leo Strauss.<sup>44</sup> Strauss’s youthful essay on *The Concept of the Political* is included in the book’s English translation.<sup>45</sup> Strauss applauded Schmitt’s critique of liberalism enthusiastically, and his only criticisms of Schmitt were that Schmitt masked the extent of his nausea (Strauss’s word) over pacifism and liberalism, and refrained from following his own argument to the inevitable conclusion that humanitarian ideals are not merely unrealistic, but are actually immoral and must be combated.<sup>46</sup> Strauss’s essay demanded a less kind, less gentle Schmitt—one might say that Strauss’s essay is Schmitt without a humanitarian face. Strauss, unlike Schmitt, has exerted a powerful and lasting influence on American politics, in no small part because so many Straussians have occupied positions in

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<sup>43</sup> See ELLEN KENNEDY, *CONSTITUTIONAL FAILURE: CARL SCHMITT IN WEIMAR 2* (Duke Univ. Press 2004); Craig McFarlane, *Carl Schmitt in English*, THEORIA, <http://www.theoria.ca/research/> (updated Nov. 1, 2008).

<sup>44</sup> See Horton, *The Return of Carl Schmitt*, *supra* note 20.

<sup>45</sup> SCHMITT, *supra* note 17, at 97.

<sup>46</sup> See *id.* at 116 (“nausea”), 119–20 (discussing Schmitt’s concealment of his moral critique of humanitarian ideals).

government, journalism, and the neoconservative movement.<sup>47</sup> Neoconservatives have been among the most vigorous lawfare critics.

But I am not arguing for a causal influence of Schmitt on lawfare critics, because I cannot demonstrate that it is there. Rather, I am arguing that Schmitt's philosophy offers the best articulation I have found of the lawfare critique. It may be time for lawfare critics to take ownership of their ancestor.

#### IV. Schmitt's Misrepresentation of Politics

What can be said in response to Schmitt?<sup>48</sup> A full-fledged assessment of Schmitt's views lies beyond my aim in this short paper. But I would like to raise some points that bear specifically on the lawfare debate.

Start with Schmitt's insistence that the term "political" is itself polemical.<sup>49</sup> This amounts to a hidden, self-referential caution to readers that Schmitt's *own* concept of the political is polemical. It is not neutral, objective, academic, or philosophical. It is slanted, biased, and loaded. Schmitt tells us that much, but he never holds the mirror to himself and tell us exactly *how* his concept is loaded.

My answer is that even though "that's just political!" is often an accusation, the word "political" has positive associations in our tradition, which Schmitt cunningly trades on. Aristotle proclaimed that man is the *zōon politikon*, the political animal, and argued that the political life is the best and freest life for man as a practical being.<sup>50</sup> It would seem to follow, then, that pacifists or humanitarians who yearn for the end of bloody friend-enemy polarities want to destroy something essential to human beings. At several points in *The Concept of the Political*, duly noted by Strauss, Schmitt hints, without actually saying, that even if it were possible to expunge deadly friend-enemy dyads from the world it would not be desirable. It would shrink the meaningfulness of human life to mere entertainment; life would at most be interesting, but never meaningful.<sup>51</sup> Strauss seizes on these hints that a depoliticized world would be a sub-human world and insists that this is Schmitt's actual view.<sup>52</sup>

We hear in Strauss echoes of Nietzsche's contempt for "the last man," the post-dangerous man, the timid bourgeois—about whom Schmitt too speaks with contempt.<sup>53</sup> Without politics, man would not be man. He would be a tamed puppy. Schmitt does not quite say this, but he hints at it: "Were this entity [the friend-enemy grouping] to

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<sup>47</sup> See, e.g., CATHERINE H. ZUCKERT & MICHAEL ZUCKERT, *THE TRUTH ABOUT LEO STRAUSS: POLITICAL PHILOSOPHY AND AMERICAN DEMOCRACY* (The Chicago Univ. Press 2006); SHADIA B. DRURY, *LEO STRAUSS AND THE AMERICAN RIGHT* (St. Martin's Press 1999); ANNE NORTON, *LEO STRAUSS AND THE POLITICS OF AMERICAN EMPIRE* (Yale Univ. Press (2004) (discussing Strauss's influence).

<sup>48</sup> Setting to one side his disagreeable career as a Nazi and anti-Semite, which are not the basis of the criticisms that follow. See Strong, *supra* note 17, at ix-x; MEIER, *supra* note 18; HOLMES, *supra* note 18, at 38-39; BALAKRISHAN, *supra* note 18.

<sup>49</sup> See SCHMITT, *supra* note 17, at 31-32.

<sup>50</sup> Aristotle, *Politics*, in 2 *THE COMPLETE WORKS OF ARISTOTLE*, *supra* note 10, at 1987, 1.2.1253a2. Aristotle claims at the beginning of the *Politics* that the state (the *polis*) "aims at good in a greater degree than any other [community], and at the highest good." *Id.* at 1986, 1.1.1252a5-63.

<sup>51</sup> SCHMITT, *supra* note 17, at 35; Strauss, *supra* note 17, at 53.

<sup>52</sup> Strauss, *supra* note 17, at 115-17.

<sup>53</sup> *Id.* at 51 and 62.

disappear, . . . then the political itself would disappear.”<sup>54</sup> That sounds pretty scary if you have positive Aristotelian associations with politics, but in fact, Schmitt’s assertion is a mere tautology. He has defined the concept of the political as the friend-enemy grouping, so by definition if the friend-enemy grouping disappears the political disappears. So what? The only thing that makes this assertion sound significant is the set of associations—absent from Schmitt’s friend-enemy construct—that makes us think the political is a form of community rather than antipathy, and therefore that the political is indispensable to meaningful human life.

Among these associations is the positive, constructive side of politics, the very foundation of Aristotle’s conception of politics, which Schmitt completely ignores. Politics, we often say, is the art of the possible. It is the medium for organizing all human cooperation. Peaceable civilization, civil institutions, and elemental tasks such as collecting the garbage and delivering food to hungry mouths all depend on politics. Of course, peering into the sausage factory of even such mundane municipal institutions as the town mayor’s office will reveal plenty of nasty politicking, jockeying for position and patronage, and downright corruption. Schmitt sneers at these as “banal forms of politics, . . . all sorts of tactics and practices, competitions and intrigues” and dismisses them contemptuously as “parasite- and caricature-like formations.”<sup>55</sup> The fact is that Schmitt has nothing whatever to say about the constructive side of politics, nor about local politics; and his entire theory focuses on enemies, not friends. In my small community, political meetings debate issues as trivial as whether to close a street and divert the traffic to another street. It is hard to see mortal combat as even a remote possibility in such disputes, and so, in Schmitt’s view, they would not count as politics, but merely administration. Yet issues like these are the stuff of peaceable human politics.

Schmitt, I have said, uses the word “political” polemically—in his sense, politically. I have suggested that his very choice of the word “political” to describe mortal enmity is tendentious, attaching to mortal enmity Aristotelian and republican associations quite foreign to it. But the more basic point is that Schmitt’s critique of humanitarianism as political and polemical is itself political and polemical. In a word, the critique of lawfare is itself lawfare. It is self-undermining because to the extent that it succeeds in showing that lawfare is illegitimate, it de-legitimizes itself.

What about the merits of Schmitt’s critique of humanitarianism? His argument is straightforward: either humanitarianism is toothless and apolitical, in which case ruthless political actors will destroy the humanitarians; or else humanitarianism is a fighting faith, in which case it has succumbed to the political but made matters worse, because wars on behalf of humanity are the most inhuman wars of all. Liberal humanitarianism is either too weak or too savage.

The argument has obvious merit. When Schmitt wrote in 1932 that wars against “outlaws of humanity” would be the most horrible of all, it is hard not to salute him as a prophet of Hiroshima. The same is true when Schmitt writes about the League of Nations’ resolution to use “economic sanctions and severance of the food supply,”<sup>56</sup>

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<sup>54</sup> *Id.* at 45.

<sup>55</sup> *Id.* at 30.

<sup>56</sup> *Id.* at 79.

which he calls “imperialism based on pure economic power.”<sup>57</sup> Schmitt is no warmonger—he calls the killing of human beings for any reason other than warding off an existential threat “sinister and crazy”<sup>58</sup>—nor is he indifferent to human suffering.

But international humanitarian law and criminal law are not the same thing as wars to end all war or humanitarian military interventions, so Schmitt’s important moral warning against ultimate military self-righteousness does not really apply.<sup>59</sup> Nor does “bracketing” war by humanitarian constraints on war-fighting presuppose a vanished order of European public law. The fact is that in nine years of conventional war, the United States *has* significantly bracketed war-fighting, even against enemies who do not recognize duties of reciprocity.<sup>60</sup> This may frustrate current lawfare critics who complain that American soldiers in Afghanistan are being forced to put down their guns. Bracketing warfare is a decision—Schmitt might call it an existential decision—that rests in part on values that transcend the friend-enemy distinction. Liberal values are not alien extrusions into politics or evasions of politics; they are part of politics, and, as Stephen Holmes argued against Schmitt, liberalism has proven remarkably strong, not weak.<sup>61</sup> We could choose to abandon liberal humanitarianism, and that would be a political decision. It would simply be a bad one.

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<sup>57</sup> *Id.* at 78.

<sup>58</sup> *Id.* at 48.

<sup>59</sup> David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85 (2004).

<sup>60</sup> *See generally*, MARK OSIEL, *THE END OF RECIPROCITY* (Cambridge Univ. Press 2009) (arguing that there are reasons beyond reciprocity for maintaining humanitarian norms).

<sup>61</sup> HOLMES, *supra* note 18, at 57-58. Holmes reminds us rather dryly that it was the liberal states that won World War I. *Id.* at 48.