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Outsourcing Sacrifice: The Labor of Private Military Contractors

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Numerous scandals arising from the United States government's increased use of armed private military contractors have drawn attention to the contractors' legally ill-defined position. But the complexity of the contractors' relation to various bodies of law and doctrine—including military law, international law, state tort law, employment law, and sovereign immunity—is not the only salient issue. The contractors are also awkwardly positioned in relation to the traditional understanding of sacrifice, which has structured Americans' imaginings about those who kill and are killed on behalf of the nation. In this understanding, there is a mutually constitutive relationship between citizenship and sacrifice. This Article examines the contractors' relation to the tradition of sacrifice and finds that they are officially excluded from it—their deaths are not included in body counts, for instance, and they are not given medals and honors. It construes the emergence of the contractor as an effort by U.S. officials to avoid the political liability entailed in calling a loss a sacrifice and discusses the way in which the legal form of contract and the policy of privatization have been means through which this is attempted. The Article then focuses on one case in which this effort ran into difficulties: the spectacular and grotesque killing, dismembering and immolation of four Blackwater contractors in Fallujah, Iraq. In this event, individuals who had contracted their services came to be seen as having sacrificed for the U.S. In conclusion, the Article urges that while it is important to address the lack of legal clarity surrounding contractors, it is also necessary to address their position in the tradition of sacrifice and attend to the deeper issues of popular and governmental sovereignty which that tradition articulates.

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INTRODUCTION

> "They made the ultimate sacrifice and they are missed by their friends and families and their clients."[1]
>
> —*The Red Zone*, private military contractor website

Killing by, and the killing of, armed private military contractors in Iraq has drawn attention to their ill-defined legal and cultural position. Are these contractors and their employers subject to Iraqi law, U.S. military or criminal law, state tort law, or international law? Can they kill with impunity? A symmetrical question arises: can they be killed with impunity? By this I mean not whether an Iraqi who kills a contractor would be immune from prosecution, but whether the killing of a contractor implicates the United States government in the same way that the killing of a U.S. soldier does—that is, as a sacrifice for the nation which officials and the public are expected to recognize, count, and honor. Are the contractors, in sum, both unable to commit homicide and ineligible for sacrifice? Do the legal form of contract and the policy of privatization serve to immunize and dissociate the United States from these forms of liability for those who kill or are killed on its behalf?

The United States has a long tradition of honoring those who serve in its armed forces, of recognizing their suffering and deaths as sacrifices. Part I of this Article, "Sovereignty and Sacrifice," describes this tradition, the significance of which extends far beyond the military, since citizenship, the enjoyment of civil liberties, and military service have long been profoundly intertwined. In this mutually constitutive relationship, those who sacrificed on behalf of the nation were citizens, and citizens were those who sacrificed for the nation. This tradition is visible at some of the most moving sites in the American national tradition, such as at Arlington National Cemetery, and in its most powerful political oratory, such as the Gettysburg Address. As Paul Kahn has urged in his exploration of this dimension of American political culture, these offer a conception of death not as a "mere negation" of life, but as a point of transcendence.[2] Those who by various criteria—gender, race, status as slave, and sexual orientation, for example—have been excluded from eligibility for sacrifice, have found that their exclusion from that part of the citizen-sacrifice equation has been offered as one explanation for their exclusion from full citizenship. Those outsiders who have been able to show that they have sacrificed through military service—for example, immigrants—

1. The Red Zone, www.psd-eod.typepad.com/dont_worrywell_protect_yo/2005/06/index.html (last visited Dec. 26, 2008).

2. PAUL KAHN, PUTTING LIBERALISM IN ITS PLACE 63 (2005).

have found themselves inscribed as citizens, while citizens who refuse to serve may, in theory, find themselves denationalized.[3] This Part links this relationship between citizenship and sacrifice to a concept of popular sovereignty—in which sovereignty is dispersed among the ephemeral but occasionally visible "People."

Part II, "The Unsacrificeable Contractor," examines the private military contractors' relation to this traditional linkage between citizenship and sacrifice. Are they excluded from this form of recognition and its various political and legal ramifications? Whether or not military privatization is cost-effective is a complex question.[4] A far easier claim to substantiate is that it is cost-effective in the currency of national sacrifice. Contractor deaths are not accorded the same honors as those offered to soldiers,[5] they are not included in official body counts, etc. Moreover, since contractors are sometimes seen as motivated by compensation in "excess" of that offered soldiers—to borrow a word from the international law definition of the mercenary—their conduct lacks a component of the sacrificial idea. That is, that sacrifice as an altruistic giving of the self, even an act of love. Thus, the provisional conclusion of Part II is that there are good reasons to think that contractors are excluded from the American sacrificial tradition—the contractors are akin to mercenaries, and their deaths are, for a national audience, banal and insignificant events, not sacrifices. But as this Part also notes, we can detect other formulations that suggest that our national engagement with sacrifice is more complex and that the legal and cultural designations do not exhaust our understanding of the contractors. Contractors and U.S. officials have described contractors' deaths as "sacrifices." Even the U.S. military has been confused in this area, handing out (and later retracting) Purple Hearts and other medals to contractors.

To look more deeply into this complex reality, Part III, "The Sacrifice at Fallujah," examines a widely reported example of the difficulties entailed in creating a group of unsacrificeable persons. Early in the U.S. war in Iraq, in March 2004, four armed contractors employed by Blackwater Security Consulting were ambushed and then grotesquely and spectacularly killed, dismembered, and immolated, by hundreds of Iraqis and insurgents in Fallujah. For many U.S. officials and media commentators, these acts of "desecration," as some called them, re-nationalized the service that had been privatized. The deaths were

3. *See infra* Part I and accompanying notes.

4. Laura Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 149, n.45 (2005) (writing that "[m]ilitary privatization can perhaps be explained primarily by the promise of cutting costs," but noting in a footnote that these "cost savings have not been conclusively demonstrated").

5. I use "soldier" as a generic term to refer to the members of the Armed Forces, such as sailors and airmen.

conceived as sacrifices on behalf of the United States, and becoming sites where the nation itself became visible through violent loss. This Part asks whether this conceptualization stems from deeply rooted ideas of popular sovereignty, according to which sovereignty resides not in the body of the king or the state but in the citizenry, and, in a latent sense in the body of the individual citizen. This notion provides a pathway between an American national audience and the suffering of the contractor, guiding the horrified identification which many people seemed to feel and upon which officials acted. One theme I draw out of this example is the way that calling a loss a sacrifice can challenge *ex ante* legal classifications. Although I do not present a narrowly causal argument, following the Fallujah event we have seen numerous changes in the legal and policy location of military contractors.

Part IV, "The Other Sovereign," follows the subsequent legal proceedings arising from the Fallujah incident: a fraud and wrongful death suit brought in North Carolina state court brought by the families of the slain contractors. The contractors killed in Fallujah moved from a private status to a public and consecrated one *via* their membership in the sovereign. Their employer, Blackwater (thus far unsuccessfully) sought to make a parallel move, claiming that it too was actually part of the sovereign, at least in sufficient degree that it should enjoy sovereign immunity from litigation in state or federal court. This is a different "sovereign," to be sure, one that traces its genealogy not to an empheral People but more typically to the Crown or international law. Thus I organize my narrative around the juxtaposition of two conceptions of sovereignty: popular sovereignty and governmental sovereignty. If contractor companies were to gain immunity, and contractor deaths were to remain banal and not sacrificial, this would constitute an innovative alignment, since currently the sovereign immunity of the state is cojoined with calling deaths in its service "sacrifices." This Part ends rather anti-climactically with the dismissal of the contractors' suit from court—not because of a finding of immunity, but because of a binding arbitration clause in the independent contractor agreement that each contractor had signed.

Having sketched some of the basic themes surrounding the contractors' relation to sacrifice and their employers' efforts to assert immunity, Part V, "The Distribution of the Capacity for Violence," takes a broader look at the place of military service in American society. Is it our concern that the government is able to employ force without the bodily participation of the citizenry (without asking for their "sacrifice"), and is thereby hewing more to the tradition and genealogy of governmental sovereignty than popular sovereignty? Is there anything novel in this development, or is it simply an old story in a new form? We might have the same complaint about the increased mechanization of war (for instance, the use of drones and

robots),[6] or the (sometimes covert, sometimes illegal) use of proxy armies such as the Hmong mercenaries in Laos, the Afghan mujihideen, or the Nicaraguan contras, to say nothing of support for other states and their various adventures against their own populations or external enemies.[7] In the case of proxy armies, this too might look like an effort to "privatize" war and outsource sacrifice.[8] Indeed, as compared to some of these alternatives, present day contractors such as Blackwater seem virtually in-house. In this Part, I locate the contractor in relation to the decline of the citizen soldier, the rise of a permanent army, the advent of nuclear weapons and the end of conscription after the Vietnam War. Drawing on Elaine Scarry's originality reading of the Second Amendment to the U.S. Constitution and the War Powers Clause, I look at the distribution of the capacity for violence in the American polity and relate an increasing centralization of that capacity to a passive conception of sacrifice—citizens imaginatively if not actually participate in political violence as potential victims, in nuclear war, for instance, or terrorist attacks. In either case, there is very little actual call (and perhaps need) from the government for assistance from the citizenry, as compared with the experience of total war in the mid-twentieth century.

The Part also describes the role of Milton Friedman in the Presidential Commission that recommended the end of the draft, in particular his conceptualization of military service as, above all, an issue of manpower and labor best addressed through market mechanisms. The Commission report framed conscription as an unfair form of "in-kind" taxation, and Friedman even described it as slavery. In a conceptualization of military service as a matter of labor and not a sacrament, we can see important precursors to the current emergence of military contractors. The Commission's discussion of the disparity between a market wage and the compensation offered the conscript offers another way to think of the conscript's sacrifice. They are compelled to sell at a loss—less a willing sacrifice of the self than an act of being sacrificed.

Before proceeding further, it may provide clarification to make explicit a few other features of my point of departure. The tradition of honoring sacrifice may typically be associated with the power of the state—for

6. Cornelia Dean, *A Soldier Taking Orders from its Ethical Judgment Center*, N.Y. TIMES, Nov. 24, 2008, at D1.

7. *See* MAHMOOD MAMDANI, GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR (2005) 65-66 (describing that in order to close the Ho Chi Minh Trail in Laos, the "CIA led a secret army of thirty thousand Hmong mercenaries against Communist guerillas. . . .As opposition to the Vietnam War mounted back home, the advantages of proxy war became clear: waged in secret, it was at the same time removed from congressional oversight, public scrutiny, and conventional diplomacy"); *id.* at 178 (describing "Nixon doctrine" that "Asian boys must fight Asian wars"); *id.* at 131 (describing the Afghan mujahideen as proxy for U.S. where the "point was to ensure the direct involvement of as few Americans as possible").

8. *See id.* at 131 ("The overall effect was progressively to privatize the [Afghan] war on an international basis").

instance in the ability of officials to summon and manipulate nationalist sentiment. This Article is focused on another dynamic, namely, the way in which calling a loss a sacrifice functions as a form of liability for officials. Clearly I do not examine sacrifice as a category that pertains only to the barbaric other – such as the suicide bomber. And I do not undertake a deconstruction of social contract theory, in which the preservation of the individual's life is the purpose of the covenant, or of liberal political thought, for which death is nothing but negation, as unable to account for the actual place of sacrifice in our political order. Kahn, in his book *Putting Liberalism in Its Place,* has already done this in a profound way; he has urged that sacrifice and sovereignty must be considered together, and that sacrifice and not contract is the most accurate way of framing the political relationship.[9] I take as a point of departure that the U.S. government pursues not only a monopoly of violence but also a monopoly of sacrifice – that is, control over sacralized, transcendent loss. Having made these assumptions, what I wish to explore in this Article are policies that *avoid* sacralization and sacrifice, that unbundle the sacred and the state. More specifically, I describe a state that uses legal form to attempt to construe certain deaths as sacrificial and others as banal and meaningless, in relation to a given audience. I then explore some of the difficulties that these attempts encounter as nonstate actors employ and advance their own conceptions of sacrifice and meaningful loss.

In using a vocabulary that has Christian (as well as Jewish and Islamic) resonances, I do not intend to explicitly engage the question of whether the state is actually a "religious" organization or whether I am describing a "political theology."[10] In addition to being a religious term, sacrifice is relevant as a political and economic category; but, more interestingly, it operates at points of contact between those larger organizing categories (political, economic and religious).

In a more recent scandal involving Blackwater, contractors shot and killed 17 Iraqi civilians in Baghdad in 2007. Like the Fallujah incident, these killings have resulted in significant media and legal drama, including Congressional hearings, lawsuits by aggrieved relatives, and an examination of the position of the contractor. As with the contractors' deaths, the deaths of the Iraqi civilians appears to chafe against the legal structure initially established by the United States (and the now sovereign Iraqi state) which designated such deaths as legally insignificant. In the

9. KAHN, *supra* note 2, *passim*.

10. For discussion of these themes, see TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 21-66 (2003); CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 36 (George Schwab trans., University of Chicago Press 2005); WINNIFRED SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005); MICHAEL TAUSSIG, THE MAGIC OF THE STATE (1997).

more recent case, the repressed category is not sacrifice, but homicide.

Since the attacks at Fallujah, the legal position of the contractors has changed in important ways—and so too has the political climate. Just months afterwards, before leaving Iraq and transferring sovereignty from the Coalition Provisional Authority to the Iraqi government, Paul Bremer issued Order 17 giving the contractors (Blackwater had been guarding Bremer) immunity from prosecution under Iraqi law.[11] In 2004 Congress amended the Military Extraterritorial Jurisdiction Act, subjecting civilian contractors to federal criminal prosecution, including contractors working for U.S. agencies other than the Defense Department (a 2000 amendment already covered those employed by the Department).[12] Two years later, in February 2006 private contractors were recognized as part of U.S. Total Force along with the rest of the armed services.[13] In late 2006, a defense spending bill, with very little notice, placed contractors under military law, the Uniform Code of Military Justice—but doubts have been raised about exercising military jurisdiction over "civilians."[14] Most recently, Iraq (through the 2008 Status of Forces Agreement with the United States, and fueled by anger at the killing of civilians in Baghdad by Blackwater in 2007) asserted jurisdiction over contractors and in early 2009 it refused to issue Blackwater a license to operate in the country.[15] Back in the United States, as of late 2008, several of the Blackwater workers involved in the Baghdad shootings have been indicted for manslaughter.[16] While the contractors are increasingly subject to various forms of civil and military jurisdiction in the United States and Iraq there remains much uncertainty.[17]

In the midst of these on-going developments, serious questions remain

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11. Coalition Provisional Authority Order Number 17 (Revised), (June 27, 2004), *available at* www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf (Section 4.3 "Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto").

12. The law extends jurisdiction over employees of "any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas." 18 U.S.C. § 3267 (1)(A)(i)(II)(2004), *amended by* Pub. L. 108-375, 118 Stat. 1811.

13. DEPARTMENT OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 87 (2006), *available at* www.defenselink.mil/pubs/pdfs/QDR20060203.pdf ("The Department of Defense is the world's largest employer, directly employing more than three million people. The Department's Total Force—its active and reserve military components, its civil servants, and its contractors—constitutes its warfighting capability and capacity").

14. National Defense Authorization Act for Fiscal Year 2007 §552, 120 Stat. 2083, 2217 (amending 10 U.S.C. § 802(a)(10)).

15. AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF IRAQ ON THE WITHDRAWAL OF THE UNITED STATES FORCES FROM IRAQ AND THE ORGANIZATION OF THE ACTIVITIES DURING THEIR TEMPORARY PRESENCE IN IRAQ, Art. 12(2), Nov. 17, 2008, *available at* www.whitehouse.gov/infocus/iraq/SE_SOFA.pdf; Ernesto Londoño & Qais Mizher, *Iraq to Deny New License to Blackwater Security Firm,* WASH. POST, Jan. 29, 2009 at A12.

16. United States v. Slough, Indictment, filed Dec. 4, 2008, CR-08-360 (D.C.D.C), at, www.news.findlaw.com/nytimes/docs/iraq/blackwater-indictment1208ind.html; Ginger Thompson & James Risen, *5 Guards Face U.S. Charges in Iraq Deaths*, N.Y. TIMES, Dec. 6, 2008.

17. For broad discussion, including anti-Pinkerton statutes, see Michael Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CON. L.J. 233, 255 (2000).

about how best to strengthen mechanisms of legal accountability and administrative oversight and control.[18] While the word "contract" may conjure up an image of a sober agreement and reciprocal exchanges, much of the contracting—and the multiple layers of subcontracting—has been remarkably chaotic, disjointed, opaque and sometimes corrupt. It has often been undertaken without competitive bidding and with guaranteed profits, and sometimes seems to blur into other transactional forms—such as gift or even larceny.[19] There are also broad questions about the threat that contractors pose to democratic accountability.[20] A related issue, and one which is explored in this Article, is what I discuss as the sacrificial liability of the U.S. government. Amidst the many reforms contemplated and critiques leveled, the sacrifice issue is latent but only rarely explicitly addressed.[21] While the lines of legal accountability are redrawn, there is little talk of the need to bury contractors at Arlington National Cemetery or to insert them into the politically costly structures of honor and recognition which played an important role in the rise of the industry in the first instance.

One reason why it is important to focus on our language and practices of calling certain losses "sacrifices" is that these track the government's dependence on the citizenry, as well as our interdependence, as citizens, upon one another. While the reasons to want to avoid this form of giving are obvious from the point of view of the citizen, the government that avoids it is showing its autonomy from the citizenry. Seen in this light, a turn away from sacrifice in the U.S. political and legal order constitutes a recalibration of relations between citizen and state. It is one that runs parallel to the rise of a state of exception which various authors have examined in recent years.[22] These two developments share a common

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18. *See, e.g.*, Dickinson, *supra* note 4.

19. For a sustained argument on the underlying gift-like nature of the market and the social contract, see Carol Rose, *Giving, Trading, Thieving and Trusting: How Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 315 (1992) ("The oddly anomalous category of gift, then, seems central to exchange. Exchange may rest on gift directly: one party is left exposed to the danger of loss, at least temporarily, and gives over her goods in trust, even without the assurance of reciprocity. Or exchange may rest on gift indirectly: we create outside enforcement mechanisms that enable us to take those first risky steps with some confidence, but those enforcement mechanisms, that old Leviathan, only get started because someone gives the time and energy needed for organizing them. Either way, the category of exchange requires the very element of unilateral generosity that seems to make gift so strange").

20. Martha Minnow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, And Democracy*, 46 B.C. L. REV. 989, 1023 ("But even more troubling is the possibility that by using private contractors, the government can avoid checks and balances in a democratic system"); *see also* Clifford J. Rosky, *Force Inc.: The Privatization of Punishment, Policing and Military Force in Liberal States*, 36 CONN. L. REV. 879, 938 (2004) (for an excellent break-down of the spectrum of accountability arguments).

21. *See* Jon Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001, 1043-46 (2004) (discussing the lack of public meaning attributed to contractors' deaths as contrasted with those of soldiers).

22. In fact, the relation between sacrifice and various elaborations of the exception are more complicated—mainly because recent years are not best conceived of as being in the tradition of the

theme: the independence of the government from the citizenry in one case, and from the normal legal order in the other. In the contractor example, both types of estrangement, from law and from the citizenry, are potentially joined.

The Conclusion raises the question of bringing the contractors into the national tradition of sacrifice. If contractors are to act on behalf of the sovereign—which they are, if they are to kill and be killed in the interests of the United States—perhaps their deaths should be seen as sacrifices. Indeed, as I show through various examples, there are signs that this transformation may already be underway. The Article does not endorse this development, however, since such a recognition by policy makers could backfire, increasing the prestige of contractors without functioning as a form of public accountability.

I. SOVEREIGNTY AND SACRIFICE

If one dimension of sovereignty is a capacity to exercise violence with legal impunity, how are we to understand the relation of sovereignty to sacrifice? Designating the death of a citizen at the behest of the state a "sacrifice" often functions as a form and rhetoric of accountability, insisting that the loss was not (or should not have been) insignificant, but rather something transcendent and sacred which should be honored and recognized. Thus sacrifice might militate against sovereign impunity. At the same time, since this "accountability" can verge on the empheral, it might, in many instances, seem to be little more than a cynical screen for an underlying ability to demand an offering without compensation.

In recent years, sacrifice is often discussed as the act that U.S. citizens have not been asked to perform. While this is a time of "war," the complete giving of the self—or its taking by the government—that had come to characterize total war of the twentieth century is clearly absent.

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exception. For background on the exception as the "new norm," see, for example, GIORGIO AGAMBEN, STATE OF EXCEPTION 3-4, 9 (Kevin Attell trans., University of Chicago) (2005); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2002). I cannot resist noting that it is the rejection by top Bush and Cheney advisors of "acting extralegally" that is the perhaps the most interesting part of Jack Goldsmith's account, JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007), of his brief tenure as head of the Office of Legal Counsel. Advisors such as Alberto Gonzales and David Addington, according to Goldsmith, rejected the "Locke-Jefferson paradigm" of prerogative power: where the executive would take legally questionable steps (in Locke's language, exercise prerogative) when absolutely necessary, but would then "throw himself on the mercy of Congress and the people so that they could decide whether the emergency was severe enough to warrant extralegal action." *Id.* at 81, 83. By contrast, because of the "hyper-legalization of warfare," according to Goldsmith, this model was "off the table," and "The President had to do what he had to do to protect the country. And the lawyers had to find some way to make what he did legal." *Id.* at 81. It is hopefully not stretching the term sacrifice too much to think that it is relevant here: that the official who knowingly makes himself a criminal for the common good sacrifices himself for it. S/he hopes that the sacrifice will be not be necessary, that they will be forgiven. This seems to the civil disobedience model of prerogative power which Judge Posner has described. RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 152-55 (2006).

Sacrifice is what Americans have not been asked to do, but it does appear frequently as the technique America's enemies employ when they martyr themselves.[23] Even so, sacrifice—or at least sacralization—is visible at sites like "ground zero" in New York which has become a national shrine of a kind, and in the reception of the deaths of soldiers. We can still detect republican currents by which sacrifice and citizenship are mutually constitutive, however attenuated or partisan these links may be.[24]

This Part canvases various usages of the term sacrifice, looking first at examples from the anthropological record and the Bible and, second, at examples from the United States. It does not purport to be comprehensive, but rather identifies several themes that will guide our analysis of private military contractors.

A. The Divine Sovereign

A brief review of sacrifice in the anthropological record and the Bible serves to highlight several relevant points. First, is an idea that sacrifice mediates and links different domains. In Marcell Mauss and Henri Hubert's sociological gloss from the 1890s, sacrificial procedure "consists in establishing a means of communication between the sacred and the profane worlds through the mediation of a victim, that is, of a thing that in the course of the ceremony is destroyed."[25] Anthropologist Claude Levi-Strauss, writing in the 1950s, employed a similar idea but generalized it beyond Mauss' sacred/profane dichotomy. "Sacrifice," he wrote, "seeks to establish a desired connection between two initially separate domains." [26] By asserting a connection and relation of identity between distinct objects—he was focusing on sacrifices of substitution where x is given instead of y—it blurred distinctions, and hence meaning itself. He derided sacrifice as, literally, nonsense.[27] It is just the potential nonsense of sacrifice, when in the hands of non-state actors, that is especially interesting in our current moment. In our contractor example, these themes are relevant: we have a policy that declares the contractors' deaths are insignificant, but through the violent act of destruction, the significance of their deaths is recalibrated.

Second, we can think of sacrifice in relation to sovereignty (a point I take up in the next section as well). As a technique of connecting the temporal with the transcendent, sacrifice is deeply linked to sovereignty in

23. *See, e.g.*, TALAL ASAD, ON SUICIDE BOMBING, 43-45, 51 (2007) (criticizing the widespread use of "sacrifice" as an analytic to describe suicide bombing.).

24. *See* Mateo Taussig-Rubbo, *Sacred Property: Searching for Value in the 9/11 Rubble*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269533 (discussing disputed status of rubble from attacks as abandoned and as sacred).

25. HENRI HUBERT & MARCEL MAUSS, SACRIFICE: ITS NATURE AND FUNCTION 97 (W.D. Halls trans., University of Chicago Press) (1964).

26. CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 224-28 (1966).

27. *Id.*

a vast range of human societies. Anthropologist Marshall Sahlins states that in Indo-European and Polynesian conceptions of kingship, political authority invariably arrives from "outside" the society. The outsider status can be literal, as when the would-be sovereign is an immigrant, a foreign prince, or created through the commission of terrible crime, usually rape, incest or murder, which shows that the sovereign is outside the moral and legal order.[28] Sacrifice is one common way for the foreign sovereign to become domesticated, or the sovereign is himself killed and is reborn as a local god.[29] By taking or receiving (the ambiguity is important) offerings from the locals, the foreign sovereign becomes bound to the local people, and is temporarily pacified. This evokes a conception of sovereignty not merely as a state of exception to the normal order, but also as a creative, foundational force, a constituent power.[30] Sacrifice in relations with political authorities might be seen as on a continuum with other forms of offering like first fruits, taxes, and tribute.[31] These are all given "up" to the political authorities and non-human powers. This dimension of sacrifice suggests a link to traditions of governmental sovereignty—in which the state is an alien entity, not derivative of "the People." But it also reaffirms that sacrifice composes part of the sovereign's dependence on the local people.

Third, in many of the classic stories of sacrifice, there is a substitution of the sacrificial victim at the last minute (the ram in place of Isaac; a hind in place of Iphigenia), although this (some commentators say) is transcended with the "new" self-sacrifice of Jesus or that of Socrates.[32] Even in the "old" stories, there is an element of giving of the self—thus with Abraham's sacrifice it is clear that Isaac's loss of life would have been an enormous loss to Abraham, that he too is a victim.[33] And in the "new," such as Jesus', themes of substitution are not hard to detect: he is a lamb who suffers in place of humanity; he is the son given by the father.

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28. MARSHALL SAHLINS, ISLANDS OF HISTORY 73 (1985).

29. *Id.* at 73 ("Initially a stranger and something of a terror, the king is absorbed and domesticated by the indigenous people, a process that passes by way of his symbolic death and consequent rebirth as a local god").

30. *See* Andreas Kaylvas, *Popular Sovereignty, Democracy and Constituent Power*, CONSTELLATIONS, 12, 2: 225 (2005).

31. *See, e.g.*, ROSS HASSIG, TRADE, TRIBUTE, AND TRANSPORTATION: THE SIXTEENTH-CENTURY POLITICAL ECONOMY OF THE VALLEY OF MEXICO (1993).

32. Many interpreters of our dominant religious traditions insist, like Weberian theorists of modern disenchantment, that ours is a post-sacrificial era. For instance, many commentators describe archaic shifts internal to the sacred Book from sacrifice to law in the Jewish case, or from sacrifice to love in the Christian. *See* Jill Robbins, *Sacrifice, in* CRITICAL TERMS FOR RELIGIOUS STUDIES 288 (Mark Taylor ed., 1998). I draw on Robbins throughout this section. See also Jonathan Sheehan, *Sacrifice Before the Secular*, REPRESENTATIONS 105 (Winter 2009), 12-36. [online at HTTP://CALIBER.UCPRESS.NET/DOI/ABS/10.1525/REP.2009.105.1.12]; and Robert Yelle, *Rhetorics of Law and Ritual: A Semiotic Comparison of the Law of Talion and Sympathetic Magic*, Journal of the American Academy of Religion 69 (2001): 627-47.

33. *Genesis* 12:15; *see* MAURICE BLOCH, PREY INTO HUNTER: THE POLITICS OF RELIGIOUS EXPERIENCE 30 (1992).

My point here is not to claim any particular insight into these instances, but to mobilize them to highlight a recurrent tension between sacrifice as a giving of the self and as a giving of the other.[34] This dynamic, inherent in many instances of sacrifice, is relevant for our purposes as the military contractor raises the question of whether sacrifice can be performed by the other, whether it can be "outsourced," or whether all sacrifice must be of the self. The contractor seems to teeter on the divide between a giving of the self and the giving of a substitute.

Fourth—and here we engage with thematics even more obviously Judeo-Christian, but which are relevant for us—this distinction between "old" and "new" sacrifice raises further important points: the role of ritual and law; and the dichotomy between sacrifice and economic exchange now conceived as "profane" and self-interested. As for Christians, Christ's sacrifice is also the last sacrifice—all that follow will be merely a copy. Sacrifice becomes an internal, interior and spiritualized act. Spiritualization leads us to see the old sacrifice as economism, as interested in exchange, as insincere, ritualistic and formalistic. It is *ritual* sacrifice that makes the practice seem alien for moderns. By rejecting ritual, the act is seen to emanate from the self. Sacrifice, from the perspective of this tradition, is in tension with and beyond law and ritual since, in a typical Christian formulation, it is an act of love. Real sacrifice is not that which is mandated by law, but is that which emanates from within the self.

These points about ritual, law and economism—and again I must insist that I mobilize these assertions quite aware that they are caricatures—are directly relevant to our topic. They detail a genealogy that asserts a stark dichotomy between self-interest and sacrifice, between formalism and sincerity, which are also the understandings of sacrifice that the contractors confront. These seem to underlie the easy common sense assertion that contractors, motivated by money, cannot sacrifice. Hubert and Mauss, even while insisting on a rather rigid sacred/profane dichotomization, did not so starkly divide sacrifice and self-interest: "fundamentally there is perhaps no sacrifice that has not some contractual element" and in sacrifice "disinterestedness is mingled with self-interest."[35]

Each of these themes relating to sacrifice—connecting different domains in a conceptual or legal order; a way of giving to the sovereign; substitution of the other versus the giving of the self; a rejection of ritual, law and economism—usefully draws our attention to important dimensions of the narrative I wish to develop regarding contractors.

34. *See* PAUL KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 94 (2008).

35. HUBERT AND MAUSS, *supra* note 25, at 100.

B. The Popular Sovereign

Given this (highly reductive) account of the divine or foreign sovereign, we might think that sacrifice has no bearing on societies where sovereignty and political power more generally are not perceived as divine or foreign. Indeed, it is the core premise of political modernity that political power is human and immanent (that "We the People" are sovereign),[36] not foreign and transcendent. If sacrifice is a technique that connects one domain to another (the human and the non-human), what about societies where there is but one domain—the human, the here and now? Or where, even if a divine realm is recognized, it is either considered irretrievably separate from the political realm, or the non-human actors cannot be reached and manipulated? Does the denial of God or the divine King as sovereign not also entail the disappearance of the "other" domain? And if sacrifice entails a mediation between two domains (such as Mauss' sacred and profane), is sacrifice, then, impossible for those who do not live in such a divided world?

Jean-Luc Nancy takes up these questions in an important article, writing that sacrifice only makes sense in reference to an "outside," and that with the evacuation of the divine from the political sphere, "there is no 'outside.' The event of existence, the 'there is,' means that there is *nothing else*. There is no obscurity that would be God.... Existence, in this sense, in its proper sense, is unsacrificeable."[37] Building on Nancy, Italian philosopher Giorgio Agamben argues that since human life, what he calls "bare life," is now the highest value (if not the only value), there is nothing else (God, the state, etc.) to which it can be given. But Agamben's argument is at its most interesting when he claims that while we cannot sacrifice life, sovereignty is that power which can take life with impunity. That is, he urges that sovereign power describes the actor who/which can kill without committing a sacrifice or a homicide.[38] Sovereignty exists in a double exception from human law and divine law.

I mention Agamben because his conception of sovereign power helps me to frame the turn by the government to contractors—the designation of the contractor as unsacrificeable life. My suggestion is not to accept Agamben's formulation as describing a transcendent truth of sovereignty, but to see it as describing a specific effort to constitute actors whose death is not a sacrifice, an effort that, as I show below, is not always successful.

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36. *See, e.g.*, AKHIL AMAR, AMERICA'S CONSTITUTION 335-36 (2005). For a view of popular sovereignty as a construct that serves to disable popular power, see EDMUND MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 14 (1989).

37. Jean-Luc Nancy, *The Unsacrificeable*, 79 YALE FRENCH STUD. 20-38, 37 (1991).

38. GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 83 (trans. Daniel Heller-Roazen, 1998) (writing that the "sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice, and sacred life [homo sacer]—that is life which may be killed but not sacrificed—is the life that has been captured in this sphere").

Despite Nancy and Agamben's observations, abstract concepts such the state, nation, or country have served, and in the United States continue to serve, as an "outside" to which the self, "existence," can be given. The centrality of sacrifice is particularly obvious in relation to military service, but perhaps extends to democratic politics more generally.[39]

In the United States, sacrifice and citizenship have long been seen as mutually constitutive: to forgo one is to disaggregate an ancient coupling. Amidst the American flags and placards that immigrant protestors and their supporters in New York City displayed in May 2006, for example, several signs declared that the bearer had served, or had children serving in, the U.S. Armed Forces. The signs evoke a well-worn transactional form—those who offer their bodies in the service of the nation should be recognized as deserving of citizenship. Indeed, it is a staple of political rhetoric. President Bush acknowledged this logic in a speech outlining his immigration policy following the demonstrations by immigrants:

> On a visit to Bethesda Naval Hospital, Laura and I met a wounded Marine named Guadalupe Denogean. . .[who] came to the United States from Mexico when he was a boy. He spent his summers picking crops with his family, and then he volunteered for the United States Marine Corps as soon as he was able. During the liberation of Iraq, Master Gunnery Sergeant Denogean was seriously injured. And when asked if he had any requests, he made two: a promotion for the corporal who helped rescue him, and the chance to become an American citizen. And when this brave Marine raised his right hand, and swore an oath to become a citizen of the country he had defended for more than 26 years, I was honored to stand at his side.[40]

In this structure, military sacrifice can elevate the outsider—the immigrant serving in the U.S. military—closer to status of citizen. Such honoring is often not forthcoming, but I am attempting to describe the ground from which this is seen as a scandal. Recall that with the contractor, the norm is that there is no recognition owed. Sacrifice is not to be confused with all suffering and death; it captures a small subset of losses and designates them as important and transcendent. Sacrifice of the self is a paradigmatic technique in "making us all Americans," as

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39. See John Borneman's survey in "German Sacrifice Today," SACRIFICE AND NATIONAL BELONGING IN TWENTIETH CENTURY GERMANY 17-21 (Marcus Funck et al. eds., 2002) (viewing sacrifice in the simple act of voting though which "the People" are momentarily present in the act of delegating authority to representatives); DANIELLE ALLEN, TALKING TO STRANGERS 38-39 (2004) (seeking to redirect our attention "beyond the battlefield to other moments of sacrifice," such as the self-sacrifice of young daughters in the tale of Jepthah and his unnamed daughter and in the U.S. civil rights movement, and more generally to the ways in which, in "large republics" "some citizens are always giving things up for others"); and JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 51 (1991).

40. George W. Bush, President, Address to the Nation on Immigration Reform (May 15, 2006), *available at* www.whitehouse.gov/news/releases/2006/05/20060515-8.html.

President Bush said in his speech.[41] It is a path to naturalization—even posthumously, as provided by a 2003 law.[42] Conversely, those who refuse to sacrifice *via* military service have been denationalized, stripped of citizenship.[43]

In his pre-Civil War Opinion in *Dred Scott v. Sandford*,[44] Chief Justice Taney evoked this same tradition to buttress his position that African Americans were aliens, not citizens, by reference to their exclusion from state militias. He cited the laws of New Hampshire as one example according to which:

> No one was permitted to be enrolled in the militia of the State, but free white citizens. . . Nothing could more strongly mark the entire repudiation of the African race. The alien is excluded, because, being born in a foreign country, he cannot be a member of the community until he is naturalized. But why are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not, by the institutions and laws of the State, numbered among its people. He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it.

While Taney's decision was rejected by the Civil War Amendments, the assumption of the passage cited was not. Indeed, this same structure is at the heart of Lincoln's Gettysburg Address and the Emancipation Proclamation—except that the "state" which is receiving the sacrifice is now the United States, not the its member states.[45] Those excluded from military service have understandably claimed that they are losing out on accessing the particular prestige accorded military service.[46] What we see in Taney and Lincoln is an intersection between the sovereign and

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41. *Id.*

42. Posthumous Citizenship for Active Duty Service Act, Pub. L. No. 101-249, § 2(a), 104 Stat. 94 (1990).

43. Denationalization has been restricted by the Supreme Court in the post-war era, a periodization that conforms with our standard narratives of post-war culture as not entailing much in the way of citizen "sacrifice." *See* 8 U.S.C. § 1481 (2007) listing grounds for denationalization. *See* Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1481 (1986) ("Alarmed by the eagerness with which Congress had expanded the grounds for denationalization in the 1940s and 1950s, faced with statutes that stripped citizenship on grounds other than sorting out allegiances, concerned about the use of denationalization as a form of punishment, and cognizant of the harms that involuntary statelessness imposed, the Court adopted a prophylactic rule strongly protective of the individual").

44. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 415 (1856).

45. *See* Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in 7 COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler ed., 1953); Abraham Lincoln, The Emancipation Proclamation (Jan. 1, 1863), *available at* www.archives.gov/exhibits/featured_documents/emancipation_proclamation/transcript.htm.

46. Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1308 (1991) ("The logic of that coupling [civil rights and military obligations] is clear: from the earliest moments of the republic to the most recent, the concept of the civil franchise has been inseparable from the record of military participation").

sacrifice—the citizen dies so that the sovereign may live. It is not the citizen who is unsacrificeable, but the sovereign. And yet Agamben's point may be that in a government where the people are sovereign the sovereign is not an "other," hence sacrifice has a circular character, for the sacrificing citizen is really giving to him or herself.

While this traditional citizen/sacrifice coupling is still visible, as suggested by President Bush's comment, it is also easy to see it as anemic —whether it has become weak because of a "Vietnam gap" between the military and the rest of the population, the end of conscription, or some other reason such as a diminished need for active mass participation in warfare. Indeed, many of the clichés about and diagnoses of American society after World War II suggest that America is a hedonistic, self-centered, consumer society,[47] and that the traditional relationship of citizenship to military service is disintegrating. One commentator notes "a central paradox of present-day American militarism. Even as U.S. policy in recent decades has become progressively militarized, so too has the Vietnam-induced gap separating the U.S. military from society persisted and perhaps even widened."[48] If, on the other hand, we focus on the shared vulnerability entailed by the existence of nuclear weapons as a kind of conscription, we see the matter differently—the post WWII era emerges as one in which all Americans are grasped by the potential for sacrificial death, albeit of a passive sort.[49] This seems very far from any link to popular sovereignty—rather it seems closer to a divine or governmental sovereignty in which the state is strikingly autonomous.

From yet another perspective, the list of those who are "allowed" to sacrifice themselves is expanding—the revolutionary effects of the women's and civil rights movements seems to have made some headway against a gendered and racial conception of whose loses will garner official recognition as sacrifices. Thus we confront a rough but nonetheless striking correlation between a move to more genuine civic and political equality and the emergence of an imagined equality in death on a national and global scale. Overall, we might think that citizenship and military service, while long considered mutually constitutive in the United

47. *See generally* LIZBETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA (2003).

48. ANDREW J. BACEVICH, THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR 27, 28 (2005) ("For the generations that fought the Civil War and the world wars, and even those who served in the 1950s and 1960s, citizenship and military service remained intimately linked. Indeed, those to whom this obligation to serve did not apply—including at various times the poor, people of color, and women—were thereby marked as ineligible for full citizenship. . .In our own time, all of that has changed. . .There is a simple explanation for this fact. As with so many other aspects of life in contemporary America, military service has become strictly a matter of individual choice").

49. Paul Kahn, *Nuclear Weapons and the Rule of Law*, 31 N.Y.U. J. INT'L L. & POL. 349, 355 (1999) ("These weapons rest implicitly on a policy of conscription that extends to every citizen—and even beyond—for which no exemptions are granted").

States, have come unraveled in numerous ways, and at the same time that the linkage has become more universal and encompassing.

Another perspective considers not who is eligible to sacrifice but rather who is eligible to receive the sacrifice. If a mass consumer-oriented society is seen as corrupt, the public may seem an unworthy recipient of sacrifice—an extremely common theme. The imagined recipient of the sacrifice may not, in fact, be civilians, but some other group, such as the military itself. Soldiers may imagine their sacrifice not for the country but for their unit or their "band of brothers." Samuel Huntington, speaking of the officer corps in a book published in the same year the Civil Rights Act of 1964 was enacted, describes a monastic military sacrificing for a corrupt civilian population. For him, West Point is a Sparta in the "midst of Babylon" and he opines that "today America can learn more from West Point than West Point from America. . . .If the civilians permit the soldiers to adhere to the military standard, the nations themselves may eventually find redemption and security in making that standard their own."[50] In another, more recent version of cultural decline and resentment, it is hard-working residents of the heartland who sacrifice for "blue-state" elites,[51] while President Obama, on the campaign trail in 2008, also invoked death for the United States as a powerful demonstration of unity: soldiers "have fought together and bled together and some died together under the same proud flag. They have not served a Red America or a Blue America — they have served the United States of America."[52]

Thus, the picture today is quite complicated. The roles of those giving and receiving sacrifices for the nation are not clearly defined. We can see sacrifice invoked both as an inclusive practice, and as a burden that is not fairly distributed. Part V engages these issues further, asking how the advent of a standing army and an all-volunteer army affected the traditional structure linking sacrifice and citizenship. In particular, reflecting on the American tradition of the citizen soldier, I will problematize the assumption, permeating my commentary thus far, that the volunteer soldier's sacrifice in a standing army is paradigmatic. I will explore how a standing army might itself been seen as a kind of "outsourcing" of sacrifice. For the time being, this Part has sought to sketch some of the relevant understandings of the relation between citizenship, sovereignty and sacrifice.

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50. SAMUEL P. HUNTINGTON, THE SOLIDER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS, 465-66 (1964).

51. ROBERT D. KAPLAN, IMPERIAL GRUNTS: THE AMERICAN MILITARY ON THE GROUND, 259-60 (2005) (narrating that the "military is part of another America," the "working class and slightly above: that vast, forgotten multitude of America existing between the two coastal, cosmopolitan zones, which journalists in major media" inhabit).

52. Mark Z. Barabak & Richard B. Schmitt, *Barack Obama Has Advantage of Big Bucks, a Big Name: Colin Powell*, L.A. TIMES, Oct. 20, 2008, *available at* www.mobile.latimes.com/detail.jsp?key=186387&rc=nation&full=.

II. THE UNSACRIFICEABLE CONTRACTOR

Having seen that there is a link between sacrifice, sovereignty and citizenship, this Part examines the private military contractors' relation to this structure. Are they excluded from this form of recognition? This Part describes three formulations as to whether the deaths of contractors hired by companies working for the United States are seen as "sacrifices," and if so, sacrifices for whom. In a first formulation, they are mercenaries; in a second, they sacrifice, but this sacrifice is in the private sector and for the client; in a third, their deaths are seen as sacrifices for the United States.

A. Mercenaries: ineligible for sacrifice

> "[A mercenary is] motivated to take part in the hostilities essentially by the desire for private gain. . .material compensation substantially in excess of that promised or paid to combatants. . ."
>
> —Geneva Convention, Protocol I[53]

Contractors' deaths are not sacrifices, we might think—contractors are motivated by private gain, not national service. That is, they did not die so that the nation might live, but because they chose a dangerous, well-paid line of employment. They are mercenaries whose deaths do not resonate with a broader national audience.[54] We need only point out that there is a Tomb of the Unknown Soldier, none for the Unknown Contractor.[55] Arlington National Cemetery, that sacred site of the nation's military, also does not provide for the burial of the contractor as such (veterans who are contractors would be eligible for such an honored burial—a theme to

53. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47(2)(c), adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

54. For an argument that contractors should often be seen as mercenaries, *see* Zoe Salzman, *Private Military Contractors and the Taint of Mercenary Reputation*, 874- 891, 40 N.Y.U. J. INT'L L. & POL. 853 (2008). Many commentators do not see contractors as mercenaries but as something new. *See* Peter Singer, *War, Profits and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 525-6 (2004). Protocol I provides that mercenaries "shall not have the right to be a combatant or prisoner of war," and defines a mercenary as "one who (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces." Protocol I, *supra* note 53, art. 47(1).

55. I adapt Benedict Anderson's observation. Anderson, in insisting on the national nature of Tombs to the Unknown Soldiers, writes: "The cultural significance of such monuments becomes even clearer if one tries to imagine, say, a Tomb of the Unknown Marxist or a cenotaph for fallen Liberals. Is a sense of absurdity unavoidable." BENEDICT ANDERSON, IMAGINED COMMUNITIES 10 (1990).

which I return later).[56] Contractors are not included in overall troop figures announced by U.S. officials, even though at present in Iraq they are more or less at parity.[57] Contractor deaths are not included in the daily body count of soldiers (by one estimate they have been killed at a rate one quarter that of U.S. soldiers), nor are they given official medals, pensions, or public honors.[58] (In fact, individual contractors have been given medals from the United States, including Bronze Stars and Purple Hearts, in recognition of their service; but the military has said it intends to retract the medals.)[59]

Contractors are also excluded from less formal recognition: for instance, at an event attended by 8,000 people in Leesburg, Florida to honor the troops, Rep. Troutman, explained to the *Washington Post* why contractors were not also honored at the event: "This was for the servicemen and women who are not there by choice; to me, that makes a difference." The contractor, the Representative explained, may "come back home" whenever he wants.[60]

We might suppose that for the U.S. government, and the American public more generally, the contractor's death is neither offered nor received as a "sacrifice." This sense is strengthened when we reflect on the intellectual pedigree that surrounds the turn to private military contractors, i.e., the ideas associated with privatization, outsourcing, neo-liberalism, etc.—lines of thought and argument which are, to say the least, skeptical of public spiritedness as a firm ground upon which to build government policy, and for which the very notion of sacrifice may be analytically impossible, all action being either self-interested or morally

56. 38 U.S.C. § 2402 (2003) (listing persons eligible for interment in national cemeteries).

57. John M. Broder & James Risen, *Contractor Deaths in Iraq Soar to Record*, N. Y. TIMES, May 19, 2007, *available at* http://www.nytimes.com/2007/05/19/world/middleeast/19contractors.html (noting that almost "300 companies from the United States and around the world supply workers who are a shadow force in Iraq almost as large as the uniformed military. . . .about 126,000 men and women working for contractors serve alongside about 150,000 American troops, the Pentagon has reported"); *see* James Risen, *U.S. Spending on Contractors in Iraq Reported to Reach $85 Billion*, INT. HERALD TRIB., Aug. 13, 2008, *available at* http://www.iht.com/articles/2008/08/12/america/contractor.php (claiming that there are more contractors than U.S. soldiers in Iraq).

58. Broder & Risen, *supra* note 57 (estimating that 917 contractors had been killed in Iraq). Only a small portion of the total number of contractors are armed—but of that smaller group, the mortality rate may be higher than soldiers. Moreover, since the deaths of non-U.S. citizen contractors are not, under U.S. Department of Labor rules, required to be reported, there is likely under-reporting in that category. THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 371 (2007). For discussion of the lack of medical care provided to contractors as compared with soldiers, see Matthew Kestian, *Civilian Contractors: Forgotten Veterans of the War on Terror*, 39 U. Tol. L. Rev. 887 (2008).

59. Renae Merle, *Contract Workers Are War's Forgotten: Iraq Deaths Create Subculture of Loss*, WASH. POST, July 31, 2004, at A1; *see also* Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004 at A1 (writing that the Pentagon mistakenly awarded honors to contractors).

60. Merle, *supra* note 59. Of course, if it is choice that distinguishes the two, it might be objected that the soldier is increasingly a paid professional and a volunteer, not a draftee.

abhorrent, since it entails a giving of the inalienable self.[61]

While it does not frame the issue as one of sacrifice, Peter Singer's book *Corporate Warriors* provides support for the claim that the avoidance of sacrificial meaning was central to the emergence of the contractor sector in the post-Cold War era. Contractor firms got their first significant entrée into the U.S. foreign policy under President Clinton.[62] It was in the Balkans, Singer writes, when Clinton, seeking to pursue an unpopular intervention, but unwilling to call up 9,000 reservists—which he deemed too politically costly—arrived at the solution that the military would "pass the work on" to Texas-based Brown & Root Services.[63] It is under President Bush (and Vice President Dick Cheney, former head of contracting giant Halliburton) that the move to contractors has accelerated exponentially, but it is important to recognize that there has been bi-partisan support for this "reinventing" of government.[64] Some skeptics have urged that this reinvention has not actually downsized the government, but has simply made it less accountable to the public. In the words of a critic, it allows the government to "grow itself" invisibly since "government contractors are not normally counted in tallies of the federal workforce and because there is no easily accessed means for accounting even for how many government contracts are in existence."[65] This creative accounting seems analogous to what we see in the military contractor case, where it is sacrifice that is pushed off the books.

In summary, the turn to the military contractor represents, we might argue, an attempt by officials to designate, by law, policy and cultural tradition, a class of individuals whose deaths will be banal and insignificant to a national audience. Their relation to the body politic would be one of contract and subcontract, not sacrifice.

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61. *See, e.g.*, Milton Friedman's complaint about President Kennedy's famous line from his inaugural address—"Ask not what your country can do for you, ask what you can do for your country." Friedman objected: "The organismic, 'what you can do for your country' implies that government is the master or deity, the citizen the servant or votary." MILTON FRIEDMAN WITH ROSE FRIEDMAN, CAPITALISM AND FREEDOM 1 (1962).

62. PETER SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 6 (2003). Singer notes that the deaths of three DynCorp contractors in Colombia did not produce any "public outcry nor crash investigations, unlike what would have happened in an accident involving U.S. military personnel" and the death of another contractor did not require the U.S. embassy to release the same information as it would have had the contractor been a soldier. *Id.* at 208-9. Singer links the prestige in the United States as stemming "from the perceived integrity and values of the soldiers within it and the spirit of selfless service embodied in their duty on behalf of the country." *Id.* at 204. "It is clear, however, that private military activity does indeed associate the military profession with the profit motive, in opposition to the very values that incur public esteem". *Id.* at 205.

63. *Id.* at 6.

64. BARRY D. FRIEDMAN, REGULATION IN THE REAGAN-BUSH ERA: THE ERUPTION OF PRESIDENTIAL INFLUENCE 176-77 (1995) (comparing President Clinton's privatization agenda with that of Presidents Reagan and H.W Bush).

65. Chris Sagers, *The Myth of Privatization*, 59 ADMIN. L. REV. 37, n.115 (2007).

B. Sacrifice for the Client

Among contractors, another position can be detected. The epigraph to this Article is from a website for private military contractors: it speaks of contractors whose deaths were an "ultimate sacrifice" and "is dedicated to the men who gave their lives so 'the client' would be safe."[66] In the military context, we typically think of sacrifice as something the soldier does for the nation or state, at least if we recall Lincoln at Gettysburg when he speaks of the "consecration" of the battlefield by those who "gave their lives that [the] nation might live."[67] Yet the quote from the contractor website suggests that for the contractors themselves, as well as for their employers and their families, their deaths may indeed be seen as "sacrifices." A journalist recounts that Blackwater has created a "memorial rock garden on their compound in Moyock, where each contractor that [sic] has been killed while serving the company is given a stone with their name engraved on it."[68] The memorial includes a life-size sculpture of a young boy, head turned down, clutching to his breast a ceremonially folded U.S. flag. A dedication provides: "This memorial is dedicated to the courage and honor of our fallen teammates. Their dedication and sacrifice will never be forgotten. May God bless them and their families."[69] One way we might conceive of this entire elaboration of ritual and sacralized recognition is as a migration of the sacred into the private and corporate world, one that runs parallel to an effort by officials to unbundle the sacred and the state through privatization.

The use of contractors can thus be called an *outsourcing* of sacrifice—it maintains that sacrifice takes place, but the significance is removed from the purview of the government and the public and is contained within the private sphere of the family and the company. This view rejects the assumption that sacrifice can only exist for the nation, that the state monopolizes not only legitimate violence, as Max Weber urged, but sacrifice as well.[70]

C. Outsourcing Sacrifice

A third view which can be detected in the United States' reception and classification of deaths of U.S. citizen contractors (although there are a few examples of it extending to non-citizens), is that not only are the contractors' deaths sacrifices for the employer, they are also sacrifices to

66. The Red Zone, *supra* note 1.

67. Lincoln, Gettysburg Address, *supra* note 45.

68. Bill Sizemore, *Suit Against Blackwater over Contractor Goes to Arbitration*, VIRGINIA-PILOT, May 20, 2007, *available at* http://hamptonroads.com/node/269051.

69. *See* Blackwater, www.blackwaterusa.com/press/memorial.asp (last visited Dec. 26, 2008).

70. MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H.H. Gerth & C. Wright Mills eds. and trans., Oxford University Press 1958) ("[A] state is a human community that (successfully) claims the monopoly of the legitimate use of physical force.").

and for the United States—the client. In this remarkable view, which President Bush expressed after the killing of civilians in Baghdad in 2007,[71] sacrifice is still "outsourced" in the sense that it is not performed by individuals bearing the marks of the sovereign—the uniform or the flag—but it is *not* outsourced in the sense that the deaths are seen, recognized and honored by the United States, albeit in an *ad hoc* and belated manner.

The state, nation, or public returns as the recipient of the sacrifice, rejecting the dichotomy between monetary self-interest and national service. Only a few years ago it would probably have been difficult to detect this alignment of contract and sacrifice: the mercenary would have been the most likely template for the armed contractor. Above all, such an alignment—had it existed in the mind of the general public—would have undermined an important attraction for policy makers of contractors in the first place, that is, that contractors deaths were not construed as "sacrifices." The American legal and public imagination is still in the process of locating and giving meaning to the suffering of contractors—but it is possible to detect an emergent conception of the civilian-soldier, as contrasted with the citizen-soldier. Whether officials can designate a group of individuals whose deaths on behalf of the state will be ineligible for national sacrifice is still undetermined.

Examples of efforts to honor and give medals to contractors both illustrate this outsourcing of sacrifice and perhaps suggest an even more nuanced structure. The U.S. government has deemed that contractors are eligible for public honor by the United States, but only as civilians, through awards such as the Defense of Freedom Medal. These are described on an official website as the "civilian equivalent" of a Purple Heart,[72] as both require the recipient to have been injured or killed.[73] The Defense of Freedom medals were initially given to civilian Pentagon employees in 2001, but slowly, many years later, they are being given to contractors. The stories from these events are ambiguous so far as sounding like examples of honored sacrifice. For example, contracting giant Kellog, Brown & Root asked contractors who were eligible to receive the award to sign a release waiving any future medical claims against KBR before they could receive the award. This is somewhat

71. *See* Associated Press, *Blackwater Will Probably Leave Iraq, Officials Say*, Oct. 17, 2007, *available at* www.msnbc.msn.com/id/21352794 (President Bush, commenting on investigations into Blackwater for shooting civilians in September 2007, was quoted as saying: "I will be anxious to see the analysis of their performance." The quote continued: "There's a lot of studying going on, both inside Iraq and out, as to whether or not people violated rules of engagement. I will tell you, though, that a firm like Blackwater provides a valuable service. They protect people's lives, and I appreciate the sacrifice and the service that the Blackwater employees have made").

72. Exec. Order No. 11,016, 3 C.F.R. 596 (1959-1963).

73. *See* Official Site of the Defense of Freedom, www.defenseoffreedom.com (last visited Dec. 26, 2008); *see also* Jim Garamone, *Intelligence Agency Presents Defense of Freedom Medals*, AM. FORCES PRESS SERVICE, OCT. 19, 2001 ("The medal commemorates their valor and sacrifice").

scandalous since there is no provision for such waivers in the eligibility guidelines for the medal, which has simple criteria—injury or death. Even so, it is interesting as an explicitly exchange-oriented conception of recognition—the medal is given in "consideration"[74] for the waiver of claims. Describing an event where these medals were awarded, the *L.A. Times* recounted a remarkable scene in 2007:

> Executives in dark blue suits shifted uncomfortably as an Army major general in battle fatigues awarded posthumous Defense of Freedom medals to the families' loved ones, all contractors killed while working in Iraq. But this was no public recognition of sacrifice. The event was held in secret, with guards to keep out the media. The Army even refused to release the names of those it was honoring. The nation's gratitude was delivered behind closed doors.[75]

In terms of my three renditions of the relation between the contractor and sacrifice, this tableau suggests another permutation. The deaths are sacrifices, they are recognized as for the nation, but—and this is the "innovation" on my version—the "nation" does not include the public at large. A similar story can be seen with respect to private contractor companies. In addition to government awards, contractor companies have developed their own medals. Thus we can juxtapose the two vectors of recognition that greet the dead contractor: one is from the state, another from the private sector, but both seem to share an awkwardness in being neither public nor private events. In 2008, Blackwater's efforts extended to an awards ceremony where Blackwater founder, Eric Prince, gave out the Blackwater Worldwide Defense of Liberty Medal to injured contractors. On the one hand the "sacrifices" recognized were in the service of the United States (not to mention "Liberty"), since the medals were for those contractors and employees who have been killed or wounded in the "service of their country." But, on the other hand, the event was, the Blackwater website stated "a quiet one as this was not a public recognition of sacrifice" and the "names of the honored were not released to the media."[76] In both of these stories of honoring, by the government and Blackwater, there is talk of sacrifice but there is also secrecy, suggesting a structure reminiscent of the ways that many soldiers' deaths have also been secluded into a "family" and "private" sphere.

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74. *See* Kellog Brown & Root, Inc., Authorization and Release Form 5, *available at* www.democrats.senate.gov/dpc/hearings/hearing37/allenallexhibits.pdf ("Paragraph 9. Release: I agree that in consideration for the application for a Defense of Freedom Medal on my behalf that on behalf of myself, my heirs, executors, administrators, assigns and successors, I hereby release, acquit and discharge and do hereby release, acquit and discharge KBR, all KBR employees, the Military and any of their representatives. . .").

75. T. Christian Miller, *The Battle Scars of a Private War*, L.A. TIMES, Feb. 12, 2007, at A1.

76. Dana Richardson, Blackwater Worldwide Defense of Liberty Medal: Wounded Independent Contractors Are Recognized, www.blackwaterusa.com/btw2008/article/ medals.pdf.

III. THE SACRIFICE AT FALLUJAH

> While stopped in traffic, several armed Iraqi insurgents walked up behind these two unarmored vehicles and repeatedly shot these four Americans at point blank range, dragged them from their vehicles, beat, burned and disfigured them and desecrated their remains.
>
> —Plaintiff's Complaint, Nordan v. Blackwater[77]

This Part examines one example of the difficulties entailed in creating a group of unsacrificeable subjects. This came early in the U.S. war in Iraq, in March 2004, when four armed Blackwater contractors were ambushed, and then grotesquely and spectacularly killed, dismembered, and immolated, by hundreds of Iraqis and insurgents in Fallujah. For many U.S. officials and media commentators, these acts of "desecration," as many called them, re-nationalized what had been privatized, and the deaths were conceived by many as sacrifices on behalf of the United States.

A. From Contract to Sacrifice

In March 2004, four armed military contractors employed by Blackwater Security Consulting were escorting kitchen supply trucks through Fallujah—although they were U.S. citizens, numerous layers of contracting and subcontracting separated them from the U.S. government.

Each contractor had entered into an Independent Contractor Service Agreement with Blackwater. They were to provide security and logistical aid to ESS Support Services Worldwide, which, in turn, had contracted with Kellog, Brown & Root, which, in turn, contracted with the U.S. Army. Blackwater and its partner in the venture, Regency Hotel and Hospital Company, had signed a contract with ESS.[78] A sub-contract was entered into on March 12, 2004 between Regency and Blackwater that gave Blackwater control over the security detail. This sub-contract, the families of the killed contractors have alleged, omitted certain protections provided for in the primary contract, such as armored vehicles, while the individual contractors were advised only of provisions of the primary contract.

On March 30, the four contractors were sent on a mission to escort three ESS kitchen supply trucks to a military base. Without maps, with no

77. Plaintiff's Complaint at ¶17, Nordan v. Blackwater, No. 05-CVS-000173 (North Carolina, Wake County Superior Court, Jan. 5, 2005) [hereinafter "Complaint"]. Blackwater also uses the word "desecrated." Response to "Majority Staff Report on Private Military Contractors in Iraq: An Examination of Blackwater's Actions in Fallujah" 3 (Oct. 2007) [hereinafter: Response] (on file with author) ("Following the attack, the four American bodies were dragged from their vehicles, desecrated/set on fire, and hung from a bridge").

78. In the Complaint, *supra* note 77, ¶ 7-10, the contractual structure is described.

familiarity of the area, and no logistical support, the convoy got lost. The families of the contractors (who, as discussed below, have brought a lawsuit against Blackwater) also allege that they were not given the correct weapons, and were not allowed to practice with the weapons they did receive. On their first night out, they were lucky to find haven in a Marine base. They set out the next day, and plotted a course through Fallujah, even though it was considered hostile by the military. With only four personnel in unarmored vehicles, and trapped in a dense urban setting, it was easy work for their attackers to kill them.

Amidst great public excitement and drawing a crowd numbering in the hundreds, the contractors were dragged through the streets behind a vehicle, torn limb from limb, and immolated. Finally, portions of two of the contractors' bodies were hung on a bridge over the Euphrates river. The attack was accompanied by denunciations of the United States and the burning of the American flag. The event was videotaped and edited to include an introduction and narrative from a participant—including, according to an American journalist, praise to Allah and a statement that "We did not kill them, they kill themselves"—which was then posted on the Internet and disseminated to media outlets.[79] Images of the event dominated the print and television news in the United States,[80] conjuring an atmospherics, for the American television audience, entirely different from the earlier "Shock and Awe" phase of the war.

Immediately after the attacks, the deaths were compared by officials and mainstream media commentators in the United States to those of the U.S. Army Rangers killed and desecrated in Somalia during the Clinton Presidency. The Somalia deaths had attained iconic status, symbolizing American retreat when faced with the death of its own soldiers. The fear of a repeat performance, the "Mogadishu effect," was no doubt important to officials who had subsequently made timely extraction of injured soldiers pivotal to their protocols—recognizing that the body of the soldier was an invaluable canvas upon which to work.[81] And the shock of this event itself reinforced reliance on contractors by President Clinton in Bosnia and Colombia. What is remarkable, at least given our assumption that the contractor is ineligible for sacrifice, is the ease with which the

79. ROBERT YOUNG PELTON, LICENSED TO KILL: HIRED GUNS IN THE WAR ON TERROR 134 (2006).

80. Images of the attack ran on the front page of *The New York Times*, *USA Today*, and the *Washington Post*. The propriety of the publication of the gruesome images was itself a topic of debate.

81. Gwynne Dyer, *The Fallujah Effect*, PITTSBURGH POST-GAZETTE, Apr. 4, 2004, ("In the mid-'90s there used to be something called the 'Mogadishu line' which the U.S. military were never supposed to cross. Rounding up from the 18 U.S. soldiers who were killed in one day in Mogadishu in 1993, it was a doctrine which stated that the U.S. armed forces should undertake no overseas mission that was likely to cause the deaths of more than 20 American soldiers except when vital national interests were involved. That was far too simplistic, of course—it was not so much the number of dead Americans as the videotape of their bodies being dragged before cheering crowds that turned the U.S. public against Somalia—but that is why this incident may mark a turning point").

contractors were assimilated to a consecrated status.[82] The private relation of contract did not restrict the relays between individual and the U.S. audience; no matter that in the usual course of events, as noted, contractors' deaths are not counted, announced, or publicly mourned. Among commentators, there were rare exceptions to this sympathetic identification with the contractors, which only underscored the depth of the acceptance of the contractors as being, above all, "Americans." For instance, a blogger wrote on his prominent site the Daily Kos: "They aren't in Iraq because of orders, or because they are there trying to help the people make Iraq a better place. They are there to wage war for profit. Screw them."[83] This reaction itself became a minor scandal; the blog was subjected to criticism from across the political spectrum, and the author was ultimately obliged to account for and contextualize his harsh language (he explained that his exposure to civil war as a child in Central America made him hostile to anyone who would go to a war zone to make a profit).[84]

The response to the attack was not left to the other contracting party, Blackwater, or to the numerous intermediate parties, or even to military officials on the ground. Four days later, at the direction of the White House and the Secretary of Defense, military officials on the ground were ordered to invade the city, over the objections of on-site commanders.[85] Even though military officials were extremely critical of the fact that the contractors represented the United States to Iraqis with very little military oversight or control, and despite envy and animosity between ordinary soldiers and contractors, the Marines named the bridge where the bodies were hung "Blackwater Bridge." The U.S. military siege of the city led to approximately 800 Iraqi civilian deaths.[86] The insurgents managed to hold the city, which itself marked an important point in the rise of the insurgency.[87] U.S. forces launched a second assault in November 2004 in

82. William Kristol, *After Fallujah*, WEEKLY STANDARD, Apr. 12, 2004, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/003/945uchaa.asp ("The similarity struck everyone right away: Mogadishu, October 3, 1993; Fallujah, March 31, 2004. But we cannot permit these two outrages to be similar in their effect" since, according to Kristol, Mogadishu had lead to the U.S. withdrawal from Somalia and to genocide in Rwanda. To "properly honor[] the sacrifice of those who died on March 31 in Fallujah" the U.S. should "deepen" its "commitment to victory" and act aggressively against hostile residents). Mark Bowden, author of BLACK HAWK DOWN, a book about the Mogadishu incident, also compared Fallujah to Mogadishu. Mark Bowden, *The Lessons of Mogadishu*, WALL STREET J., Apr. 5 2004.

83. *Corpses on the Cover*, DAILY KOS, Apr. 1, 2004, www.dailykos.com/story/2004/4/1/144156/3224.

84. Presidential candidate John Kerry dropped the link on his official web page to the blogger: "In light of the unacceptable statement about the death of Americans made by Daily Kos, we have removed the link to this blog from our website." *Quoted in* Drudge Report, Apr. 4, 2004, www.drudge.com/2004/20040404.php.

85. RICKS, *supra* note 58.

86. JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY 143 (2007).

87. RICKS, *supra* note 58, at 435.

which the city suffered massive damage. While the events at Fallujah brought the contractors into public view for the U.S. public as sacralized persons, the deaths of Iraqi civilians in the fighting in the city were mostly unreported—and those who did report on those deaths were, according to some accounts, specifically targeted by the United States in the siege.[88] Put another way, while the sacred contractor was perhaps an unexpected occurrence, the U.S. audience would be carefully protected from exposure to the suffering of Iraqi civilians.

From what we know of the perspective of the attackers as reported in the U.S. media, the event is full of sacrificial thematics and evinces a complex global exchange. According to one account, some participants declared that "With our blood and our souls, we will sacrifice for Islam" and one resident compared the contractors bodies, dangling from the bridge, to "slaughtered sheep"—an archetypal sacrificial victim.[89] Nir Rosen described the attacks as part of a standardized routine, akin to an American lynching: "There is a word for this sort of thing. In Iraqi dialect, the Arabic word *sahl,* which literally means dragging a body down the street, has grown to mean any sort of public massacre."[90] In another report, the Brigades of Martyr Ahmed Yassin claimed authorship of the attack, describing it as "a gift from the people of Fallujah to the people of Palestine and the family of Sheikh Ahmed Yassin who was assassinated by the criminal Zionists."[91] (The square where the attack took place was renamed for the slain Sheikh). Blackwater's account of the attack emphasized that the contractors were targeted as Americans: "The ESS truck drivers—all third country nationals—were intentionally spared and left to escape. . .The ambush, apparently, was only intended to kill the Americans."[92] Indeed, the attackers do not seem to have been aware of or interested in the fact that the Americans were contractors and not soldiers, though they were not wearing uniforms. In some accounts, the attackers thought the contractors were spies.[93]

The sacrificial status of the *victims* (as contrasted with the perpetrators) of terrorist and insurgent violence has received little attention, although

88. SCAHILL, *supra* note 86, at 138-41.

89. *Id.* at 103.

90. Nir Rosen, *Home Rule*, NEW YORKER, July 5, 2004, *available at* http://www.newyorker.com/archive/2004/07/05/040705fa_fact.

91. John Lee Anderson offered this description of the various groups active in Fallujah at the time of the attack: "The men in Fallujah who were fighting the Americans were an amalgam of disgruntled tribesmen, Baathists, old Republican Guards, criminals. . .and a number of Islamist foreign fighters. The day after the murder and mutilation of the American contractors, a group calling itself the Brigades of Martyr Ahmed Yassin claimed that the killings had been carried out in retaliation for Israel's assassination of Yassin, the Hamas leader. . ." John Lee Anderson, *Letter from Baghdad*, NEW YORKER, May 3, 2004, at 63.

92. Blackwater emphasized that the cause of the incident was betrayal by Iraqi forces, not its own incompetence. *See* Response, *supra* note 77, at 3.

93. SCAHILL, *supra* note 86, at 101.

Arjun Appadurai has described the genre of the videotaped beheading of kidnapping victims, starting with that of journalist Daniel Pearl, as a "public sacrifice." [94] Whether or not the Iraqi insurgents were making a conscious reference to sacrifice in their mode of killing the contractors, the stark resemblance to standard forms of scapegoating is hard to dismiss. While the United States may have carefully blocked, through the various layers of contract, many of the pathways along which sacrificial identification could travel, the attackers positioned their action as one addressed to the United States through the bodies of the contractors.

However we construe the Iraqis' intentions and the audience they meant to address, for much of the American audience, the attackers released the latent sacrificial potential of the contractors as American citizens. To make an analogy to the law of business organizations, the attack pierced the veil of contractual intermediaries, making visible for Americans the displaced tie between themselves and the contractors. As important as the communications infrastructure of a hand-held video recorder and distribution was—and it was clearly essential—we should not let a focus on the technology overshadow the content of what was communicated, and what message was received. If we ask the question of what went wrong with the U.S.' effort to displace sacrificial meaning, the attackers' specific framing of their assault as one on the United States is important. We can also have recourse to American popular sovereignty, which, as Kahn puts it, "tells us that we—each of us—are the popular sovereign, that our bodies constitute its body."[95]

It was precisely this location of sovereignty in the body of the individual citizen that is credited for the restriction of mercenary activity by the United States through neutrality laws shortly after the American Revolution. This distribution of sovereignty made it increasingly difficult for states to deny responsibility for or identification with the violence employed by their citizens abroad—be that mercenary, filibuster, privateer or pirate violence. Janice Thomson writes that doing so was "inconsistent

94. ARJUN APPADURAI, FEAR OF SMALL NUMBERS 12 (2006) ("Let me conclude this overview by focusing on the most recent form of public and mass-mediated shock to enter the dramas of violence staged in the name of religion, nationality, freedom and identity, namely the videotaped kidnappings of victims in Iraq and, in some instances, their beheading, as a media tool for exerting asymmetric pressure on various states, most recently India, by groups associated with militant Islam. In some ways, we see a return here to the simplest forms of religious violence, the sacrifice, about which Rene Girard has written eloquently. Starting with the videotaped beheading of Daniel Pearl in Pakistan soon after 9/11, the public sacrifice has grown into a more systematic tool of political expression") (internal citation omitted); *see also* FAISAL DEVJI: LANDSCAPES OF THE JIHAD: MILITANCY, MORALITY, MODERNITY 96 (2005) ("Indeed, there is a sense in which even the jihad's enemies—or victims—come to participate in the rites of martyrdom by dying alongside its suicide bombers in spectacular set-pieces like the attacks of 9/11. This may explain why supporters of the jihad are forever drawing parallels between its own dead and those of its enemies, because both coalesce in a community of martyrdom made possible by the virtual intimacy of the media, which allows each party to exchange words and deeds with the other").

95. KAHN, *supra* note 2, at 246.

with the view that sovereignty came not from God through the monarch but from man or the citizen himself. With the individual citizen as the ostensible source of sovereignty, the state could no longer disclaim responsibility for his violent activities in the international system."[96] In destroying the contractors' bodies, the Fallujah attackers simultaneously gave them back to the United States as citizens. To more successfully outsource sacrifice, policy makers should not employ U.S. citizens, and yet doing so would bolster claims that the contractors are mercenaries.

B. Desecration and the Empty Place

Is it the case that the American public saw "the sovereign" in the charred remains of their countrymen? Borrowing from Claude Lefort and Bruce Ackerman, I wish to suggest one way we might approach this question.

In an important essay, "The Permanence of the Theologico-Political?" Lefort describes that at the center of contemporary democratic politics we do not have a King, but what Lefort calls an "empty place."[97] The popular sovereign

> has the status of a subject. The people possesses sovereignty; they are assumed to express its will; power is evoked is exercised in their name; politicians constantly evoke them. *But the identity of the people remains latent.* Quite apart from the fact that the notion of the people is dependent upon a discourse which names the people, which is itself multiple and which lends the people multiple dimensions, and that the status of a Subject can only be defined in terms of a juridical

96. JANICE E. THOMSON, MERCENARIES, PIRATES AND SOVEREIGNS; STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE 148 (1994). Thomson describes the controversy over mercenaries who sold their labor on the international market as posing the question of whether the mercenary was "a market actor, pursuing private ends through the sale of his labor? Or was he a political actor for whose actions his home state could be held accountable?" *Id.* at 55. In addition to the popular sovereignty explanation for the phase-out of the mercenary, Thomson also says that the ban of non-state violence "is principally the result of interstate relations" not "from within the 'society.'" *Id.* at 147. She writes that "the problem did not come from the demand side; states like Great Britain were more than happy to hire foreigners to fight their wars. Instead, the problem emerged on the supply side; a state that allowed its citizens or subjects to serve in a belligerent's military could not claim neutrality. In short, states began to hold [in the late 1700s] one another accountable for the international actions of individuals under their sovereign jurisdictions. The threat was real, belligerents could reject the state's claim to neutrality and draw it into war." *Id.* at 59. That is, states compel one another to monopolize force. The U.S. position as a superpower seems deeply relevant to this line of argument: following the same logic, we might seek to interpret the emergence of contractors as derivative of the U.S.' position as a superpower, i.e., a context where the "interstate relations" that force a state to take responsibility for its citizens are attenuated. For another recounting of the "de-privatization" process in relation to U.S. naval power in the 1890s, see Nicholas Parillo, *The De-privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1, 5 ("Overall, it seems, the nation's new imperial ambitions and consequent strategic imperatives not only banished privateering from the realm of possibility, but also transformed the Navy itself into a 'not-for-profit' organization").

97. Claude LeFort, *The Permanence of the Theologico-Political?*, *in* DEMOCRACY AND POLITICAL THEORY 213-55 (David Macey, trans., Basil Blackwell 1988)

> constitution, the people are, as we have noted, dissolved into a numerical element at the very moment of the manifestation of their will.[98]

This notion of the empty place and the inability of "the People" to fill it are helpful in opening up a perspective from which to think about what is happening in American political culture when we seize on images of ourselves in a burst of recognition—in the attack at Fallujah, in New York on 9/11. But I am anticipating—first, I wish to juxtapose Bruce Ackerman's conception of our constitutional order.

Ackerman is well known for his "dualist" conception of the U.S. Constitutional order.[99] During the Founding itself, the Reconstruction Era, and the New Deal, political elites have pushed beyond established institutional forms to create new ways to fuse mobilized popular sovereignty to reasoned deliberation. These are acts of higher lawmaking, constitutional moments, of which it may be said that "the People" have reappeared on the political stage and given considered approval to significant change. Ordinarily, however, American democracy follows the path of what Ackerman calls normal politics, during which decisions are made by political representatives—not the People. At such times of demobilization, Ackerman speaks of "the absent People."[100]

At one point in *We the People*, Ackerman describes normal politics as entailing a semiotic, not a mimetic, form of representation.[101] A mimetic form of representation entails an institutional order that gives the public the appearance of being a reflection, a mirror, of itself. Like a photograph or a naturalistic portrait, it does not call attention to the form of representation itself, but rather seems to be neutral and transparent. The semiotic form, by contrast, calls attention to the form of representation, as does a Cubist painting which accentuates some features of the object represented over others. The bulging eyes and distended forms in Picasso's *Guernica* captures something other than a photograph of the bombed city. The U.S. Constitution provides, Ackerman urges, a semiotic form of representation during normal politics. Each branch of government traces a different path and timeframe of representation (from direct election by citizens to appointment by the President; two, four, six year electoral cycles, and life-time appointments; the horizontal separation of powers at the federal level and a vertical separation with the states) each of which, in a controversy, presents the public with differently compelling claims to be acting in the name of the People. This form of representation rejects the relation of synecdoche—in which a part (the government)

98. *Id.* at 230 (emphasis added).
99. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993).
100. *Id. at* 264.
101. *Id. at* 179-99.

stands in for the whole (the People). As with the Cubist painting, the public sees an image that calls attention to the complexity of representation. In sum, normal politics entails a semiotic form of representation: it excludes the possibility that a "small group can ever be transubstantiated into the People."[102]

Yet this is only part of the story of American political practice for Ackerman. He detects a recurrent practice during which a different register of political meaning is engaged: one in which, through broad, deep, and sustained dialogue and debate, Americans have substantially revised core parts of their constitutional order. While during normal politics "the People simply do not exist," during higher lawmaking, the entity and process that is "the People" become visible.[103] Ackerman hesitates in asserting that representation itself is overcome by instantiation: he does not, for instance, describe the emerging People in terms of "transubstantiation" of the citizenry. Yet Ackerman would likely reject Lefort's notion that there is invariably an "empty place" at the center of democratic politics.

What does this have to do with Fallujah? My suggestion is that what America is offered in the various tableaus that terrorize—9/11, Daniel Pearl, Fallujah—might be thought of as interacting with the issue of the "empty place" and the forms of representation which Ackerman details. Ackerman offers us one way to get from representation to instantiation—but it is certainly not the only way. These forms of violence provide another (certainly not with the same democratic pedigree as Ackerman's constitutional moments, but that is not at issue). Through violence the attackers instantiate in individual bodies and objects the idea of the country, the nation, the state—even We the People—for a national audience. If we conceive of Ackerman's dualism as operating through semiotic representation in the realm of normal politics, and dialogic instantiation in higher lawmaking, the attack at Fallujah engages another dimension of political action: sacrifice and desecration. Here it is spectacular violence against objects and persons targeted because they are American that plays the central role in overcoming the gap that representation entails between individuals, the People, and institutional form (the government), into the unity of instantiation. Spectacular sacrificial violence marks, for a given audience, bodies and objects as embodiments of the United States. Momentarily, part does stand in for whole.

The notion of sacrifice does not grasp the provocative quality of the action in Fallujah—though the etymology of the word sacrifice, to "make sacred," seems on point so far as the reception by the United States is

102. *Id. at* 184-85 (emphasis removed from first quotation).
103. *Id. at* 263.

concerned. This emerges not only from the attack's grotesque character, but also from the most obvious point: the attack was aimed at someone else's sacred character; it was a "desecration." Yet desecration entails destroying something *already* sacred—as in the cases of "Koran desecration," or in proposed constitutional amendments banning the "desecration" of the U.S. flag.[104] Given that one of the attractions of the military contract worker is that they are not located as sacred characters—unlike the soldier in the armed forces whose death is officially a national loss—we see that the reception of the Fallujah event entailed a re-sacralization (seeing the contractors as citizens, as belonging to the sovereign), which was then followed by desecration.

Moreover, while sacrifice is often described as action contained within ritual and legal formats, and is thus formalized and institutionalized, in this incident it emerges as an assertion, a claim that cuts across the legal order advanced by the United States. The designation of "sacrifice" is essentially retrospective. Compared with sacrifice, which is contained by the state and exemplified by war memorials, this is unexpected and entrepreneurial.

Even if there is merit in deploying Ackerman and Lefort to grasp what is going on in this setting, the appearance of the United States or other abstract notion does not in and of itself lead to any particular outcome. It seems, rather, to be a resource that can be deployed to a variety of ends. For example, while the Fallujah killing brought added scrutiny, ultimately it seems to have served to legitimate the contractor industry. Like soldiers, contractors could have national meanings inscribed on their bodies. Jeremy Scahill, author of a book-length exposé of Blackwater, describes the effect of the Fallujah attack as "blowing open a door to legitimacy."[105] Is it possible to explain the connection between spectacular death and legitimization in this context? My analysis specifies the thematic of sacrifice and the link to popular sovereignty. The Fallujah case shows that the dichotomy between the contractor and sacrifice can be transcended: relations can be at once contractual and sacrificial.

104. For an argument on the central role of negation in creating the sacred in a "disenchanted" society, *see* MICHAEL TAUSSIG, DEFACEMENT: PUBLIC SECRECY AND THE LABOR OF THE NEGATIVE 13 (1999) ("The disenchantment of the world still seems to me a largely accomplished fact. What exists now is perhaps best thought of as a new amalgam of enchantment and disenchantment, the sacred existing in muted but powerful forms, especially—and this is my central preoccupation—in its negative form as desecration." I would suggest that there remain in U.S. political culture official sites of the sacred—the Constitution and other manifestations of the popular sovereign— even in the absence of "desecration.").

105. SCAHILL, *supra* note 86, at 157.

IV. THE OTHER SOVEREIGN

Despite the assimilation of the contractors to the high status enjoyed by the soldiers killed in Somalia, the spectacular event did not, of course, legally transform contractors into soldiers, nor did it entail the various benefits and limitations that that transformation would bring. The families of the Fallujah contractors, acting through the Estates of the deceased brought a fraud and wrongful death suit against Blackwater—not the United States, not the perpetrators—in North Carolina state court, alleging that Blackwater had shown reckless disregard for the health and safety of the contractors by sending them into hostile territory without adequate preparation.[106]

In the previous Part, I suggested that a deep structure of popular sovereignty provided a pathway linking the killed contractors to a broader U.S. audience. That is, I traced one way in which the event was received by the U.S. audience—as evidenced by media reports and the reactions of high-level officials. In this Part, I trace other ways in which the event at Fallujah was received in the U.S. as it pulsed through the court system, arbitration, and the political theatre of congressional hearings. In each of these fora, the shape of the event changed and presented a variety of alignments of public and private. It is hard to state with certainty that any one of these should be read as indicative of the shape of enduring imaginative horizons, but they are suggestive of the range of possible ways in which Americans think about contractors. I begin by describing Blackwater's response to the litigation brought by the parents of the killed contractors and emphasize Blackwater's attempt to declare itself part of the sovereign and hence immune from suit. This litigation part of the story ends abruptly with the removal of the Estates' suit from state court to secret arbitration proceedings.

I then describe how Blackwater was brought before Congress, where it asserted a range of radically contrasting arguments: it insisted it was a private entity that should not have to answer questions about its profitability. It even pointed to the ongoing litigation as a reason why Congress should hold off from investigating and thus respect the sanctity of legal process. Thus if Blackwater was part of the sovereign before the courts, it was part of the private sector before Congress. Aside from seeing this as completely cynical, this shape-shifting is intriguing as a form of power in its own right. Not all of Blackwater's arguments can be shoe-horned into the public/private divide. Blackwater also insisted that it was a patriotic company where veterans "re-enlist in the private sphere" and that its members had sacrificed their lives to protect U.S. officials like the very Congresspersons interrogating them. Here we return our

106. Nordan v. Blackwater Security Consulting, LLC 382 F.Supp.2d 801 (E.D.N.C. 2005).

discussion of outsourcing sacrifice and the deep power that comes from dying for another—for although it is Congress that better represents the U.S. public, Blackwater was able to say that its members had died for the United States and thus could claim a particular form of authority. This last scenario—in which political representatives confront the contractor who claims to have sacrificed employees—is particularly unsettling in showing how the charismatic power of sacrifice and the sacred can be deployed against long-established institutions.

Finally, this Part describes how contractors also advertise themselves as part of a universal mission, one in which they not only sacrifice for the United States, they give themselves for humanity. While this certainly could pose a conflict with a notion that they are U.S. patriots, it need not. After all, the United States is also, in important respects, a universal project.

A. Seeking Immunity, Finding Arbitration

Following the killings at Fallujah, the Estates of the killed contractors brought a fraud and wrongful death suit against Blackwater in North Carolina state court.[107] Blackwater vigorously sought to avoid facing a group of local jurors who might award a large punitive damages award. In establishing the nexus between the deaths and Blackwater's conduct, the contractors' Estates urged that Blackwater was more concerned with profits than the lives of their employees, or contractual obligations, and that Blackwater "fraudulently and deceptively lur[ed] [the contractors] away from their families and loved ones."[108] They sought damages for "mental anguish, fear and terror of being forced to travel into the center of Fallujah. . .and the physical pain and suffering of being shot, beaten, burned, tortured and dismembered."[109] Perhaps underlining that she was not herself being mercenary, the mother of one of the contractors explained to a journalist that she did not "intend to receive a penny of that blood money" she might receive as damages, but rather that she was "doing this so they do not mistreat others like they did my son and the other men."[110]

The contractors' access to a jury of fellow civilians is a significant benefit of not being a soldier, albeit a highly unpredictable one. A windfall punitive damages award is a thing of popular fantasy and legal possibility. The soldier, compensated with honor, medals and the

107. Nordan, 382 F.Supp.2d 801.

108. Plaintiff's Complaint, Nordan v. Blackwater, No. 05-CVS-000173 (North Carolina, Wake County Superior Court, Jan. 5, 2005) ¶ 93.

109. *Id.*

110. Jay Price and Joseph Neff, *Families Sue Over Fallujah Ambush*, THE NEWS AND OBSERVER, Jan. 7, 2005, *available at* http://www.newsobserver.com/511/story/219750.html (last visited January 15, 2009).

protections of the pension and other benefits of the regulatory state, is generally excluded from state and federal courts. This exclusion is but a part of the overall transformation of the soldier's status to something closer, as the Army T-shirts say, to the "property" of the United States. While the contractor can quit, the soldier who leaves can, under certain circumstances, be executed for desertion.[111] The difference is no doubt appreciated by the many thousands of U.S. deserters who have taken refuge in Canada.[112] The soldier's enlistment contract is akin to what Max Weber described as a "status contract," which is what the courts call it as well,[113] while a Marine who has fled to Canada calls it a "devils contract."[114] But what of the contractors' contract? Surely it is not such a status contract that mystically merges the two parties and renders one party unable to sue the other? After all, is not the essence of the entire enterprise of privatization and subcontracting that the parties remain distinct—that the contractors are not even employees but are "independent contractors"?

Blackwater's various responses to the litigation are noteworthy and underscore the innovate spaces contractor companies inhabit, moving in and out of the sovereign sphere. Despite its founder Erik Prince's claim to want to be the military services version of Federal Express, Blackwater did not want to forgo certain benefits of being part of or associated with the government. Blackwater argued that the Constitution's foreign affairs and war powers clauses rendered Blackwater immune from suit in state and federal court.[115] The United States, Blackwater urged, has a "unique federal interest" "in the remedies available for those working in support of national defense or war zone efforts,"[116] and it claimed that it was the "functional equivalent of a federal officer."[117]

Blackwater thus attempted to shift the litigation from the everyday world of contract and tort—where one might expect a private actor—into another register, that of sovereignty and the sovereign's immunity from

111. 10 U.S.C. §§ 885(c) (Aug. 10, 1956) ("Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct. . .").

112. Scott Pelley, *Deserters: We Won't Go to Iraq*, CBS News, Dec. 8, 2004, *available at* http://www.cbsnews.com/stories/2004/12/06/60II/main659336.shtml.

113. 2 MAX WEBER, ECONOMY AND SOCIETY 668 (1978); *See, e.g.*, *In re* Grimely, 137 U.S. 147, 151-52 (1890) (describing enlistment contracts as "special because they bring about a change in status, from civilian to soldier, just like marriage contracts change a man's status to husband and the woman's status to wife"); *see also* Qualls v. Rumsfeld, 357 F. Supp. 2d 274 (D.D.C. 2005) (denying motion for preliminary injunction by serviceman claiming that government's "stop-loss" policy was a breach of contract).

114. Pelley, *supra* note 112 (quoting Pfc. Dan Felushko, "[N]obody should make me sign away my ability to choose between right and wrong.").

115. *See In re* Blackwater Sec. Consulting, 460 F.3d 576, 586 (4th Cir. 2006).

116. Nordan v. Blackwater Security Consulting, LLC, 382 F. Supp. 2d 801, 811 (E.D.N.C. 2005).

117. *In re* Blackwater Sec. Consulting, 460 F.3d at 590 n.8.

suit.[118] If we can say that the contractors in Fallujah underwent the transformation from an everyday status to a sacralized one, Blackwater attempted to follow a parallel path, moving from the role of private contractor to that of an actor that enjoys attributes of the sovereign, in particular, its immunity from suit. We might gloss this as the intersection of two traditions: one, derived from popular sovereignty that allows Americans to see themselves in the bodies of fellow citizens, to see "America" when they see the contractors' bodies desecrated; and another, the tradition of governmental sovereignty, by which the state is itself a sovereign and immune from suit.

For two years, Blackwater pushed these various claims, finally seeking review from the U.S. Supreme Court with the assistance of Kenneth Starr.[119] The federal courts, including the Supreme Court, declined to remove the case from state court based on Blackwater's sovereign immunity or other arguments. They did not reject them outright, but found that they could be entertained in state court.[120] The Fourth Circuit found Blackwater's simultaneous arguments that the federal courts should remove the case from state court, and that federal courts did not have jurisdiction "too extravagantly recursive for us to accept."[121] Despite Blackwater's lack of success, it would be premature to dismiss out of hand the idea that it should enjoy immunity for the work it does, just as it is premature to insist that the deaths of its workers are not sacrifices. For a few months, discovery in the state court proceeded and the existential threat of a large punitive damages award must have seemed a possibility to Blackwater.

Blackwater, however, was finally able to derail the case with another argument, one inspired not by its sovereign attributes but by a closer reading of the adhesion contract it had required the contractors to sign. The contract included a binding arbitration clause and Blackwater successfully urged a federal court in April 2007 to send the matter to arbitration (it is not apparent why Blackwater took two years to assert this

118. Another grounds for removal from state court that Blackwater urged was that of preemption by the federal government worker's compensation scheme, the Defense Base Act, overseen by the Department of Labor. Nordan, 382 F. Supp. 2d at 803. The Defense Base Act ("DBA"), 42 U.S.C. §§ 1651-1654 (2000), provides for compensation for "the injury or death of any employee engaged in any employment" "under a contract centered into with the United States or any executive department, independent establishment, or any agency thereof . . . ." What is interesting about this, of course, is that Blackwater seeks to avoid tort liability by urging that the "independent contractors" are now to be construed as employees. For discussion of the Defense Base Act and the lack of medical care available to military contractors, see Kestian, *supra* note 58, at 896 n.79 ("Wounded civilian contractor employees deserve death and disability benefits commensurate with their status as wounded veterans, but other military veteran's benefits should not be extended to them.").

119. John M. Broder & James Risen, *Blackwater Mounts a Defense With Top Talent*, N.Y. TIMES, Nov. 1, 2007, at A1.

120. Blackwater Sec. Consulting, LLC v. Nordan, 127 S. Ct. 1381 (2007).

121. *In re* Blackwater Security Consulting, 460 F.3d at 592.

argument).[122] Typically, arbitration takes place in private, the result is confidential, and arbiters are generally not able to award punitive damages. A Blackwater spokesperson commented to the press that "Anyone who supports the rule of law should be encouraged to see the written agreement finally being honored and the dispute heading to arbitration as the parties agreed."[123] The inclusion of binding arbitration clauses in employment and independent contractor contracts is itself related to broader currents of privatization and the valorization of non-public fora.[124]

This waiver of the right to go before a court functions, in our narrative, as a private version of claims for sovereign immunity. By different paths, both remove the dispute from the courts. One emphasizes the absence of the sovereign's consent, while the other points to the contractors' consent. For our purposes, the end result, avoiding state court and a local jury, and the public sphere more generally, is the same.[125]

It is necessary to pause for a moment and acknowledge that there is something surprising in the notion of sovereign immunity of the government in a world of popular sovereignty. After all, the United States is nowhere in the Constitution declared a sovereign, let alone one with immunity. As Akhil Amar writes: "in America, neither federal institutions not state governments were truly sovereign. Only the people were." [126]

Likewise, thus far, I have asserted that the United States is grounded in a concept of popular sovereignty, and that this is important in the ability of the state/nation/sovereign to be seen and found in the body of the contractor. And I have asserted that sovereignty and sacrifice are central to the relation between the citizen and this popular sovereign: it is through sacrifice, among other ways, that the citizen participates in the life of the sovereign, dying so that it might live, as Lincoln would say. But there is another idea of sovereignty at play also: it is not only the people who are

122. Blackwater Sec. Consulting, LLC v. Nordan, (E.D.N.C. 2:06-CV-49-F) (order dismissing proceedings, Apr. 20, 2007, Judge Fox), *available at* http://www.scribd.com/doc/321411/Nordan-v-Blackwater-Security. (Independent Contractor Service Agreement provided in Section 20.1 that "Contractor and BSC hereby agree that any dispute regarding interpretation or enforcement of any of the parties' rights or obligations under this Agreement shall be solved by binding arbitration according to the rules of the American Arbitration Association and shall be conducted in Currituck or Camden County in North Carolina").

123. Sizemore, *supra* note 68 (quoting Anne Tyrell).

124. Clyde Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 685-86 (2004) ("The effect of the these contracts has been to privatize justice, substituting privately constructed arbitration for publicly established courts. This becomes particularly problematic when the rights being adjudicated are not contractual rights created by the parties, but statutory rights created by Congress, or legal rights established by common law.").

125. Much of the information in the public domain—and in this Article—about the Fallujah incident came from the lawsuit brought by the contractors' families. Blackwater has sought to restrict the families' ability to talk about the case by invoking the confidentiality agreements included in the contracts.

126. AMAR, *supra* note 36, at 335-36.

sovereign, but rather the government or state or union.

One evocation and explication of this other sovereignty (although not directly related to immunity) can be found in Justice Sutherland's 1936 majority opinion in *United States v. Curtiss-Wright Export Corporation*.[127] He wrote that "[r]ulers come and go; governments end and forms of government change; but sovereignty survives.... Sovereignty is never held in suspense." He was speaking not of popular sovereignty or "We the People," but of a different "power" that preceded the Constitution. This was the power of "external sovereignty" which "passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."[128] Thus where our standard story is one of a revolution in the location of sovereignty from King to People, here we have an alternate version, one of continuity that never touches the People but goes directly to the Union and the executive in particular.[129] Both notions of the sovereign—the popular sovereign and the governmental sovereign—point to a source outside and beyond the constitutional order: one to the People, the other to the Crown or to international law. I do not endeavor to theorize the relation between these two, but to say, as Sutherland does, that these sovereignties can be separated by a territorial trope such as inside/outside, domestic/foreign, is not reassuring.[130] It was just such divides that total war—which was to come soon after Sutherland's opinion—was to overwhelm, and which the war on terror supposedly overwhelms as well. Just as the individual can sacrifice to or for the popular sovereign, one can also do so for the governmental sovereign.

The sovereign's immunity from litigation is one consequence of this conception of the sovereign as anterior/exterior to the legal order—even if we now prefer to ground immunity in a functional public policy analysis.

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127. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936). For discussion of the "pendulum" swings between Curtiss-Wright and its lead competitor, *Youngstown*, *see* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN CONTRA AFFAIR 135 (1990).

128. Curtiss-Wright Exp. Corp., 299 U.S. at 316-17. For analysis of Sutherland's Opinion, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 14 (2002) (describing the opinion as culmination of nineteenth century state positivism which had flourished after the Civil War in numerous areas of regulation, including immigration, relations with Indian nations and in the territories, and urging that doctrine of inherent powers is difficult to defend or justify).

129. Curtiss-Wright, 299 U.S. at 320 (describing President as the "sole organ of the federal government in the field of international affairs" but also noting that it, "like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution"). Judge Richard Posner reads *Curtiss-Wright* to mean that the "nation is prior to the Constitution," a reading which obscures the distinction between our two sovereigns, folding into the word "nation" both "the People" and the "United States." POSNER, *supra* note 22, at 4. But he is right to read the "principle of the case," or at least the principle of Sutherland's dicta, to be "that national power is not limited to the powers explicitly granted by the Constitution." *Id.*

130. *See* A. Kaylvas, *supra* note 30, at 224-25 (distinguishing sovereignty as command from sovereignty as constituent power, the latter drawing on George Lawson, John Locke, Thomas Paine, Emmanuel Sieyès, and Carl Schmitt).

Since the sovereign is the source of the constitution (as constituent power) or above the law (through the exception), it is an act of self-contradiction to be subject to the law. It entails that the sovereign cannot be sued in its own courts: in Blackstone's maxim, "the king can do no wrong."[131]

One way these themes connect to our discussion of contractors is *via* the Federal Tort Claims Act (FTCA) which Congress enacted in 1946 and which waived the government's sovereign immunity.[132] The doctrinal development around the statute—which I will briefly describe—offers one window into shifting forms of liability, the reach of sovereignty and the ability of contractors to benefit from immunity. Contextualizing the statute in an important 1950 case extending the government's immunity, Justice Jackson wrote in the majority opinion in *Feres v. United States* that even though the "political theory that the King could do no wrong was repudiated in America," the doctrine was "invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown."[133] As a result, Jackson continued, as the government "expanded" its agents have "caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remediless."[134] The FTCA was to address that problem by waiving the federal government's immunity from state tort litigation "where the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ."[135] The FTCA might be read as a step towards the United States putting itself in the position of a private actor—by waiving its sovereign immunity—"privatizing" itself in the sense of making itself legally vulnerable to other individuals for damages caused them.

The date of the FTCA should be noted: at the same time that the United States assumed a transcendent degree of sovereign power over life on a global scale with its acquisition of nuclear weapons, it also waived its sovereign immunity from suit. But the waiver of immunity for common law torts did not extend to claims where the United States was acting

131. 1 WILLIAM BLACKSTONE, COMMENTARIES, 238-39 (1966). ("Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong. Which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would totally destroy the constitutional independence of the crown, which is necessary to the balance of power. And, secondly, it means that the prerogative of the crown extends not to do any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice"). The full paragraph, which draws on the motif of the king's two bodies rather than facilitating unrestrained power, seems to cut in exactly the other direction: if the action was "exceptionable" it was not actually the action of the king.

132. 28 U.S.C. § 1346(b)(1) (2005).

133. Feres v. United States, 340 U.S. 135, 139 (1950).

134. *Id.*

135. *Id.* at 141 (citing 28 U.S.C. 2674); *see* PETER SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 35-41 (1983).

undeniably like a sovereign and not a "private individual" (in the language of the FTCA).[136] For instance, it provided for a combatant activities exception— it being the nature of the sovereign at war to be able to incur injury and death without tort liability.[137] The 'privatization' of the United States could only go so far, since there are no actors, as Jackson wrote, "even remotely analogous" to the United States in the military setting and he offered as an example that "no private individual has power to conscript or mobilize a private army . . . ."[138] Thus, the language of the statute quoted above—that immunity was waived "in the same manner and to the same extent as a private individual"—served as a "test"[139] for Jackson, one that lead, he found, to a broad exclusion of liability "for injury to servicemen where the injuries arise out of or are in the course of activity to incident to service."[140] This exception to liability went beyond a narrow view of any specifically military activities and covered a range of contexts—and according to one author, "essentially reinstated military immunity" for servicemen seeking to sue the United States.[141]

Unable to sue the government, soldiers injured by equipment or services provided by contractors attempted to sue the contractors. In turn, contractors sought indemnity from their client, the United States. At first, in 1977, the Supreme Court rejected that move and left the contractors exposed to liability. After all, the Court explained in *Stencel Aero Engineering Corp. v. United States*, because the "relationship between the United States" and the contractor—in that case the manufacturer of a malfunctioning aircraft ejection system—"is based on a commercial contract, there is no basis for a claim of unfairness in this result." [142] Indeed, is this not the logic and ethos of commercial law, duly emphasizing the separate nature of the parties to the transaction? Why should the government protect and immunize the private contractor?

If the government was not going to immunize contractors, they presumably would pass on the costs of their exposure to litigation to the government in the form of higher prices or perhaps simply refuse to sell to the government. These concerns do not seem unusual—the price of a

136. 28 U.S.C. § 2674 (2005) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . .")

137. 28 U.S.C. § 2680(j) (2005) (bars "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"); Imbrahim v. Titan Corp., 391 F. Supp. 2d 10, 18 (D.D.C. 2005) (this "exception seems to represent Congressional acknowledgment that war is an inherently ugly business for which tort claims are simply inappropriate").

138. Feres, 340 U.S. at 141 .

139. *Id.* (citing 28 U.S.C. § 2674).

140. *Id.* at 146.

141. Kateryna L. Rakowsky, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 365, 379 (2006).

142. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 674 (1977).

good or service will typically provide for such mark-ups and yet courts stepped back from this simple logic, which would leave the contractors liable but able to pass on the cost. Courts were not content to leave these interactions in the sphere of the market and one worried that "holding the supplier liable . . . would subvert the *Feres-Stencel* rule" for "despite the government's immunity [the contractor] would pass the costs of accidents off to the United States."[143] Why, we might ask, does the normal operation of the marketplace—in which the buyer is asked to cover the costs of the product—"subvert" immunity? This seems to be just the point, that the sovereign is one who can engage in unequal exchanges, who need not offer compensation, especially so in the context of war. The background assumption, relevant to our discussion of Blackwater, seems to be that the services or products provided in war-making would not be economically viable without sovereign immunity. If one really had to pay the full costs, there would be no financial incentive to supply the goods or services. Perhaps it is that this sphere of military activity where the government relies on an array of private actors resides between a regime of reciprocity—as in the market contract or the social contract—and a sovereign regime of unilateral taking (or giving).[144]

In 1988, Justice Scalia, writing for the majority in *Boyle v. United Technologies,* recalibrated the Court's contractor defense doctrine and drew on the test developed in the Agent Orange litigation.[145] Scalia picked up on the concern about the pass through of costs to the government. Where there is a unique federal interest, Justice Scalia found, contractors may be immune when undertaking tasks tailored to the particular needs of the government and so long as officials are kept informed.[146] Thus the mere purchase of a number of standard helicopters available in the civilian market would not lead to immunity for the manufacturer—but where they were designed to meet government specifications and the government was made aware of dangers, there could be immunity. The point, for our purposes, is that insofar as the government is acting like other buyers in the marketplace, there is no need for immunity. But to the extent that private contractors adapt themselves to the particular needs of the sovereign—in particular, taking greater risks—there should be immunity, or else contractors may not have an

143. McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); *cited in* Kateryna Rakowsky, *supra* note 141, at 381.

144. *See* Rose, *supra* note 19, at 315.

145. Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

146. Boyle, 487 U.S. 500 (1988), granted contractors immunity from suit when the government specified the product requirements; where the contractor met the specifications; and where the government knew as much or more than the contractor about the product. *Boyle* found exception to liability in the "discretionary function" in the FTCA, 28 U.S.C. § 2680(a) (2005), not in *Feres*. *See also* Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992) (extension of contractor immunity under combatant activities exception of FTCA).

incentive to provide specialized products. Immunity would flow only as a result of actions and decisions of officials, not contractors.

The doctrinal trajectory of immunity just sketched—the immunity of the United States, its partial waiver of immunity in the FTCA, and the disputes over the reach of immunity to contractors—provides an important background for the Blackwater litigation. It seems to circle around the insight that the sovereign cannot truly operate in a world where it is responsible—liable in tort—for the harms it may inflict. It is not clear how this body of law and doctrine will apply to companies like Blackwater—and given the removal of the litigation to arbitration, we will perhaps never know in our particular case. Perhaps to the extent that Blackwater is not acting independently but is following orders and specifications provided from the United States, the greater the likelihood of immunity. For instance, in another contractor case—one arising from the role of private interrogators and translators at Abu Ghraib and brought by detainees and their surviving family members—the district court concluded that that if the contractors "were essentially soldiers in all but in name," their employers could assert immunity.[147] The employers, now eager, like Blackwater, to assert that they were not, after all, separate entities, stated that their employees were on "loan" to the military.[148]

In relation to the Fallujah case, there are significant differences between the contractors and soldiers in terms of supervision and command and control. In other contexts—such as Blackwater's highly detailed contracts with the State Department—the differences may not be so stark. But in all of Blackwater's operations, some of the hallmarks of the soldier status, such as death for desertion, are simply not present. At least in such a literal sense of what the "soldier in all but name" test might mean, no private company could satisfy it. As Justice Jackson noted, no private party is "even remotely analogous" to the sovereign.[149] But the deeper paradox may be that the more Blackwater must seek out a "soldier" status to avoid liability, the greater the collision with the entire ethos of outsourcing and privatization. To give just one example, the Fallujah contractors were, according to Blackwater, independent contractors, one of the most autonomous categories of labor—they are not even under sufficient control and direction to be "employees," let alone soldiers. But

147. Imbrahim v. Titan Corp., 391 F. Supp. 2d 10, 19 (D.D.C. 2005) (describing test as composed of questions such as: "What were their contractual responsibilities? To whom did they report? How were they supervised? What were the structures of command and control? If they were indeed soldiers in all but name, the government contractor defense will succeed, but the burden is on defendants to show that they are entitled to preemption."); *see also* McMahon v. Presidential Airways, 502 F.3d 1331, 1351 (11th Cir. 2007) ("[P]rivate contractor agents may be entitled to some form of immunity that protects their making or executing sensitive military judgments, and that overlaps and possibly extends beyond the question provided by the political question doctrine.").

148. Imbrahim, 391 F. Supp. 2d at 19.

149. Feres, 340 U.S. at 141.

here, as with the contractors' supposed ineligibility for sacrifice, legal form may be overcome by substance. The form of the relationship—independent contractor—would probably not stand up to much scrutiny. They are—at least from a tax perspective—more likely employees.[150]

Overall, two strong forces seem to be at work: a centrifugal force that pushes responsibility and liability outwards through contracting and privatization; and a centripetal force that pulls the sector back towards the sovereign in order to be immune and remain a viable business model. The force pulling the contractors back in is related to Justice Scalia's concern in *Boyle* that at least certain activities would not be undertaken unless there was immunity—they could not be sustained in a world of reciprocal obligations and compensation for harms incurred. The centrifugal force is—I have argued— tied to an avoidance of sacrifice. In our analysis of the interaction between sovereignty and sacrifice we saw that soldiers' deaths were a sacrifice, but the contractors' was officially not. The soldier's injury generates no legal liability for the government, and neither does that of contractor—the Fallujah contractors' estates sued Blackwater, not the United States. That is, the government retains immunity in both cases, but faces sacrificial liability only with respect to soldiers. But what we have explored is a possible transformation in these structures. Contractor sacrifice is slowly being recognized, and the courts are attempting to discern whether contractor companies merit immunity. Both seem to orbit around the "soldier"—if they are like soldiers, individuals killed are more likely to be considered eligible for sacrifice, while their employers, when responsible for their deaths, are more likely to be immune. And perhaps there is a logic to this dual movement by which the contractor sacrifices and their employer is legally immune, that is, that with sacrifice we are talking about a non-legal liability. This comports with some of the conceptions of sacrifice we have canvassed: that it is fundamentally beyond law and in the domain of sovereign action.

B. Re-Enlisting Through the Private Sector

The Fallujah event also reached Congress when the Republican Party lost its majority in the 2006 mid-term elections and Congressman Waxman, Chairman of the House Committee on Oversight and Government Reform, began to hold hearings on the contractor industry and Blackwater in particular. In these hearings (one in February 2007 and another in October 2007), Blackwater took a different stance to the one it had adopted in court, pointing to the integrity of the judicial process as a

150. *See* Robert W. Wood, *Worker Characterization Lessons From Blackwater*, TAX NOTES, MARCH 3, 2008, at 1010 ("[I]t is hard for me to read this contract [Blackwater's 18-page adhesion contract for its workers] without thinking that the worker is simply required to do what he is told" and thus is not an independent contractor).

reason why Congress should not get involved.[151] Indeed, Blackwater General Counsel Andrew Howell, Esq. urged the committee that it was not proper and might even be unlawful to inquire into the Fallujah incident because of the ongoing litigation: "Litigation is conducted according to the rule of law before an impartial judge or jury hearing direct testimony over many days from witnesses and experts."[152] In its court papers this was precisely what Blackwater was seeking to avoid. In later hearings in October 2007, when Blackwater founder Eric Prince was asked about the profitability of Blackwater he declined to give figures: "I can give approximate numbers, but we're a private company. And I'm sure it's the Congress's main interest in maintaining healthy competition amongst government vendors. So we're a private company, and there's a key word there: 'private.'"[153]

Juxtaposing Blackwater's stance in court and before Congress, we see an actor that seeks both the attributes of sovereignty and the protections of the private sphere. Prince's appearance before Waxman's committee came only after the scandal of the Blackwater killing of 17 Iraqi civilians in Baghdad in September 2007. The rejection of the mercenary label was emphatic in Prince's testimony, and he emphasized that his company was doing work requested by the United States and that his employees had died doing so. Indeed, since many missions consisted of protecting important U.S. officials—such as the members of Congress questioning Prince—there was an implicit complaint that he was being attacked by

151. February 2007 hearing, *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report* (Feb. 7, 2007) *Before the H. Comm. On Oversight and Government Reform*, 110th Cong. [hereinafter *February 7 Hearing*]; documents including transcript of hearing *available at* http://oversight.house.gov/story.asp?ID=1165; October 2007 hearing, *Blackwater USA: Private Military Contractor Activity in Iraq and Afghanistan, Before the H. Comm. On Oversight and Government Reform*, 110th Cong. (2007) [hereinafter *October 2 Hearing*], transcript *available at* http://oversight.house.gov/documents/20071127131151.pdf, related documents *available at* www.oversight.house.gov/story.asp?ID=1509.

152. Statement of Andrew Howell, Esq., General Counsel, Blackwater, Dec. 7, 2007, 4 [hereinafter Howell Statement] *available at* http://oversight.house.gov/story.asp?ID=1165 and incorporated into *February 7 Hearing* at 123-128., 126; in responding to a Congressional investigation of the Fallujah attack, Blackwater also sought to manipulate some sovereign attributes regarding the classification of documents. Thus, Blackwater described its position to the House committee which had sought Blackwater's reports on the Fallujah attack: "We understand the Committee has the facilities and necessary clearances to hold classified information. As a contractor, however, Blackwater lacks unilateral authority to provide the Committee with any classified incident reports." Responses to Questions for the Record, Andrew Howell, General Counsel, Blackwater USA (Feb. 16, 2007). Andrew Howell quoted in MAJORITY STAFF REPORT, PRIVATE MILITARY CONTRACTORS IN IRAQ: AN EXAMINATION OF BLACKWATER'S ACTIONS IN FALLUJAH 15 (2007), *available at* http://oversight.house.gov/documents/20070927104643.pdf. In pursing the "classified" reports, however, the committee discovered that not only were the reports not classified, but that subsequent to the committee's request Blackwater had hand-delivered copies of its own reports and reports of a government body to the Department of Defense and requested that they be reviewed for whether they should be classified. The Defense Department rejected this effort to gain a classified status for Blackwater's documents, but the effort shows the innovative alignment of public and private that Blackwater envisions. Id., 14-17.

153. *October 2 Hearing* at 109 (2007) (Testimony of Eric Prince, chairman and CEO of the Prince Group, LLC and Blackwater USA).

those who his company had died protecting. Prince, a clean-cut former Navy SEAL, insisted that Blackwater was a patriotic American company in a long lineage of contractors going back to the founding of the republic.[154] Blackwater contractors, Prince continued, "have sworn the oath to support and defend the Constitution" and they "bleed red, white and blue."[155]

In a letter responding to a congressional report on the Fallujah event, Blackwater wrote that the company "and the veterans who work for Blackwater, have taken a difficult burden off the shoulders of the American Armed Forces."[156] Another attempt to dislodge the mercenary label was to refer to the contractors as veterans and to describe Blackwater as a place where they simply reenlist: "Military contractors, comprised largely of military veterans 're-enlisting' through the private sector like the four Americans killed in Fallujah, fill vital gaps in the all-volunteer force."[157] This marvelous locution—*re-enlisting through the private sector*—captures well the novel construction of outsourced sacrifice as both private and sacrificial. Howell, Blackwater's attorney, also made the explicit point that Congress should not be too critical: "Chances are, if and when you as Members of Congress and your staffs travel into Iraq, your lives will be protected for a least part of the trip by Blackwater professionals."[158] And he supplied testimonials of support such as one from the U.S. Ambassador to Iraq (referring to the death of five Blackwater contractors, saying that "they represent the best of America, showing valor and courage in the work they did each day"[159]) and one from a State Department spokesperson ("We will always remember their courage, commitment, and ultimate sacrifice for their country"[160]). Indeed, the State Department had become increasingly close to and reliant on Blackwater since it hired the company to provide for the security of much of its personnel around the world.

The family members of the killed contractors were also offered an opportunity to testify before Waxman's committee.[161] They did not

154. Statement Of Erik Prince, Chairman, The Prince Group, LLC And Blackwater USA, in *October 2 Hearing* at 25, 26.

155. *October 2 Hearing* at 100.

156. BLACKWATER'S RESPONSE TO 'MAJORITY STAFF REPORT' ON 'PRIVATE MILITARY CONTRACTORS IN IRAQ: AN EXAMINATION OF BLACKWATER'S ACTIONS IN FALLUJAH I (not dated or signed; released Oct. 2007).

157. *Id.* at 10.

158. *Howell Statement* at 1 in *February 7 Hearing* 123.

159. *Id.*

160. *Id.* at 2, *February 7 Hearing* at 124 (quoting Sean McCormick).

161. Testimony of Kathryn Helvenston-Wettengel, Rhonda Teague, Donna Zovko, and Kristal Batalona (Feb. 7, 2007), available *February 7 Hearing* at 76-83, 78. In a jointly issued statement the family members described a different vision of the company. *February 7 Hearing* at 77: "Blackwater gets paid for the number of warm bodies it can put on the ground in certain locations throughout the world. If some are killed, it replaces them at a moment's notice. What Blackwater fails to realize is that the commodity it trades in is human life."

explicitly reject the "mercenary" label, but they noted that the "talents of highly-skilled special forces personnel do not always translate well into civilian life."[162] They said that Blackwater told "our men" that they "would be performing work that would make a difference, such as guarding Ambassador Paul Bremer, not escorting empty trucks that were going to pick up kitchen equipment."[163] Their deaths, we might take this to mean, should have been sacrifices in the service of an important goal, but instead were a waste.

The Fallujah event might be understood as the exception proving the rule that it is possible to construe the contractor as excluded from sacrifice, and that well-defined legal structures can indeed offer significant aid to officials seeking to outsource sacrifice and protect themselves from the political liability that the deaths of U.S. soldiers entails. It seems extremely fortunate for the contracting sector that this major scandal was one in which contractors were the victims and not the perpetrators—unlike the more recent scandal where Blackwater employees killed 17 civilians. (Although contractors were clearly central to the Abu Ghraib torture story, which broke shortly after Fallujah, this was not generally framed as being a contractor scandal.) The most important outcome may be that the Fallujah event promoted the view that the contractors were not simply mercenaries. Indeed, in the interpretation I have offered, the attack re-nationalized the contractors, downplaying the perception of them as self-interested and representing private values. Blackwater's operations were not shut down or taken over by the military—on the contrary, they expanded significantly. The United States, we might speculate, is on the cusp of both accepting that the contractor's body can be a site of sacrifice and leaving this potential in the private sector.

We thus return to an outsourcing of sacrifice: the sacrifice is outsourced, yet it remains sacrifice for a national audience. If what is important about our language of sacrifice is that it tracks a form of governmental dependence on the citizenry, the important question is whether seeing the contractor's death as a sacrifice plays the same role. That is, is this a sacrifice of the other (as with the substitute) or of the self. If it is a sacrifice of the other, does this mean that there is no felt connection between the citizenry and the contractor? If so, then perhaps this language of sacrifice is not serving to bolster governmental accountability. In fact, it is perhaps even worse than a scenario in which the contractors' death is banal since it presents the public with a site of the sacred (say, Blackwater's memorial at its corporate headquarters) over which the public has no claim. Rather than having given of itself, the citizenry has passively received. Talk of sacrifice should attune us to the particular

162. *Id.* at 3.
163. *Id.* at 5.

kind of power and prestige generated by giving of the self—which we see extravagantly displayed in the way that Blackwater asserted itself before Congress.

C. Sacrifice for Universal Values

> We do not see contemporary brigades volunteers going off to fight for human rights around the world. Just the opposite: the independent entrepreneurs of military expertise today are corporate entities, selling their skills. They are motivated by profit and have no interest in sacrifice.
>
> —Paul Kahn, *Sacred Violence*[164]

I have sketched an emergent potential reading of contractors' deaths as ones addressed to and for the United States. In truth, the industry is not so limited, and sacrifice can be for more universal concerns. In August 2004, Blackwater joined an association of military contractor companies called the International Peace Operations Association (IPOA).[165] The association's quarterly magazine of January 2006 contains a full-page advertisement from the company.[166] On a black background, the words "Bosnia," "Somalia," "Sudan," "Afghanistan," "Rwanda," and "Iraq" radiate from a small planet earth in the upper corner of the page. The text explains:

> We live in a world that gets smaller each day. Inescapably, there are clashes between cultures and value systems. Tragedies that went unnoticed and undetected 10-20 years ago are daily brought to the world via network news and the internet. And now that we are aware of the many travesties of justice in the world, those of us who enjoy freedom and democracy are now bound to help share it with the world. Through selfless commitment and compassion for all people, Blackwater works to make a difference in the world and provide hope to those who still live in desperate times.[167]

Positioned as part of a "Peace and Stability Industry," as the head of IPOA Doug Brooks calls it,[168] Blackwater declares its devotion to justice, freedom and democracy.[169] The advertisement does not go quite so far as to employ the term sacrifice, yet "selfless commitment" gets close.[170]

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164. KAHN, *supra* note 34, at 100.

165. IPOA was founded in April 2001.

166. Blackwater, *Advertisement*, IPOA QUARTERLY, January 2006, at 4, *available at http://ipoaonline.org/en/journal/quarterly_2006_010203.pdf*

167. *Id.*

168. President's Message, IPOA QUARTERLY, January 2006, [hereinafter *President's Message*] at 2, *available at* http://ipoaonline.org/en/journal/quarterly_2006_010203.pdf

169. *Id.*

170. Blackwater, *Advertisement*, *supra* note 166.

Importantly, the devotion the advertisement articulates is not addressed to nation or state, but to the principles of justice and to the protection of "all people."[171] Indeed, the lack of a sacrificial bond between state and contractors can be construed as a positive attribute of the contractor. In cases where justice demands an intervention but national politicians are loath to risk their own citizens, the contractor provides a way for states to promote justice without demanding sacrifice. Perhaps this notion is not completely hollow in light of the impact of the "Mogadishu effect." Blackwater, in the advertisement at least, indicates that it will provide the "selfless commitment"—presumably at times in lieu of citizen armies.

But there is another point to be drawn from this type of language. For when the advertisement refers to those of "us" who "enjoy freedom and democracy," and how we are "bound" to "help share it with the world," this echoes the enlightened imperial strains of U.S. political discourse. From this perspective, sacrifice "for" the United States is not for "the state" so much as it is for the universalizing project which the state expresses, a project of human freedom, democracy, liberty, etc.

Indeed, this version of U.S. military action as oriented less to the destruction of an enemy than to the expansion of universal rights is said to be increasingly visible, even if it is hardly novel in the United States, let alone in the history of empire.[172] The U.S. Navy, to cite one example, was de-privatized at just the same time that the United States expanded its imperial ambitions: "Overall," Nicholas Parillo writes, "it seems, the nation's new imperial ambitions and consequent strategic imperatives not only banished privateering from the realm of possibility, but also transformed the Navy itself into a 'not-for-profit' organization."[173] If we typically associate national defense with republican virtue and imperialism with coercive extraction, Parillo suggests a drastically different alignment. Imperialism in America had to be *more* humanitarian than simple national defense.

From this vantage point, sacrifice for the United States becomes sacrifice not for a nation but for a transcendent global project. Indeed, the United States becomes the actor willing to suffer for others in order to provide the basic public good of global security. In its strongest form, which perfectly inverts narratives of the United States as an exploitative empire, the globe is seen as covered in the blood of Americans who have

171. *Id.*

172. As Ann Stoler remarks, it would be a mistake to see the American "empire" as unique in imagining itself as beneficent and committed to universal values. Ann Laura Stoler, *Degrees of Imperial Sovereignty*, PUBLIC CULTURE, vol. 18, issue 1: 125-146, 133 (2006).

173. See Parillo, *supra* note 96, at 11, 91. ("The New York Times reported that the McKinley Administration—which was officially justifying the war as a humanitarian mission to rescue Cubans from Spanish oppression—worried that the captures might put the United States 'in a bad light before the world' . . . [Members of the press] charged that the system tarnished the war's much-touted humanitarian rationale.").

died for others. As former Presidential candidate John McCain urged: "But the fact is, America is the greatest force for good in the history of the world. My friends, we have gone to all four corners of the Earth and shed American blood in defense, usually, of somebody else's freedom and our own."[174] In the same vein, President Bush, when asked on *60 Minutes* whether he owed an apology to the people of Iraq he responded that, on the contrary, "the Iraqi people owe the American people a huge debt of gratitude" and most Iraqis "understand that we've endured a great sacrifice to help them."[175]

Another aspect of this global project is that it is not only U.S. citizen-contractors who are dying in its service. Indeed, once the American project is universalized, there is no conceptual reason why non-U.S. citizens should not be able to contribute. To cite one recent recognition of this: in 2008, five Fijian contractors who died in Iraq were awarded the Defense of Freedom medal. In seven years, the medal specially created to honor the civilian victims of 9/11 at the Pentagon has migrated to the South Pacific. The U.S. Embassy representative explained to the *Fiji Times* that "the ceremony was to honour the five men who bravely laid down their lives as part of an international effort to fight terrorism and create freedom."[176] In sum, portions of this industry are positioned as simultaneously patriotic (to the United States) and global, a combination facilitated by the universal nature of the U.S. project.

However noble their motivations might be, contractors do not, of course, work for free. The President of IPOA, Doug Brooks, writes that the "theme for 2006 is 'Beyond Iraq.'"[177] The "bulk of reconstruction funds have already been spent, and the Coalition will be scaling back its presence in the country."[178] Yet "[n]ew opportunities for private firms continue to expand in international peace operations elsewhere in the world, from the Democratic Republic of Congo to Haiti to the Sudan."[179] (In October 2007, days after IPOA announced that it would investigate Blackwater's compliance with IPOA standards, Blackwater withdrew from the group.[180])

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174. Senator John McCain, Address at Second McCain—Obama Debate (Oct. 7, 2008) (transcript *available at* http://www.cnn.com/2008/POLITICS/10/07/presidential.debate.transcript/).

175. *60 Minutes* (CBS television broadcast Jan. 14, 2007).

176. Monica Singh, *Local War Casualties Get Medals*, FIJI TIMES ONLINE, Aug. 15, 2008, http://www.fijitimes.com/story.aspx?id=97870 ("US Embassy Charge d'Affairs Jeff Robertson said the ceremony was to honour the five men who bravely laid down their lives as part of an international effort to fight terrorism and create freedom.").

177. *President's Message*, *supra* note 168.

178. *Id.*

179. *Id.*

180. Press Release, International Peace Operations Association Statement Regarding the Membership Status of Blackwater USA (Oct. 12, 2007) (on file at http://ipoaonline.org/php/index.php?option=com_content&task=view&id=156&Itemid=80).

The epigraph to this section quotes Kahn as writing that private military firms are "motivated by profit and have no interest in sacrifice."[181] If we took a jaundiced—or perhaps simply a realistic—view of contractors' sacrifice talk, we might dismiss the examples I have produced as mere advertising and propaganda. To engage with these examples of sacrifice is to be taken in by a cynical, and transparent, ploy. This may be the right response, and yet there may be something more interesting and profound underway. Earlier I described the boundary between old "economistic" sacrifice and the "new" selfless sacrifice.[182] Kahn's conception seems to tend towards such a dichotomous account as well, insisting on the divide between political and economic—one cannot sacrifice for the market. Hubert and Mauss, we saw, did not insist upon a firm dichotomy between gift, contract and sacrifice—and their framing seems helpful.[183] Thus one way to think of these examples regarding contractors is that they are tracking a recalibration between the different conceptions of sacrifice, between economic and political action.

V. THE DISTRIBUTION OF THE CAPACITY FOR VIOLENCE

> In the realm of policy, I regard eliminating the draft as my most important accomplishment.
>
> —Milton Friedman[184]
>
> Legal conscription is only a regularized form of a relationship [the citizen's availability for sacrifice to the sovereign] that is always an implied possibility—a background condition of popular sovereignty.
>
> —Paul Kahn, *Sacred Violence*[185]

Perhaps what is troubling about the rise of the contractor is that it suggests that the government is able to employ force without the bodily participation of the citizenry (without asking for their "sacrifice"), and is thereby increasingly autonomous and thereby hewing more to the tradition and genealogy of governmental sovereignty than popular sovereignty. Is there anything novel in this development, or is it, rather, simply an old story and struggle in a new form? This Part first looks at the rise of a permanent standing army and the advent of nuclear weapons. I draw on Elaine Scarry's reading of the Founders' understanding that the citizenry,

181. KAHN, *supra* note 34, at 100.

182. *See supra* Part I, "The Divine Sovereign."

183. *Id.*

184. Brian Doherty, *Best of Both Worlds: Milton Friedman Reminisces About His Career as an Economist and His Lifetime "Avocation" as a Spokesman for Freedom*, , REASON ONLINE, June 1995, *available at* http://www.reason.com/news/show/29691.html.

185. KAHN, *supra* note 34, at 134.

as a collective, would have greater capacity for violence than the government.[186] Both nuclear weapons and a standing army undercut the government's need for ordinary citizens to (actively) participate in violence. Here, conscription plays an important corrective role (at least in the example of the Vietnam war) as a mechanism that established a certain amount of governmental dependence on the citizenry. Scarry suggests a vision of the mobilized popular sovereign acting together as an ideal type of decentralized sovereignty.[187] This provides a vantage point from which to see the permanent standing (volunteer or conscript) army, a post-war innovation, as itself a kind of outsourcing of sacrifice.

Second, I turn to the termination of conscription in 1973, where military service was conceived as a matter of taxation, manpower and labor, not sacrifice, and find, in this transition, a reconceptualization that leads to the contractor. In particular, I discuss economist Milton Friedman's conceptualization of the draft as an in-kind tax that overburdens some individuals by paying a below market wage. This Part also discerns different conceptions of sacrifice. In my discussion of Scarry, I mention Kahn's view of vulnerability to nuclear war as a kind of conscription and a sacrifice. But I note that this is a rather passive version of sacrifice, of *being* sacrificed. In another view of sacrifice, it is an unbalanced exchange, a taking without compensation. Sacrifice, this is to say, tracks the "gap" between a market wage and that paid the conscript. This deficit works in the opposite sense with respect to mercenaries who are, in the language of international law, motivated by "excess" pay. Here the disparity can perhaps explain why their deaths are not sacrifices—and, more interestingly, suggests that sacrifice emerges from an unequal exchange.

A. The Ideal of the Citizen-Soldier

Elaine Scarry's reading of the U.S. Constitution's Declare War Clause and the Second Amendment provides an important vantage point into the tension that has run throughout this Article between governmental sovereignty and popular sovereignty.[188] She understands the Second Amendment to entail a distribution of violence in which the citizenry will have greater capacity for violence than the government.[189] If the

186. Scarry, *supra* note 46, at 1269-71.

187. *Id.*

188. *Id.* at 1308.

189. *Id.* (writing that the Second Amendment "came into being primarily as a way of dispersing military power across the entire population"); *see also* Parillo, *supra* note 96, at 13 ("[F]ollowing Jeffersonian ideology, Americans dreaded the advent of a large permanent governmental military as a threat to democracy, and they considered the small merchant firms and commercial seamen who engaged in privateering to be less dangerous to the republic than a large navy, since the privateers inflicted violence in a totally decentralized way, were strategically incapable of acquiring or defending a European-style global empire, had no permanent stake in war, and could melt back into civil society

government wants to go to war, it will need the participation of the citizenry. Part of the Founding generation's aversion to standing armies, Scarry urges, was that armies upset this distribution and the dependence of the government.[190] The second piece of Scarry's reading addresses the power to declare war, vested in Congress in Article I, Section 8. For Scarry, in order for a declaration to become actual war, it must, because of the distribution entailed in the Second Amendment, be "substantiated by the call to arms, in which the proposal either is ratified or refused, depending on what portion of the population approves of the country's military participation."[191] Thus like a constitutional amendment, war requires going beyond the procedures of normal politics (to use Bruce Ackerman's phrase)[192]—the congressional declaration must be ratified through popular participation. Without such a distinction between the acts of representatives and the acts of the people, Scarry's argument could simply be met by the objection that the normal routes of decision-making are adequate to protecting the public.

The distribution of the capacity for violence and the steps towards mobilization which Scarry imagines, are now, of course, unrecognizable. As John Yoo has reminded us, Presidents routinely take the country to war without a congressional declaration of war, let alone popular participation.[193] Even so, viewed not as an empirical claim about our present day practices but as a normative and originalist assertion, Scarry's reading of the Second Amendment provides a useful ground to explore concerns about governmental sovereignty entailed in a standing army and in nuclear weapons. The significance of a standing army, from this perspective, is that while Congress is in a position to stop military action through funding, the default positions which Scarry says the Founders envisaged are reversed—Congress and the public have *de facto* consented in advance, rather than saying yes, they must say no. Extending these concerns to nuclear weapons, Scarry writes that:

> A freestanding missile is the realization of everything that ever was feared in the standing army. It permits the concentration of a military

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when their services were no longer needed. For many Americans, it seems, the clause of the Constitution authorizing 'letters of marque' had a purpose not unlike that of the Second Amendment, which guaranteed citizens the right to 'bear arms' in a 'militia' composed of laypersons organized in local communities, as opposed to professional warriors identified with the central state.") (citations omitted).

190. Scarry, *supra* note 46, 1280-83.

191. *Id.* at 1311.

192. ACKERMAN, *supra* note 99, at 3-34.

193. JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2006) (this is not to credit Yoo's eccentric attempt to ground this 20th century reality in the original understanding of the Founders, nor to express any satisfaction with his silence on the impact of the emergence of a standing army for his position); *see* STEPHEN HOLMES, THE MATADOR'S CAPE: AMERICA'S RECKLESS RESPONSE TO TERROR 290 (2007); *see also,* John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)* 120 HARV. L. REV. 754 (2007).

> force in a central location. It is attached to executive will rather than to the will of the people. Its structures are permanently in place and depend little on historical situations, leaving no room for improvisations or debate.[194]

The turn to standing armies and nuclear weapons has disabled or avoided both Article 1, Section 8 and the Second Amendment, in terms of Scarry's reading of what they mean. If the citizenry's active consent and participation is disabled, what are the implications for the concept of sacrifice (a term which Scarry does not employ)? If by sacrifice we mean the citizen's voluntary giving of his or her self, then this too would be disabled. But if we mean a more passive idea of sacrifice, of *being* sacrificed, then perhaps the threat of nuclear war represents the availability of the entire citizenry for sacrifice. This is Kahn's conception of the matter:

> Nuclear weapons are a constant reminder that the state's interests come first and last, that all individuals—citizens and noncitizens alike—may be sacrificed to the primacy of the sovereign state. These weapons rest implicitly on a policy of conscription that extends to every citizen—and even beyond—for which no exemptions are granted.[195]

Perhaps the distinction between Scarry and Kahn is simply one between the actor who offers a sacrifice (Scarry's citizen who consents), and one who is the offering (Kahn's citizen who is passive and sacrificed by the state). Of course there is an actor in Kahn's conception—the state, now acting, to Scarry's dismay, with substantial autonomy from the citizenry. Kahn would, I think, reject an analysis that pivoted on consent, which, for him, simply signals the attempt to reduce our analysis to a liberal framework in which individual consent is the core issue. He writes: "The ambiguity in the term *sacrifice* captures the issue exactly: the act of sacrifice can refer to the self or an other. Sacrifice is both transitive and intransitive."[196] This duality or tension in the idea of sacrifice is one that I have explored in relation to the contractor—whether their deaths are those of the "self" or of the "other." That said, we can still distinguish different distributions of sacrifice from one another, and how they change over time. Thus where Kahn, quite rightly I think, writes that "Legal conscription is only a regularized form of a relationship that is always an implied possibility—a background condition of popular sovereignty,"[197] it is still important to look at changing distributions of sacrifice, and the power of competing notions of governmental sovereignty. While it is

194. Scarry, *supra* note 46, at 1285.
195. Kahn, *supra* note 49, at 355.
196. KAHN, *supra* note 34, at 94.
197. *Id.* at 134.

important that Kahn points out the continuity from the Founding to the present, surely we should also track the discontinuities. The narrative that Scarry offers about the rise of the standing army suggests that we may want to distinguish different moments in our changing national tradition of sacrifice.

In Scarry's discussion of the standing army, a relevant distinction emerges between a conscript army and a volunteer force. She notes, for example, that the draft functioned during the Vietnam War to engage the citizenry—the call to conscription was itself a manifestation of the state's dependence on the people. Scarry quotes Alexander Bickel:

> A democratic state which fights with a conscripted popular army, as most states like ours have done since the French Revolution, will do so effectively with difficulty when a large and intense body of opinion, particularly among those of fighting age, resolutely opposes the war on moral and political grounds. A conscripted army requires more than a majority political decision to fight a war.[198]

In attempting to contain presidential war making without congressional approval, legislators passed the War Powers Resolution in 1973.[199] Although Scarry does not make the point, getting rid of the draft, which Congress did that same year, worked at cross-purposes, if it was the draft which served as a check on war making. In the War Powers Resolution, Congress acted to reinforce only one of the lines of consent that Scarry identifies, its own. In getting rid of the draft and leaving a standing army, it did not act to reinforce the citizenry's (collective) consent.

Does the emergence of the private military contractor fit into the overall arc of Scarry's argument, one in which the government increasingly has access to force without gaining the consent of the citizenry? In one sense, it clearly does: the use of contractors frees the government from the burden of finding citizen-volunteers or announcing a draft. We could, that is, discern a decline in popular sovereignty and a rise of governmental sovereignty. On the other hand, if Scarry is interested in citizens who consent, aren't the contractors ideal examples of this? They share certain features with Scarry's citizen contractors: they are civilians and choose to participate (unlike the conscript), and their service is based on continuing consent (it is not enforced by the threat of death, as is the soldier's). On the other hand, the parallel has an air of the absurd: the contractors do not represent the people in some collective sense which is Scarry's real concern.

The position Scarry articulates provides grounds to be skeptical that the tradition of recognizing military losses as sacrifices could serve to enhance

198. Scarry, *supra* note 46, at 1261 (quoting ALEXANDER BICKEL, THE MORALITY OF CONSENT (1975).

199. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

governmental dependence on the citizenry—because doing so coexists with the very forms of government power (a standing army) she bemoans and because it can easily be used to drum up nationalistic fervor in which others, but not oneself, must face danger. Scarry's conception of the standing army serves to problematize the way in which I have described the volunteer soldier's death as a sacrifice that binds the government to the citizenry. Once a force is permanent, it is separated from the everyday life of the society—think of Huntington's description of West Point amidst the Babylon of American life.[200] The volunteer soldier in a standing army is already removed from the citizenry to a degree that undercuts the kind of governmental dependence Scarry envisions. This is to say that "sacrifice" seems to have many possible political entailments: for example, it can be used by citizens to enhance the accountability of government, since it tells us that a death was not invisible and insignificant; but it can also serve to render sacred a permanent institution like the military and thereby make it less vulnerable to critique.

B. From Sacrifice to Tax

The Presidential Commission (known as the Gates Commission) which paved the way for the transition to an all-volunteer force included amongst its 15 members economists Milton Friedman and Alan Greenspan.[201] According to the Gates Commission Report, "conscription is a form of taxation, and the power to conscript is the power to tax."[202] Thus rendered fungible as monetary payments to the state, military service was not conceived as a transcendent activity that linked the citizen and sovereign. The Gates Commission Report offered a different conception of military service to what we saw in Scarry's account where military service was an essential part of citizenship:

> Any government has essentially two ways of accomplishing an objective whether it be building an interstate highway system or raising an army. It can expropriate the required tools and compel construction men and others to work until the job is finished or it can purchase the goods and manpower necessary to complete the job. Under the first alternative, only the persons who own the property seized or who render compulsory services are required to bear the expense of building the highway or housing project. They pay a tax to finance the project, albeit a tax-in-kind. Under the second alternative, the cost of the necessary goods and services is borne by the general public through taxes raised to finance the project.

200. HUNTINGTON, *supra* note 50, 465-66.

201. REPORT OF THE PRESIDENT'S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE (1970) [hereinafter GATES COMMISSION].

202. ELIOT A. COHEN, CITIZENS AND SOLDIERS: THE DILEMMAS OF MILITARY SERVICE 167 (1985) (quoting GATES COMMISSION).

> Conscription is like the first alternative—a tax-in-kind. A mixed force of volunteers and conscripts contains first-term servicemen of three types—(1) draftees, (2) draft-induced volunteers, and (3) true volunteers. Draftees and draft-induced volunteers in such a force are coerced into serving at levels of compensation below what would be required to induce them to volunteer. They are, in short, underpaid.[203]

In this rendition, governmental objectives are not distinguished in kind: there is no essential difference between building an interstate highway and raising an army. Rather, two modes of extraction from the population are noted: a general tax and an in-kind tax. Instead of seeing certain kinds of activity as non-delegatable, as ones that citizens should perform in their capacity as citizens—such as voting, serving on juries in the army or the militia—the issue is framed as one of manpower and labor.

Even so, it is possible to detect something akin to sacrifice in the quotation from the Gates Commission Report when it describes conscription, but here it is sacrifice not as the willing giving of the self, but a predatory taking by the powerful. The draft, the Gates Commission Report tells us, gets labor at below market rates, and this shortfall in wages is borne by the conscript—an "in-kind" tax. We saw that the mercenary is described in international law as motivated by "excess" pay. In the Gates Commission's analysis of the draft, it is the state that enjoys an excess, that which it takes but for which it does not pay. While Scarry described the importance of the government asking for the collective participation of the citizenry, in the Gates Commission Report we see another alignment of accountability. By paying a prevailing market wage, paid for by a general tax, the lines of accountability between the population and government are strengthened. For now the government will tax the people collectively, not force the burden—of an "in kind tax"—onto the individual conscript. This gap between market wage and the compensation offered the conscript is one way to think of the soldier's sacrifice. Conscripts "sell at a loss,"[204] to use one dictionary definition of sacrifice. If we emphasize the coercive dimension, this "sacrifice" is more a forced sale, a taking, and one without, in the words of the takings clause, "just compensation."[205]

We can appreciate the economists' point in the Gates Commission Report that the conscripting government is not giving compensation at

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203. GATES COMMISSION, *supra* note 201, at 23.

204. Merriam-Webster Online, "Sacrifice," http://www.merriam-webster.com/dictionary/sacrifice.

205. The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. For discussion of the draft as a taking, see William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue*, 20 HARV. J.L. & PUB. POL'Y 23, 24 (1996) ("The military draft was a taking of property—men's property in their own labor—with much less than full compensation."). *See also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 481 (4th ed. 1992) (discussing conscription as a tax).

prevailing wage rates. Yet this seems to overlook the way in which the tradition of recognizing the soldier's loss as a sacrifice is a form of compensation, one that may, from the perspective of officials, seem even more burdensome than paying the prevailing wage. That is, the soldier is offered compensation for the shortfall the Gates Commission identifies—in the form of public recognition, medals, honors, and what we have generally encountered as the sacrificial tradition. Whether this compensation is a mirage, or whether it pushes the soldier into a transcendent realm of martyrdom and national sainthood, is a question that has been answered in different ways and is certainly deeply grounded in the specifics of any given conflict. For example, the history of the Purple Heart medal illuminates the tension between "real" monetary compensation and other forms of payment. The "original" Purple Heart created by General Washington was a Badge of Military Merit that he announced in his General Orders of August 7, 1782, after being informed by the Continental Congress to stop his practice of giving commissions or promotions, since the Congress could not afford the extra pay these entailed. Instead of a reward with a monetary cost, then, Washington devised his award made of purple cloth, which was later reinvented in 1932 as the Purple Heart.[206] In this story, Washington invented the honor as a substitute for promotions and pay increases, an account that reiterates basic questions about whether the honoring we see in the granting of medals and in the calling a loss a sacrifice is really just a ruse, a bad deal, a trinket dressed up as the sacred. In this Purple Heart story it comes in lieu of "real" compensation. Of course, that is the cynical or secular interpretation, and surely one that many would find offensive since it fails to see in the medal a symbol of transcendent loss. But perhaps it is the inadequacy of the item given (say the cloth or metal), in relation to the service rendered (say the value of life or injury as calculated in tort law), that is essential to sacrifice. The individual is linked to a larger collectivity by the very fact that they have not received "fair" compensation. It is just this "debt" or imbalance which links individual and the larger entity, turning an exchange relation into a relation of incorporation. Put another way, we might think of a sacrifice as intrinsically an unequal exchange, a perspective that suggests why we are often so worried that it may simply be a trick or a larceny.

If the volunteer soldier is paid a market rate, does this undercut the notion that they sacrifice? That is, if the volunteer is paid a market wage, perhaps they have already been compensated for their loss. There is no need to add on the additional layer of sacrificial compensation. There

206. *See* www.purpleheart.org/Membership/Public/ AboutUs/HistoryMedal.aspx. For discussion of awards, coins in particular, given by commanders to soldiers, see Major Kathryn R. Sommerkamp, *Commander's Coins: Worth Their Weight in Gold?* 26 ARMY LAWYER 6, 9 (1997).

would be neither a shortfall (on the part of the individual) nor an excess (on the part of the state) that demands some additional recognition and honoring. The two parties have made a fair bargain. Thus, from this perspective, it is the conscript who sacrifices (or is sacrificed) while the volunteer does not sacrifice. More to the point, and more disturbingly, from this perspective, the volunteer looks much like the private military contractor. Indeed, both Scarry and the Gates Commission Report problematize the notion that the volunteer standing army sacrifices.

The reference to "excess compensation" in the Geneva Convention definition of the mercenary is relevant to this discussion—even if the contractors are generally not "mercenaries" in a strict legal sense.[207] This "excess" requirement was intended to "distinguish a mercenary from a volunteer who, motivated by his ideals, accepts the usual or ordinary conditions of pay of the other soldiers, and also to distinguish a mercenary from other members of the regular armed forces."[208] What are we to make of the notion of excess compensation? From the point of view of the Gates Commission, it seems fair to suppose, there is nothing "excess" in what the contractors are paid—by definition, they are paid a market rate, and hence their pay is not excess in relation to that baseline. The excess, as the Protocol explains, is in relation to the soldier. If that happens to be a conscript, then, according to the Gates Commission, they are likely underpaid and the "excess" pay is simply what is necessary to meet the fair market price. But if the baseline if the volunteer soldier, then the comparison to the contractor is more difficult since both of these are consenting. We seem to have various interpretative options: the volunteer is paid a fair market rate and the contractor is "overpaid," and thus instead of fair exchange or a sacrifice in relation with the contractor we have something closer to a larceny of the taxpayer; or if we for some reason think that the volunteer is underpaid (for example, that the government is taking advantage of vulnerable young people in recruiting them and underpaying them) then perhaps the contractor is not paid an excess amount. In addition to thinking about monetary compensation, we should reflect on the other part of the Convention's definition, the mercenary's "motivation." It is not just a dollar amount, but that they act for their own benefit, they do not "give" themselves to the larger project. And this failure to give the self is, as noted, a critical legal difference: the contractor can withdraw their consent at any time while the soldier's

207. *See* Protocol I, *supra* note 52, http://www.icrc.org/IHL.nsf/FULL/470?OpenDocument (listing criteria under Protocol I).

208. Marie France Major, *Mercenaries and International Law*, 22 GA. J. INT'L & COMP. L. 103, 108-09 ("However, no consensus could be reached in 1976 on a definition of 'mercenary.' The reason for this stalemate was a divergence of approaches between the Third World countries who wanted a wide, all-encompassing definition (since they are the ones who must endure the activities of mercenaries) and Western states who were pushing for a narrow definition (because they are the main suppliers of mercenaries)").

consent is (at least for a period of years) irrevocable.

We have encountered at least two interpretations of the way conscription relates to accountability: for Scarry, (reflecting on the Vietnam war) it preserves the government's reliance on the people; for the Gates Commission Report, it avoids the government's reliance on the consent of the citizenry, since it employs coercion. These two perspectives focus on different issues. Scarry is concerned with a notion of collective consent (that "the People" have authorized military action acting directly, not through their representatives or the channels of normal politics). The Gates Commission Report focuses on individual consent from the volunteer and the shared burden of more equitable taxation in the absence of the "in-kind" tax. Both give reason to reconsider whether the volunteer in a standing army should be seen to "sacrifice."

Thinking through these larger frameworks helps deepen our understanding of how we should proceed with respect to contractors. Even Congressman Waxman, who has led the inquiries into Blackwater, seems to accept the essential fungbility of military activity with other types of government action. In his opening remarks at the hearings on Blackwater, he framed his approach as one concerned with cost and benefit, narrowly construed:

> If Blackwater and other companies are really providing better service at lower cost, the experiment of privatizing is working. But if the costs are higher and performance is worse, then I don't understand why we are doing this. It makes no sense to pay more for less. We will examine this issue today and facts, not ideology, need to guide us here.[209]

This framing of the issue is important, but we might pause at Waxman's dismissal of "ideology." For while he probably had in mind an ideology that insisted that privatization was *per se* beneficial, he neglects to mention the sacrificial tradition. This tradition brings with it a much more complex idea of cost and benefit than what the Congressman seems to have in mind.

Long after his participation on the Gates Commission, in a book he wrote with his wife Rose, Milton Friedman recalled a memorable interchange during the Gates Commission's hearings with General Westmoreland:

> In the course of his testimony [against an all volunteer force], he made the statement that he did not want to command an army of mercenaries. I stopped him and said, 'General, would you rather command an army of slaves?' He drew himself up and said, 'I don't like to hear our patriotic draftees referred to as slaves.' I replied, 'I

209. *October 2 Hearing*, *supra* note 151, at 3 (statement of Rep. Waxman, Chairman, House Comm. On Oversight and Government Reform).

> don't like to hear our patriotic volunteers referred to as mercenaries.' But I went on to say, 'If they are mercenaries, then I, sir, am a mercenary professor, and you, sir, are a mercenary general; we are served by mercenary physicians, we use a mercenary lawyer, and we get our meat from a mercenary butcher.' That was the last that we heard from the general about mercenaries.[210]

This passage recapitulates much of our discussion. Justice Taney, we saw, explained that the slave formed "no part of the sovereignty of the State, and is not therefore called on to uphold and defend it."[211] Friedman offers the inverse reading. Rather than a high, sacred calling, (compulsory) military service is, rather, slavery.[212] This is another way of thinking of the meaning of the uncompensated taking which the Gates Commission found inherent in conscription. The conscript is one whose body and labor is made use of by another (indeed, this "slave" of the state may be cheaper to acquire than an actual slave whose owner must be paid).[213] This intimation of a duality of slavery and sacrifice—in both the individual becomes a vehicle for another person or idea—is revealing, through both we leave the liberal world of self-ownership. But one offers a kind of sainthood, the other degradation.

Westmoreland, in Friedman's recounting, sees the relations in yet another way. He saw the volunteers as mercenaries, in contrast to patriotic draftees. Their patriotism is ensured, presumably, by the fact that one can be sure that the draftee has no hidden motive for joining since they do not join, but are made to join. By pointing out that there was self-interest to be found in all occupations—Friedman's examples echoing Adam Smith's famous lines[214]—Friedman writes that he managed to cut off the argument that volunteer soldiers would lack the proper motivation. Or, put another

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210. David Henderson, *The Role of Economists in Ending the Draft,* vol. 2 ECON. J. WATCH No. 2, 362-76, 370 (2005) (quoting MILTON FRIEDMAN & ROSE FRIEDMAN, TWO LUCKY PEOPLE 380 (1998)).

211. Dred Scott, 60 U.S. (19 How.) 415.

212. The Supreme Court, incidentally, had long before rejected any notion that the Thirteenth Amendment prohibition of involuntary servitude barred conscription. Arver v. US, 245 U.S. 366, 390 (1918) ("[W]e are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.").

213. Fischel, *supra* note 205, at 30 ("Judah Benjamin, Secretary of State for the Confederacy, seriously contemplated the use of slaves to shore up the ranks. He soon realized, however, that this was financially infeasible. Slaves could be hired for military service from their masters, but the going rate for slaves (paid to their masters, of course) was $30 per month, while Confederate soldiers were paid only $11 per month. It is reasonable to conclude that had slaves been subject to the military draft, more of them would have been employed by the military. As it was, slaves' status as property protected their lives, at least from battle deaths") (internal citations omitted).

214. ADAM SMITH, THE WEALTH OF NATIONS Bk. 1, Ch. 2-3 (1901) ("It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.").

way, Friedman insisted that we all lack the proper motivation, and that it is naïve to expect anything but a mercenary attitude.

Yet the notion that volunteer soldiers are mercenaries does not grasp our perceptions of the military. Even though the benefits of military service to the individual (bonuses, health care, education) are openly acknowledged, "sacrifice" remains central to American conceptions of military service. The volunteer soldier is neither categorically divorced from self-interest nor purely altruistic: we suppose some intermingling of various factors, just as Mauss supposed was usually the case with any sacrifice.

Thus Friedman and the Gates Commission can be seen as at once articulating a powerful perspective, but one which has not fully carried the day. In our current situation, we have a particular composite: a volunteer, standing army whose losses we call sacrifices. This configuration combines various threats. If we credit Scarry, there is a danger in the existence of a standing army; and the absence of coercion in the draft disables another form of accountability. I have emphasized that calling the soldier's death a sacrifice serves as a kind of liability for officials, and I linked it to a tradition of popular sovereignty. But we have developed an alternate reading: that calling military losses sacrifices could serve to increase the military's prestige and simply reinforce the dependence already institutionalized in a standing army. In the broad sense I have used the term, this would lend weight to governmental sovereignty.

Friedman's line of thinking, according to which military service was above all a labor and manpower issue to be addressed in the marketplace, effortlessly leads to our current dilemma with the contractor. We have seen that one plausible interpretation of the contractor is as ineligible for sacrifice. But we have also seen that this categorization is not stable, that there is recurrent reference by contractors and officials to "sacrifice." We confront, in the body of the contractor, a fusion of contract and sacrifice, an overcoming of a dichotomous conceptualization of the two transactional forms. This poses the same dangers just noted in our tradition of calling soldiers' deaths sacrifices. Rather than bolstering popular sovereignty, calling the contractors' deaths sacrifices could serve to reinforce the people's understanding of themselves as disarmed and passive—and thereby sound more in the tradition of governmental sovereignty or what we might call corporate sovereignty.

CONCLUSION

Rather than foregrounding the legal liability of private military contractors and their employers, this Article has addressed the sacrificial liability of the U.S. government. Having described the traditional structure linking sacrifice and citizenship in the United States, I asked what the contractor's relationship was to this tradition and found that it

was one of exclusion. However, among contractors, and even among high-level officials, there is some recognition, albeit informal and *ad hoc,* that contractors' deaths can be considered "sacrifices." This was especially evident when contractors were U.S. citizens, although I offered a few examples of how this recognition extended to contractors from other parts of the world, such as Fiji. These were sacrifices to or for a range of entities and ideas: the client, the country, freedom, or the war on terror.

In the examination of one noteworthy case, the killing of four armed U.S. citizen contractors in Fallujah, I urged that the U.S. reception of that event could be seen in relation to a concept of popular sovereignty. This conceptualization of sovereignty designates ordinary citizens as latent vehicles for or of the sovereign—even though "the People" are ephemeral, their attackers targeted them as relating to the collectivity and thereby summoned it for an American audience, illuminating the latent potential of the part (the citizen) to stand in for the larger whole (the sovereign). The designation "independent contractor" was overwhelmed by the status of "American" and "citizen." I turned to this analysis in an effort to grasp why it was that the legal relation of "independent contractor" was not adequate to grasping the event, and why it was that the contractors' deaths could not or would not remain banal and insignificant to the U.S.

I then examined the contractors' employer, Blackwater, in its attempts to assert sovereign immunity from the litigation commenced by the contractors' families. The status of governmental sovereign promised a position of no legal liability—and thus in the context of my narrative, served precisely the opposite ends of the relation between part and whole in relation to the popular sovereign. It served to ensure that the sovereign would not be liable to citizens—since an essential feature of the relation is one in which the sovereign—at war—can ask for life and cause death. Two strong forces seem to be at work: a centrifugal force that pushes responsibility and liability outwards through contracting and privatization; and a centripetal force that pulls the privatized sector back towards the sovereign in order to be immune and remain a viable business model. Were the contractor companies successful in their arguments—which thus far they have not been—and were contractors' deaths not considered sacrifices, we would see a new alignment, one in which the government had neither sacrificial liability nor legal liability for those who die undertaking work on its behalf.

The emergent and largely informal recognition of sacrifice I describe raises an obvious question: should contractors be officially included in the tradition of national sacrifice? Should they be given Purple Hearts and buried at Arlington? If contractors are to act on behalf of the sovereign—if they are to kill or be killed in the interests of the United States—perhaps their deaths should be recognized as sacrifices. Or, if our concern is only the discrepancy between the recognition offered soldiers and contractors,

both could be leveled downwards. To the extent we share Scarry's concern about a standing army, and to the extent we are skeptical that seeing their losses as sacrifices actually furthers the goal of governmental accountability, perhaps we should not honor either. Both contractors and soldiers, from this radical viewpoint, can be seen as examples of an outsourcing of the duties of the citizen-soldier. Calling contractors' deaths sacrifices would increase the prestige of contractors, perhaps definitively freeing them of the mercenary stigma. If the goal of granting such recognition is to duplicate the costs which officials confront when soldiers die carrying out national policy, it is not clear that this would happen. The likely problem is that the citizenry would not see the contractors' deaths as relating to themselves, and thus the deaths would not trigger them to ask their representatives for an accounting of why the loss (the sacrifice) was justifiable. Indeed, it seems plausible that such a policy would have the opposite outcome by offering a vision of government as ever more autonomous and present the public with private sacred sites—such as that at the Blackwater headquarters—over which they have little claim.

The specter of a government which engages in violence but avoids sacrificial meaning has been raised by Giorgio Agamben in his book *Homo Sacer: Sovereign Power and Bare Life*.[215] He urges that sovereign power describes the actor who/which can kill without committing a sacrifice or a homicide. Sovereignty exists in a double exception from human law and divine law. Drawing on the work of Paul Kahn, my analysis has supposed a different point of departure: that sacrifice and sovereignty are deeply intertwined. In the United States, the link seems to have been critical to the understanding of citizenship and of slavery. At the core of my analysis, then, is an entirely different point than that which Agamben advances: the enormous difficulty and, in the instance of the Fallujah incident, the failure of the attempt to construct the actor who is unsacrificeable.

And yet our examination of the attempt to outsource sacrifice provides a point of contact with Agamben; it is precisely in order to avoid the fact that the deaths of soldiers are considered to be sacrifices that the contractor seems to have emerged. It is the contractor whom law and policy attempts to designate as one whose death is not a sacrifice. Perhaps, then, we see the United States attempting to become a sovereign in Agamben's sense, attempting to shed this layer of liability.

215. AGAMBEN, *supra* note 38, at 83.