Leiden Journal of International Law (2016), 29, pp. 677–697
 doi:10.1017/S0922156516000261

From Apology to Utopia's Point of Attack

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Abstract
This contribution to the Symposium celebrating the Twenty-fifth Anniversary of Martti Koskenniemi's *From Apology to Utopia* explores the relevance of the book for contemporary theorists of the international world. In doing so, the article puts Koskenniemi's classic in a contest with John Yoo's recent book, *Point of Attack*. The purpose in doing so is three-fold. First, it is to illustrate the contemporary use of Koskenniemi's structuralist method. Second, it is to show how the use of the method, with its attendant reliance on modes of legal thought, might give pause to international thinkers seeking to reinvigorate particular structures of argument from the nineteenth century. Third, the two books are put into conversation in order to highlight what I believe to be the very productive results of the structuralist method that have, for the most part, been dormant for a generation.

Key words
From Apology to Utopia; international legal history; international legal theory; Koskenniemi; structuralism

While it is difficult in the United States to find much agreement about the meaning and value of international law, one thing is for sure – a disdain for the United Nations and the forms of public life it is meant to represent is steadily creeping in. Decisions like the recent *Kiobel* v. *Royal Dutch Petroleum*,[1] for example, are regularly taken to signal this deepening loss of faith.[2] In that case, the US Supreme Court applied a canon of interpretation, known as the presumption against extraterritorial jurisdiction, to the Alien Tort Claims Act, a long-standing statutory vehicle for bringing claims for violations of international law in US courts.[3] The result, in short, was a severe narrowing of the allowable interplay between customary international law and the US role in condemning foreign acts of violence.[4] *Kiobel* may very well reflect an increasing trend among Americans to think about notions of global justice in exclusively national terms; that international law may still have some function in

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1 *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013).
2 See generally 'Agora: Reflections on Kiobel', (2014) 107 *American Journal of International Law* 829.
3 *Kiobel*, *supra* note 1, at 1664.
4 Ibid., at 1669.

coordinating the interests of sovereign states, but as for its potential to provide those states with standards of good behaviour, maybe not so much.[5] Of course, with the presidential election of Barack Obama there were those in the United States hoping for a reversal of such anti-international trends. But as decisions like *Kiobel* and the Obama Administration's predilection for drone strikes has made apparent, such a reversal has been difficult to discern.[6]

It is in these early decades of the twenty-first century and in the context of this American sensibility that John Yoo's recent book, *Point of Attack*, might be seen as a reflection of an increasingly anxious mood and continued skepticism about international law.[7] To be sure, Yoo's professional image is an extreme one but it is, by and large, his conclusions that often strike so many as beyond the pale.[8] Traces of his so-called 'pragmatic' rationales, in contrast, are constantly valorized in American television programming and film, and are likely far more popular than we care to think. *Point of Attack* consolidates and deepens these rationales for what was the Bush Administration's approach to international law and what in time may become the approach of the next Administration to the global war on terror.[9] In a word, it is an approach to international law and international relations which has lost all faith in the international legal order of the United Nations, and an approach in which principles of equality and theories of justice simply have no place.[10] It is an approach, in contrast, that is meant to be rational, realistic, and above all else, *effective*.

As for its substance, Yoo's book is a fascinating piece of advocacy for a global increase in government-sponsored killing.[11] Yoo's thesis, in short, is that we should steadily distance ourselves from the international law of the mid-twentieth century and move towards a contemporary international law that encourages what he calls the 'Great Powers' to use more violence in foreign territories. As the Great Powers, which is a term that ultimately seems intended to reference the singular authority of the United States rather than a true collective of diverse states,[12] deploy more and more good violence, international society will enjoy a total increase in 'global welfare'.[13] According to Yoo, international law would transform for the better in the effort to legitimize the killing of the weak by the strong. In outright disregard for the principles of sovereign equality or the idea that the international community might be the better location for making such decisions about the use of force, Yoo suggests

5 See, e.g., E. Posner, *The Perils of Global Legalism* (2009).
6 See generally J. Desautels-Stein, 'The Judge and the Drone', (2014) 56 *Arizona Law Review* 117. For further explanation of this anti-internationalist mood, see I. Wallerstein, *World-Systems Analysis* (2004), 87.
7 J. Yoo, *Point of Attack* (2014).
8 J. Gathii, 'Failing Failed States: A Response to John Yoo', (2011) 2 *Californian Law Review Circuit* 40. See also J. Ohlin, *The Assault on International Law* (2015).
9 See, e.g., J. Yoo, 'Using Force', (2004) 71 *University of Chicago Law Review* 729, at 730–1; J. Yoo, 'Fixing Failed States', (2011) 99 *Californian Law Review* 95, at 96.
10 Yoo, *supra* note 7, at 13–14.
11 Ibid., at 3, 113 and 119.
12 Ibid. at 208.
13 Ibid., at 5 ('This book argues that the international system should encourage the great powers to follow a [cost-benefit] approach to war. The system should allow armed intervention when the expected benefits to global welfare, which include putting an end to the harmful activity in a targeted country, exceed the likely costs.').

that certain types of states, which we might term 'irrational states'[14] in light of Yoo's reliance on rational choice theory, ought to be excluded from the same rights of violence enjoyed by the Great Powers.[15] For example, while the United States will be legally justified in the killing of suspected terrorists in Egypt, Egypt would be legally barred from targeting individuals in US territory, assuming Egypt had determined that the US was unable or unwilling to take action against what Egypt understood to pose a substantial threat. As Kenneth Anderson colorfully puts the idea:

> States are not all the same . . . No rational US leader is going to take the solemn international law admonition of the "sovereign equality of states" too seriously in these matters—and the United States has never regarded a refusal to do so as contrary to international law but instead as something built into international law as a qualification on the reach of the "sovereign equality of states." There will not be "Predators over Paris, France," anymore than there will be "Predators over Paris, Texas," but Pakistan, Yemen, Somalia, and points beyond are a different story.[16]

The upshot in *Point of Attack* is that the UN Charter's conception of an inherent right of self-defence and the general approach to state-sponsored use of force is hopelessly outdated, since that conception seeks to *limit* the use of force, if not abolish it. But in order to better increase global welfare, Yoo argues, we need a new international law that moves in the opposite direction, better incentivizing states to *use* force. If international law better incentivized states to use force, terrorists would have less safe harbors in the world, and on the whole, the lives of a majority of the world's people would be better. In order to better understand how this re-orientation could work, Yoo suggests that we look into international legal history, and more particularly, to the Great Powers system that emerged after the Congress of Vienna in 1815, the early nineteenth century settlement in Europe after the Napoleonic Wars.[17]

That is, while Yoo sees international organizations as definitively incapable of closing the gap between formal rules and the real interests of international society,[18] he does believe in the necessity of hierarchy in the international legal order, which is what leads him back to 1815.[19] And just as the Great Powers of the nineteenth century enjoyed an exclusive panoply of legal rights, so too does Yoo want today's Great Powers to have the same honor. The Great Powers, in this view, would have the right to kill on foreign territory and re-write the borders of such irrational states.[20] Not because they are superior civilizations, mind you, but because they enjoy *rational*

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14 Yoo believes that the categories of 'rogue' and 'failed' state present different calculations, but for all intents and purposes he treats them as 'targeted states' in opposition with the Great Powers. Ultimately, such states become targets for war because they simply cannot muster an effective government (i.e., 'unable'), or have an effective government but one that is crazy or evil or both (i.e., 'unwilling'). Yoo introduces the concepts together in his welfare calculus, *supra* note 7, at 112–17. See also, R. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (1990); J. Rawls, *The Law of Peoples* (2001).

15 Yoo, *supra* note 7, at 128.

16 K. Anderson, 'Targeted Killing and Drone Warfare: How We Came to Debate Whether there is a Legal Geography of War', media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf.

17 Yoo, *supra* note 7, at 120.

18 Ibid., at x, 4, 19, 23.

19 Ibid., at 153–4.

20 Ibid., at 191.

https://doi.org/10.1017/S0922156516000261 Published online by Cambridge University Press

superiority. And while the Great Powers might have moral obligations not to tread too hard,[21] Yoo explains that these targeted states ought to have no legal claims to territorial integrity or self-defence.[22] But, again, says Yoo, there is nothing neo-imperialist about the plan; Yoo claims that such a refiguring of the international legal order along the lines of good social science won't simply benefit the Great Powers – it will benefit all the world. International law, in other words, must learn to more realistically track the political world which it inhabits.

It is here that I want to pause and put Yoo's argument in some context. Of course, there are many contexts to choose from, and obvious candidates would include those texts arguing for why we ought to retain faith in the international legal order. Perhaps we could look to comforting progress narratives about how we have matured beyond the imperialism in the nineteenth century, or to those analyses of the moral bankruptcy of rational choice theory and its related variants, or to those arguments claiming proudly the necessity of understanding international law as exactly a discourse of justice. One could go on and on. But the context I have in mind is an unlikely candidate, and it is Martti Koskenniemi's *From Apology to Utopia: The Structure of International Legal Argument*.[23] But why Martti Koskenniemi, and why *this* book?[24] After all, *From Apology to Utopia* is typically remembered as a turgid piece of legal science from the theory-obsessed 1980s, the rather useless purpose of which was to demonstrate *ad nauseum* the indeterminacy of international law.[25] More to the point, *From Apology to Utopia* was at the time received by the international community as a wholesale attack on the foundations of international law.[26] As some commentators worried, *From Apology to Utopia* threatened to undermine the fabric of the international rule of law, the very coherence of our invisible college of international lawyers.[27] And isn't this exactly what Yoo is trying to do? For aren't both Yoo and Koskenniemi, in their different ways, arguing *against* a belief in international law? Or to put it another way, if Yoo's work reflects a possible (and very depressing) trajectory for American public opinion about the efficacy of international law, wasn't the point of attack in *From Apology to Utopia* precisely to show that international law was, well, pointless?

No, it wasn't. Unlike *Point of Attack*, *From Apology to Utopia* sought to uncover practices of international legal argument in order to assist the international community in better understanding the structured relationship between international law and

21 Ibid., at 13.
22 Ibid., at 128, 161.
23 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006).
24 Some might, for example, think of Koskenniemi's *The Gentle Civilizer of Nations* as the better choice, since that book does have as its focus the standard of civilization in international legal thought.
25 I. Scobbie, 'Towards the Elimination of International Law: Some Radical Skepticism about Skeptical Radicalism', (1991) 61 *British Yearbook of International Law* 339, at 345; N. Purvis, 'Critical Legal Studies in Public International Law', (1991) 32 *Harvard Journal of International Law* 81. For further discussion, see J. d'Aspremont, 'Martti Koskenniemi, the Mainstream, and Self-Reflectivity', (2016) 29 LJIL 625–39.
26 For discussion, see J. Desautels-Stein, 'International Legal Structuralism: A Primer', (2016) 7 *International Theory* (forthcoming).
27 J. Alvarez, 'Judging the Security Council' (1996) 90 *American Journal of International Law* 39; J. Alvarez, 'Why Nations Behave', (1998) 19 *Michigan Journal of International Law* 393, at 317; J. Alvarez, 'Commemorating Oscar Schachter, the Teacher', (2004) 104 *Columbia Law Review* 556, at 557; J. Alvarez, 'Positivism Regained, Nihilism Postponed', (1994) 15 *Michigan Journal of International Law* 747, at 782–3.

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international politics.[28] The effort was most assuredly *not* to pave the way for later works like *Point of Attack*, which are oblivious to the structures of legal thought *From Apology to Utopia* meant to elucidate. But to see how *From Apology to Utopia* can be mobilized *against* works like *Point of Attack*, rather than as having a strange affinity with them, I need to first say a bit more about the point of *From Apology to Utopia*.

In that book, Koskenniemi built a 'classical' structure of legal argument,[29] and he built it out of the work of Thomas Hobbes.[30] As is well known, Hobbes' political theory posited a 'natural' state of humanity.[31] In this natural state, the human being is *individualized*, meaning, the human *qua* 'individual' is defined as a morally autonomous, rights-bearing subject, constrained by no higher authority to which he hasn't given his consent.[32] Hobbes' individuals were sources of subjective value, and no other source of value was defensible.[33] The older Aristotelian notion that values were objective, somehow pre-existing the individual, no longer made any sense.[34] As a consequence, individuals could literally do no wrong – everything was right so long as the individual's efforts were directed towards or derived from the promotion of their self-preservation.[35] Of course, Hobbes' idea was not that individuals could not be governed by a higher authority – it was rather that in order for an individual to be properly governed by another human being, the individual would need to consent to the governing.[36]

As Koskenniemi describes, these ideas led to a crucial aspect of Hobbesian theory in particular and liberal theory more generally.[37] If value could only be sourced in individual will, no individual had a natural right of authority over anybody else. The concept of *equality* was inextricably linked to the principle of individualism, since if any one person had a right of independence and self-preservation, the logical grounding of such rights was rooted in the idea that all people had them.[38] Consider: if one or some individuals decided that one or some other individuals had less of a right than they, the first group would be forced to appeal to some value other than subjective value in order to defend the idea that the second group had been treated

28 For a powerful supporting argument to this effect, see A. Rasulov, '*From Apology to Utopia* and the Inner Life of International Law', (2016) 29 LJIL 641–66.

29 Koskenniemi, *supra* note 23, at 106. For discussion of classical legal thought in the context of American Legal Thought, see D. Kennedy, *The Rise and Fall of Classical Legal Thought* (2005); J. Desautels-Stein, 'Pragmatic Liberalism: The Outlook of the Dead', (2014) 55 *Boston College Law Review* 1041.

30 See, e.g., E. de Vattel, *The Law of Nations* (B. Kapossy and R. Whatmore, eds., 2008), 8; S. Pufendorf, *De officio hominis et civis juxta legem naturalem libri duo* (1927), 17–21; D. Armitage, *Foundations of Modern International Thought* (2013).

31 T. Hobbes, *Leviathan* (C.B. Macpherson, ed., 1968), 183.

32 Ibid., at 189.

33 Ibid.; R. Unger, *Knowledge and Politics* (1975), 66–89.

34 See, e.g., A. MacIntyre, *After Virtue* (2008), 51–5.

35 Hobbes, *supra* note 31, at 189–90.

36 Ibid., at 192–3.

37 Koskenniemi, *supra* note 23, at 71–2. The literature on Hobbes is enormous. The most formative text for me remains C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (2011). On 'context', see A. Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (1987). For more recent treatments, see generally J. Collins, 'The Early Modern Foundations of Classic Liberalism', in G. Klosko (ed.), *The Oxford Handbook of the History of Political Philosophy* (2011); A. Brett, *Changes of State* (2011); A. Monahan, *The Circle of Rights Expands* (2007).

38 Hobbes, *supra* note 31, at 183–4.

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unequally.[39] Consequently, equality in the state of nature was axiomatic – to deny absolute equality was to deny individualism.[40] Each rights-bearing individual in the state of nature was justified in pursuing his own self-preservation precisely because nobody else was born with a prior authority over his person. But this right of self-preservation was enjoyed by all, which made for a world that, as Hobbes famously described, wasn't all that pleasant.

This is Hobbes' war of all against all. If there is no such thing as a natural community, and no natural constraints on what an individual might define as a threat to their right of self-preservation, everyone has a right to everything. This includes a right to other people's property, and other people's bodies. This situation, obviously enough, created a constant state of war where all reprisals and measures deployed in anticipation of future reprisals were justified. After all, there was no higher authority capable of determining *a priori* when a threat was insufficient to trigger a deadly response. In this natural condition, justice was a matter of individual discretion.

For international lawyers operating in the mode of classical legal thought, like Emerich Vattel,[41] Hobbes presented a fully-formed theory of politics that served as a powerful metaphor for the international order.[42] This metaphor, often known as the 'domestic analogy', suggested that despite the obvious differences between a human being and a political construct, the sovereign state could be likened to the rights-bearing individual.[43] Extending the metaphor further, the domain in which sovereign states interacted with one another could be likened to Hobbes' image of the state of nature.[44] The problem for international lawyers, however, was figuring out how to draw the analogy to the end: For Hobbes, the new art of politics takes flight once the individual surrenders some aspect of his natural right in order to legitimate the normative authority of government.[45] For Vattel, sovereigns renounce nothing.[46] And yet, international lawyers argued in favour of something called 'international law', a set of rules binding upon sovereign states. This is the puzzle of international law operating in the register of liberal theory – how to create a valid system of international law on the basis of a broken metaphor.[47]

The metaphor broke in other ways as well. If sovereigns were not going to follow Hobbes into the political society of the Leviathan, they neither existed in Hobbes' state of nature and the attendant war of all against all.[48] For Vattel, and unlike for

39 Koskenniemi, *supra* note 23, at 89–94.
40 Ibid.
41 A helpful summary of Vattel's work is available in S. Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in the Bodin and Vattel and the Myth of Westphalia* (2004). See also, N. Onuf, 'Civitas Maxima: Wolff, Vattel, and the Fate of Republicanism', (1994) 88 *American Journal of International Law* 280.
42 Koskenniemi, *supra* note 23, at 108–22; Vattel, *supra* note 30, at 8.
43 See, e.g., H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927).
44 Vattel, *supra* note 30, at 36–7.
45 Ibid., at 38.
46 That is, international lawyers operating in the classical mode reject the notion that sovereigns need to renounce their rights in order for there to be a viable international law. See, e.g., Vattel, *supra* note 30, at 13.
47 L. Gross, 'The Peace of Westphalia, 1648-1948', (1948) 42 *American Journal of International Law* 26.
48 My brief discussion here is focused only on Vattel's view of the *jus ad bellum*. For Vattel's discussion on the rules constraining the modes of warfare, see Chapter VIII: Of the Rights of Nations in War, *supra* note 30.

Hobbes, sovereign states could not justifiably take the territory of other sovereigns in much the way individuals could take the property of other individuals. Sovereign states all equally enjoyed a right of territorial integrity, wherein no sovereign was legally justified in using force on the territory of another.[49] As Vattel, explained, '[t]he right of making war belongs to nations only as a remedy against injustice: it is the offspring of unhappy necessity.'[50] Vattel explained that, unlike in Hobbes' state of nature, states enjoyed a legal warrant to use force only when the use of force was in the service of a 'perfect right'.[51] Rights to use force, in turn, were only available when another state had violated some prior obligation.[52] In the absence of a legally cognizable injury, as a consequence, the use of force between sovereigns was illegal.[53] Indeed, Vattel explained that '[s]elf-defense against unjust violence is not only the right but the duty of a nation, and one of her most sacred duties'.[54] But this didn't mean that wars were only legally justified when they were defensive.[55] 'Offensive' wars were legally justifiable, but only when their purpose was to compensate for or prevent future injuries.[56] The legal category of offensive war did not, as a consequence, include 'conquest, or the desire of invading the property of others: views of that nature, destitute even of any reasonable pretext to countenance them, do not constitute the object of regular warfare, but of robbery . . . '.[57] However, this category did include justifiable acts in the service of preventing future harms. The line between conquest and the prevention of harm, of course, is far more grey than black.[58] But unlike Hobbes's view that the line was meaningless since the prevention of harm was always a decision left solely to individual discretion, Vattel suggested that the distinction was made real by those maxims derived from the common interests of mankind.[59]

In classical legal thought, international legal argument therefore begins with an analogy between the rights-bearing individual promulgated in liberal political theory, and the sovereign state.[60] In this view of the Standard of Sovereign Equality, all sovereigns are free and equal, just as all individuals in a hypothesized state of nature are free and equal.[61] These were what Koskenniemi labelled 'ascending arguments of justification', arguments sourced in the sovereign equality of states. In contrast were 'descending arguments', arguments sourced in natural ideas of justice with the purpose of setting standards of right conduct for sovereigns. The tricky thing about

49 Vattel, *supra* note 30, at 74–5.
50 Ibid., at 500.
51 Ibid., at 483–4.
52 As Rubin has already suggested, Vattel here anticipates a version of Wesley Hohfeld's conception of rights/duties. A. Rubin, *Ethics and Authority in International Law* (1997), 78.
53 Vattel, *supra* note 30, at 484.
54 Ibid., at 487. See also, T. Twiss, *The Law of Nations Considered as Independent Political Communities* (1861), 12–13.
55 Vattel, *supra* note 30, at 487.
56 Ibid., at 484
57 Ibid., at 471.
58 Yoo, in contrast, seems to think the line is pretty bright. Yoo, *supra* note 7, at 172.
59 The mechanism by which Vattel believed such maxims to take on a binding character was the 'voluntary law'. Vattel, *supra* note 30, at 18–20.
60 Koskenniemi, *supra* note 23, at 106–7.
61 Ibid., at 74; See also T. Woolsey, *Introduction to the Study of International Law* (1908), 59; Twiss, *supra* note 54, at 11.

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descending arguments, however, is their total vulnerability to ascending arguments. How is one sovereign to offer a higher moral ground from which to judge another? This is the Hobbesian problem, simply internationalized.

Now let's return to *Point of Attack*. As we can understand from this brief summary of classical legal thought, sovereign states are analogized to rights-bearing individuals vying in a state of nature. As this analogy develops, however, sovereigns are deemed as only partially like individuals. Sovereigns initially do not enjoy a right to make war whenever they might suspect a threat to their sense of self-preservation, whereas Hobbesian individuals enjoy exactly that right. There are rules governing when and where sovereigns can fight, and as these doctrines progressed, rules emerged for governing how sovereigns could fight as well.[62] As international law developed after the Congress of Vienna, European sovereigns increasingly sought out legal strategies for limiting the domain in which sovereigns enjoyed the rights and protections of full sovereignty from the domain in which there were quasi-sovereigns, states with less rights, or no rights at all.[63] In *Point of Attack*, Yoo is interested in doing the same, invoking precisely this nineteenth century approach for use today. However, unlike Yoo's effort to use rational choice theory as the means for excluding irrational states from the circle of full rights-bearing sovereigns,[64] a central legal strategy in the nineteenth century turned on racial theory.[65] Or, to put this point another way: In the

62 Though, for many commentators of a more 'modern' persuasion, the laws of war in the nineteenth century were more of a joke than anything else. The modern view of the laws of war, it is suggested, begins with the Hague Peace Conferences held at the turn of the twentieth century. As Brownlie has argued, international law before the First World War ceased to have any 'limiting effect' on the decisions of states to use violence against one another: I. Brownlie, *International Law and the Use of Force by States* (1963), 48: 'The practice and doctrine of the period before 1920 present both a right of self-help and a right of self-preservation, the latter being unfortunately predominant and therefore obscuring the judicial value of the doctrine of self-help. This latter doctrine, which regarded war as a mode of judicial settlement, was nevertheless gaining ground in the period before the First World War. The greatest obstacle to adequate legal regulation of the use of force was the right of self-preservation and related tangle of doctrine concerning necessity and intervention. Categories such as self-preservation and necessity are too vague and susceptible to selfish interpretation to provide a sufficient basis for a legal regime . . . Lastly, the attempt to use vague categories of intervention and self-preservation to give a veneer of legality and morality to the exercise of the right of war or to the numerous interventions which occurred in this period obscured the situation and complicated the task of creating an adequate legal regime for the use of force.': Ibid., at 48–9. See also, J.H.W. Verzijl, *International Law in Historical Perspective* (1968), 215 ('Never until the twentieth century has the use of force been banned by positive international law, nor would it have even been possible to ban it in a society without any central authority to enforce the ban.').

63 See, e.g., A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005). This mode of exclusion wasn't elaborated only in terms of self-interest. Rhetorically, at least, it was often couched in terms that suggested a progressive development available to the 'inferior' state. For example, Woolsey explained, 'A state in the lower grade of civilization, like a savage, becomes conscious of its separate existence in the act of resistance, or of defending that existence. Such self-preservation on the part of the individual arouses, it may be, no better feeling than that of independence and self-reliance; in the state it helps the members to feel their unity and dependence, and the priceless value of the state itself. Hence war is a moral teacher: opposition to external force is an aid to the highest civic virtues.' Woolsey, *supra* note 61, at 5. See also, L. Benton, *A Search for Sovereignty: Law and Geography in European Empires 1400-1900* (2009).

64 Yoo, *supra* note 7, at 62.

65 Of course, it hardly needs saying that human beings have enslaved and exploited other human beings for as long as our history has been kept. But the point here is precisely that pre-liberal scholars like Vitoria did not use 'race', and that they could not have. Racial classifications were a distinctly liberal tactic. The point is that we can easily imagine a story in which liberalism created a new hunger for a means to maintain the subordination of certain human populations, while still able to retain the basic architecture of liberal rights for the more powerful groups. One way to do this could be found in the new turn to empirical science, and if it could be scientifically proven that certain humans were actually more 'human' than others, this would

context of the structure of classical legal thought, nineteenth century international lawyers sought a legal argument that could exclude certain sovereigns from the realm of states that possessed 'full' rights, and that argument was motivated by racial theory.[66]

Yoo's argument relies upon precisely the same structure of classical legal thought, but he replaces racial theory with rational choice theory. Now, to be clear, it isn't necessary to at the moment to argue that rational choice theory is essentially racist. It is rather the more structuralist point I want now to emphasize, and show that in light of *From Apology to Utopia*, we can see how in *Point of Attack* rational choice theory is serving precisely the same goal of exclusion that racial theory played in the nineteenth century. Notably, the large group of states that was at the mercy of race science in the nineteenth century is the same group of states deemed unable, unwilling, or generally irrational in Yoo's science of rational choice.[67]

As was argued repeatedly by nineteenth century lawyers defending the Great Powers system, only racially superior sovereigns were bound by the laws of

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provide an effective means for circumscribing the Family of Nations. The invention of the human 'races' was the secret of the new liberal hierarchy, cloaking it in neutrality and necessity. The term 'race' is sometimes traced back to the work of Bernier in 1684, writing just 30 years after the 1651 publication of Hobbes' *Leviathan*. F. Berneir, 'A New Division of the Earth, according to the Different Species or Races of Men Who Inhabit It', (1684) *Journal des Scavans*. Bernier, like the Comte de Buffon and Johann Friedrich Blumenbach who would later write the more popular texts on the physical 'varieties' of the human species, were all monogenecists. The major work of Georges-Louis Leclerc, Comte de Buffon, was *Histoire naturelle, générale et particulière* (1749–1788). Johan Blumenbach's central work here was *On the Natural Variety of Humankind* (1776). Good treatments of the history of race science include I. Hannaford, *Race: The History of an Idea in the West* (1996); N. Stepan, *The Idea of Race in Science* (1982); B. Baum, *The Rise and Fall of the Caucasian Race* (2006).

66 There are many instances of the use of race as a means of exclusion throughout US law, as well as at international law. On the domestic side, critical race theory has done the most in pursuit of the point. See, e.g., N. Gotanda, 'A Critique of "Our Constitution is Colorblind"', (1991) 44 *Stanford Law Review* 1. For helpful discussion of the point at a broader level, see T. McCarthy, *Race, Empire, and the Idea of Human Development* (2009). In terms of uses in the nineteenth century among international lawyers, see, e.g., W.E. Hall, *A Treatise on International Law* (1909), 52 ('As has already been mentioned, international law is a product of the special civilization of modern Europe, and is intended to reflect the essential facts of that civilization so long as they are fit subjects for international rules . . . If it fails to do so, either through the imperfection of its civilization, or because the ideas, upon which it is founded, are alien to those of the European peoples, other states are at liberty to render its admission to the benefits of international law dependent on [the uncivilized state's willingness to conform to European values.]'); T.J. Lawrence, *The Principles of International Law* (1895) ('. . . the notions of classical antiquity differ immensely from those of modern Europe, and in our own day there is a great gulf fixed between the views of European and American statesmen on the one hand and those of the potentates of Central Africa on the other. But though there are several systems of international law, there is but one important system . . . it grew up in Christian Europe, though some of its roots may be traced back to ancient Greece and ancient Rome. It has been adopted by all the civilized states of the earth . . . We have, therefore, in our definition, spoken of it as "the rules which determine the conduct of the general body of *civilized* states."') Ibid., at 4–5. Thus, Lawrence explained that even while certain populations might satisfy the criteria for statehood, sovereignty alone was insufficient to warrant 'membership in the family of nations. For there are many communities outside the sphere of international law, though they are independent states . . . It would, for instance, be absurd to expect the King of Dahomey to establish a Prize Court, or to require the dwarfs of central African forest to receive a permanent diplomatic mission.' Ibid., at 58. Whether they be 'a race of savages', or the more accomplished races of Turkey, China, or Japan, non-European peoples were presumptively inferior and outside the family of nations. Ibid., 58–9. J. Lorimer, *The Institutes of the Law of Nations* (1883), 101–2 ('As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres—that of civilized humanity, that of barbarous humanity, and that of savage humanity . . . It is with the first of these spheres alone that the international jurist has to deal . . . He is not bound to apply the positive law of nations to savages, or even to barbarians as such.' In distinguishing between the civilized, barbarous, and savage spheres of humanity, Lorimer explained that it would be helpful to 'distinguish between the progressive and non-progressive races'.).

67 For discussion of this phenomenon in the language of core and periphery, see Wallerstein, *supra* note 6.

territorial integrity, and if a racially superior state sought to use force on territory belonging to a racially inferior people, the rules governing the ensuing violence were purely 'moral'.[68] Thus, in the classical approach international legal thought begins by positing a world of free and equal sovereign states but then shifts towards delimiting the domain of freedom and equality only to those peoples ranking as fully human – what Bluntschli called 'the nations of the daylight'.[69] These racially superior states belonged to a sphere governed by international law known as 'the Family of Nations',[70] at the core of which was the model of Great Powers that Yoo is interested in resurrecting.[71] The 'children of the night', the so-called racially inferior states, did not enjoy the same rights as those within the Family, and those in the Family in turn did not enjoy all the legal privileges enjoyed by the Great Powers.[72] As the structuralist account of classical legal thought in *From Apology to Utopia* helps us to see, this history of an entirely racialized and exclusionary Great Powers system is the analogy to be drawn between Yoo's welfare approach and the classical canon of nineteenth century international legal thought.[73]

We could imagine, however, a response that goes something like this: 'So what if in 2015 we replicate a structure of argument in which we decide to limit the realm of fully sovereign states only to those states that are rational, i.e., liberal-democratic, modernizing states? And who cares if in the past the line between full sovereigns and the rest was drawn in the register of racial theory? What matters today is that we aren't racist, that we aren't engaged in the project of building empires. And what also matters is that we aren't blinded by ideals that have no practical relevance, or in the worst case, actually cause real harm. In the end, it just doesn't matter what structure of thought we're happening to occupy, if such things even exist.'

Again, there's quite a lot one might say here, but let me limit the brief counter-response to the one we should glean from *From Apology to Utopia*. It is true that the relationship between critique and structuralist analysis is complex, and that nothing *critical* necessarily *follows* from having constructed a structure of legal thought.[74] But

68 Woolsey, *supra* note 61, at 232–3.

69 Bluntschli cites Pritchard, Gobineau, and Waltz in his 'scientific' account of the racial composition of the law of nations. J.Bluntschli, *The Theory of the State* (2000), 76 ('Highest in the scale stands the white race of Caucasian or Iranian nations, the "nations of the daylight", as Carus calls them in opposition to the children of the night and of the twilight . . . They are preeminently the nations which determine the history of the world. All the higher religions which unite man with God were first revealed among them; almost all philosophy has issued from the works of their mind. In contact with other races they have always ended by conquering them and making them their subjects. They give the impulse to all higher political development. To their intellect and to the energy of their will, we owe, under God, all the highest achievements of the human spirit.').

70 See, e.g., L. Oppenheim, *International Law* (1913), 30–5; G. Gong, *The Standard of Civilization in International Society* (1984), 19.

71 Yoo, *supra* note 7, at 191.

72 Bluntschli, *supra* note 69, at 76.

73 This point has much in common with the TWAIL ("Third World Approaches to International Law") literature. See generally M. Fakhri, 'The 1937 International Sugar Agreement: Neo-Colonial Cuba and Economic Aspects of the League of Nations', (2011) 24 *Leiden Journal of International Law* 89; C. Thomas, 'Critical Race Theory and Postcolonial Development Theory: Observations on Methodology', (2000) 45 *Villanova Law Review* 1195; M. Matua, 'Why Redraw the Map of Africa? A Moral and Legal Inquiry', (1995) 16 *Michigan Journal of International Law* 1113, at 1113–37.

74 See, e.g., D. Kennedy, 'Critical Theory, Structuralism, and Contemporary Legal Scholarship', (1985) 21 *New England Law Review* 209; T. Heller, 'Structuralism and Critique', (1984) 36 *Stanford Law Review* 127. I take this

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notice what has already been conceded even in the response from above. For most international legal thinkers, there is an absence in terms of understanding how their 'thinking' might operate in the context of structure of legal thought. *From Apology to Utopia* suggested that it may very well be impossible to 'think' outside of structure of legal thought, and if this was the case, then an understanding of the menu of such structures clued us in to the availability of different ways of conceptualizing the international legal order. And the first concession from above is precisely, 'So what if in 2015 we replicate a structure of argument . . . ?' If the structuralist has put you in the posture of already accepting that there are structures of legal thought, and forced you to question the relevance of operating in a very old structure of thought that has come under extreme forms of assault, we can already see the work *From Apology to Utopia* is doing. The 'thinking' in a book like *Point of Attack* is already in the process of being both de-naturalized and de-novelized by having accused that thinking as an artifact of nineteenth century legal thought.

'Alright', but then our respondent says again, 'but even if I might have been unwittingly operating in the mode of classical legal thought, I have held fast to the point that a return to Great Powers hierarchy must be *rational* and not *racist*. And this is a crucial and saving distinction.' Once again, our respondent gives away more than he realizes, for having conceded that he is engaged in a line-drawing exercise between full sovereigns and not-so-full-sovereigns, he has conceded that there are legitimate ways in which the lines might be drawn that can be meaningfully distinguished from illegitimate ways. An initial suggestion might be that the tools of the social sciences can objectively assist us in making these distinctions. But, of course, this reliance on social science is deeply problematic. First, nineteenth century race science explicitly set itself out as a social science approach to the question and that didn't work out very well. Second, many would contest the capacity for social science to say anything about how a particular nation-state might objectively fail a standard of achievement that would enable that nation-state to be labeled 'sovereign'. Third, many would contest, more particularly, the capacity of rational choice theory to be of any assistance here at all. For while there might be agreement about rational choice theory's ability to explain the nature of decision-making in a so-called 'rational' mindset, there is far less agreement about how rational choice theory could serve as a means for unpacking cultural inclinations as either rational or irrational in the first place. But in any event, the point here is that it is the structuralist analysis that forces the respondent into the position of having to defend such legitimate ways of undermining the principle of sovereign equality.

Finally, it really does matter what structure of legal thought we happen to occupy. As Koskennimei outlines in *From Apology to Utopia*, the structure of classical legal thought is also the structure of liberal political theory. And if we continue to speak in the language of liberal legalism, we also continue to speak its tensions, its

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also to be among the points made by John Haskell in his contribution to this symposium. See J. Haskell, '*From Apology to Utopia*'s Conditions of Possibility', (2016) 29 LJIL 667–76.

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contradictions, as well as its freedoms. As Koskenniemi explains, liberalism is about, if it is about anything, *equality*. Of course, the perennial question, and the question lying at the heart of *Point of Attack*, is *equality for whom*? But once we are forced to grapple with the fact of liberalism's syntactical presence in works like *Point of Attack*, we are occasioned to ask not only of that book's own internal contradictions and misunderstandings, but also about how the nature of this language constitutes the world in which we come to receive works like *Point of Attack*. For as structuralism has so often suggested, our language makes the world in which all of Yoo's so-called realism is meant to operate. As Roberto Unger has suggested in a related context, the line separating our visions of justice and our visions of reality may be less distinct than we imagine: 'It is true that we cannot become visionaries until we become realists. It is also true that to become realists, we must make ourselves into visionaries.'[75]

There is, however, a second and different argument in *Point of Attack* for winding back the clock and trashing the UN system. Beyond the positive idea that we need to resurrect the Great Powers approach of the nineteenth century is Yoo's more critical argument that the post-war approach is so laughably ineffective at managing international society that we have to question the source of our collective error. This error can be located in the 'move to institutions' following the First World War with the creation of the League of Nations, and later, the United Nations.[76] In Yoo's view, this early twentieth century fascination of politicians and lawyers with world government was deeply anachronistic.[77] Focusing on Woodrow Wilson, Yoo claims that the source of this error was the wrenching of Aristotelian just war theory out of its historical contexts, and the use of this medieval set of ideas to abolish war.[78] According to Yoo, not only did Wilson and his associates utterly fail to understand how the ideas of one community of people living so long ago could not be transplanted in the early twentieth century, they also failed to see how their efforts to abolish war were hopelessly counterproductive.[79]

Again, we can turn to *From Apology to Utopia* in order to put Yoo's argument in some context. From Koskenniemi's perspective in that book, in order to understand how Yoo confuses the argumentative apparatus of the early twentieth century with the argumentative apparatus of the sixteenth, we need first to explicate two other modes of legal thought beyond classical legal thought: a pre-liberal structure of argument, and a modern structure of argument. As famously articulated by St Thomas Aquinas, and as Yoo summarizes as well, just war theory included three basic elements: (1) authority; (2) just cause; and (3) right intention.[80] Just war theory

75 R. Unger, *What Should Legal Analysis Become?* (1996), 190.
76 G. Schwarzenberger, *The League of Nations and World Order* (1936). See also, M. Mazower, *No Enchanted Palace* (2009); D. Kennedy, 'The Move to Institutions', (1987) 8 *Cardozo Law Review* 841.
77 Yoo, *supra* note 7, at 68.
78 Ibid., at 54, 69–71.
79 Ibid., at 78.
80 See, e.g., I. Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' De Iure Praedae—The Law of Prize and Booty, Or "On How to Distinguish Merchants from Pirates"' (2006) 31 *Brooklyn Journal of International Law* 741. See generally B. Kingsbury and B. Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (2011).

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also, as Yoo explains, belongs to a very particular vision of the world. But, as is more helpfully articulated in *From Apology to Utopia*, just war theory can be grounded by way of a contrast with liberal political theory as the marker between the law of the 'ancients' and classical legal thought, in a rough heuristic sense just war theory might be called 'pre-liberal'.[81]

To understand the pre-liberal world of Aristeotelianism in which just war theory lived,[82] there are two ideas worth emphasizing.[83] The first is universalism.[84] Unlike the 'universalist' predilections of twentieth century thinkers like Hans Kelsen or Richard Falk,[85] in this pre-liberal mode the jurist derives normative authority exclusively from a divine or naturally eternal law, which itself was also a reflection of the divine.[86] Citing to St Thomas, Grotius explained:

> let us give first place and pre-eminent authority to the following rule: What God has shown to be his Will, that is law … the act of commanding is a function of power, and primary power over all things pertains to God….[87]

And again, '[t]he Will of God is revealed … in the very design of the Creator; for it is from this last source that the law of nature is derived'.[88] The authority of all law drew, in the end, on God's Will. Thus, the validity of human law depended on its conformity with the divine, and in the event of some disconnect between positively enacted rules and divine command, the former lost all authority as law.[89] This view of legal authority was universalist in the sense that its structure applied globally and equally to Emperors and slaves alike.[90] Pre-liberal law paid no attention to distinctions between the national and international law, the public and private, or the moral and legal.[91] There was one single source of law, for all.[92] Critically, the principle of sovereign equality had yet to be invented.

The second element of pre-liberal legal thought I want to emphasize is the presence of teleological argument.[93] As is well known, for Aristotle both the human being and the city-state were understood in teleological terms; they each had a particular purpose, and the function of ethics was to assist man in the transition from

81 Koskenniemi, *supra* note 23, at 80.
82 Ibid.. See also, D. Kennedy, 'Primitive International Legal Scholarship', (1986) 27 *Harvard International Law Journal* 1. For contexts in political theory, see A. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (2014), 11–37. For an analytic examination of Thomas Aquinas and his basic theory of law, see B. Russell, *The History of Western Philosophy* (1945).
83 For discussion of the use of 'grammar' in this sense, see D. Kennedy, 'A Semiotics of Legal Argument', (1991) 42 *Syracuse Law Review* 75.
84 Kennedy, *supra* note 82, at 8.
85 H. Kelsen, *The Pure Theory of Law* (1981); R. Falk, *A Global Parliament: Essays and Articles* (2011).
86 F. Vitoria, *Political Writings* ([1539] Anthony Pagden and Jeremy Lawrance, eds., 2008) 277–92.
87 H. Grotius, *Commentary on the Law of Prize and Booty* (1950), 8. See also E. Midgley, *The Natural Law Tradition and the Theory of International Relations* (1975), 137.
88 Grotius, *supra* note 87, at 20.
89 Vitoria, *supra* note 86, at 279.
90 Ibid., at 252–64.
91 Kennedy, *supra* note 82, at 9–10.
92 See, e.g., F. Suarez, *De Legibus, ac Deo Legislatore (On Laws and God the Lawgiver)* (1612), reprinted in J. Brown Scott (ed.), *Selections from Three Works of Francisco Suarez, in Classics of International Law* (1944), 14.
93 MacIntyre, *supra* note 34, at 54.

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his immature beginnings to his natural end.[94] Man's purpose was to find happiness, but happiness could be found only through the habitual performance of practical reason in accordance with the virtues.[95] Of course, happiness meant different things for different people, just as human beings had different purposes. Some were born as natural slaves, some were meant to be philosophers, and definitions of human happiness and a virtuous life depended on one's capacity.[96] The teleology of pre-liberal jurisprudence is, as a consequence, a jurisprudence of hierarchy, and not equality.[97] For pre-liberal writers like Vitoria,[98] the *jus gentium* emerged as a focal point for a natural and universal ethics.[99] Through adherence to this 'law of nations', man and the city alike could transform themselves into what they were to 'naturally' become.[100] Derived from natural law, but again owing its ultimate normative authority to the divine, the *jus gentium* represented 'universal consent of all peoples'.[101] By following these natural dictates, the whole of humankind might achieve its own grand *telos*, namely the practice of virtuous sociability.[102]

It is against this particular pre-liberal style that we can contrast the rise of classical legal thought. An initial point concerns the classic liberal encounter with naturalism and its corollary in teleological argument. In classical legal thought, natural law is retained, though natural law in the liberal tradition is a different animal than natural law in its Thomistic form.[103] In contrast, teleological modes of legal argument seem to vanish.[104] As recalled from above, for thinkers like Hobbes it was wrong to believe that human beings were predetermined in some way to fulfill a particular purpose, or become any certain thing. People weren't acorns, holding within themselves the latent potential to transform in only a singularly 'correct' direction.[105] Human beings were now to be regarded as equally autonomous creatures, and the only justifiable claim on what a person ought to become could come from the subject himself.[106] The role of law, in this view, was to assist the individual person in his efforts at

94 See, e.g., Aristotle, *The Nicomachean Ethics* (T. Irwin, trans., 1999), 8–9.
95 See generally M. Ransome Johnson, *Aristotle on Teleology* (2005).
96 Aristotle, *supra* note 94, at 23.
97 B. Kingsbury, 'Sovereignty and Inequality', (1998) *European Journal of International Law* 599. For a contrasting view, see H. Lauterpacht, 'The Grotian Tradition in International Law', (1946) 23 *British Yearbook of International Law* 1. Again, my focus here links 'pre-liberal jurisprudence' exclusively with the medieval Aristotle. I do not mean to suggest that all modes of legal thought before Hobbes are 'pre-liberal' in the sense that I am describing here.
98 I recognize that there is disagreement about whether Grotius ought to be characterized as a pre-liberal or proto-liberal or some other thing. See, e.g., A. Nussbaum, *A Concise History of the Law of Nations* (1947), 109; R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (2001). Here I follow Kennedy and Koskenniemi's characterization of Grotius as a 'pre-liberal' due to his consistent tendency to locate legal authority in nature or the divine rather than the sovereign state. Kennedy, *supra* note 82, at 8–9; Koskenniemi, *supra* note 23, at 58–69.
99 Nussbaum, *supra* note 98, at 14–15; Midgley, *supra* note 87, at 136.
100 For a critique, see Anghie, *supra* note 63.
101 Grotius, *supra* note 87, at 33.
102 Vitoria, *supra* note 86, at 278–83.
103 See generally J. Finnis, *Natural Law and Natural Rights* (2011).
104 MacIntyre, *supra* note 34, at 62.
105 Ibid., at 51–5.
106 P. Manent, *An Intellectual History of Liberalism* (1995), 25 ('The right of the sovereign, individual or collective, is necessarily unlimited. His sovereignty is absolute because the right transmitted to him by everyone is unlimited. The sovereign inherits the *jus in omnia* that belonged to each individual in the state of nature.').

self-determination.[107] Aristotelian teleology became, by definition, illiberal since it depended on the existence of some 'theory of intelligible essences'.[108]

Alright, so there we have a snapshot of 'pre-liberal' legal thought, as articulated in *From Apology to Utopia*.[109] Now let's jump ahead to the early twentieth century and the rise of 'modern legal thought'.[110] Immediately, we see a continued embrace of natural law, as well as the return of teleological reasoning.[111] On the one hand, the modern fascination with teleological reasoning is of a very different order of magnitude than what can be found in the writings of a Vitoria or Grotius, for example. For many such 'modern' scholars, as varied as Alejandro Alvarez, J.L. Brierly, Hersch Lauterpach, Elihu Root, and Georges Scelle, if international law was going to transition into the modern world order of the twentieth century, it would have to actually serve the real needs of the international community.[112] But to do so, international law must be functional. It must be purposive. It must understand the international legal order as a community of interdependent sovereigns, governed by a strong normative system. In order to be a strong normative system, international rules needed to be tailored to real social needs.[113] If it was too far from power and purpose, international law would be ineffectual or damaging.[114] Indeed, 'effectiveness' became the call sign of the moderns, but in order to be effective, international law needed a conceptual basis for explaining how it could change and adapt to new social demands.[115]

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107 This idea is at work in Maine's famous thought about the shift from 'status to contract', for example H. Maine, *Ancient Law* (1870). See also F. Hayek, *The Constitution of Liberty* (1978). Kennedy has framed the idea in his 'will theory' of law, where '[t]he state ought to and largely did in fact define the rules of law so as to guarantee the free exercise of individual will, subject to the constraint that willing actors respect the like rights of other willing actors.' D. Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form', (2000) 100 *Columbia Law Review* 94, at 96.

108 Unger, *supra* note 33, at 66–90. For discussion of these two senses of natural law, see L. Strauss, *Natural Right and History* (1965), 7 ('Natural right in its classic [Aristotelian] form is connected with a teleological view of the universe. All natural beings have a natural end, a natural destiny, which determines what kind of operation is good for them.').

109 Koskenniemi, *supra* note 23, at 95–106.

110 Ibid., at 158.

111 See, e.g., H. Lauterpacht, *International Law and Human Rights* (1950), 114–15. As an aside, this is one reason why Yoo might associate early twentieth century institution building with Aristotelianism. At a surface level it might seem plausible to suggest that, since the moderns were expressly advocating for natural law prohibitions on war and other constraints on states, as well as a more consequentialist way of reasoning about international rules, Wilson and co. were resurrecting a pre-liberal Aristotelianism. As Yoo writes, 'Wilson sought a revival of just war theory. In a manner reminiscent of the medieval philosophers, Wilson viewed aggressive war as a criminal activity. Defensive war represented prosecution and punishment of aggression.' Yoo, *supra* note 7, 66. Now, I have little interest in what Wilson or House or anyone else 'sought' to revive, and we can leave this question to their biographers and intellectual historians. But with respect to the 'manner' in which the moderns sought to reconstruct a new international law – their style of legal argument – it is a mistake to see this manner as resembling pre-liberal Aristotelianism in any way but the weakest sense.

112 See, e.g., Brierly's condemnation of the *Lotus* decision. J.L. Brierly, *The Basis of Obligation in International Law* (1958), 142–51. See also, H. Lauterpacht, *The Function of Law in the International Community* (2011); H. Morgenthau, 'Positivism, Functionalism, and International Law', (1940) 34 *American Journal of International Law* 260, at 273.

113 A. Alvarez, 'The New International Law', (1929) 15 *Transactions of the Grotius Society* 35, at 41–2.

114 Ibid., at 36.

115 One important entryway into this new form of jurisprudence was provided by Wendell Holmes, Jr. in his 'bad man' jurisprudence. In this view, law was 'valid' so long as it actually mattered in the day-to-day of the man worried about law's sanction. '[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court.' O. Wendell Holmes, Jr., 'The Path of the Law', (1897) 10 *Harvard Law Review* 455, at 458.

This brand of international legal functionalism, as it became associated with modern legal thought in the early twentieth century, has very little to do with the Aristotelian-cum-Thomistic thinking so prevalent among just war thinkers in the sixteenth century. For these scholars, man begins in sin, must practice virtue as sourced in the will of the divine, so that each human may progressively become what is his pre-ordained destiny.[116] Just war theory, as it was used in the fifteenth and sixteenth centuries, was embedded in this way of thinking, wherein authority is ultimately sourced in the universal authority of God and God alone.[117] It is God that has set the developmental paths along which we habitually practice virtue. But this is a far cry from the mode of legal argument we see among the early twentieth century institution builders, who looked to the interests of sovereigns, and not of gods.

For the moderns, the manner was far more reminiscent of their classical predecessors in the nineteenth century than it had been of just war theory. For as Leo Gross bemoaned on the tercentenary of the Peace of Westphalia, the problem wasn't that we ought to reject the figure of the rights-bearing sovereign, but that the new institution builders hadn't taken Hobbes seriously *enough*.[118] Where Hobbes had demanded that individuals in a state of nature surrender some portion of their rights to a political authority capable of securing order, so too, Gross suggested, sovereigns ought to have surrendered their rights to a true world government. Far from having rejected the liberal discovery of rights[119] and the sovereign form upon which they were based, as Yoo seems to imply, the moderns wanted very much to retain their liberalism.[120] The difference was that rather than muddle through the puzzle of securing international order in a world where sovereigns surrender nothing at all, the moderns wanted to take Hobbes seriously enough to establish a form of political authority that could actually suppress inter-state violence, just as government at the domestic level was meant to do.[121] International legal functionalism counseled a move in this direction. Once it was asked, what is the function of international law?, and the answer involved the maintenance of international peace and stability, the way forward was plain – create a rule of law that could effectively secure the end of war, as reflected in canonical examples from liberal political theory.[122]

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116 Anghie, *supra* note 63, at 16–17.

117 For a full discussion, see generally Kennedy, *supra* note 82.

118 To be clear, it was not normal at all for modern thinkers to expressly argue for an international *Leviathan* in the Hobbesian style. Rather, my point is that for all of their raging against the Westphalian paradigm, it was unusual for the moderns to actually reject the liberal premises of the domestic analogy. As Kennedy has suggested in a different context, the moderns were interested in saving liberalism from itself, and not in its rejection. D. Kennedy, 'Three Globalizations of Law and Legal Thought', in D. Trubek and A. Santos (eds.) *The New Law and Development: A Critical Appraisal* (2006).

119 Lauterpacht's rights-centric vision of Grotius is especially illuminating here. Lauterpacht, *supra* note 97, at 43.

120 Among the most explicit of such efforts is W. Roepke, 'Economic Order and International Law', (1954) 86 *Recueil des Cours* 203, 220–50.

121 See, e.g., Q. Wright, *Contemporary International Law* (1961); P. Marshal Brown, 'International Lawlessness', (1938) 32 *American Journal of International Law* 775.

122 For discussion, see C. Beitz, *Political Theory and International Relations Theory* (1999); K. Waltz, *Man, the State, and War: A Theoretical Analysis* (2001); A. McGrew and D. Held, *Governing Globalization: Power, Authority, and Global Governance* (2002).

On the other hand, if modern teleology had little connection with the redemption narrative of the pre-liberal thinkers, what about the idea that the moderns were interested in using natural law as a way of both identifying the needs of international society and the routes towards their resolution? Despite Yoo's suggestions otherwise, the use of natural law in the service of 'peace' should hardly serve as a signal that a jurist has travelled back in time, before liberalism. Within liberalism itself, legal thinkers have long relied on natural law arguments, constantly throughout the nineteenth century and up to the present.[123] The difference, however, between the natural law thinking of a Brierly or Verdross,[124] as opposed to a Pufendorf,[125] is again the source from which natural law is thought to be derived.[126] If a jurist argues that the positive law of a sovereign is invalid because it fails to properly derive both its content and authority from the divine, we are dealing with a pre-liberal mode.[127] If a jurist claims instead that natural law ought to provide substantive content and authority for international law, but claims that such rules are derived from the nature of the subject (i.e., human nature, the nature of international society), we are looking instead at a post-liberal form of argument.

Natural law thinking in classical legal thought and modern legal thought has taken a number of forms, but the structure remains very much the same.[128] The jurist begins with the postulate of sovereign rights, and the belief that sovereignty is the core idea out of which the international legal order will be arranged. This is explicit in the work of a Vattel,[129] but less so in the work of a Lauterpacht.[130] Though for Lauterpacht it is there just the same; in using sovereignty as the concept against which the rights of both individuals and the international community will be assessed and determined, sovereignty remains the concept against which the effort to define the international legal order will be constructed.[131] But whether we are arguing in the style of the classics or the moderns, the bare assertion of sovereign rights will be insufficient in our desire to create international order, and so we resort to normative patterns of justification – rules that can constrain the rights of sovereign states.[132] Again, these normative patterns are varied. There is Vattel's 'voluntary law', Lorimer's reliance on race science, Gross and Lauterpacht's reliance on the 'natural' shift towards international institutions. These normative patterns are a definable aspect of legal argument in the classical and modern canons, since they inevitably revolve around the problem of creating order in a world of free and

123 See D. Kennedy, 'The Nineteenth Century: History of an Illusion', (1986) 65 *Nordic Journal of International Law* 385.
124 A. Verdross, 'Forbidden Treaties in International Law', (1937) 31 *American Journal of International Law* 571.
125 Pufendorf, *supra* note 30.
126 See generally L. Strauss, *Natural Right and History* (1953).
127 Kennedy, *supra* note 82, at 8–9.
128 Koskenniemi, *supra* note 23, at 89–94.
129 Vattel, *supra* note 30, at 67 ('The law of nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights.').
130 Lauterpacht, *supra* note 97, at 28.
131 Ibid. ('Undoubtedly, international law is primarily-though not exclusively-a body of rules governing the relations between states . . . ').
132 See generally E. Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (2012).

https://doi.org/10.1017/S0922156516000261 Published online by Cambridge University Press

equal sovereigns. Again, all of this tracks Koskenniemi's discussion of ascending and descending patterns of justification.

And now we can come to the major problem for Yoo's argument about the early twentieth century. In the plan to create a League of Nations and later a United Nations, the effort to use natural law to resolve the problem of creating order in the midst of sovereign equality is entirely consistent with liberal political theory. Despite Yoo's claim to the contrary, it has little connection with pre-liberal just war theory. This is because the problem of sovereignty is a very different thing than the problem of just war theory. Just war theory, and the larger pre-liberal structure of argument in which it was located, have nothing whatsoever to do with the problem of reconciling the contrasting wills of sovereigns as they were understood to exist in the twentieth century. It belongs to a wholly different time, and while Yoo accuses Wilson of anachronism, it seems that the better critique is to shoulder *Point of Attack* with the same accusation. Failing to understand the structure of modern international legal thought, Yoo sees in the recent past a much older past that just wasn't there.

What's more, while Yoo criticizes the moderns for mistakes they never made, he misses the extent to which his own demands for realism and effectiveness rely on a key modern invention in legal functionalism. Just like the moderns that are the object of Yoo's wrath, in a very modern mode Yoo seeks a more purposive, flexible, effective international law.[133] Just like the moderns, Yoo believes in the necessity of deducing his prescriptions from the first premises of the sovereign state.[134] Just like the moderns, Yoo believes that in order for international law to be more functional, it must better track the real interests of international society, which will require an unprecedented degree of legal hierarchy.[135]

But it is in implementing the principle of hierarchy that Yoo and the moderns part ways, and Yoo begins to look more classical. For whereas the moderns sought to establish hierarchy in global institutions, Yoo recalls the Great Powers system of the nineteenth century.[136] Whereas the moderns were skeptical of sovereign equality but remained committed to its formal expression as found in Article 2(4) of the UN Charter, and later in the 1970 General Assembly Declaration on Friendly Relations,[137] Yoo's hostility towards the United Nations bears more resemblance to the discredited concept of the Family of Nations in which some states possess rights withheld from the rest.[138] And whereas the moderns sought to abolish war, Yoo presents a more classical taste for more war – more war in which the Great Powers subdue the not-so-great powers.[139] All in all, Yoo doesn't merely misunderstand structure of modern legal thought. He misunderstands the way in which modernism provides the basis for his own classical analysis.

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133 Yoo, *supra* note 7, at 120.
134 Ibid., at 17.
135 Ibid., at 23.
136 Ibid., at 113.
137 United Nations General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625 (1970).
138 Yoo, *supra* note 7, at 128.
139 Ibid., at 4–5.

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To summarize, in placing *Point of Attack* in the context of *From Apology to Utopia*, two separate issues emerged. First, Yoo's use of a Great Powers model recalls much from a widely discredited mode of classical legal thought. In the nineteenth century, it was conventional to claim special rights for the Great Powers, though at the time the standard measure for deciding which states bore rights and which didn't was explicitly racist. In turning to rational choice conceptions of global welfare as a contemporary measure for the line between those states enjoying rights of territorial integrity and self-defence, and placing the authority to conduct cost-benefit analysis exclusively in the hands of the Great Powers, Yoo's approach returns us to a brutal and much-maligned moment in the history of legal thought. While Yoo's approach has divorced itself from the blatant racism of classical legal thought, it nevertheless condemns the standard of sovereign equality in a way that would have been right at home in the nineteenth century. What's more, it remains to be explained just how it is that any form of line-drawing might be legitimated in 'objective' terms.

Second, Yoo bolsters his argument for a return to the nineteenth century by way of an attack on early twentieth century institution-building. His claim is that the modern architects were doomed to fail, since their interest in raising the standard of sovereign equality in documents like the UN Charter were buoyed by commitments to just war theory. Just war theory, Yoo claims, made no sense in the twentieth century, and much less in the twenty-first. But Yoo is mistaken. The modern mode of international legal thought has only the most superficial of connections with just war theory. For as the historian Stephen Neff has suggested, the connection between early twentieth century international lawyers and scholastic thinkers goes as far as the moderns wanted to make peace a default in international legal order.[140] But that's about as far as it goes. Rather than invoke the fundamental assumptions of just war theory in the effort to raise international institutions, it is more helpful to focus on how the moderns were crafting legal arguments in a context where the normativity of race science was undergoing a dramatic transformation.[141] Nineteenth century forms of racism were in the process of being eclipsed by inchoate theories of racial

140 S. Neff, *Justice Among Nations* (2014).

141 A major intervention was made by Huxley and Haddon who published *We Europeans* in 1936. J. Huxley and A. Haddon, *We Europeans* (1936). Attacking the 'pseudo-science' of writers like Gobineau and Smith, Huxley and Haddon argued that the bulk of race science had been established to support the political, social, cultural, and economic superiority of some populations over others, and that as real science, the biology of race was complete nonsense, ibid., at 144–64. To be sure, they were not arguing that various populations could not be separated by innate genetic differences with regard to both physical and psychological traits – this would present an argument against race that would eventually come later in the century. But, where Huxley and Haddon admitted the existence of innate genetic differences between groups, they first challenged the non-sequitur that one could deduce psychological conditions from physical conditions, ibid., at 144. That is, there was no real evidence whatsoever that black skin or a certain cranial capacity could tell a scientist anything at all about 'racial' intelligence. Second, they criticized the idea that one could find average degrees of intelligence based on physiognomy – 'there will be in every social class or ethnic group a great quantitative range and a great qualitative diversity of mental characters, and different groups will very largely overlap with each other', ibid., at 70. Third, Huxley and Haddon suggested that whereas race science had previously concluded that 'race is everything' in the question of nature versus nurture, this was surely wrong. Climate and culture played an enormous role in the differentiation of human capabilities, and as yet, they concluded, there was simply no way of quantifying how explanatory nurture or nature might be in any given situation. While Huxley and Haddon agreed that there were innate differences between populations, and therefore kept within the discourse of a biological idea about the separation of groups of human beings, they believed that 'nothing in the nature of "pure race" in the biological sense has any real existence', ibid., at 14. Looking

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equality, resulting in the absence of a formerly go-to mode of legal normativity.[142] The interests of the moderns, in some degree, was to create a legal order responsive to a world populated by free and equal sovereigns, an order that would nevertheless involve a hefty dose of legal, race-neutral hierarchy.[143] Whereas just war theorists were interested in implementing the Will of God in a world in which race science had yet to emerge, the modern canon is interested in the every different problem of managing the Will of Sovereign States, where all races are deemed equal in the opportunity to have a state at all.[144]

Of course, this is Yoo's interest as well. Rather than understanding *Point of Attack* as iconoclastic or as an extreme image in the contemporary American landscape, it may be better to see the book as a presentation of extremely familiar points of view. On the one hand, Yoo wants to bring back a version of classical legal thought, an effort which is certainly extreme in the sense of its vulgarity but quite centrist in its invocation of a traditionally imperialist form of legal thought. On the other hand, Yoo is also a thoroughly modern character, despite all his railing against the UN establishment. For the arguments he raises against the architects of early twentieth century international institutions are the same arguments they had used themselves. His functionalist method was forged in exactly the moment he thinks international legal thought to have taken its wrong turn.

But, to be fair, this blindness is hardly Yoo's alone. Fifty years out from Elihu Root's call in 1913 for a more effective international law guided by a more functional approach, New Haven and Columbia School scholars in the 1960s were still characterizing their proposals as rather novel, if not still as a rejection of a 'mainstream' formalism.[145] It must have seemed as if in the intervening five decades, no one had been listening.[146] Struck by the oddness of this recurring theme, some scholars working in the 1980s and 1990s suspected that the 'reality-based' approaches of

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to Herodotus' use of the term ethnos, Huxley and Haddon suggested 'ethnic group' to provide a superior way of labeling political, cultural, social, and economic differences between human populations, ibid., at 30–1.

142 Indeed, a formal veneer of sovereign equality came to become something like an ordering principle in the modern canon. Unlike in the context of the Family of Nations, where only those racially superior states enjoyed rights of territorial integrity and self-defence, the modern canon promulgated a new set of rules equally applicable to all members of the UN system. No better example is there than the UN Charter itself. In the first chapter of the Charter, the fourth paragraph of Art. 2 states: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

143 Of course, and at the same time, the concept of equality was hardly self-evident in terms of how and where it ought to be applied. See, e.g., P. Potter, *Introduction to the Study of International Organizations* (1922), 254.

144 See, e.g., United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (1960).

145 Speaking for a generation of lawyers, D.P. O'Connell stated in 1965 that 'traditional institutions, consecrated by philosophical systems whose momentum is largely spent, and formed by political situations that are unlikely to be rejected, are called in question, and their historical evolution has been subjected to an analytical scrutiny that is *unprecedented* in legal scholarship.' D. O'Connell, *International Law* (1970), ix. O'Connell's position is worthy of a bellwether for functionalism, given his stark differences with those advocates of the New International Economic Order, calling into question exactly the traditional institutions O'Connell himself appeared to believe had been spent. See, e.g., *Second report on succession of states in respect of matters other than treaties*, by Mr. Mohammed Bedjoui, Special Rapporteur: Economic and financial acquired rights and State succession', UN Doc. A/CN.4/216/REV.1, 18 June 1969.

146 See, e.g., W. Friedman, *The Changing Structure of International Law* (1964), 369.

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the New Haven and Columbia Schools were better conceived as complements than alternatives, and the time was ripe for some new approaches to international law.[147]

Nevertheless, the call for a more functional and effective international law continued. In the next round of reconstructive thinking that was to come, Harold Koh charged the field with the claim that '[i]nternational legal scholars do have an idea that has power, and that idea is *transnational legal process*'.[148] Knowing his roots, Koh explained that this powerful idea had several elements, including a critique of the old distinction between something called 'national' and another called 'international', a critique of the old idea that states are the sole or primary subjects of international law, an acceptance of the functional view that international law must shift and transform in accordance with the needs of international society, and an acceptance of the functional view (at least going back to the pre-New Haven scholars) that international law must be capable of providing normative compulsion.[149] It is in this context that arguments from the fields of law and economics and rational choice theory argued that – yet again – international law was too formalistic and, as Eric Posner argued recently, under the spell of a 'global legalism' totally out of sync with the drivers of international life, namely, the actual interests of international society and real state power.[150]

Which brings us to Yoo, who is certainly not the first failing to notice the pedigree of his own brand of legal functionalism. Indeed, he is merely the last. Though he does have the notoriety of being among the first in the twenty-first century to use legal functionalism for such classical ends. More than a century has passed since legal arguments have been raised with such formidable disregard for the principle of sovereign equality, and with the explicit aim of returning the international legal order to a world in which law was so deeply racialized. Might they catch on? Might they form the basis of a nascent mode of legal argument, perhaps a 'contemporary legal thought'?

While *From Apology to Utopia* continues to be of much use today, offering a historical method for understanding structures of legal thought, its diagnosis ends in the middle of the twentieth century. Writing in the 1980s, Koskenniemi's Owl of Minerva kept to the legal thought of the pre-liberals, the classics, and the moderns. It hadn't yet taken a view of the contemporary world, and the possibility of a new structure of legal argument, a contemporary legal thought. It is to this contemporary terrain, perhaps, that *From Apology to Utopia* might lead a next generation.

147 See, e.g., A. Rasulov, 'NAIL', in D. Kennedy and J. Beneyto (eds.) *New Approaches to International Law: The European and American Experiences* (2013).
148 H. Koh, 'Transnational Legal Process', (1996) 75 *Nebraska Law Review* 181, at 183.
149 Ibid., at 184.
150 See, e.g., J. Goldsmith and E. Posner, *The Limits of International Law* (2005).

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