

THE JUDGE AND THE DRONE

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Among the most characteristic issues in modern jurisprudence is the distinction between adjudication and legislation. In some accounts, a judge's role in deciding a particular controversy is highly constrained and limited to the application of preexisting law. Whereas legislation is inescapably political, adjudication requires at least some form of impersonal neutrality. In various ways over the past century, theorists have pressed this conventional account, complicating the conceptual underpinnings of the distinction between law-application and lawmaking. This Article contributes to this literature on the nature of adjudication through the resuscitation of a structuralist mode of legal interpretation. In the structuralist view, the distinction between adjudication and legislation has little to do with so-called neutral law application and political lawmaking. At the same time, and perhaps surprisingly, structuralists do not assume that adjudication is wholly subjective either. Rather, structuralists view judicial practice as at once constrained and discretionary, emerging only in the navigation of the syntactic and topological structures of legal language. The judge is certainly free to speak the law in myriad ways, but just as critically, the particularly legal forms in which the judge may speak are always limited by the language of law itself. In order to demonstrate this structuralist mode of legal interpretation, I apply it to an emerging and hotly debated field of law known as the law of killing. Within international law's rules regulating the use of force, the law of killing is most commonly associated with the legality of drone strikes in the context of the U.S. Administration's ongoing fight with al Qaeda and "associated forces." Structuralism does not help us figure out whether drone strikes in any given instance are legal. But it does help us understand the patterns of legal

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reasoning that assist in giving certain strikes a gloss of legal necessity, as well as those patterns that do not.

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INTRODUCTION

Embracing one of the most popular jurisprudential tactics of the 20th century, Ronald Dworkin's *Law's Empire* begins with a critique of positivism.¹ In Dworkin's view, positivism failed to address the now well-known problem of "theoretical disagreement about the law."² A theoretical disagreement arises when judges are at odds with respect to the relevant lines of precedent or the interpretation of statutes: what Dworkin called the "grounds of decision."³ Positivists, Dworkin explained, missed this systemic dimension of legal

1. See RONALD DWORKIN, *LAW'S EMPIRE* 1 (1986). The literature on legal positivism is massive. For some of the best-known discussions, see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* (Hackett Publ'g Co. 1998) (1832); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1945); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Along with Dworkin's work, famous criticisms include JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* (2d ed., 2011); Lon Fuller, *Positivism and Fidelity to Law: a Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911).

2. DWORKIN, *supra* note 1, at 5. For discussion, see, e.g., SCOTT SHAPIRO, *LEGALITY* 282 (2011); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

3. DWORKIN, *supra* note 1, at 5–6.

disagreements—and as a consequence, law writ large—because they adhered to an old-fashioned and formalistic idea about judges working under the hard constraints of a law that preceded their decisions.⁴ In this view, judges simply apply the law, they do not make it, and adjudication is only ideological when something has gone wrong.⁵ If judicial work does happen to breach this barrier between law application and creation, the result is “judicial activism”: the usurpation of legislative authority.⁶ If judges disagree about the relevant lines of precedent or how to interpret the statute, then, at least most of the time, one of them is just mistaken.⁷

While I enjoy a good trashing of positivism as much as anybody, I do not believe that Dworkin avoided the problems he set out to resolve.⁸ But I do think Dworkin was on to something, and it was the idea that law is, at its core, *argumentative*.⁹ This perspective concedes that law is relatively indeterminate¹⁰ and that judges in fact have much more legitimate discretion to decide than the positivists were ready to admit.¹¹ In this, I completely agree.¹² But Dworkin’s difficulty, as pointed out repeatedly by Stanley Fish, lay in the manner in which Dworkin tried to ultimately exclude ideological influence and bring judicial constraints back into the picture.¹³ Or, in other words, Dworkin’s realization that

4. A common example of formalism in this sense is JOSEPH BEALE, SELECTIONS FROM BEALE’S TREATISE ON THE CONFLICTS 21–25 (1935).

5. See, e.g., Owen Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 11–13 (1986).

6. A different but related concern is Bickel’s “counter-majoritarian difficulty.” ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (2d ed. 1986). See also Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1349 (2006).

7. See, e.g., ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 6 (2012).

8. See also Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991).

9. DWORKIN, *supra* note 1, at 13 (“Legal practice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate their claims about what law permits or forbids that would be impossible—because senseless—without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims.”).

10. *Id.* at 87–88 (“Each judge’s interpretive theories are grounded in his own convictions about the ‘point’—the justifying purpose or goal or principle—of legal practice as a whole, and these convictions will inevitably be different, at least in detail, from those other judges. Nevertheless, a variety of forces tempers these differences and conspires toward convergence.”).

11. For an example of the realist version of this critique, see WALTER WHEELER COOK, *LOGICAL AND LEGAL BASES OF CONFLICTS OF LAW* 1–47 (1942).

12. And, to be fair, many positivists would also point out that positivism is far more sophisticated than Dworkin realized. See SHAPIRO, *supra* note 2, at 357–59.

13. As Fish has suggested, “it is neither the case that interpretation is constrained by what is obviously and unproblematically ‘there,’ nor the case that interpreters, in the

positivists failed to appreciate the reality of law as an argumentative practice was a really good one. Where Dworkin faltered was in his explanation of how the construction of argumentative patterns actually works, and more specifically, how he characterized the constraints he believed to work upon the interpretive negotiation of theoretical disagreement.¹⁴

For Dworkin, these constraints rescued judicial interpretation from the problem of “radical indeterminacy” sometimes associated with critical legal studies.¹⁵ While Dworkin believed that law was essentially argumentative, he also believed that, in the end, a judge’s interpretive work could emerge free and clear of ideological content.¹⁶ This, of course, is the role of Dworkin’s principle of integrity.¹⁷ If done correctly, Dworkin promised, judges avoid the ideologically motivated mistakes of judicial activism and decide hard cases in the light of moral ideals existing independently of the judge’s own partisan preferences.¹⁸ Dworkin’s theory of legal argument thus at once embraced the relatively indeterminate nature of “theoretical disagreements about law” only to ultimately produce a view of law that demoted that indeterminacy to the work of ideologically motivated judges.¹⁹

In this Article, I adopt Dworkin’s basic postulate of law as argumentative in character, but reject his theory of interpretive constraints. Also, like Dworkin, my view of law as a field of argument rejects the positivist distinction between law and morality, though I also reject Dworkin’s way of reconceptualizing that distinction. In the pages that follow, I outline a structuralist approach to the interpretive practice of judicial work.²⁰ Legal structuralism views a legal system as a language, and just like any language, it is a system that at once offers the speaker (the judge) a great deal of discretion about what may be justifiably said, and also constrains the speaker (the judge) with respect to the forms in which statements may be made. Thus, like Dworkin, legal structuralists agree that law is a highly discretionary and a relatively indeterminate form of argumentative practice.²¹ But, unlike Dworkin’s belief that indeterminacy was disciplined through the influence of moral principles working independently of judicial

absence of such constraints, are free to read into a text whatever they like” STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 97 (1995).

14. *Id.* at 105. *See also* DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 117–30 (1997).

15. DWORKIN, *supra* note 1, at 271–75.

16. *Id.* at 270–71.

17. *Id.* at 225 (“According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”).

18. *Id.* at 255–56.

19. Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. & CRITIQUE (forthcoming 2014).

20. *See also* Justin Desautels-Stein, *Back in Style*, 25 L. & CRITIQUE (forthcoming 2014).

21. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

discretion, legal structuralism suggests that radical indeterminacy is disciplined through the grammatical structure of legal argument itself. The constraints do not come from the outside, as Dworkin would have had it—they are already built in.²²

In Part I, I build a view of structuralist interpretation from the ground up. It begins in Section A with a brief survey of structuralism's basic assumptions as they developed in linguistics, social theory, and literary theory. In Section B, the discussion then illustrates these ideas through Hayden White's structuralist analysis of the distinction between history and literature.²³ This analysis is an especially helpful prelude for thinking about the distinction between law and politics, because White's description of the historian's approach to the "materials" are directly analogous to the description of the judge's approach to legal material. It is here, in Section C, that the Article comes back explicitly to the problem of freedom and constraint in judicial work, and I argue for a structuralist understanding of legal interpretation. Section D brings more specificity to the nature of legal structuralism by focusing on the illustrative field of international law.

This structuralist view of international law sets up the organizing question for Part II. Here, I ask how a structuralist mode of legal interpretation applies to the domain of international law known as the law of killing and the specific example of drone strikes.²⁴ To use Dworkin's phrasing, we could ask, "what is the nature of theoretical disagreements about the legality of drone strikes under international law?" However, rather than resort to Dworkin's Herculean approach, I apply a structuralist approach animated by the work of Hayden White, Mark Kelman, and Pierre Schlag. In Section A, I outline four intellectual orientations from which a judge might adjudicate the legality of a drone strike under international law: realism, communitarianism, individualism, and statism. I cast these orientations as interpretive positions a judge is unavoidably obliged to employ. Each of these orientations provides the judge with a prefiguration of the legal materials, which has the consequence of fitting certain interpretations and conclusions with a sense of legal necessity. In Section B, I contrast these interpretive orientations with two explanatory frameworks. In contrast to the deeper and more foundational nature of the prefiguring orientation, a judge's choice of one explanatory framework over another involves the narrative structure into which the legal materials are placed. Thus, while the orientation sets the ground rules for the story, the narrative has to do with the sort of explanation the judge will make out of the legal material. I call these two explanatory frameworks the "Charter Peacetime" framework and the "Charter Wartime" framework.

22. Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 562 (1982).

23. HAYDEN WHITE, *CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 40–41 (1987) [hereinafter WHITE, *CONTENT*].

24. See, e.g., *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) [hereinafter *TARGETED KILLINGS*].

Part III explores the structuralist approach to drones in the context of a hypothetical adjudication. Section A begins with a return to the problem of legal interpretation and the issue of freedom and constraint in judicial work. The discussion illustrates the issue through a debate between two fictional judges, both of which Dworkin targeted in *Law's Empire*.²⁵ The first position is exemplified by a positivist judge, while the second is represented by a pragmatist judge. Building explicitly off of Duncan Kennedy's work, Section B contrasts these two judicial approaches with the structuralist or ironic mode of interpretation. The vehicle for the discussion is a hypothetical adjudication of a U.S. drone strike and the incidental killing of a U.S. citizen in Egypt.

I. STRUCTURALISM

In this Part, I offer a structuralist style of interpretive practice.²⁶ Structuralism begins with semiotics.²⁷ A semiotic approach understands language as a system of signs.²⁸ Legal structuralism, in turn, explores the structure of "law" as a language-system, in much the same way that a linguist studies the structure of English as a language-system. In other words, legal structuralism takes a semiotic approach to law.²⁹ Legal structuralism presents the analyst with a style for evaluating the interpretive practice of judges,³⁰ but it does not provide the analyst

25. DWORKIN, *supra* note 1, at 114–75.

26. See generally 1–4 JONATHAN CULLER, *STRUCTURALISM: CRITICAL CONCEPTS* (2006); TERENCE HAWKES, *STRUCTURALISM AND SEMIOTICS* (2003). There are, of course, many varieties of legal interpretation. Since the early 1980s, legal scholarship has steadily addressed the problem of interpretation. For some representative discussions, see Owen Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985); Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985); David Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251 (1985); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); G. Edward White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569 (1982); James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982). For more recent discussions, see *INTERPRETATION, LAW, AND THE CONSTRUCTION OF MEANING* (Anne Wagner, Wouter Werner & Deborah Cao eds., 2007); *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* (Andrei Marmor & Scott Soames eds., 2011); Peter Fitzpatrick, *Reading Slowly: The Law of Literature and the Literature of Law*, in *READING MODERN LAW: CRITICAL METHODOLOGIES AND SOVEREIGN FORMATIONS* (Ruth Buchanan, Stewart Motha & Sundhya Pahuja eds., 2012).

27. See, e.g., DUNCAN KENNEDY, *LEGAL REASONING* (2008).

28. See *infra* notes 38–99.

29. See, e.g., DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991). Other literatures are relevant to the larger discussion of the philosophy of language, but I bracket them out in the context of this Article's discussion. See, e.g., J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1975); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (2009).

30. "The word tropic derives from *tropikos*, *tropos*, which in Classical Greek meant 'turn' and in Koine 'way' or 'manner.' It comes into modern Indo-European languages by way of *tropus*, which in classical Latin meant 'metaphor' or 'figure of speech'

with a way of distinguishing between interpretations of legal materials. Structuralism does not, for example, say anything about whether Antonin Scalia or Richard Posner has the better interpretation of the Voting Rights Act,³¹ or whether drone strikes are a valid use of force under international law.³² But if structuralism is silent on such critical questions, of what use could it possibly be?

As the structuralist historian Hayden White has argued, there are several “tropological”³³ levels of interpretive practice in a given historical account.³⁴ There is the level at which the historian unconsciously deploys a style of organizing the universe of archival material. There is also the level at which she semiconsciously “chooses” an explanatory mode for the materials that she has selected. There is the more conscious “rhetorical” mode in which she decides what sort of narrative form the explanation will take.³⁵ Finally, there’s the conclusion in which the historian constructs the bottom line—the takeaway that makes the historical account worth pondering. Legal structuralists provide a similar account of law.

True, the structuralist never gets to the merits. Structuralism will not help us understand who is somehow “right” in the fight over same-sex marriage or campaign finance reform. But what it does help us understand is how a conclusion in one of these debates takes on a sense of legal necessity—why it was that this

and in Late Latin, especially as applied to music theory, ‘mood’ or ‘measure.’ All of these meanings, sedimented in the early English word *trope*, capture the force of the concept that modern English intends by the word *style*, a concept that is especially apt for the consideration of that form of verbal composition which, in order to distinguish it from logical demonstration on the one side and from pure fiction on the other, we call by the name *discourse*.” HAYDEN WHITE, *TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* 2 (1978) [hereinafter WHITE, *TROPICS*].

31. Posner criticized the majority opinion in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), which Justice Scalia joined, in Richard A. Posner, *The Voting Rights Act Ruling Is About the Conservative Imagination*, SLATE (June 26, 2013, 12:16 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html.

32. See *infra* notes 271–362.

33. Tropology provides “a perspective on language from which to analyze the elements, levels, and combinatorial procedures of nonformalized, and especially pragmatic discourses. Tropology centers attention on the turns in a discourse: turns from one generalization to another, from one phase of a sequence to another, from a description to an analysis or the reverse . . . In complex discourses such as those met with in historiography or indeed any of the human sciences, the rules of discourse formation are not fixed . . . This is why efforts to construct a logic or even a grammar of narrative have failed. But the turns can be identified, classified as types, and generic patterns of their typical orders of occurrence in specific discourses established.” HAYDEN WHITE, *FIGURAL REALISM: STUDIES IN THE MIMESIS EFFECT* 10–11 (1999) [hereinafter WHITE, *FIGURAL*].

34. White’s major work is HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH CENTURY EUROPE* (1973) [hereinafter WHITE, *METAHISTORY*].

35. For introductory discussions of the relation between rhetoric and semiotics, see DANIEL CHANDLER, *SEMIOTICS: THE BASICS* (2007); WINFRIED NÖTH, *HANDBOOK OF SEMIOTICS* (1990).

rather than that conclusion was the right one.³⁶ What are the intellectual orientations that tend to organize the field of discourse? What modes of explanation make possible the debate over whether the text carries meaning independently of the reader? What are the basic grammatical rules of the legal lexicon which *constitute* that debate? Why is it that our legal conclusions so often seem the product of an arrested imagination, perpetually delimiting new and experimentalist possibilities? It is to these questions that legal structuralism proposes answers. While it would be careless, if not downright irresponsible, to suggest that the legal conclusions do not matter, the legal structuralist is focused instead on the styles of legal discourse that constitute the possibilities for generating the form of the conclusions in the first place.³⁷

In order to more fully develop this view of structuralist interpretation, this Part progresses in four sections. Section A briefly explains Ferdinand de Saussure's theory of semiotics and Claude Levi-Strauss's use of semiotics in his structuralist anthropology. This Section also introduces a common example of the deconstructionist critique of structuralism in Paul de Man's essay on the relation between semiotics and rhetoric. Section B pushes past de Man and offers Hayden White's theory of historiography as a style of merging semiotics and rhetoric in the shadow of deconstruction. Section C brings White's analysis of the conventional distinction between history and literature to the more familiar distinction between law and politics, arguing for a structuralist perspective on law, in which the form of legal texts are governed by a deep grammar, and patterned through recurring rhetorical grooves. By way of illustration, Section D brings legal structuralism to international law.

A. Semiotics and Rhetoric

At the center of structuralism is Ferdinand de Saussure and the field of semiotics—the study of language as a system of signs.³⁸ Three of Saussure's

36. For a recent discussion of this point, see Kennedy, *supra* note 19.

37. Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1243 (1989) (“[T]he typical supposition within the legal community that intellectual endeavor can and must converge in ‘points’ or ‘solutions’ or ‘ideas’—or ‘conclusions’—has a real tendency to kill thought. When the metamorphosis from thought to conclusion is complete, thought is ensconced in a safe objectified form—distinct from the thinker and always ready for rapid professional deployment. This tendency to reduce thought to conclusions—to mere ideas—is, of course, characteristic of rationalism. And much of this Article has been an attempt to show that this very way of conceptualizing thought (or anything else) often results in serious misunderstanding. This rationalist misunderstanding has a systematic character—one which is thus intelligible. Indeed, the systematic character of rationalist misunderstanding turns out to be the very technique by which rationalism sustains itself as a viable cognitive orientation.”).

38. 1 FRANÇOIS DOSSE, HISTORY OF STRUCTURALISM: THE RISING OF THE SIGN, 1945–1966, at 45 (Deborah Glassman trans., University of Michigan Press 1997) (1991) (“In order to understand the structuralist paradigm, therefore, we have to begin with the Saussurean break, since an entire generation read and considered [Saussure's *Course on General Linguistics*] to be the founding moment.”); CRITICAL THEORY: A READER 11 (Douglas Tallack ed., 1995) [hereinafter CRITICAL THEORY READER] (“In the 1960s

semiotic distinctions are relevant here: (1) signifier/signified; (2) *langue/parole*; and (3) synchronic/diachronic. In contrast to earlier work in linguistics,³⁹ Saussure believed that a sign was composed of two elements,⁴⁰ neither of which was *necessarily* tethered to an objective description of a world independent of linguistic experience.⁴¹ For instance, the function of the word “apple” is not to describe that piece of fruit;⁴² the relation between “apple” and the fruit is arbitrary.⁴³ We might as well use *ping guo* or *clernz*. Either would do the trick. Saussure suggested that the English utterance of “apple” is merely a material signifier (a “sound-image”) for the immaterial concept of an apple floating around in your head—the signified.⁴⁴ When the signifier and signified unite in the course of a communication, a sign is formed.⁴⁵ Because of this arbitrary relation between signified and signifier, the meaning of the communication only becomes available through the act of distinguishing one sign from another, of creating difference between signs.⁴⁶ In other words, we only rarely encounter the meaning of an utterance because the sound of the word has some intrinsic connection with the concept the word is meant to designate. More typically, we encounter the meaning in a relational way. In the English language, we get more of the meaning of “apple” by distinguishing it from “ape” or “leap” or “people” or “orange,” and less

Saussure’s model of language became paradigmatic for a number of important structuralist ventures which sought to analyze systems of signs of fashion, advertising, narrative and poetry, and whole cultures”); Jean-Michel Rabaté, *Introduction to JOHN STURROCK, STRUCTURALISM 6–10* (2003).

39. FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS 1–5* (Wade Baskin trans., Charles Bally & Albert Sechehaye eds., 1959).

40. *Id.* at 65–70.

41. *Id.* at 113 (“Not only are the two domains that are linked by the linguistic fact shapeless and confused, but the choice of a given slice of sound to name a given idea is completely arbitrary. If this were not true, the notion of value would be compromised, for it would include an externally imposed element. But actually values remain entirely relative, and that is why the bond between the sound and the idea is radically arbitrary.”).

42. *Id.* at 66 (“The linguistic sign unites not a thing and a name, but a concept and a sound-image.”). Contrast this view with Thoreau’s description of a “leaf.” *CRITICAL THEORY READER*, *supra* note 38, at 13 (“No wonder the earth expresses itself outwardly in leaves, it so labors with the idea inwardly The overhanging leaf sees its prototype. Internally, whether in the globe or animal body, it is a moist thick lobe, a word especially applicable to the liver and lungs and the leaves of fat (. . . globus, lobe, globe; also lap, flap, and many other words); externally, a dry thin leaf, even as the f and v are a pressed and dried b. The radicals of lobe are lb, the soft mass of the b (single-lobed or B, double-lobed), with the liquid l behind it pressing forward.”).

43. SAUSSURE, *supra* note 39, at 68.

44. *Id.*

45. *Id.* at 67.

46. *Id.* at 103 (“The linguistic entity is not accurately defined until it is *delimited*, i.e. separated from everything that surrounds it on the phonic chain. These delimited entities or units stand in opposition to each other in the mechanism of language.”); HAWKES, *supra* note 26, at 11.

from some inherent or natural connection between “apple” and the conception of apple.⁴⁷

But Saussure’s idea here was not merely that different languages assign different signs to preexisting conceptions. His idea went considerably further, suggesting that different languages actually construct the *concepts* differently as well, i.e., “apple” (the “sound-image”) as well as apple (the concept).⁴⁸ That is, the signified concepts shift between languages, and over time, within languages as well.⁴⁹ There is no inherent core of meaning in a concept, and no inherent way of signifying it. The relation between signifieds and signifiers is arbitrary and relational, in both directions: its sound-images are arbitrary, and the way a language constructs and organizes the world through its signifieds is arbitrary as well.⁵⁰

The arbitrary nature of language feeds into the arguably contradictory idea that languages are, nevertheless, systemic.⁵¹ Saussure’s theory of the language-system unpacks in his well-known distinction between *langue* and *parole*.⁵² *Langue* refers to the fundamental syntactical rules shaping the contours and boundaries of the linguistic structure.⁵³ As Saussure explained, the *langue* represents “the whole set of linguistic habits which allow an individual to understand and be understood.”⁵⁴ The *langue* is consequently social in nature, meaning that it is shared by everyone partaking in the language-system.⁵⁵ It is also determinate in scope. The *langue* is a system of constraints operating equally on each language speaker. Its contents are fixed and closed, and in the context of the system, universal.⁵⁶ In order for the system to function, people cannot just make up their own rules of grammar willy-nilly.⁵⁷

People can, however, say almost anything they like so long as they are operating within the constraints of the *langue*. This highly discretionary surface level of language is *parole*, which refers to the open, arbitrary, and individually created combinations of speech-acts made in light of the deep structure of the

47. SAUSSURE, *supra* note 39, at 67.

48. *Id.* at 12.

49. There is a helpful discussion of this point in JONATHAN CULLER, FERDINAND DE SAUSSURE 39–45 (1986).

50. *Id.* at 33–34.

51. HAWKES, *supra* note 26, at 9.

52. SAUSSURE, *supra* note 39, at 9.

53. *Id.*

54. *Id.* at 77.

55. *Id.*

56. *Id.* at 73. (“A language constitutes a system. In this one respect . . . language is not completely arbitrary but is ruled to some extent by logic; it is here also, however, that the inability of the masses to transform it becomes apparent. The system is a complex mechanism that can be grasped only through reflection; the very ones who use it daily are ignorant of it.”).

57. This is the point made famous in Wittgenstein’s notion of “private language.” LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953).

langue.⁵⁸ Thus, where *langue* is unconscious and out of sight, *parole* is intentional and visible. Where *langue* is syntax, *parole* is utterance. Where *langue* represents a field of coercion, *parole* is free. Where *parole* is apparent and everywhere, *langue* is only discoverable through an analysis of the common qualities demonstrable in *parole*.⁵⁹

If *langue* is only discoverable through a study of *parole*, how is the study to be conducted? Is it done historically, looking at the development of English, or fashion, or whatever, over time? How much time? How do we fix the limits of study? It is here that Saussure's third distinction comes in, the distinction between synchronic and diachronic analysis.⁶⁰ For some, this was the only way to understand how languages formed, through historical, functionalist, and evolutionary treatments of the way in which language changed over time. This kind of effort is notable for a search for the origin, where it all started, and what happened from there. This is diachronic analysis, the study of a system in chronological form.⁶¹ In contrast was his preferred synchronic approach. In this ahistorical mode, the linguistic structure is studied at a snapshot in time.⁶² We do not bother with how the sign came to appear or with the curiosity that it "meant" one thing only later to "mean" something entirely different. The absolutely arbitrary nature of the sign suggested that it could only be studied in its relational dynamic in a frozen state. This was not because Saussure thought history unimportant; it was because he believed that given the constantly changing nature of signs in history, they could only be understood in relation to other signs in a particular and momentary system.⁶³ To know the *langue*, it must be studied synchronically as an operating system. To critique the *langue*, we can compare its different manifestations diachronically, over time.⁶⁴

58. SAUSSURE, *supra* note 39, at 76 ("Nothing could be more complex [than the way in which language evolves]. As it is a product of both the social force and time, no one can change anything in it, and on the other hand, the arbitrariness of its signs theoretically entails the freedom of establishing just any relationship between phonetic substance and ideas.").

59. ROSALIND COWARD & JOHN ELLIS, LANGUAGE AND MATERIALISM: DEVELOPMENTS IN SEMIOLOGY AND THE THEORY OF THE SUBJECT 12 (1977) ("The speech act is only comprehensible on the basis of the whole system from which it gains its validity; and the system itself only exists in the multitude of speech acts. The structure of language is the systematicity which informs every individual act of speech: it is a system which can be constructed by an analyst but has no concrete existence as such.").

60. SAUSSURE, *supra* note 39, at 79–100.

61. *Id.*

62. *Id.* at 82.

63. *Id.* at 80.

64. To be sure, Saussure recognized that the agent's use of *parole* necessarily changes the *langue* over time. But the structuralist method, in its search for a total understanding of the system, bracketed out the agent and the influence of *parole* in favor of a static and relational analysis of the system. Thus, language was to be explained neither by the "real" world to which language seemed to be related, nor by the agent's operation of the language over time. Explanation followed purely through reference to relations between the relevant terms. For a discussion of the problem of a metaphysics of presence, which *seems*

Building out from this Saussurean baseline, we get to structuralism.⁶⁵ Claude Levi-Strauss described the project as an investigation into “whether the different aspects of social life (including even art and religion) cannot only be studied by the methods of, and with the help of concepts similar to those employed in, linguistics, but also whether they do not constitute phenomena whose inmost nature is the same as that of language.”⁶⁶ Thus, narrative, cuisine, or law might each be understood as a distinct “language-system.”⁶⁷ The structuralist method involved the targeting of a field, an isolation of the “units” comprising the field, and the search for commonalities underlying them.⁶⁸ In his study of myth, for example, Levi-Strauss argued that each historical/cultural iteration of, say, the *Oedipus* myth, could be interpreted as simply one particular performance (*parole*) of a universal grammar (*langue*) constituting the deep structure of the *Oedipus* “language-system.”⁶⁹ The form of any given myth was governed by unconscious rule-structures, and the job of the anthropologist was to root them out.⁷⁰ What might therefore appear to be a random mass of arbitrary practices could be reconstructed as *parole*.⁷¹ Underlying the *parole*, and indeed generating the specific instances of myth telling, was a *langue* comprised of universal themes.⁷² These universal themes governed the way in which specific myths might be articulated in much the same way that the rules of syntax govern particular utterances in linguistics.⁷³ The governing has little to do with the substance of what is said, but much to do with the way in which it could be said.

like it might be the case here, see Jacques Derrida, *Structure, Sign, and Play in the Discourse of the Human Sciences*, in *THE STRUCTURALIST CONTROVERSY: THE LANGUAGES OF CRITICISM AND THE SCIENCES OF MAN* 247 (Richard Mackey & Eugenio Donato eds., 2007).

65. HAWKES, *supra* note 26, at 19–20. There are any number of authors one might choose in going on to a summary presentation of the structuralist approach. Roman Jakobson, Claude Levi-Strauss, Roland Barthes, Jacques Lacan, Jean Piaget, Louis Althusser, Paul Ricoeur, and many others fill the typical list. Levi-Strauss is helpful here because of his contrast with Barthes and Foucault, discussed *infra* notes 96–97.

66. CLAUDE LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 62 (1963).

67. See CULLER, *supra* note 26, at 8–9.

68. See LEVI-STRAUSS, *supra* note 66, at 21–22.

69. *Id.* at 209–15.

70. *Id.* at 230 (“the kind of logic in mythical thought is as rigorous as that of modern science . . . the difference lies, not in the quality of the intellectual process, but in the nature of the things to which it is applied In the same way we may be able to show that the same logical processes operate in myth as in science, and that man has always been thinking equally well . . .”).

71. *Id.* at 208 (“Mythology confronts the student with a situation which at first sight appears contradictory. On the one hand it would seem that in the course of a myth anything is likely to happen. There is no logic, no continuity.”).

72. *Id.* (“But on the other hand, this apparent arbitrariness is belied by the astounding similarity between myths collected in widely different regions. Therefore the problem: If the content of a myth is contingent, how are we going to explain the fact that myths throughout the world are so similar?”).

73. *Id.* at 210–11.

By the 1970s, structuralism was in trouble.⁷⁴ An example comes from the “poststructuralist” critique associated with Paul de Man’s influential article, *Semiology and Rhetoric*.⁷⁵ In this early illustration of “deconstruction,” de Man criticized structuralists for their

use of grammatical (especially syntactical) structures conjointly with rhetorical structures, without apparent awareness of possible discrepancies between them In their literary analyses, Barthes, Genette, Todorov, Greimas and their disciples all simplify and regress from Jacobson in letting grammar and rhetoric function in perfect continuity, and in passing from grammatical to rhetorical structures without difficulty or interruption. Indeed, as the study of grammatical structures is refined in contemporary theories of generative, transformational, and distributive grammar, the study of tropes and figures . . . becomes a mere extension of grammatical models, a particular subset of syntactical relations.⁷⁶

De Man did not think that it was a mistake to look for grammatical structures, but he questioned the legitimacy of including the figures of rhetoric within the taxonomy of those structures.⁷⁷ Say that the structuralist has identified a *langue* “underneath” some body of material. Grant the plausibility of this *langue* and its capacity for generating formal transformations in *parole*. But what are we to make of situations—which de Man believed to be all too common—where the “grammatical structure” of a poem, or even a single line, is totally unambiguous, but the presence of vying rhetorical modes yields entirely incompatible readings?⁷⁸ How can rhetoric “flow” out of the grammar, when the rhetoric is so often capable of twisting the grammar into contradiction?⁷⁹ By all appearances, grammar is now in the service of rhetoric. Where *langue* was supposedly in the dominant position, *parole* now seems to be doing all the talking.

Was it possible that this reversal of fortunes in which rhetoric dominated grammar was due simply to the fact that, in certain circumstances, one given

74. 2 FRANCOIS DOSSE, HISTORY OF STRUCTURALISM: THE SIGN SETS, 1967–PRESENT 281 (1997).

75. The relation between a rhetorical space and *langue* was famously critiqued in PAUL DE MAN, BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM (1971); Paul de Man, *Semiology and Rhetoric*, 3 DIACRITICS 27 (1973) [hereinafter de Man, *Semiology*]. For recent discussion, see Don Paul Abbott, *Splendor and Misery: Semiotics and the End of Rhetoric*, 24 RHETORICA 303 (2006).

76. de Man, *Semiology*, *supra* note 75, at 28.

77. *Id.* At 29–30 (“The grammatical model of the question becomes rhetorical not when we have, on the one hand, a literal meaning and on the other hand a figural meaning, but when it is impossible to decide by grammatical or other linguistic devices which of the two meanings (that can be entirely contradictory) prevails. Rhetoric radically suspends logic and opens up vertiginous possibilities of referential aberration.”).

78. *Id.*

79. *Id.* at 30.

rhetorical reading will simply be right in a way that others could not?⁸⁰ If so, this would show rhetoric's dominance to be a mere façade.⁸¹ But for de Man and the structuralists as well, it was hopeless to suggest that one rhetorical mode was a better way of manifesting the underlying grammar.⁸² On the other hand, if such a prioritization was unavailable, rhetorical structure and grammatical structure seemed unlikely to line up outside of a dubious "metaphysics of presence,"⁸³ getting us back to de Man's complaint about the structuralist failure to understand the fungibility of grammar and structure, *langue* and *parole*.

To be sure, de Man's point was not to show that rhetoric was somehow superior to grammar.⁸⁴ On the contrary, just as de Man demonstrated the rhetorization of grammar, he was similarly keen to show us the grammatization of rhetoric.⁸⁵ In a reading of a short passage from Proust's *Swann's Way*, de Man focused on a series of metaphors shot through the text, ranging from butterflies of light to bubbling brooks of cool air.⁸⁶ The passage, de Man admits, looks like a feast of tropological discourse in the repeated deployment of dramatized metaphors.⁸⁷ But when pressed, these tropes reveal the metonymic characteristics of grammar pulsing underneath, where "the mechanical, repetitive aspect of grammatical forms is shown to be operative in a passage that seemed at first to celebrate the self-willed and autonomous inventiveness of a subject."⁸⁸ De Man's purpose here is to show how the subjective flavor of the rhetorical figure can collapse into the unconscious depth of grammar, just as the automatic quality of grammar so easily slips back into indeterminacy of rhetorical choice.⁸⁹ The difference between grammar and rhetoric, and the sense that the latter might flow from the former, seems always on the run.⁹⁰

In the United States, this sort of deconstruction was often heard as structuralism's death knell.⁹¹ But not everyone saw it this way. Jonathan Culler, for example, consistently argued that it was a mistake to understand what came to be known as "poststructuralist" approaches to discourse analysis as a rejection of

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 30–31.

88. *Id.* at 32.

89. *Id.*

90. *Id.* at 33. ("We end up therefore, in the case of the rhetorical grammatization of semiology, just as in the grammatical rhetorization of illocutionary phrases, in the same state of suspended ignorance. Any question about the rhetorical mode of a literary text is always a rhetorical question which does not even know whether it is really questioning.")

91. PETER CAWS, STRUCTURALISM: THE ART OF THE INTELLIGIBLE 2 (1988) ("The career of the structuralist movement . . . was meteoric: a brilliant streak followed by relative extinction. It managed to pass from novelty to fashion to cliché in a very few years, with hardly any interval of mature reflection . . .")

structuralist semiotics.⁹² Rather, Culler suggested that poststructuralism had merely introduced another family of techniques into the structuralist toolkit, rather than having demonstrated the impossibility of structuralist work.⁹³ Indeed, the knee-jerk reaction to read “poststructuralist” analysis as “post” anything relied on a serious mischaracterization of the supposedly “totalizing” nature of structuralist analysis.⁹⁴ Roland Barthes, a figure often thought to represent the shift from structuralism to poststructuralism in his *S/Z*,⁹⁵ is a perfect example of Culler’s point.⁹⁶ Michel Foucault is as well.⁹⁷

92. JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 188–89 (1982) (“This does not mean that the notion of the sign could or should be scrapped; on the contrary, the distinction between what signifies and what is signified is essential to any thought whatsoever There are no final meanings that arrest the movement of signification The possibility of endless replication is not an accident that befalls the sign but a constitutive element of its structure, an incompleteness without which the sign would be incomplete The fact that any signified is also in the position of signifier does not mean that there are no reasons to link a signifier with one signified rather than another; still less does it suggest, as both hostile and sympathetic critics have claimed, an absolute priority of the signifier or a definition of the text as a galaxy of signifiers.”).

93. *Id.* at 30.

94. In this sense, I disagree with the conventional attitude towards legal structuralism as well. *See, e.g.*, GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* 115–16 (1995) (“Duncan Kennedy’s article *The Structure of Blackstone’s Commentaries*, for example, employed the method of structural anthropology found in the work of Claude Lévi-Strauss By studying the ‘twists and turns’ of various arguments used by judges and lawyers at early common law to mediate this *fundamental contradiction*, Kennedy offered an explanation of how legal doctrine actually works in practice to legitimate existing social practices Early 1980s CLS scholarship typically claimed that a given legal doctrine was hopelessly trapped [by the fundamental contradiction] [T]he commitment to a structuralist and ideological account of law created a dilemma for CLS scholars. In their early work, as critical legal scholars seemed to say, there was a ‘true’ and ‘essential deep structure’ to the law. As James Boyle explained: ‘The structuralist method put critical legal theorists oddly close to classical doctrinalists such as Samuel Williston. . . .’ Classical doctrinal scholars found the ‘true, essential’ structure of the law in the natural objective categories of the common law. Critics in the early 1980s found the ‘true, essential’ structure of legal doctrine in the fundamental contradiction This rendered CLS work subject to the critique of false essences.”).

95. ROLAND BARTHES, *S/Z* (1970).

96. *See, e.g.*, Roland Barthes, *Inaugural Lecture, Collège de France*, in *A BARTHES READER* 457, 474–75 (Susan Sontag ed., 1982) (“Semiology has a relation to science, but it is not a discipline What relation? An ancillary relation: it can help certain sciences, can be their fellow traveler for a while, offering an operational protocol starting from which each science must specify the difference of its corpus In other words, semiology is not a grid; it does not permit a direct apprehension of the real through the imposition of a general transparency which would render it intelligible. *It seeks instead to elicit the real, in places and by moments, and it says that these efforts to elicit the real are possible without a grid. It is in fact precisely when semiology comes to be a grid that it elicits nothing at all The semiologist is, in short, an artist* He plays with signs as

In this light, it seems entirely appropriate to regard de Man's form of discourse analysis as simply *one way* of doing discourse analysis, rather than as the end of structuralism.⁹⁸ Or rather, de Man's analysis suggests that readings purporting to "get it right" are probably wrong, but so long as we regard discursive treatments as possibilities, models, and heuristics rather than mirrored representations of a true reality, deconstructionist and structuralist readings may live happily ever after, rather than having been fated as archenemies. As a consequence, we should see de Man's critique as extremely problematic for those who see semiotics as necessarily wedded to a positivist or apodictic methodology for uncovering humanity's greatest secrets. Following de Man, it seems more than plausible that in a great many cases, we might find marginal ideas in a rhetorical analysis serving to undermine the autonomy of that very analysis, just as the reverse will happen in a description of grammatical structure. But this is hardly an immobilizing discovery for the analyst who has already accepted the ironic nature of the enterprise: This is not a quest for truth. It is a quest for style, and the hope that in elucidating style in its many structures, we will be all the better for it.⁹⁹

with a conscious decoy, whose fascination he savors and wants to make others savor and understand.") (emphasis added).

97. See CULLER, *supra* note 26, at 14 ("In fact, many of the positions or claims associated with post-structuralism are manifest even in the early work of Barthes, Foucault, and Lacan. These positions include the difficulty for any metalanguage to escape entanglement in the phenomena it purports to describe, the possibility for texts to create meaning by violating the conventions that structural analysis seeks to delineate, or the inappropriateness of positing a complete system, since systems are always changing. Post-structuralism involves not the demonstration of the inadequacies or errors of structuralism but (a) avoiding structuralist proclamations of this or that new 'science,' and (b) superimposing on the structuralist project of working out what makes cultural phenomena possible a meta-investigation of the effects of the concepts and procedures that analysts use. Post-structuralism may be best understood as the recurrent self-critique of structuralist analysis, the attempt to expose presuppositions of any analytical procedure."); MICHEL FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* (A.M. Sheridan Smith trans., Routledge 2002) (1969).

98. WHITE, *TROPICS*, *supra* note 30, at 46.

99. WHITE, *CONTENT*, *supra* note 23, at 189. Hayden White has suggested that there are at least four ways to relate language and reality. "Language can be taken to be (1) a manifestation of causal relationships governing the world of things in which it arises, in the mode of an index; (2) a representation of that world, in the mode of an icon (or mimesis); (3) a symbol of that world, in the mode of an analogue, natural or culture-specific, as the case might be; (4) simply another among those things that populate the human world, but more specifically a sign system, that is, a code bearing no necessary, or 'motivated,' relation to that which it signifies." *Id.*

B. History and Literature

It is here that I want to turn to the historian Hayden White's work on style and structure.¹⁰⁰ While very much indebted to semiotics and structuralism,¹⁰¹ White's work operates on a separate level of analysis, providing cues as to how speakers orient themselves to the underlying *langue* and craft their strategies for speaking it at the level of *parole*.¹⁰² Like Barthes¹⁰³ and the philosopher Richard Rorty,¹⁰⁴ White's approach began with a rejection of the Enlightenment distinction

100. A year after de Man published his essay on semiology and rhetoric, White confronted Jakobson's distinction between metaphor and metonymy—the distinction deconstructed by de Man. Hayden White, *The Historical Text as Literary Artifact*, 3 *CLIO* 277 (1974). The takeaway from the exchange is that while there now seems to be a consensus about the deployment of interpretive techniques in the service of surfacing the apodictic meaning of texts, this recognition is misunderstood if it is taken to mean that the tools of rhetoric are useless. Indeed, such a nuanced understanding of the relation between rhetoric and semiotics is evident as early as Roman Jakobson's famous essay *Linguistics and Poetics*, in *STYLE AND LANGUAGE* 350, 370–71 (Thomas A. Sebeok ed., 1960) (“In poetry where similarity is superinduced upon contiguity, any metonymy is slightly metaphorical and any metaphor has a metonymical tint. Ambiguity is an intrinsic, inalienable character of any self-focused message . . . [However,] the supremacy of poetic function over referential function does not obliterate the reference but makes it ambiguous.”). Of course, it is true that the vast field of stylistics has not consistently adhered to Jakobson and White's epistemological posture. The fascination of stylisticians with objectivity and empiricism remains, though it is, to be sure, complicated. See, e.g., Ray MacKay, *Mything the Point: A Critique of Objective Stylistics*, 16 *LANGUAGE & COMMUNICATION* 81 (1996); M. Short et al., *Stylistics, Criticism, and Myth-Representation Again: Squaring the Circle with Ray Mackay's Subjective Solution for All Problems*, 7 *LANGUAGE & LITERATURE* 40 (1998).

101. See, e.g., WHITE, *METAHISTORY*, *supra* note 34, at 31. Of course, as is typical of almost every structuralist I have ever encountered, White takes what he needs and rejects what he does not. He is no “disciple.” For example, White explained, “I have also profited from a reading of the French Structuralist critics: Lucien Goldmann, Roland Barthes, Michel Foucault, and Jacques Derrida. I should like to stress, however, that I regard the latter as being, in general, captives of tropological strategies of interpretation in the same way that their nineteenth-century counterparts were.” *Id.* at 3. On my reading, White believed this more the case with Foucault than with Barthes. See Hayden White, *Foucault Decoded: Notes from Underground*, 12 *HISTORY AND THEORY* 23 (1973). See also HERMAN PAUL, *HAYDEN WHITE* 74–76 (2011).

102. WHITE, *METAHISTORY*, *supra* note 34, at 32–39.

103. WHITE, *CONTENT*, *supra* note 23, at 42–43.

104. Inspired in part by the work of Thomas Kuhn, Richard Rorty approached analytic philosophy in a way very reminiscent of White's approach to historiography. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 322 (1979). Rorty argued that the analytic philosopher's preference for empiricism, for example, cannot be justified because it is more empirical than its alternatives. *Id.* That is begging the question. Those traditions—empiricism, rationalism, scientific method—were merely the inventions of particular people, and the question of why you would prefer these traditions over, say, medieval concepts of the universe, or scientology today, are not amenable to justification in

between art and science.¹⁰⁵ For more than a century, White explained, historians had understood themselves as practicing between the poles of pure art on the one side and pure science on the other, where art was understood as subjective and creative and science thought objective and analytical.¹⁰⁶ Traditionally, historians rejected both positions, claiming their work to be more craft than science, but more concrete than the imaginary nature of artistic manipulation.¹⁰⁷ The dichotomy relied on an assumption that one could actually tell it like it is—a realistic assumption in the natural sciences but not anywhere else. Or, to put the sensibility another way, historical practice might not have been a natural science, but it sure as hell was not art.¹⁰⁸

Pointing to mid-twentieth century developments in the philosophy of science, White suggested that this famous dichotomy between the imaginary and the objective was problematic, to say the least.¹⁰⁹ When a historian begins the

a way more “objective” than the way in which we would debate styles of art. For Rorty, the choice of one style over another, whether it was a choice of Marx over FDR, Copernicus over Ptolemy, or Stravinsky over Copeland, was a choice about *edification*. *Id.* at 360. And Rorty found empiricism extremely edifying: “[The] point of edifying philosophy is to keep the conversation going rather than to find objective truth. Such truth, in the view I am advocating, is the normal result of normal discourse. Edifying philosophy is not only abnormal but reactive, having sense only as a protest against attempts to close off conversation by proposals for universal commensuration through the hypostatization of some privileged set of descriptions. The danger which edifying discourse tries to avert is that some vocabulary, some way in which people might come to think of themselves, will deceive them into thinking that from now on all discourse could be, or should be, normal discourse. The resulting freezing-over of culture would be, in the eyes of edifying philosophers, the dehumanization of human beings.” *Id.* at 377.

105. See generally Hayden White, *The Burden of History*, 5 HISTORY AND THEORY 111 (1966) [hereinafter, White, *The Burden of History*]. WHITE, TROPICS, *supra* note 30, at 27. For a related discussion in the context of Science and Technology Studies, see Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 982–89 (2005).

106. See White, *The Burden of History*, *supra* note 105.

107. *Id.* See also PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* (1988); James Kloppenberg, *Objectivity and Historicism: A Century of American Historical Writing*, 94 AM. HIST. REV. 1011 (1989).

108. See *id.*

109. *Id.* at 46–47 (“It now seems possible to hold that an explanation need not be assigned unilaterally to the category of the literally truthful on the one hand or the purely imaginary on the other, but can be judged solely in terms of the richness of the metaphors which govern its sequence of articulation. Thus envisaged, the governing metaphor of an historical account could be treated as a heuristic rule which self-consciously eliminates certain kinds of data from consideration as evidence. The historian operating under such a conception could thus be viewed as one who, like the modern artist and scientist, seeks to exploit a certain perspective on the world that does not pretend to exhaust description or analysis of all the data in the entire phenomenal field but rather offers itself as *one way among many* of disclosing certain aspects of the field The result of this attitude is not relativism but the recognition that the style chosen by the artist to represent either an inner or an outer experience carries with it, on the one hand, specific criteria for determining

process of explaining something about a given past event, even when the object of representation is intended to be nothing but fact, the historian inevitably prefigures the facts in an unavoidable act of translation.¹¹⁰ In grasping at the past event, in other words, the historian has no choice but to express her view of the fact in *language*.¹¹¹ This act of “translating” a fact into a historical narrative, White explained, was precisely the same act of translating imagined ideas into a novel:¹¹²

Literary discourse may differ from historical discourse by virtue of its primary referents, conceived as imaginary rather than real events, but the two kinds of discourse are more similar than different since both operate language in such a way that any clear distinction between their discursive form and their interpretive content remains impossible.¹¹³

That is, the historian and the novelist are both faced with a set of materials, and in the work of forcing those materials into a narrative, the historian/novelist will necessarily confront the structure of language. Whether the language is English or Arabic, the historian/novelist will never encounter in language a neutral, empty, and transparent vessel for a telling of the facts, or an expression of the imaginary.¹¹⁴ Language has its own structures that will have to be navigated, and the facts of the past are no less vulnerable to these structures than are the imagined events of literature.¹¹⁵

By pressing on the conventional distinction between history and literature in this way, White distanced himself from the worry about whether a history is “getting it right.”¹¹⁶ What is more useful to question is the style in which the

when a given representation is internally consistent and, on the other provides a system of translation which allows the viewer to link the image with the thing represented on a specific level of objectification Style thus functions as what Gombrich calls a ‘system of notation,’ as a provisional protocol or an etiquette. When we view the work of an artist—or, for that matter, of a scientist—we do not ask if he sees what we would see in the same general field, but whether or not he has introduced into his representation of it anything that could be considered false information for anyone who is capable of understanding the system of notation used.”). *See also* BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS* (1986).

110. WHITE, *CONTENT*, *supra* note 23, at 47.

111. *Id.*

112. *Id.* at 43 (“In historical discourse, the narrative serves to transform into a story a list of historical events that would otherwise be only a chronicle. In order to effect this transformation, the events, agents, and agencies represented in the chronicle must be encoded as story elements; that is, they must be characterized as the kinds of events, agents, agencies, and so on, that can be apprehended as elements of specific story types. On this level of encodation, the historical discourse directs the reader’s attention to a secondary referent, different in kind from the events that make up the primary referent, namely, the plot structures of the various story types cultivated in a given culture.”).

113. WHITE, *FIGURAL*, *supra* note 33, at 6.

114. *Id.*

115. *Id.*

116. White has suggested that one element in the historian’s traditional aspiration towards objectivity is the moral meaning associated with an indeterminate historical record.

history is told, for as White has suggested, “the content is in the form.”¹¹⁷ However, shifting our focus away from the historian’s conclusions and toward the style in which the historian draws her conclusions, one objection needs immediate attention.¹¹⁸ In questioning the distinction between history and literature, we would be mistaken for understanding White as suggesting that just as a novelist might write a story about anything, anything goes when it comes to telling history.¹¹⁹ The idea was never that history and literature are identical, since they so clearly are not.¹²⁰ History takes as its object events that actually took place in the past, while literature is under no such obligation.¹²¹

Take the example of the Holocaust.¹²² Is it a plausible historical account of the Third Reich to suggest that had the actor Bill Murray never been childhood friends with Adolf Hitler, the Holocaust would never have taken place? If done well, it seems possible that this could form the basis of a novel, but it could never be a plausible historical account; Hitler was dead before Bill Murray was even born. Similarly, there also seem to be wrong ways of telling history, even when the facts are “straight.”¹²³ The notion of a historical account of the Holocaust in which its central themes are presented as a comedy is a well-known example of a narrative mode which just seems mistakenly attached to a set of facts.¹²⁴

To push this idea further, we can align White with de Man and suggest that when it comes to telling the history of the Holocaust, there are only ways of getting it wrong.¹²⁵ We might get it wrong because we have made factual errors (i.e., Bill Murray), we might get it wrong because we have provided a narrative of the facts that fails to correspond with our underlying premises about the value of human life (i.e., the Holocaust as comedy), and we might get it wrong simply because we prioritized one central event at the expense of another, more

WHITE, CONTENT, *supra* note 23, at 21–22 (“The demand for closure in the historical story is a demand, I suggest, for moral meaning, a demand that sequences of real events be assessed as to their significance as elements of a moral drama. Has any historical narrative ever been written that was not informed not only by moral awareness but specifically by the moral authority of the narrator? It is difficult to think of any historical work produced during the nineteenth century, the classic age of historical narrative, that was not given the force of a moral judgment on the events it related.”).

117. *Id.* at ix.

118. WHITE, FIGURAL, *supra* note 33, at 12–22.

119. WHITE, CONTENT, *supra* note 23, at 44–45.

120. *Id.*

121. *Id.*

122. See generally PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE “FINAL SOLUTION” (Saul Friedlander ed. 1992).

123. WHITE, FIGURAL, *supra* note 33, at 28.

124. *Id.* at 29–30.

125. Though there may be some interesting insights creeping around in the blind spots, I do not mean here to make any explicit references to Paul de Man’s infamous history with the Nazis. For discussion, see DAVID LEHMAN, SIGNS OF THE TIMES: DECONSTRUCTION AND THE FALL OF PAUL DE MAN (1992).

“marginal” event (i.e., it was all the fault of the Treaty of Versailles).¹²⁶ Thus, if there are no right ways to make a historical account and only wrong ways, history and literature seem far less different than we may have thought.¹²⁷ White explained that in historical practice, “narrativization produces a meaning . . . by imposing a discursive form on the events that its own chronicle comprises by means that are poetic in nature This is what Barthes meant when he said: ‘Narrative does not *show*, does not *imitate* [Its] function is not to “*represent*,” it is to *constitute* a spectacle.’”¹²⁸ Further, White argued:

A history is . . . less like a picture intended to resemble the objects of which it speaks or a model . . . than “a complex linguistic structure specifically built for the purpose of *showing* a part of the past.” In this view, historical discourse is not to be likened to a picture that permits us to see more clearly an object that would otherwise remain vague and imprecisely apprehended. Nor is it a representation of an explanatory procedure intended finally to provide a definitive answer to the problem of “what really happened” in some given domain of the past. On the contrary . . . historical discourse is less a matching of an image or a model with some extrinsic reality than a making of a verbal image, a discursive “thing” that interferes with our perception of its putative referent even while fixing our attention on and illuminating it.¹²⁹

So just what does the historian do?¹³⁰ As White explained, she begins with the “data,” the “facts,” the unworked material to be explained. Unfortunately,

126. See generally, e.g., MICHEL FOUCAULT, *THE ORDER OF THINGS* (1966); Michel Foucault, *Nietzsche, Genealogy, History*, in *THE FOUCAULT READER* 76 (Paul Rabinow ed., 1984).

127. WHITE, *TROPICS*, *supra* note 30, at 60; WHITE, *CONTENT*, *supra* note 23, at 47–48.

128. WHITE, *CONTENT*, *supra* note 23, at 42–43.

129. WHITE, *FIGURAL*, *supra* note 33, at 6.

130. Here is White’s description of a historian on top of her game:

Now, in my view, any historian who simply described a set of facts in, let us say, metonymic terms and then went on to emplot its process in the mode of tragedy and proceeded to explain those processes mechanistically, and finally drew explicit ideological implications from it—as most vulgar Marxists and materialistic determinists do—would not only not be very interesting but could legitimately be labeled a *doctrinaire* thinker who had “bent the facts” to fit a preconceived theory. The peculiar dialectic of historical discourse—and of other forms of discursive prose as well, perhaps even the novel—comes from the effort of the author to mediate between alternative modes of emplotment and explanation, which means, finally, *mediating between alternative modes of language use* or *tropological* strategies for originally describing a given field of phenomena and constituting it as a possible object of representation. It is this sensitivity to alternative linguistic protocols, cast in the modes of metaphor, metonymy, synecdoche, and irony, that distinguishes the great historians and philosophers of history from their less interesting counterparts

there is nothing in the facts themselves that directs the historian about what to make of them.¹³¹ Data does not come preloaded with a figurative language that might assist the historian in crafting his narrative.¹³² This figurative language, absolutely necessary to the making of any historical explanation, must come from someplace *other* than the facts themselves.¹³³ Historians therefore gain an “explanatory effect” by “building into their narratives patterns of meaning similar to those more explicitly provided by the literary art of the cultures to which they belong.”¹³⁴ “What the historian must bring to his consideration of the record are general notions of the *kinds of stories* that might be found there, just as he must bring consideration to the problem of narrative representation some notion of the ‘pre-generic plot structure’ by which the story he tells is endowed with formal coherency.”¹³⁵ So what are these patterns of meaning, these plots and narrative structures, and where do they come from? Since, for White, there can be no such thing as historical explanation without a story, what is the structure in which these stories are told? And importantly, how does this relate to the discussion of semiotics and rhetoric from above?

Recall Saussure’s distinction between *langue* and *parole*.¹³⁶ In the context of a posited language-system, we begin with the object of the linguist’s analysis: those grammatical rules constituting the *langue*, generally unconscious to the speaker, or at least, not consciously visible at the moment of speech. As it happens, speech-acts often come in prefigured forms—what we might refer to as the structure of rhetoric. This structure involves those tropes and grooves in the language-system’s terrain, “linking”¹³⁷ *langue* and *parole*. Of course, there is no

WHITE, TROPICS, *supra* note 30, at 129.

131. *Id.* at 110 (“As thus envisaged, the historical discourse can be broken down into two levels of meaning. The facts and their formal explanation or interpretation appears as the manifest or literal ‘surface’ of the discourse, while the figurative language used to characterize the facts points to a deep-structural meaning This conception of the historical discourse permits us to consider the specific *story* as an *image* of the events *about which* the story is told, while the generic story-type serves as a *conceptual model* to which events are to be likened in order to permit their encodation as elements of a recognizable structure.”).

132. *Id.* at 60.

133. WHITE, FIGURAL, *supra* note 33, at 8 (“In the passage from a study of an archive to the composition of a discourse to its translation into a written form, historians must employ the same strategies of linguistic figuration used by imaginative writers to endow their discourses with the kind of latent, secondary, or connotative meanings that will require that their works be not only received as messages but read as symbolic structures.”).

134. WHITE, TROPICS, *supra* note 30, at 58.

135. *Id.* at 60.

136. *See supra* note 64.

137. This is the link de Man was warning against taking too seriously. At the sake of redundancy, let me state again that I fully accept this deconstructionist critique. My articulation of a “link” between semiotics and rhetoric in this context is intended as an irrationalist style of presentation; it is not a positivist, rationalist account of something actually happening as an essence or a deep truth. I am describing an interpretive practice and an intellectual orientation—one style of such a practice and orientation. No more, no less.

reason to believe that as a matter of fact, the *langue* actually generates particular tropes and figures. De Man showed how easily, for instance, we can see that is precisely *not* what happens. Nevertheless, it is perfectly appropriate to suggest a protocol or style in which we do marry *langue*, *parole*, and rhetorical structure, so long as we remember that it is a simulacrum we are expounding, and not truth.

Now, let us begin with the *langue*. Think of this as the core, or floor, of the language-system. This is the space where the constitutive rules of the system are found. Next, query just how it is that we come to operate or exercise these rules in such wildly different ways. We are obliged to follow the same syntactical rules, but we use those rules to write so many different things. Is the space between *langue* and *parole* totally indeterminate? I do not think that it is. True, at the level of *parole*, anything goes so long as the speech conforms to the syntax. But more often than not, in the passage from the deep structural rules of the language-system to the surface-level conclusions, the historian defaults into one of several ready-made styles for narrativizing the facts. This is just as true for the historian to the novelist to, as discussed below,¹³⁸ the judge.

White explained that there were several levels here in the space between *langue* and *parole*, but for present purposes I want to address just three. The first and deepest orientation is what White referred to as “tropological.”¹³⁹ “This ground is that of language itself, which, in areas of study such as history, can be said to operate tropologically in order to prefigure a field of perception in a particular modality of relationships.”¹⁴⁰ White may very well be conflating the tropological ground with Saussure’s *langue*, but for our purposes, we will take it as an orientation towards the *langue*, and not as identical with it.

White suggested that this “tropics of discourse” was inhabited by the four master tropes of metaphor, metonymy, synecdoche, and irony.¹⁴¹ These tropes are interpretive strategies mediating between individual consciousness and the phenomenal world, and it is through these strategies that we endow experience with meaning.¹⁴² The strategy of metaphor, for example, takes our experiences of

138. See *infra* notes 150–91.

139. WHITE, CONTENT, *supra* note 23, at 47 (“If there is any logic presiding over the transition from the level of fact or event in the discourse of that narrative, it is the logic of figuration itself, which is to say, tropology. This transition is effected by a displacement of the facts onto the ground of literary fictions or, what amounts to the same thing, the projection onto the facts of the plot structure of one or another of the genres of literary figuration.”).

140. WHITE, TROPICS, *supra* note 30, at 72 (“Historiographical disputes will tend to turn, not only upon the matter of what are the facts, but also upon that of their meaning. But meaning, in turn, will be construed in terms of the possible modalities of natural language itself, and specifically in terms of the dominant tropological strategies by which unknown or unfamiliar phenomena are provided with meanings by different kinds of metaphorical appropriations.”).

141. Kenneth Burke, *Four Master Tropes*, 3 KENYON REVIEW 421, 421 (1941); KENNETH BURKE, A GRAMMAR OF MOTIVES 503 (1969). I discuss irony below, *infra* notes 361–90.

142. WHITE, TROPICS, *supra* note 30, at 72.

difference and finds in those differences deeper similarities. Metonymic strategies construct the whole out of the prioritized part, assuming in the process the distinction between universal and particular. The strategy of synecdoche, in contrast, relies on the universal/particular distinction but in order to prioritize the totality.¹⁴³ As White explains, “the important point is that in metaphor, metonymy, and synecdoche alike language provides us with models of the *direction* that thought itself might take in its effort to provide meaning to areas of experience not already regarded as being cognitively secured by either common sense, tradition, or science.”¹⁴⁴

Thus, the first plane of tropological orientation concerns the way in which the analyst approaches the *langue* in order to secure meaning.¹⁴⁵ This orientation sets the table for the analysis to follow, though it does not strictly determine the subsequent cognitive and rhetorical moves. As for the cognitive move, this involves a prefigurative choice of the historian about the kind of explanation she will make of the materials. This is a choice about “what a set of historical events will look like *once they have been explained*.”¹⁴⁶ Now, I have somewhat oddly labeled this as a prefigurative choice, combining what seems like an unconscious emphasis on prefigurative with a conscious choice. But I think this ambiguity is appropriate here, since it signals just the right tone: In most cases, the historian may very well have a sense of the explanatory form she is going to pursue, but have little if any sense about the way in which that form will prefigure the rhetorical terrain on which the explanation is going to happen.

Beyond what White referred to as this prefigurative, explanatory orientation lies another plane, moving closer in the direction of *parole* and away from the deep rules of the *langue*: the rhetorical mode.¹⁴⁷ As opposed to the historian’s semiconscious explanatory orientation, this next phase is about the sort

143. White explores these tropological strategies at length in his *Metahistory*. He uses Hegel, Marx, Nietzsche, and Croce as textual representatives. WHITE, *METAHISTORY*, *supra* note 34, at xi.

144. WHITE, *TROPICS*, *supra* note 30, at 73.

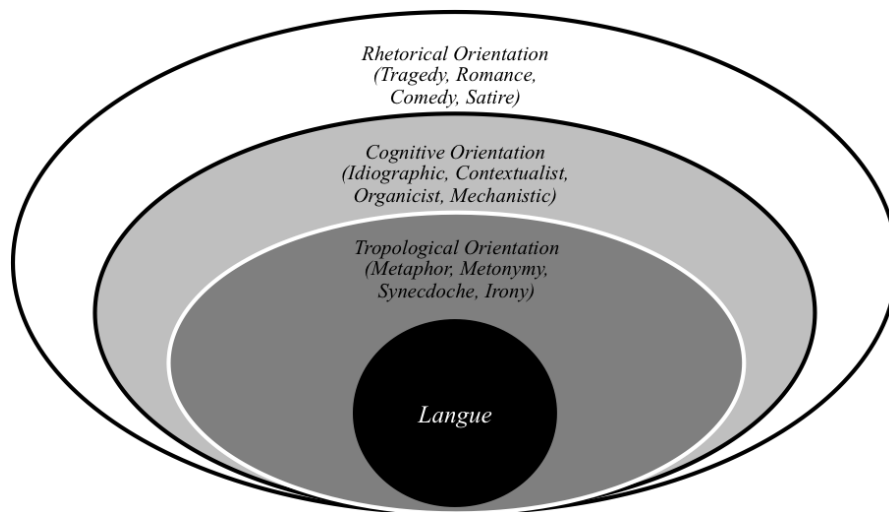
145. WHITE, *FIGURAL*, *supra* note 33, at 8 (“Indeed, it is only by troping, rather than by logical deduction, that any given set of the kinds of past event we would wish to call historical can be (first) represented as having the order of a chronicle; (second) transformed by emplotment into a story with identifiable beginning, middle, and end phases; and (third) constituted as the subject of whatever formal arguments may be adduced to establish their ‘meaning’—cognitive, ethical, or aesthetic, as the case may be.”).

146. WHITE, *TROPICS*, *supra* note 30, at 63 (“In other words, we can distinguish among the various forms of explanation in historiography in two ways: on the basis of the direction that the analytical operation is presumed to take (towards dispersion or integration) and on the basis of the paradigm of the general aspect that the explicated set of phenomena will assume at the end of this operation.”). White explained that historical conceptions of “explanation” gravitated around four common forms: idiographic (Niebuhr, Michelet), contextualist (Burckhardt), organicist (Hegel), and mechanistic (Marx). *Id.* at 64–67.

147. The choice of one explanatory mode does not lead into a rhetorical mode; the operations are distinct. *Id.* at 66.

of plot to be used in the explanation.¹⁴⁸ What *form* of narrative is to be deployed? The rhetorical orientation concerns the aesthetic choice to present the materials as a quest, a tragedy, a satire, or some other plot structure.¹⁴⁹

To recap, at the bottom of the structure are the grammatical rules out of which the practice of history is constituted. In White's usage, this deep structure is tropological, but I want to emphasize a distinction between the *langue* itself and the tropological orientation the historian uses in her decisions to speak the *langue* in one form rather than another. Next comes the historian's explanatory orientation; the choice about how the particular universe of past facts will be given an explanatory effect. Last is the form of emplotment, which involves the historian's more conscious decision to stylize the facts through the use of certain figures rather than others, such as tragedy, comedy, and romance.



C. Law and Politics

In the discussion above I have made two key assertions. First, I introduced a structuralist style of analysis in which an agent deploys semiotics in her analysis of some social domain as a language-system. Thus, just as we understand English to operate in the structures of grammar and rhetoric, so too can we see the forms of historical practice as caught up in a drama of linguistic dynamics. Hayden White represents such a structuralist approach to the study of history, though his style is demonstrably different from the structuralist works of Claude Levi-Strauss or Michel Foucault. The second assertion is that in bringing this structuralist orientation to historical work, an old and conventional distinction

148. Among the plots are Romance, Comedy, Tragedy, and Satire. *Id.*

149. *Id.* at 67 ("Historians interpret their materials in two ways: by the choice of a plot structure, which gives to their narratives a recognizable form, and by the choice of a paradigm of explanation, which gives to their arguments a specific shape, thrust, and mode of articulations.").

between history and literature emerged as a problem. Traditionally, history was understood as a very different thing than literature: The former is meant to represent and report a record of events, as they really happened. In contrast, the stories of the literary canon are under no such obligations. White argued that while real differences do remain between these two domains, they are typically exaggerated.

Like the novelist or poet, the historian has no choice but to choose among many forms of explanatory modes in telling her story, has no choice but to choose among many plot structures in crafting her narrative, and has no choice but to style that narrative in a field of material that she has already prefigured in tropological terms. These disciplinary similarities between the work of the historian and the novelist did not require us to see history as meaningless or fictive; it demanded that we see in both history and literature the making of a kind of truth that has little resonance in the parodied distinction between the positivist flavor of the natural sciences and the totally discretionary flavor of the humanities.

Hayden White's critique of the history and literature distinction has real traction in the long-standing debate over the relation between law and politics. Just as White targeted the conventional view of the historian's task as looking into the archived materials in order to produce a "right answer" about what "really happened," so too is there an analogue in a conventional view about the task of the judge. In this view, the role of the judge is to approach the relevant legal materials in a neutral and, to the extent it is possible, objective manner.¹⁵⁰ In such a posture, the judge should be able to produce a legal argument indigenous to the judicial branch—meaning, the product of the judge's research should be something quite different from a legislative rule or administrative decision.¹⁵¹ The judge's task is

150. For a defense of "objectivity" in adjudication, see Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993). For another view, see UNGER, *infra* note 152.

151. See *United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting) (attacking the Majority's "assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role. This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. They knew well the dangers of 'primary' power, and so created branches of government that would be 'perfectly coordinate by the terms of their common commission,' none of which branches could 'pretend to an exclusive or superior right of settling the boundaries between their respective powers.' The people did this to protect themselves. They did it to guard their right to self-rule against the black-robed supremacy that today's majority finds so attractive. So it was that Madison could confidently state, with no fear of contradiction, that there was nothing of 'greater intrinsic value' or 'stamped with the authority of more enlightened patrons of liberty' than a government of separate and coordinate powers.") (citations omitted); *Morrison v. Nat'l Australian Bank*, 130 S. Ct. 2869, 2881 (2010) (criticizing the "results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court."); *Medellin v. Texas*, 552 U.S. 491, 516 (2008) ("The dissent's contrary approach would assign to the courts—not the political branches—the primary role in deciding when and how international agreements will be

more impersonal and general than the more arbitrary and political work of the legislative and executive branches.¹⁵² To hook this back into the history/literature distinction, we can see that this image of the judge is a reflection of White's image of the historian. In both cases, the judge and the historian are meant to be doing something impersonal and neutral. The judge distances herself from the regulator; the historian distances herself from the novelist.

Predictably, and like the history/literature distinction, the law/politics distinction has long been an object of critique.¹⁵³ In fact, we could fairly say that the critique dates back to the turn of the twentieth century.¹⁵⁴ The version of the critique that is most relevant here, however, begins in the 1970s.¹⁵⁵ In *Interpretive Construction in the Substantive Criminal Law*, Mark Kelman approached judicial practice in a way reminiscent of White's approach to historical practice.¹⁵⁶ When a judge begins the process of crafting a legal argument, Kelman suggested, the judge engages in a two-step process: (1) interpretive construction and (2) rational rhetoric.¹⁵⁷ Kelman's use of "interpretive construction" seemed to combine White's notions of tropological orientation and explanatory orientation. As Kelman explained, an interpretive construct referred "both to the way we construe a factual situation [tropological orientation] and to the way we frame the possible rules to handle the situation [explanatory orientation]."¹⁵⁸ Once the judge has deployed a particular interpretive construct, the way is cleared for legal rhetoric, "the stuff of admirable legal analysis."¹⁵⁹ This involves:

enforced. To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law.").

152. For an extended discussion, see ROBERTO UNGER, *KNOWLEDGE AND POLITICS* (1975).

153. For two different versions of the story, see John Henry Schlegel, *Does Duncan Kennedy Wear Boxers or Briefs? Does Richard Posner Ever Sleep? Writing About Jurisprudence, High Culture and the History of Intellectuals*, 45 *BUFF. L. REV.* 277 (1997); John Henry Schlegel, *Of Duncan, Peter and Thomas Kuhn*, 22 *CARDOZO L. REV.* 1061 (2001); David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L.J.* 1 (1972); David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575 (1984).

154. We can go at least as far back as Holmes. For discussion, see Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 *MICH. ST. L. REV.* 565. To get even further, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, (David Trubek & Alvaro Santos eds., 2006) [hereinafter Kennedy, *Globalization*].

155. For discussion, see Justin Desautels-Stein, *The Tragedy of Legal Structuralism*, *LAW AND CONTEMP. PROBS.* (forthcoming 2014) (manuscript on file with author).

156. 33 *STAN. L. REV.* 591, 591 (1981).

157. *Id.* at 591–92.

158. *Id.* at 592

159. *Id.*

distinguishing and analyzing cases, applying familiar policies to unobvious fact patterns, and emphasizing the degree to which we can rely on the least controversial underlying values. These rhetorical techniques are so intellectually complex that there is a powerful tendency to elevate falsely the importance of intellect in actual legal decisionmaking, to fail to see the interpretive construction that makes the wise posturing possible.¹⁶⁰

This actual “stuff” of legal argument—what we recognize as the work product of lawyers and judges alike—could only proceed *after* an interpretive construct was fully in place.¹⁶¹ To think otherwise is to fall prey to the same mistake of the conventional historian: believing that something in the given materials came preloaded with a way of explaining those materials.

In the domain of substantive criminal law, Kelman argued that judges unconsciously used (or were used by) four basic interpretive constructs.¹⁶² One of these interpretive constructs cabins the way in which the judge is meant to view the relevant timeframe for a dispute.¹⁶³ Ought a judge focus solely on the isolated incident that is the predicate for the dispute, or should she move further back in time, addressing the personal histories of the parties?¹⁶⁴ The decision to frame a dispute in the short versus the long term has obvious consequences: Depending on which construct the judge happens to deploy, a defendant’s intentional choices might look more like coerced ones, or vice versa.¹⁶⁵ A second and related construct involves the question of whether the judge will consider the material fact as a unified story unfolding through a series of events, or as a disaggregated series of events, some material and others less so.¹⁶⁶ A third kind of interpretive construct involves the judge’s understanding of intent,¹⁶⁷ and a fourth includes the idea of the defendant.¹⁶⁸ In both cases of intent and defendant, there appears to be a binary split enabling the judge to move in opposite directions—directions with palpable consequences for the legal arguments to follow.¹⁶⁹ In the process of practicing law, Kelman suggested, judges are unconsciously guided by one or more of these constructs toward more conscious explanatory techniques.¹⁷⁰ Two in particular involve choices in the domains of (1) intentionalism and determinism, and (2) rules and standards. Like White, Kelman did not believe that the use of any one interpretive construct would necessarily lead to a preference for determinism and

160. *Id.*

161. *Id.* at 593.

162. *Id.* I have never asked Kelman, but as far as I know it is just a coincidence that Kelman and White both identified four master constructs for interpreting legal and historical material.

163. *Id.* at 593–94.

164. *See id.*

165. *Id.* at 594.

166. *Id.* at 594–95.

167. *Id.* at 595–96.

168. *Id.* at 596.

169. *Id.* at 595–96.

170. *Id.* at 596–600.

rules, or some other combination.¹⁷¹ But, also like White, Kelman suggested that there might be “elective affinities”¹⁷² between different levels of the interpretive practice.¹⁷³

Of course, Kelman was not the first to suggest that ideology (or something like it) plays a role in the crafting of legal arguments.¹⁷⁴ H.L.A. Hart, for example, explained that when faced with “hard cases,” judges often find themselves in the penumbra and are forced to fill gaps in the law with policy analysis.¹⁷⁵ But Kelman was not talking about Hart’s “core and penumbra.” Rather, Kelman’s was the more controversial point that in every instance of legal argument, the judge’s decision was structured through the use of preconceptual and rhetorical devices.¹⁷⁶ What is clear for Kelman and White is that there is nothing rational or logical about the historian/judge’s use of one interpretive orientation over another. At the metalevel at which their analyses are operating, there are no scientific criteria for distinguishing the use of one orientation over another.

In his *Missing Pieces*, Pierre Schlag similarly argued for a set of four forms of unconscious orientation mediating the judge’s experience of the legal material.¹⁷⁷ These forms were deep and out of sight, providing the judge with ways of thinking, ways of framing and organizing the legal world.¹⁷⁸ Schlag described the four orientations:

- [1] Prerationalism asks no questions and takes things as given. It is extremely secure in its understanding of the world; it does not allow the internal intellectual distance that would permit self-reflection.
- [2] Rationalism is cognitively upsetting, because it constantly calls the world into question and asks for the redemption and justification of descriptive and normative claims.
- [3] Modernism pushes the critical edge even further and puts reason on trial. Modernism constantly strives to articulate in polite, theoretical terms the

171. *Id.* at 600.

172. WHITE, *METAHISTORY*, *supra* note 34, at 29 (“In my view, a historiographical style represents a particular combination of modes of emplotment, argument, and ideological implication. But the various modes of emplotment, argument, and ideological implication cannot be indiscriminately combined in a given work There are, as it were, elective affinities among the various modes that might be used to gain an explanatory effect of the different levels of composition. And these elective affinities are based on structural homologies which can be discerned among the possible modes of emplotment, argument, and ideological implication.”). For a recent discussion of the idea of “elective affinities,” see Christopher Tomlins, *How Autonomous Is Law?*, 3 ANN. REV. L. & SOC. SCI. 45 (2007).

173. Kelman, *supra* note 156, at 600 (“Generally speaking, narrow time frames buttress the traditionally asserted intentionalism of the criminal justice system.”).

174. Legal realism often gets the credit for this point. See, e.g., William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).

175. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1960).

176. Kelman, *supra* note 156, at 663.

177. 67 TEX. L. REV. 1195, 1195 (1989).

178. *Id.* at 1208–09

unpresentable underside of reason. [4] Postmodernism continues the modernist project, but drops the polite, theoretical conversation.¹⁷⁹

Schlag described the “prerationalist” orientation as operating in the mind of the originalist: The legal explanation pivots around some historical given. It will not matter much how “rational” or ethically desirable the point may be; if this is how it was situated in its “original position,” a proper mode of explanation will follow.¹⁸⁰ “Prerationalism in law takes the form of an abiding and unquestioning observance of intuition, craft, convention, tradition, or other sacred texts.”¹⁸¹ The rationalist orientation is very different. For a judge operating in this mode of consciousness, legal explanations are brutally dominated by rigorous and reasoned argument. “Rationalist consciousness insists first and foremost on the justification of claims according to established rules of logic or, more broadly, good reasoning. Claims are redeemable for rationalist consciousness if one can demonstrate that they follow correctly from accepted premises.”¹⁸²

In contrast is what Schlag named a “modernist” form of consciousness.¹⁸³ For the modernist judge, the archive of material looks much more like the way in which White and Kelman have described it. On this account, there simply is no rational way of organizing, explaining, or arguing,¹⁸⁴ and these modes of rationalist argument are questioned for the ideological content their scientific form is in the service of hiding.¹⁸⁵

For modernists, theory, reason, and discourse are not only autonomous forms of thought but also activities or practices whose status is underwritten by some nonrational underside: contradictions among the means and relations of production (Marx), the advent of bureaucratic organization (Weber), the unconscious (Freud), will to power (Nietzsche), cultural practice (Wittgenstein). For modernists, reason itself must be scrutinized before its products can be admitted into the intellectual arena . . . [A modernist orientation] demands that the individual ego renounce its claims to the status of the *fundamental* epistemological, ontological, or methodological unit. This demand does not just require the development of new categories. It is not, for example, merely a matter of substituting will to power or class interest for Aristotelian logic. What is required is nothing less than a change in the very form in which categories are used to think—a change not just in *what* is thought, but in the *way* it is thought.¹⁸⁶

179. *Id.* at 1208.

180. *See id.* at 1209.

181. *Id.*

182. *Id.* at 1211.

183. *Id.* at 1214.

184. *Id.* at 1215.

185. *Id.*

186. *Id.* at 1213.

Finally, Schlag presents poststructuralism as a fourth type of intellectual orientation.¹⁸⁷ While it is common enough to offer examples of deconstruction in legal analysis, Schlag does not present any instances that might be recognizable in the context of judicial practice.¹⁸⁸ This is not to criticize Schlag; I would not be sure how to construct such an image, either. What would a judicial practice look like exactly, if it “abandon[ed] the search for common ground altogether, following instead the ironic twists and turns of difference, discontinuity, and disjuncture”?¹⁸⁹

Schlag’s presentation of the four orientations is in itself poststructuralist,¹⁹⁰ while Kelman and White are operating more in the structuralist mode.¹⁹¹ But on what they all agree is the importance of bringing attention to the largely unconscious orientations historians and judges bring to the archived material when tasked with the creation of an argument. For the historian, the upshot of highlighting the prefigural troping of the story is to collapse the distinction between impersonal “history” and an imaginary literature. For the judge, the point is to highlight the preconceptual orientations that help the judge make sense of the legal materials before the legal argument has even been constructed. This problematizes the distinction between impersonal adjudication and political thought. There simply is not an impersonal or neutral or objective way of approaching the relevant materials, since those materials do not come ready-made with instructions for organizing them.

Before turning to the application of this view to the field of international law, I want to emphasize two issues that we might find troubling. First, if we take this discussion seriously, does this mean that once we have identified the relevant interpretive orientations of the judge or historian, we can predict what sort of story she will tell? Absolutely not. Remember, an acquaintance with the background orientations tells us nothing about content, i.e., what will actually be said. What such a familiarity does, however, is tell us something about the repeated forms in which the stories will be told. And as White, Kelman, and Schlag all claim: The content is in the form.

187. *Id.* at 1217.

188. *See id.* at 1248. This is perhaps the closest he gets: “The postmodernist would certainly not hesitate to point out the incoherence of both the formalist and the realist position. The formalist position suffers in that it is always the judge who writes the law. If the judge cannot be trusted to apply her own judgment, it follows that she cannot be trusted to encode her judgment into formalist doctrine. If language cannot be trusted, neither can the judicial self: that self is in the prison house of language along with everyone else. Thus, for the postmodernist, there can be no central conceptual economy among sectors—in part because the sectors cannot be stabilized. The sectorization of the legal field consumes the very attempt to rationalize and stabilize the discourse. The various sectors are not related in simple linear fashion, but rather through a multiplicity of different relations, including contradiction, antagonism, reinforcement, and repetition.” *Id.* at 1235.

189. *Id.* at 1241.

190. *See id.* at 1247.

191. Kelman, *supra* note 156, at 670–71.

Second, is it appropriate to conclude that law and politics are indistinguishable? It cannot be stated too emphatically: no. History and literature are different, just as law and politics are different. The stakes are different, the referents are different, the grammars are different, the rhetorics are different. But the differences between law and politics are closer to the differences between English and Arabic, rather than differences between fire and water.

D. International Law

Having established the basis of structuralism in semiotics, and the similar way in which structuralist interpretation complicates storied distinctions such as history/literature and law/politics, the discussion here pushes into a specific field of law, that of international law. To do so is not entirely new. Particularly in the 1970s and 1980s, structuralism was applied to a number of specific legal domains,¹⁹² including international law.¹⁹³

In the context of international law, a structuralist approach illuminates three chronic problems. The first problem concerns the tendency to regard international law as indistinguishable from politics or morality.¹⁹⁴ To suggest that international law is not really law at all is to make what we can call the “it’s all politics” mistake. This happens, for example, when scholars recount the many instances of interstate violence that have occurred since World War II and conclude that the prohibition on the use of force in the U.N. Charter is in “desuetude.”¹⁹⁵ Or, putting a different spin on the point, others suggest that the current use of drones is legal to the extent that it is in the interests of the great powers for it to be legal.¹⁹⁶ Of course, many might respond that this makes a

192. See, e.g., DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

193. See MARTTI KOSKENIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989); David Kennedy, *Theses About International Law Discourse*, in *GERMAN YEARBOOK OF INTERNATIONAL LAW* (1980).

194. For one recent example, see Oona Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252 (2011). This is probably the most familiar of all problems for international law, and for reasons that are offered with mind-numbing regularity. We are beginning to close in on two hundred years since the English philosopher John Austin first published his theory of law, and a hundred and fifty since international lawyers started freaking out about it. So the story goes, Austin expounded a view of law whereby “law” would come into being once a superior issued an enforceable command to an inferior. In the later decades of the nineteenth century, international lawyers started taking notice of the definition, and worried that because sovereign states have no superiors, international law was a façade.

The debate has gone back and forth ever since, with “realists” claiming international law to not be real law for one reason or another, and international lawyers defending law’s validity for reasons somehow invisible to the realists.

195. See MICHAEL J. GLENNON, *THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW* (2010).

196. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006).

mockery of international law as *law*, and that what these lawyers are describing is not law at all, but crude political muscle.¹⁹⁷

Rather than viewing international law as nothing but political cover, a second problem emerges in reverse. In this position, scholars believe in the availability of objectively correct legal solutions. Law is formally and functionally autonomous from politics.¹⁹⁸ International law is capable of generating correct resolutions to concrete problems, and reasonable people of varying persuasions can agree on what counts as a correct resolution and what is not. Thus, we could take the example of the well-known drone strike that killed Anwar al-Awlaki, and claim in good conscience that the fact of its legality *preceded* the adjudication.¹⁹⁹ We might say, pursuing this example further, that the armed conflict with al Qaeda, if it exists anywhere, *does not* extend to Yemen, and as a consequence the relevant legal framework for adjudicating the drone strike was human rights law. Under human rights law, as this view would have it, the particular attack on al-Awlaki, riding along through the Yemeni desert, was flatly illegal. This second problem therefore involves the unproblematic view of a strictly autonomous law, sealed off from political or ideological influence.

As we have seen already, these two problems have to do with our interpretive practice. They are problems about how the judge finds the relevant facts, frames those facts, and pushes them into the work of legal reasoning. A third problem, however, involves a more specific issue of interpretation in the special context of international law. It is a commonplace in the international law community to situate debates between those in favor of sovereignty and those in favor of some other more progressive position like peace or human rights. In these debates, the sovereign position is suggested to have some sort of determinate meaning, just as the peace position is expected to have one as well. So we see “sovereignty versus human rights,” or “sovereignty versus peace,” or sovereignty versus some other nonsovereign norm. It is a real mistake, however, to think that an argument in favor of sovereignty necessarily means anything about peace or rights, just as it is a mistake to think that it could lead to a position on the legality of drone strikes. It is a mistake because an argument in favor of sovereignty does not necessarily lead to anything at all. I come back to this in my description of the “statist” orientation below.

To summarize, the three problems are these. First, there is the “pragmatist” judge targeted by Dworkin in *Law’s Empire*.²⁰⁰ The judge convinced of this perspective does not believe that international law is really law at all, and

197. Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006).

198. For a recent and interesting take, see JEAN D’ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW* (2011).

199. Among the most systematic illustrations of this is Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Regulation of Lethal Force*, 13 Y.B. INT’L HUMANITARIAN LAW 3 (2010).

200. DWORKIN, *supra* note 1, at 151–75.

that it is all just politics. Second, there is Dworkin's "positivist,"²⁰¹ faithfully believing in the text of international rules as formally logical and coherent, and fully capable of resolving concrete disputes. The meaning is waiting in the text, and the politics of a given interpretive practice is, or should be, irrelevant. Third, there is the view that when positivists and pragmatists actually go about adjudicating an international law claim, they will tend to choose from relatively determinate positions about sovereignty, human rights, and so on. In this view, the human rights advocate will pray for the judges to avoid the sovereignty position, since they know that it will not bode well for their defense.

From a structuralist perspective, these three problems are not really problems so much as they are mistakes. Each view of the way judges go about interpreting the legal material in an international law case is wrong. With respect to the first problem of whether international law is really law, consider for a moment the seemingly random question, "Is Amharic a language?" Amharic is the official language of Ethiopia, but it is little known in many parts of the world, including the United States, Europe, and Asia. Its effects are arguably of little consequence for those people that have never heard of it, as well as for those that know of it but have never heard it spoken or know how to speak it. But is any of this relevant to the question of whether Amharic is a language? Your gut reaction is likely that these considerations are irrelevant, and that if we want to know the answer, we need to know something about the conventional methods we use for defining a language, and then look to see if Amharic meets that definition. Amharic, Arabic, Chinese, and English may be called "languages" because they share the basic constitutive elements of language.²⁰²

Similarly, in addressing the "it's all politics" problem and the suspicion that international law is really only international politics, the legal structuralist asks instead, "is international law a language-system?" She could ask the same of contract law, antitrust law, or constitutional law. The structuralist looks for a basic syntax, a working lexicon, explanatory modes, narrative models, and recurring tropes.²⁰³ If we find these elements in the discourse of international law—the manner in which the very large global community of international law scholars, judges, and practitioners *speak/write* international law—then yes, international law is a language-system. There is a discourse of international law, just as there is a discourse of constitutional law, and so on. On this view, it is a mistake to belabor the question of whether international law is really law, whatever that might mean. The better and more relevant question is whether international law is a functioning language-system, and the best answer is that it is.

There is a separate question lurking here about the social impact of a particular language-system, just as we might ask of the impact of Amharic. If the effects of international law or contract law or some other field of law are deemed

201. *Id.* at 114–50.

202. Of course, the basis of language will itself be contested. For one recent treatment, see JOHN SEARLE, MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION (2009).

203. *See infra* notes 100–49.

negligible, then we have entered a conversation about the social meaning of that language-system, but not one about whether the field is constituted as a language-system in the first place.²⁰⁴ When commentators suggest that international law is not really law, they are implicitly conflating these two conversations, suggesting that in order to “really be law,” a legal system must satisfy some set of social purposes, having some particular social effect. They are looking for international law’s efficacy in a sociological evaluation of a given place and time.²⁰⁵ “International law was not followed here; it had no impact there.” To be sure, these issues are essential, and I do not want to be understood as suggesting that we should ignore questions about law’s social role. Indeed, it is critical that we bring attention to those places where international rules are not followed, or appear out of sync with the interests and needs of people and power, or advantage the wealthy at the expense of the subordinated. But for every account of international law’s lack of effectiveness, there are contrary accounts of its power. It is a very messy business making claims about whether a legal system is or is not having a particular social effect or realizing some special purpose. It is also a different business than establishing the semiotic basis of a legal structure.

The bottom line is that the apparently unstoppable desire to ask whether international law is really law consistently fails to see that the distinction between “the law in action” and “law in the books” is a distinction made possible by the language of international law. A popular rhetorical move is to criticize international law’s effectiveness, just as it is a popular countermove to defend international law’s effectiveness. Bracketing questions about international law’s capacity to meet certain social needs, the structuralist interrogates the interpretive orientations and the constitutive grammar that motivate these recurring rhetorical forms. The question for the structuralist is not about the correspondence between the legal system and the real world (as if they were different things), but it is about the way in which the grammar of the legal system sets the rules for the forms in which we go about talking about things like correspondence. On the structuralist view, international law is just as much law as any other legal field similarly constituted as a language-system, just as Amharic is as much a language as any other.

Thus, for the legal structuralist, the “it’s all politics” problem is actually just a mistake. The point is neither that international law is *in fact* really law, nor that it is only politics. The point is that this is simply an unhelpful way of even getting at the meaning and merit of international law. Further, by stressing the

204. While Raz does not draw this distinction himself, his well-known essay on the rule of law establishes the common view that in order for law to be valid we need to know something of its social effects. “Regarding the rule of law as the inherent or specific virtue of law is a result of the instrumental conception of law. The law is not just a fact of life. It is a form of social organization which should be used properly and for the proper ends. It is a tool in the hands of men differing from many others in being versatile and capable of being used for a large variety of proper purposes The law to be law must be capable of guiding behavior, however inefficiently.” Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. REV. 195, 208 (1977).

205. See generally ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009).

langue generating the forms of international legal argument, the structuralist speaks to the very thing worrying the “law is just politics” people: When viewed as a language-system, it becomes clear that judges are actually quite deeply constrained by the legal structure in which they are operating. The fears that international law is susceptible to an “anything goes” mentality vanish when we consider the powerfully constraining nature of the legal structure.

Now, in addressing the second problem of formally autonomous law, the structuralist does an about-face, shifting from an emphasis on *langue* to *parole*. In this case, the judge believes that the text holds all the power, and that international law is really law like any other field, in a strong ontological sense. For the structuralist, in contrast, it is conceded that the grammar governs much in terms of the style in which the judge fashions her rhetoric, but it must also be emphasized that the substance of *what is said* is highly discretionary. Again, so long as the grammar is obeyed, the legal speaker can say just about whatever he wants. The answer to a question about the legality of drone strikes most certainly does not lie in the text. In the end, the answer lies in the judge’s own discretion (though, as the structuralist has already counseled, this discretion is nevertheless highly disciplined by the structural constraints of the grammar and the rhetoric).

As for the third mistake, the structuralist stresses how these highly constraining and highly discretionary aspects of the language of international law unite in the subsystem of sovereignty. As will be discussed below, sovereignty operates at a number of levels in the discourse of international law. At a deep tropological level, the language of sovereignty provides the speaker with an orientation toward the legal materials. This judge will move toward the question, whatever it might be, with a general expectation that the sovereign will be an important part of the story. The story may ultimately be explained as an argument about the right of the sovereign to independence and integrity, or the right of a sovereign to self-defense. There is a cascade of rhetorical moves that will rain down before the judge moving from such an orientation, but what will not confront the judge is a ready-made view of sovereignty in relation to the question at hand. Sovereignty may equip the judge with orientations, grammars, and rhetorical patterns, but it will definitely not tell him whether a drone strike was legal under international law. Nor would peace or human rights or communitarianism. In each case, the judge is oriented toward the language in a particular way, and as a result, is highly constrained by that orientation. But the orientation only constrains the form of the argument. Semiotics never asks *what* a legal rule means; it asks *how* the rule means.

II. THE LAW OF KILLING

In this Part, I build off of the discussion of international law in the last Section and apply the structuralist perspective to the example of the new drone wars, and, more particularly, the emerging law of killing.

But first, a little background. Under the watch of the Obama Administration, the United States has transformed the much-maligned “War on

Terror” into an eerie campaign of machine versus man.²⁰⁶ In contrast to increasingly outdated deployments of piloted aircraft and ground troops, the United States now utilizes a fleet of weaponized robots in the hunt for suspected terrorists.²⁰⁷ Colloquially known as drones, these unmanned aerial vehicles range from the Reaper—the largest, fastest, and most heavily armed of the U.S. drone fleet—to microdrones the size of insects.²⁰⁸ The impact on the “War on Terror” has been staggering.²⁰⁹

At the turn of the twenty-first century, the U.S. government’s use of unmanned aerial aircraft in its global campaign against suspected terrorists was little known and relatively infrequent.²¹⁰ During the Bush years, there were close to fifty drone strikes accounting for about 400 dead.²¹¹ After President Obama took office, things changed.²¹² In the first two years of President Obama’s administration, the U.S. initiated four times as many drone attacks as it had during

206. See, e.g., Jo Becker & Scott Shane, *Secret Kill List Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, at A1; Daniel Klaidman, *Drones: The Silent Killers*, NEWSWEEK (May 28, 2012), <http://www.thedailybeast.com/newsweek/2012/05/27/drones-the-silent-killers.html>; Noura S. Erakat, *New Imminence in the Time of Obama: The Impact of Targeted Killings on the Law of Self-Defense*, 56 ARIZ. L. REV. 195, 197 (2014) (discussing how, every Tuesday, President Obama and his advisers review slides of terrorism suspects and determine who poses an imminent threat and should be targeted for killing).

207. *Drone Wars Pakistan: Analysis*, NEW AM. FOUND., <http://counterterrorism.newamerica.net/drones> (last visited Jan. 23, 2014).

208. Elizabeth Bumiller & Thom Shanker, *War Evolves with Drones, Some Tiny as Bugs*, N.Y. TIMES, June 19, 2011, at A1; *Pentagon Helps Build Meshworm Reconnaissance Robot*, BBC NEWS (Aug. 9, 2012), <http://www.bbc.com/news/technology-19200285>.

209. On the terrifying and human aspects of drone warfare, see Pir Zubair Shah, *My Drone War*, FOREIGN POL’Y (Mar. 8, 2012), http://www.foreignpolicy.com/articles/2012/02/27/my_drone_war. See also Peter L. Bergen, *Warrior in Chief*, N.Y. TIMES, Apr. 28, 2012, at SR1; Daniel Byman, *Al Qaeda’s Terrible Spring*, FOREIGN AFFAIRS (May 24, 2011), <http://www.foreignaffairs.com/articles/67864/daniel-byman/al-qaedas-terrible-spring>; Jonathan Master, *Targeted Killings*, COUNCIL ON FOREIGN RELATIONS (Apr. 30, 2012), <http://www.cfr.org/counterterrorism/targeted-killings/p9627>.

210. See Greg Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing*, WASH. POST (Dec. 27, 2011), http://www.washingtonpost.com/national/national-security/under-obama-an-emergine-global-apparatus-for-drone-killing/2011/12/13/gIQANPdILP_story.html.

211. *Id.*

212. David Rohde, *The Obama Doctrine*, FOREIGN POL’Y (Mar. 13, 2012), http://www.foreignpolicy.com/articles/2012/02/27/the_obama_doctrine (“[T]echnology has enabled Obama to become something few expected: a president who has dramatically expanded the executive branch’s ability to wage high-tech clandestine war. With a determination that has surprised many, Obama has embraced the CIA, expanded its powers, and approved more targeted killings than any modern president. Over the last three years, the Obama administration has carried out at least 239 covert drone strikes, more than five times the 44 approved under George W. Bush.”). For the numbers, see *Drone Wars Pakistan: Analysis*, NEW AM. FOUND., <http://counterterrorism.newamerica.net/drones> (last visited Jan. 23, 2014).

the entire eight years of the Bush Administration.²¹³ As the *Washington Post* has reported, the Obama Administration's "global apparatus for drone killing"²¹⁴ had grown to include dozens of secret facilities in the U.S., North Africa, and the Arabian peninsula.²¹⁵ Further, while "[o]ther commanders in chief have presided over wars with far higher casualty counts . . . no president has ever relied so extensively on the secret killing of individuals to advance the nation's security goals."²¹⁶

The shift in President Obama's approach has not been merely quantitative. Proponents of the drone wars claim the impact on al Qaeda's leadership is "undeniable."²¹⁷ *Scientific American* reports that no other single advance in military technology has had the kind of effect as the drone program,²¹⁸ and there is a great sense that the drones have pushed the odds in favor of the U.S. in its fight against al Qaeda.²¹⁹ In his moving report on the drone war, Pir Zubair Shah recounts two Taliban fighters bemoaning the fact that the drones "had changed everything for al-Qaeda and its local allies."²²⁰ As Moisés Naím has stated, drones present an "innovation that has drastically altered the course of war."²²¹

Hovering over all of this is the controversial question of whether the drone wars are legal, a question about which the President seems deeply interested.²²² Specifically, the question turns on whether it is lawful for the United

213. Peter Bergen & Katherine Tiedemann, *Washington's Phantom War: The Effects of the US Drone Program in Pakistan*, FOREIGN AFFAIRS (July/Aug. 2011), available at <http://www.foreignaffairs.com/articles/67939/peter-bergen-and-katherine-tiedemann/washingtons-phantom-war>.

214. Miller, *supra* note 210.

215. Craig Whitlock & Greg Miller, *U.S. Assembling Secret Drone Bases in Africa, Arabian Peninsula, Officials Say*, WASH. POST (Sept. 20, 2011), http://www.washingtonpost.com/world/national-security/us-building-secret-drone-bases-in-africa-arabian-peninsula-officials-say/2011/09/20/gIQAJ8rOjK_story.html. On February 5, 2013, it became public that the United States had established a drone base in Saudi Arabia. Robert F. Worth, Mark Mazzetti & Scott Shane, *Drone Strikes' Risks to Get Rare Moment in the Public Eye*, N.Y. TIMES, Feb. 5, 2013, at A1.

216. Whitlock & Miller, *supra* note 215.

217. *Id.*

218. Larry Greenemeier, *The Drone Wars: 9/11-Inspired Combat Leans Heavily on Robot Aircraft*, SCI. AM. (Sept. 2, 2011), <http://www.scientificamerican.com/article.cfm?id=post-911-military-tech-drones>.

219. See, e.g., P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY (2009); Daniel Byman, *Terrorism After the Revolutions: How Secular Uprisings Could Help (or Hurt) Jihadists*, 90 FOREIGN AFFAIRS 48, 53 (2011).

220. Shah, *supra* note 209.

221. Moisés Naím, *Drones and IEDs: A Lethal Cocktail*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 8, 2012), <http://carnegieendowment.org/2012/03/08/drones-and-ieds-lethal-cocktail/a1gt>.

222. On February 4, 2013, NBC News released a Justice Department White Paper titled, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force" (White Paper). Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans*, NBC NEWS

States to send drones into the territory of foreign sovereigns with the intent of killing targeted individuals, including U.S. citizens.²²³ A Special Rapporteur to the United Nations recently defined the law of killing as involving “the intentional, premeditated, and deliberate use of lethal force, by states or their agents acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”²²⁴ Somewhat surprisingly, as recently seen in the leak of a Department of Justice White Paper²²⁵ and in a major speech on counterterrorism from the President,²²⁶ the Obama Administration has attempted to justify its drone campaign under international law in a way that the Bush Administration had never done for the War on Terror.²²⁷ For President Obama, and unlike for President Bush,²²⁸ there

(Feb. 4, 2013), http://openchannel.nbcnews.com/_news/2013/02/04/16843014-exclusive-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite. The White Paper suggests that the United States is legally justified to kill in such a scenario under what I call in this Article, the “Charter Wartime” framework. See U.S. DEP’T OF JUSTICE, *LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 2* (2013) [hereinafter WHITE PAPER].

223. This literature is growing fast. For very recent treatments, see, e.g., TARGETED KILLINGS, *supra* note 24; Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365 (2012); Utah Law Review Symposium, *The Legal and Ethical Limits of Technological Warfare* (Feb. 1, 2013), <http://today.law.utah.edu/wp-content/uploads/2012/12/Symposium-Agenda.pdf>.

224. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶1, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston).

225. WHITE PAPER, *supra* note 222.

226. Barack Obama, *The Future of Our Fight Against Terrorism*, (May 23, 2013), <http://www.lawfareblog.com/2013/05/text-of-the-presidents-speech-this-afternoon/>.

227. Eight years after al Qaeda killed 3,000 Americans on September 11, 2001, the War on Terror came to an end. See, e.g., Dana Priest, *Bush’s ‘War’ on Terror Comes to a Sudden End*, WASH. POST (Jan. 23, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/22/AR2009012203929.html>. Of course, al Qaeda did not end, nor did the U.S. effort to kill and capture suspected terrorists. What did change, however, was a significant rhetorical shift whereby the War on Terror slogan was exchanged for “the armed conflict with al Qaeda and associated forces.” See Mark V. Vlasic, *Assassination & Targeted Killing—A Historical and Post-Bin Laden Legal Analysis*, 43 GEO. J. INT’L L. 259, 316 (2012); Eric Holder, Attorney General, Address at Northwestern University School of Law with Remarks Regarding Targeted Killing (Mar. 5, 2012); Jeh Charles Johnson, General Counsel of the Department of Defense, Address at Yale Law School: National Security, Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012). While the shift seems trivial, the Obama Administration’s preference for “armed conflict” with nonstate actors invites reasoned legal analysis in a way that was unavailable in the Bush Administration. The International Committee of the Red Cross explains that “[n]on-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.” International Committee of the Red Cross, *How Is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?* 5 (Mar. 17, 2008), available at <http://www.icrc.org/eng/resources/>

appears to be a genuine interest in making U.S. counterterrorism policy legally justifiable, and not merely palatable on the grounds of *raison d'état*.²²⁹

In order to illustrate a structuralist approach to this issue of whether drone strikes are legal, the discussion here in Part II relies upon a sharp distinction between four intellectual orientations and two explanatory frameworks. Drawing on the review of their work from above, the analysis below begins in Section A by pressing Mark Kelman and Pierre Schlag's writing on interpretive constructs and "intellectual orientations" onto the field of combat. I suggest that there are four dominant orientations toward the legality of drone strikes: (1) realism;²³⁰ (2) individualism;²³¹ (3) communitarianism;²³² and (4) statism.²³³ As I have described above, by "orientation" I mean that these interpretive positions are

documents/article/other/armed-conflict-article-170308.htm. For critiques of the way in which the War on Terror rhetoric displaced the role of law, see Philip Alston et al., *The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"*, 19 EUR. J. INT'L L. 183 (2008); Heinz Klug, *The Rule of Law, War, or Terror*, 2003 Wis. L. Rev. 365; Mary Ellen O'Connell, *When Is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT'L & COMP. L. 535 (2006).

228. Jack Goldsmith, for example, recently stated in a *New York Times* editorial that "[d]rone strikes against terrorists outside of so-called hot battlefields like Afghanistan have become commonplace during the Obama presidency, and have reportedly decimated the leadership of Al Qaeda and its affiliates This fateful new step in our ever-expanding war against terrorists—intentionally killing an American citizen—is fraught with the danger of executive overreach or mistakes. But the Obama administration has done an admirable job to date of balancing these potential dangers against security imperatives." Jack L. Goldsmith, *A Just Act of War*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/2011/10/01/opinion/a-just-act-of-war.html?_r=3&ref=opinion; see also Jack L. Goldsmith, *Fire When Ready*, FOREIGN POL'Y (Mar. 19, 2012), http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready. As Kenneth Anderson has said, "[t]he Predator drone strategy is a rare example of something that has gone really, really well for the Obama administration." Kenneth Anderson, *Predators over Pakistan*, 15 WKLY. STANDARD 26, 26 (2010).

229. President Obama's transparency may, of course, be criticized for not being nearly transparent enough. See INTERNATIONAL AND HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC (STANFORD LAW SCHOOL) & GLOBAL JUSTICE CLINIC (NYU SCHOOL OF LAW), *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN* 123–24 (2012).

230. For an influential account of realism in international relations theory, see KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

231. My use of "individualism" is meant to indicate a preoccupation with the individual human being as the primary unit of social analysis. See, e.g., Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 4 INT'L ORG. 513 (1997).

232. Though I think communitarian works like Michael Sandel's *Democracy's Discontent* are relevant here, I more specifically have in mind the approach of scholars like James Brown Scott and Oscar Schachter. See generally MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1998); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984).

233. See, e.g., GOLDSMITH & POSNER, *supra* note 196.

tropological, largely unconscious, and prefigurative.²³⁴ Armed with an intellectual orientation of this sort, the judge tasked with determining the legality of a drone strike will answer the question through the use of an interpretive construct giving him signals about how to organize the field of materials, how to distinguish important from peripheral questions about the scope of the facts, and how to conceive of the relevant legal frameworks from the not-so-relevant ones. Our judge is in precisely the position of White's historian.

The orientations prefigure the field of legal materials in such a way that a judge will be more or less inclined to veer toward a certain kind of explanatory narrative. As discussed below in Section B, in the context of the law of killing there are usually two. The first is "Charter Wartime,"²³⁵ which includes the special rules (*lex specialis*)²³⁶ prescribed by the U.N. Charter (*jus ad bellum*) and international instruments like the Geneva Conventions to regulate armed conflicts (*jus in bello*). Usually known as "humanitarian law"²³⁷ and sometimes referred to as "the hostilities paradigm,"²³⁸ these international rules are conventionally understood to govern armed conflicts between sovereigns, as well as conflicts that may take place in a single territory between a government and opposition forces. Notably, the Charter Wartime framework has the advantage of suspending the laws of "normal life." When this framework is turned on, sovereigns may use force in ways that are impermissible otherwise. Thus, for an arguer with a disposition to justify a drone strike, it is highly desirable to make her way into the explanatory narrative of Charter Wartime. Why would one have such a disposition or orientation? It could be for many reasons, and as discussed above, it may very well be unconscious, or it could be that the arguer feels that this is the most appropriate framework on the merits. For others, the decision may be strategic, but the present point is simply this: *All* arguers bring an orientation to the legal materials, whether they know it or not.

234. See *supra* notes 145–46 and accompanying text.

235. See *infra* notes Part II.B.

236. According to Melzer, "[s]ince many (but not all) values protected by [international humanitarian law] are also protected by human rights law, and since IHL and human rights law apply simultaneously in situations of armed conflict, the question arises as to what extent human rights law influences the regulation of the conduct of hostilities. As a general rule, the role of human rights law in regulating the conduct of hostilities is very limited because it is superseded by IHL according to the principle of *lex specialis generalibus derogat*. Where the *lex specialis* of IHL provides a rule designed for a concrete situation it takes precedence over the continuously applicable *lex generalis* of human rights, regardless of whether that rule is more or less precise." NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 382 (2009).

237. International humanitarian law is associated with the rules of fighting, and not the question of whether it was permissible to fight in the first place. The former question is associated with the *jus in bello*, while the latter is called the *jus ad bellum*.

238. Melzer argues that it is a mistake to conflate the "hostilities" paradigm with humanitarian law, as humanitarian law often regulates conduct outside of strict designations of hostilities. I have no quarrel with this, but the point has little effect on the way I am using the frameworks in this analysis. MELZER, *supra* note 236, at 81–82.

The second explanatory framework is Charter Peacetime,²³⁹ which includes the general rules (*lex generalis*) prescribed by the U.N. Charter and international instruments like the International Covenant on Civil and Political Rights to regulate the interactions between governments and individuals. Usually associated with “human rights law” and sometimes referred to as “the law enforcement paradigm,”²⁴⁰ these are the domestic and international rules constraining government action in its pursuit of criminals. One extensive area of debate is whether suspected terrorists should be treated like criminals, in which case governments would be restricted by human rights law in the amount and degree of force they can use, or like soldiers, in which case they may justifiably be killed in many sorts of circumstances. For an arguer looking to conclude that drone strikes are often illegal, the Charter Peacetime framework is usually preferred because there is far less leeway for sovereigns to kill under human rights law than there is under the laws of war.

Although I do not believe that any single interpretive orientation necessarily leads the judge to one explanatory framework, there do seem to be elective affinities in play. These affinities seem apparent in the context of the communitarian and individualist orientations, leading the judge to the jurisprudence of the International Court of Justice (ICJ) and international human rights law. It also seems apparent in the realist orientation, leading the judge away from international law and toward domestic law. In the case of the statist orientation, however, the judge seems caught up in a piece of metaphorical schizophrenia.

A. Four Interpretive Orientations

In light of the discussion of interpretive orientations from above, there are at least four orientations that might prefigure a judge’s approach to the legality of a drone strike. I label these orientations realism, communitarianism, individualism, and statism.²⁴¹

Recall that an interpretive orientation is usually unconscious, and acts like a sort of deep lens the judge uses to prefigure the field of materials that needs to be organized and explained in the form of a narrative argument.²⁴² Once again, Kelman’s description is helpful:

[Interpretive] constructs are sometimes unconscious techniques of sorting out legal material and are sometimes consciously held political or philosophical beliefs, although even the consciously held

239. See *infra* notes 306–32.

240. MELZER, *supra* note 236, at 81–82.

241. I will not highlight this point moving forward, but there do seem to me to be direct linkages between these interpretive orientations and White’s analysis of tropes. Communitarianism suggests the use of synecdoche, individualism suggests the use of metonymy, and statism suggests a blending of metonymy and metaphor. The structuralist mode of organizing the field, which I am using here, suggests irony.

242. Tropes orchestrate *parole*. KAJA SILVERMAN, *THE SUBJECT OF SEMIOTICS* 87 (1984).

beliefs function so that the users seem unaware of them Legal argument can be made only *after* a fact pattern is characterized by interpretive constructs. Once these constructs operate, a single legal result seems inevitable, a result seemingly deduced on general principle. These constructs appear both in conscious and unconscious forms in standard legal discourse.²⁴³

As White explained, such interpretive orientations “are paradigms of the operations by which consciousness can prefigure areas of experience that are cognitively problematic in order to subsequently submit them to analysis and explanation. That is to say, in linguistic usage itself, thought is provided with possible alternative paradigms of explanation.”²⁴⁴ Also, recall that while the interpretive orientation is powerfully constraining in its ability to direct the judge in certain directions rather than others, these constraints are purely about form. An interpretive orientation governs the style in which the narratives will be built; it has little if anything to do with the substantive conclusions the judge will reach. Despite this formal quality, however, it is critical to remember just how substantive form can be.

1. Realism

A realist orientation toward the field of international law may take any number of forms. In both the communitarian and individualist positions described below, the jurist prefigures the field in the way that he does very likely because he believes that international law is most realistically understood in the terms of that orientation. Thus, it is common to hear comments like: “Reality is best served through sustained attention to the needs of the international community!” “No, a realistic assessment of global welfare must begin with the protection of human rights!” And so on. One scholar’s realism is another scholar’s utopia.

In the practice of international lawyers, however, realism has the most conspicuous cache among those scholars that dismiss the reality of international law altogether.²⁴⁵ In this view, realism recommends avoiding international law and bringing focus to the loci of actual power, which has always been and always will be domestic.²⁴⁶ International law, it turns out, is a mirage, and thus an evaluation of the legality of drone strikes should be limited to an analysis of U.S. law. Consequently, this realist orientation is unlikely to lead the arguer to legal frameworks operating at the global level, and will probably carry her instead to U.S. constitutional law, administrative law, or the law of extraterritorial jurisdiction. This typically unpacks in analyses of U.S. prohibitions on

243. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 592–93 (1981).

244. WHITE, *METAHISTORY*, *supra* note 34, at 36.

245. For the initial break with international law and the beginning of a more realistic view of international relations, see E.H. CARR, *THE TWENTY YEAR CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (1964); GEORGE KENNAN, *REALITIES OF AMERICAN FOREIGN POLICY* (1954); HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1948).

246. See CARR, *supra* note 245.

assassinations,²⁴⁷ congressional authorization on the use of military force after 9/11,²⁴⁸ and whether due process requirements attach to CIA and U.S. military forces when they kill people outside of U.S. territory and who were never in U.S. custody.²⁴⁹

The discussion in the rest of this Article brackets this orientation about the irrelevance of international law, but not because legal frameworks dealing with the Authorization to Use Military Force (AUMF) and the U.S. Constitution are any less important than the ones canvassed below. I bracket it because it leads to a singular focus on domestic frameworks—an orientation that excludes global law from the relevant vocabulary.²⁵⁰

247. This discussion falls under the ban on “assassination,” dating to Senate investigations in the 1970s regarding the reported activities of CIA agents. The results of the investigation called for a statutory ban on the participation of U.S. agents in assassination attempts abroad, but President Gerald Ford instead issued an executive order. Outside the context of war, the basic contours of the idea were that U.S. agents were prohibited from targeting and killing individuals in foreign territory for politically motivated reasons. While the order made assassination illegal, it also left the question open as to what might fall within the porous borders of the concept. There is a distinct prohibition in the context of war. For discussion, see MELZER, *supra* note 236, at 45–51; William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 717–26 (2003); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SEC. J. 145 (2010); Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 50 Debate*, 5 J. NAT’L SEC. L. & POL’Y 539 (2012); John C. Dehn & Kevin Jon Heller, *Debate, Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175 (2010); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 450 (2009); Vlasic, *supra* note 227, at 45–51.

248. See Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447 (2011).

249. Richard Murphy and Afsheen John Radsan have argued that the Supreme Court’s recent decisions in “Hamdi/Boumediene suggests a sound model for judicial control of targeted killings under which courts, applying duly deferential standards, might—on rare occasions—determine the legality of attacks after they occur. Due process requires at least this minimal level of judicial control.” Murphy & Radsan, *supra* note 247, at 450. They are also keen at the same time to limit judicial intervention. “Given the limited role of courts in national security, it is imperative for the executive to develop internal procedures to ensure accuracy of targeted killings and accountability for the officials who order them. Both the Supreme Court of Israel and the European Court of Human Rights have ruled that targeted killings conducted in counter-terrorism operations must receive close, independent review *within* the executive branch. We explain why due process demands the same of American authorities. If the CIA has not already done so, it should put these procedures in place to help bring Predator strikes within the rule of law.” *Id.*

250. Nevertheless, despite the lack of attention I give to this orientation, its style is apparent. If you identify an arguer with a realist orientation, there is a good chance she will be attracted to the frameworks mentioned above.

2. Communitarianism

The way of prefiguring the field of international legal materials that I am calling “communitarian” emphasizes a whole/particular dichotomy which tends to privilege the whole.²⁵¹ In this position, the jurist understands the world as an organic totality essentially defined by its universalism rather than its particularity. The communitarian position does not reject the particular, nor deny that individualism is critically important. It is rather that the nature and function of the particular can best be understood in its relation with other particulars, and in the overall context of the whole. Thus, this mode of prefiguration is integrative rather than reductive: The jurist organizes the field of international law by understanding it first as a field of connections, ultimately defined as an international community. The welfare of the particulars (i.e., states, multinational corporations, nongovernmental organizations, individuals) is seen as a function of the welfare of the community.

In the context of international law, a communitarian orientation may lead a jurist to identify particular international organizations with the community. For some, the international community may be best reflected in the World Trade Organization, who will consider the rules and jurisprudence of that institution as especially important in organizing international relations.²⁵² Others might have more allegiance to the ICJ and the United Nations General Assembly,²⁵³ while others still might frame the international community in Emmanuel Wallerstein’s conception of core and periphery.²⁵⁴ In such a case, the peripheral and semiperipheral community is perceived as the real “international community,” and the field of international law is prefigured accordingly.²⁵⁵

251. The communitarian orientation therefore has much in common with the trope of synecdoche: There are “qualitative relationship[s] among the elements of a totality—it is integrative rather than reductive. Unlike the Metonymical expression ‘fifty sail,’ used as a figure for ‘fifty ships,’ it is meant to signal not simply a name change but a name change designating a totality . . . which possesses some quality . . . that suffuses and constitutes the essential nature of all the parts that make it up. As a Metonymy, it suggests a relationship among the various parts of the body which is to be understood in terms of the central function of the heart among those parts. As a Synecdoche, however, the expression suggests a relationship among the parts of the [unity], considered as a combination of physical and spiritual attributes, which is qualitative in nature and in which all of the parts participate.” WHITE, *METAHISTORY*, *supra* note 34, at 36.

252. The work of Ernst-Ulrich Petersmann comes to mind. *See, e.g.*, ERNST-ULRICH PETERSMANN, *INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS* (2012).

253. *See, e.g.*, Manley O. Hudson, *The Permanent Court of International Justice*, 35 HARV. L. REV. 245 (1922).

254. *See* IMMANUEL WALLERSTEIN, *THE MODERN WORLD SYSTEM I: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY* (1974).

255. For an illustration, see Arnulf Becker Lorca, *Rules for the ‘Global War on Terror’: Implying Consent and Presuming Conditions for Intervention*, 45 NYU J. INT’L L. & POL. 1, 12–13 (2012).

The communitarian orientation is not required to understand the global totality in any of these terms; rather, it is a way of prefiguring the field that is enamored with the idea of international community, but when it comes to defining the meaning of community—choosing which community is really the international one—the communitarian orientation is indeterminate. The communitarian orientation, like the ones that follow, is only an organizing mechanism. It is not a blueprint for legal argument, but rather a means for signaling to the jurist what will be the most desirable form that the argument might take.

3. *Individualism*

In this third interpretive orientation, the jurist prefigures the field of international law by adopting a preference for the particular rather than the whole.²⁵⁶ It is not that the individualist denies the value of thinking in terms of the international community, as the realist might. It is perfectly plausible, and quite common I think, for a jurist prefiguring the field in this way to believe in the desirability of both individual flourishing and a robust international community. But the point is that the individualist understands the welfare of the whole—of the community—as a necessary effect of the welfare of the individual human being, rather than focusing solely on the international community, as does the communitarian. Community is essentially reduced to the individual, and references to human rights are used as a way of referencing the global community.²⁵⁷ Thus, when jurists evoke the whole of the global law of killing through reference to Anwar al-Awlaki, this is a mark of organizing the field in a whole/particular relation that uses the particular as a substitute for the whole.²⁵⁸ This is the sensibility that instructs us to see sovereign states and international organizations as just so many individuals, and that at the bottom of all things is the morally autonomous and crucially important figure of the individual person.

Again, this interpretive orientation organizes the form of international legal argument for the jurist in such a way that it privileges the particular against the whole, but it does not tell the jurist anything about how to define or evaluate individual rights. However, it does assist the jurist in establishing that the individual will be the place to begin and orient her approach to the argument.

4. *Statism*

In the interpretive orientation I am identifying as statism, the jurist prefigures the field in two steps. Initially, this position looks a lot like the individualist position: It looks out at international law and reduces that system to the priority of the sovereign state. Thus, unlike the integrating mode of the communitarian position, the statist conceives the world in whole/particular terms, where the whole is benefited when the particular is benefited. But unlike the

256. See WHITE, *METAHISTORY* *supra* note 34, at 34.

257. See *id.* at 35.

258. See CHANDLER, *supra* note 35; ANTHONY WILDEN, *THE RULES ARE NO GAME: THE STRATEGY OF COMMUNICATION* 198 (1987).

reductive mode of individualism, the statist conflates the particular with the state, rather than the human being.

The statist prefiguration, however, does not simply substitute the individual for the state. In this mode's second step, it empowers its interpretation by analogizing the state directly with the individual. The statist mode is therefore representational in character in a way that neither the communitarian nor the individualist orientations are. In those orientations, the community and the individual are given priority due to their ontological status. The community is the orienting concept because it is the true universal; the individual is the orienting concept because it is the true particular. They are the *real*. But the sovereign state is identified as the key organizing concept in the statist position due to a metaphor: The sovereign state enjoys privileged status in the international order because it is analogized to the rights individuals enjoyed in a hypothesized state of nature. A deep and unwavering similarity is posited between the state and the individual, empowering the state with rights that are individual in origin, despite the understanding that the similarity is only figurative.²⁵⁹ The state is never reduced to the individual; it is analogized to the individual.²⁶⁰

Even if we have identified a judge's tropological prefiguration of the field in either the terms of communitarianism or individualism, we still cannot know how the judge will ultimately decide to make his argument. We only know something about the form the argument is likely to take. The communitarian and individualist orientations are more likely to lead the jurist toward the Charter Peacetime framework. It is not that the judge will necessarily do so, but these orientations are more likely than not going to foreground the materials associated with the ICJ and international human rights law.

The statist orientation, in contrast, does not seem to have any elective affinities with either the Charter Peacetime or the Charter Wartime frameworks. Anticipating a bit the discussion to follow below, an orientation in favor of sovereign rights cuts powerfully in both directions. On one side, the statist orientation pushes the legal mind (through metaphor) toward the seminal importance of a state's natural and inherent right to self-preservation. This is quite different from the technical parsing of self-defense described below in the context of the ICJ's jurisprudence. It is instead the idea that sovereign states possess in international relations what individuals possess in a hypothetical state of nature: a right to life, and an attendant right to take whatever actions the person deems necessary to stay alive.²⁶¹ Self-preservation is completely subjective. There are no

259. See WHITE, *METAHISTORY*, *supra* note 34, at 34.

260. For a general discussion of how metaphors function in this way, see GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980).

261. Hobbes's version of the state of nature was constantly in the shadow of anarchy and violence, just as so many writers would later claim the international plane to be similarly situated. For Hobbes, "because the condition of Man . . . is a condition of Warre of every one against every one, in which case every one is governed by his own Reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies; It followeth, that in such a condition, every man has a right to every

niceties here, no ultimate limits about what a person is justifiably able to do if he perceives a real threat.²⁶² When international lawyers interpret Article 51 of the U.N. Charter as a right of self-defense that allows states to kill nonstate actors with few if any territorial restrictions, and without limitation as to how long they may continue to track down and kill these people—even decades—they are likely arguing from an orientation that draws an analogy between a classic sovereign right of self-preservation and individual rights in a state of nature.²⁶³ This is a powerful and basic international legal idea that has a pedigree centuries long, and which is certainly categorical to the foundations of the U.N. Charter itself.²⁶⁴ It is

thing; even to one another's body." THOMAS HOBBS, *LEVIATHAN* 63 (Seven Treasures Publ'ns 2009). This forms a fundamental law of nature: "By all means we can, to defend ourselves." *Id.* at 64. Following Hobbes, Vattel explained, "every nation is obliged to perform the duty of self-preservation." EMER DE VATTEL, *THE LAW OF NATIONS* 69 (Joseph Chitty & Edward D. Ingraham eds., 1883). "Since then a nation is obliged to preserve itself, it has a right to every thing necessary for its preservation. For the Law of Nature gives us a right to every thing, without which we cannot fulfill our obligation" *Id.* at 70. "A nation or state has a right to every thing that can help to ward off imminent danger, and keep at a distance whatever is capable of causing its ruin; and that from the very same reasons that establish its right to the things necessary to its preservation." *Id.* at 71.

262. See HOBBS, *supra* note 261, at 63–64; VATTEL, *supra* note 261, at 69–71. See also, C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (2011).

263. International lawyers have long been drawn to the "state of nature" construct, and Thomas Hobbes's own version of it has been especially influential. Writing in 1757, the immensely popular Emer Vattel claimed that "Hobbes was, I believe, the first who gave a distinct though imperfect idea of the law of nations This author has well observed, that the law of nations is the law of nature applied to states or nations." VATTEL, *supra* note 261, at ix. "Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, lived together in the state of nature,—*Nations* or sovereign states are to be considered as so many free persons living together in the state of nature." *Id.* at 52. Samuel Pufendorf was similarly smitten. SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 149–52 (2005).

264. For sample writings in the nineteenth century, see WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 278 (7th ed. 1917) ("In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation. Where law affords inadequate protection to the individual he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary; and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden, so soon as it can be proved that by it, and it only, self-preservation can be secured."); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 89–90 (Richard Henry Dana, Jr. ed., 1866) ("Of the *absolute* international rights of states, one of the most essential and important, and that which lies at the foundation of the rest, is the right of self-preservation. It is not only a right with respect to other States, but a duty with respect to its own members, and the most solemn and important which the State owes to them. This right necessarily involves all other incidental rights, which are essential as means to give effect to the principal end. Among these is the right of self-defense."). In terms of the Charter, and the ideology that generated its adoption, see GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 165–93 (2004).

an idea that belongs to a tradition that, in a different era, was known as natural law.²⁶⁵

There is, however, a second sovereign right that is equally powerful, with just as admirable a pedigree—in fact, precisely the same pedigree. Enshrined in Article 2(4) of the U.N. Charter and elsewhere is the canonical argument (again through metaphor) holding all sovereigns to be free and equal.²⁶⁶ In this view, the very definition of sovereignty is that a sovereign has the ultimate right to define within its own territorial borders its own political, economic, social, and cultural life story.²⁶⁷ Sovereigns have absolute and exclusive jurisdiction—all of them.²⁶⁸

265. Natural law does not exactly have a great reputation today, and I do not mean to suggest that the sovereign rights orientation I am describing here is a purely natural law conception, or even that it is at odds with positivism. My point is merely that international lawyers have long argued for an analogy between individual rights and sovereign rights, and that arguments are named differently as a matter of when in time they are being argued. Today, what is sometimes called a “naked” right of self-defense may have at another time been called a “natural” right. For a typical critique, see Michael Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 941–46 (2005).

266. The U.N. Declaration on Friendly Relations states: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.” G.A. Res. 26/2625, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

267. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 111 (June 27) (“The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982.”); S.S. “*Lotus*”, 1927 I.C.J. 4, 19 (Sep. 7) (“[A]ll that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”).

268. John Marshall stated in *The Schooner Exchange* that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.” *Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812). It is an idea that played a central role in the history of international legal argument since at least the

The strength of this claim, like the claim of self-preservation, also draws on the human right of self-determination that individuals enjoy in a state of nature. To understand the sovereign right to equal freedom is to understand the individual's right to be his or her own person.

As a consequence of these twin imperatives, the statist orientation schizophrenically prefigures the field in such a way that the jurist might head in the direction of either the Charter Peacetime or Charter Wartime frameworks. The result depends largely on whether the prefiguration has foregrounded the right of self-defense or the right of equality. In other words, claims for a strong and expansive interpretation of Article 51, as well as claims for strong and restrictive interpretations of Article 2(4), are equally rooted in deeply classical metaphors about the international legal order. Consequently, scholars who complain about the primacy of sovereignty in the context of terrorism are often themselves arguing from a posture that is similarly committed to sovereignty. They just happen to be on the other side of the sovereign rights divide.

B. Two Explanatory Frameworks

In contrast to the judge's preconceptual interpretive orientation, there are modes of explanation that commonly recur in the context of a particular legal domain. Though orientation and explanation are distinct, an interpretive orientation often suggests signals about the sort of explanation the judge is likely to make. As Hayden White has suggested, "historical explanations are bound to be based on different metahistorical presuppositions about the nature of the historical field, presuppositions that generate different conceptions of the kind of explanations that can be used in historiographical analysis."²⁶⁹ Thus, when the judge identifies the facts in the terms of some set of legal materials—this is the crucial act of determining materiality—the judge is providing this kind of explanation. If we need to know whether the facts have given rise to an instance of illegality, the judge will need to craft some way of explaining how this may have happened.²⁷⁰

In the literature on drones, scholars typically use the two explanatory frameworks I introduced above in order to explicate the legality of this new form of violence. The Charter Peacetime and Charter Wartime frameworks, as their names suggest, have a common source in the U.N. Charter. In the paragraphs that follow, I recount a customary explanation for how the frameworks are meant to function. As I will explain, this recounting—by beginning with the Charter itself and the ICJ's interpretation of it rather than with some other artifact—already signals the play of a communitarian orientation.

seventeenth century. See WILHELM GEORGE GREWE, EPOCHS OF INTERNATIONAL LAW (Michael Byers trans., 2000).

269. WHITE, *METAHISTORY*, *supra* note 34, at 13.

270. I present an idiosyncratic illustration, in the context of a hypothetical drone strike, in Part III.

Since World War II, when a sovereign has desired violence in the territory of another sovereign, the violence is meant to be governed by the U.N. Charter.²⁷¹ In the first chapter of the Charter, the fourth paragraph of Article 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.”²⁷² As a consequence of this rule, Chapter VII of the Charter allows for two kinds of military force in international relations: armed attacks authorized by the Security Council²⁷³ and exercise of a sovereign right of self-defense. Article 51 states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”²⁷⁴

The set of rules governing the legal right to use military force are known as the *jus ad bellum*.²⁷⁵ Two questions in the *jus ad bellum* concern the proper way to define the language in Article 51 about “armed attack,” and whether attacks on states by nonstate actors may trigger Article 51 at all. While it is clear that the necessary threshold of intensity of hostilities for constituting international armed conflicts is lower than that for the noninternational sort, the ICJ has held that sporadic, low-intensity hostilities between two sovereigns may be insufficient to trigger article 51.²⁷⁶ The Court has also stated that Article 51 cannot be triggered by nonstate actors, and that all armed attacks must be imputable to another

271. Article 1 of the U.N. Charter lists the first purpose of the United Nations: “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” U.N. Charter art. 1, para. 1.

272. U.N. Charter art. 2, para. 4.

273. Article 39 of the U.N. Charter states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” U.N. Charter art. 39.

274. U.N. Charter art. 51.

275. The beginnings of “just war theory” are usually cited back to Thomas Aquinas’s Aristotelian defense of the idea in his *Summa Theologica*. A more modern exposition in the style of the Columbia School of international legal theory is THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2009).

276. See *Oil Platforms (Iran v. United States)* 2003 I.C.J. 161, 191 (Nov. 6) (“Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States of the kind that the court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a —most grave form of the use of force.”); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 101–02 (June 27).

sovereign.²⁷⁷ In the case of armed attacks that can be traced back to sovereigns, all reprisals by the injured state under Article 51 must be both “necessary” and “proportionate,”²⁷⁸ and strictly limited to the terms of Article 2(4).²⁷⁹ In deciding whether self-defense is legally justifiable, the court has emphasized that this is not a matter left to the subjective discretion of the injured state, and that a proper exercise of self-defense must be objectively justified.²⁸⁰

In contrast to the *jus ad bellum* is the *jus in bello*.²⁸¹ There are two sources for the *jus in bello*—rules governing the conduct of fighting once the fighting has already been initiated—and they are international treaties and international custom. The ICJ has delineated at least three fundamental rules in the *jus in bello* from these sources. The first is “distinction,” and it demands that military forces distinguish between individuals that may lawfully be killed and those who may not.²⁸² Depending on whether the dispute has been classified as an

277. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 168, 222–23 (Dec. 19) (“It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The ‘armed attacks’ to which reference was made came rather from the ADF. The Court has found above (paragraphs 131–35) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC.”); *Nicaragua*, 1986 I.C.J. at 103.

278. *Iran Oil Platforms*, 2003 I.C.J. 161, 198 (Nov. 6) (“The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.”); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8) (“A use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which compromise in particular the principles and rules of humanitarian law.”); *Nicaragua*, 1986 I.C.J. at 103. *But see id.* at 94 (“The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”).

279. See *Iran Oil Platforms*, 2003 I.C.J. at 183.

280. *Id.*

281. See MELZER, *supra* note 236, at 244.

282. See *Armed Activities*, 2005 I.C.J. at 240. Article 48 of Protocol I states: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, <http://www.icrc.org/ihl/INTRO/380>. Although parallel language does not appear in Protocol II, the principle of distinction applies in noninternational conflicts as a matter of customary international law. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention Between the United States and Other

“international armed conflict”²⁸³ or a “noninternational armed conflict,”²⁸⁴ the class of people who may be lawfully killed is different.²⁸⁵ In an armed conflict between two or more sovereigns, military targets must be limited to the enemy sovereign’s combatants, along with civilians that directly participate in the hostilities.²⁸⁶ Nonmilitary, nonparticipating people do not belong to the class of individuals who may be lawfully killed.²⁸⁷ In an armed conflict between a sovereign and one or more nonstate actors, it is trickier to define “combatant” because the dispute is not between traditional military organizations.²⁸⁸ But despite the difficulties, the Geneva Conventions require some objective measure for distinguishing fighters from nonfighters.²⁸⁹ Current thinking about the principle of distinction in noninternational armed conflicts suggests that military targets should be limited to people that have either assumed a continuous combat function or those who are directly participating in the fighting.²⁹⁰ A second rule is

Powers Respecting the Laws and Customs of War on Land, Annex, art. 25, Oct. 18, 1907, 36 Stat. 2277 [hereinafter War on Land, Annex].

283. See Int’l Comm. of the Red Cross, *The Geneva Conventions of 12 August 1949*, Common Art. 2(1) [hereinafter *Geneva Conventions I–IV*]; Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet ed., 1952).

284. Under Common Article 3 of the Geneva Conventions, nonstate actors can be parties to an armed attack. Further, noninternational armed conflicts can even be between nonstate actors, without any state involvement at all.

285. See generally, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 114–15 (June 27).

286. See War on Land, Annex, *supra* note 282, at arts. 1–2 (explaining that the “laws, rights, and duties of war” apply to: 1) a member of the regular armed forces of a belligerent party; 2) a member of “militia and volunteer corps . . . commanded by a person responsible for his subordinates[,] . . . [with] a fixed distinctive emblem recognizable at a distance[,] . . . [that] carries arms openly[,] and . . . conduct[s] their operations in accordance with the laws and customs of war”; and 3) an inhabitant of a non-occupied territory “who, on approach of the enemy, spontaneously take[s] up arms to resist the invading troops . . .”). See also Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 282, at art. 4.

287. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 282, at art. 4; War on Land, Annex, *supra* note 282, at arts. 1–2.

288. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 282, at art. 4; War on Land, Annex, *supra* note 282, at arts. 1–2.

289. See *Geneva Conventions I–IV*, *supra* note 283.

290. See NILS MELZER, INT’L COMM. FOR THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 1039 (2009) (“[I]n case of doubt as to whether a [sic] specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not amount to direct participation in hostilities. The presumption of civilian protection applies, *a fortiori*, in case of doubt as to whether a person has become a member of an organized armed group belonging to a party to the conflict. Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal

“proportionality.”²⁹¹ Here, the rule is that the advantage of using military force in an armed conflict must be gauged by offsetting externalities suffered by civilian populations. Where possible, the use of force should be curtailed so as to minimize civilian casualties.²⁹² A third governing rule is “necessity,” which predictably requires that an attack be necessary for accomplishing some military purpose, and forbids the cause of unnecessary suffering on the part of combatants.²⁹³

The Charter Wartime framework is generally regarded as abnormal. The normal default is peacetime, where international human rights law is assumed to govern those “abnormal” moments when sovereigns kill. Like humanitarian law, human rights law restricts the rights of sovereigns to kill through the rules of necessity and proportionality,²⁹⁴ but in the context of those rules operating during peacetime (*lex generalis*), these terms have a lot more bite. Human rights law presumes an absolute prohibition on the arbitrary taking of human life.²⁹⁵ The question therefore becomes whether the targeted killing is arbitrary; the killing will

proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances.”); *see also Geneva Conventions I–IV*, *supra* note 283, at Common Art. 3, AP 1, art. 52(1) and (2); AP 1, art. 50(1); HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE § 5(a) (Harvard University Program on Humanitarian Policy and Conflict Research 2009), *available at* <http://www.ihlresearch.org/amw/manual>.

291. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 35(1) & 51(5) (1977); *see also id.* art. 35(1) (“[T]he right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”).

292. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 245 (July 8) (“A use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which compromise in particular the principles and rules of humanitarian law.”).

293. The ICJ has explained that among the principles of international humanitarian law is the prohibition on causing unnecessary suffering to combatants. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 257 (July 8). The U.S. Army Field Manual explains, “‘military necessity’ . . . has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.” U.S. DEP’T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE 4 ¶3 (1956), www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf.

294. U.N. Secretary General, *Extrajudicial, Summary, or Arbitrary Executions*, ¶¶ 33–45, U.N. Doc. A/61/311 (September 5, 2006); Human Rights Committee, *General Comment No. 6*, ¶3, HRI/GEN/1/Rev.6 (2003); *see also, generally*, Inter-American Commission of Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 (2002).

295. The International Covenant on Civil and Political Rights states that the right to life is absolute, and individuals may not be deprived of that right arbitrarily. International Covenant on Civil and Political Rights art. 6, adopted Dec. 19, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) [hereinafter ICCPR].

only be justifiable when there are no other possible means available to save another human life.²⁹⁶

While this much is relatively uncontroversial, the geographical application of human rights law is not.²⁹⁷ On the one side are arguments claiming a strict territorial aspect of human rights obligations.²⁹⁸ Unless we are in the field of customary or peremptory norms governing all states, the conventional law is found in treaties adopted by states and which have entered into force.²⁹⁹ In these treaties, human rights claims are only good when a citizen is making a claim against his own government,³⁰⁰ thus triggering the presumption that governments are typically obliged to respect their human rights obligations on their own territory, or possibly with regard to their own nationals in foreign territory. Under this reading of human rights law, individuals cannot make human rights claims against harms they have suffered at the hands of foreign states.³⁰¹ To get compensation, they will have to press their own governments into the service of their claims.³⁰²

On the other hand is the position more favorable to the advocate wishing to use human rights law in order to condemn a drone strike. Here, one points out the arguments claiming that a sovereign invited to intervene in another sovereign's civil war is bound by the same human rights obligations as the host state.³⁰³ That is, the host state cannot empower an intervening state to violate human rights norms which it itself is bound to respect.³⁰⁴ This argument short-circuits the problem of extraterritoriality by rooting the human rights obligations of the intervening state in the obligations of the host state, and not in the obligations the intervening state has against its own citizens in its own territory.³⁰⁵ The upshot is that the applicability of human rights law to instances of targeted killing in foreign territories is a colorable argument, if not a winning one, when the host state has consented to the strikes.

1. The Charter Peacetime Framework

As I alluded to above, the notion that peacetime is normal and wartime is abnormal is a figuration we should associate with the communitarian and individualist orientations. It is also from these positions that the ICJ's jurisprudence, and the U.N. Charter itself, emerge as foregrounded artifacts for

296. Human Rights Committee, *supra* note 294; Inter-American Commission of Human Rights, *supra* note 294.

297. For general discussion, see generally, MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (2011).

298. *Id.* at 124.

299. *Id.*; see also, MELZER, *supra* note 236.

300. ICCPR, *supra* note 295.

301. MILANOVIC, *supra* note 297.

302. *Id.*

303. See generally, Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, (Notre Dame Legal Studies Paper No. 09-43, 2010), <http://ssrn.com/abstract=1501144>.

304. *Id.*

305. *Id.*

legal analysis. Phillip Alston and Mary Ellen O'Connell are representative scholars generally oriented to the Charter Peacetime framework in the context of drone strikes.³⁰⁶ They have consistently argued against the idea that transformations in the global order have necessitated shifts in the traditional laws of killing.³⁰⁷ Neither Alston nor O'Connell deny that states have a right of self-defense that might be triggered by terrorist attack, that such a right is constrained by rules of necessity and proportionality, or that it would be a mistake to identify the use of drones for targeted killing as a per se violation of international law.³⁰⁸ Rather, these scholars preconceive the field of argument in such a way that the Charter's positive prohibitions on the use of force are emphasized over these more metaphorical arguments in favor of states' rights.³⁰⁹

As Alston points out in his report as Special Rapporteur to the U.N., some of the main points of contention around the applicability of wartime frameworks have turned on (1) whether the right of self-defense can be triggered by terrorist attacks and whether such attacks amount to "armed conflicts"; (2) whether a "naked" right of self-defense can be exercised when arguments about the presence of armed conflicts are unavailing; and (3) whether the right of self-defense comes ready-made with an expiration date.³¹⁰

Alston's argument with respect to these questions takes its explanatory form in the peacetime framework. This choice appears to flow from an antistatist orientation. For Alston, Article 51 is a subsidiary article in the context of the U.N. Charter and cannot be taken to revitalize a view of sovereigns wielding rights of self-defense in a state of nature. At the same time, Alston is willing to entertain

306. See, e.g., Phillip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283 (2011) [hereinafter Alston, *CIA*]; Alston et al., *supra* note 227; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 224; Mary Ellen O'Connell, *Remarks: The Resort to Drones Under International Law*, 39 DENV. J. INT'L L. & POL'Y 585 (2011); Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325, 331 (2003); Mary Ellen O'Connell, *supra* note 303; Mary Ellen O'Connell, *Seductive Drones: Learning from a Decade of Lethal Operations*, (Notre Dame Legal Studies Paper No. 11-35, 2011) [hereinafter O'Connell, *Seductive Drones*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912635; Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 343 (2010); W. Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar al-Awlaki*, 16 J. CONFLICT & SEC. L. 385 (2011); Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 115 (2010).

307. O'Connell, *supra* note 303, at 12 ("In the period under review, international law contained a clear and up-to-date set of principles governing the use of force."); see also Sean Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan to Pakistan*, 85 INT'L L. STUDIES 109 (2009).

308. See *infra* notes 311–33.

309. See generally Alston, *CIA*, *supra* note 306, at 290; O'Connell, *supra* note 303.

310. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 224, at ¶ 39.

the possibility that states do retain a right of self-defense against nonstate actors, though he provides the caveat that it would only be in “very rare circumstances” that nonstate actors would be capable of launching an armed attack against a sovereign without the assistance of another sovereign.³¹¹ Given the ICJ’s high standard for an attack that triggers Article 51, Alston echoes the view that it is highly unlikely that purely autonomous nonstate actors can pull off such assaults.³¹²

Alston’s analysis of the second issue is even less generous to those opting for the Charter Wartime framework, insofar as he seems to read such scholars to deny the applicability of international humanitarian law to the exercise of a pre-Charter right of self-defense.³¹³ Alston worries that proponents of such a naturalist right of self-defense really are seeking to eliminate the *jus in bello* in that context. For scholars like Alston, such a possibility seems quite likely, given the way their explanatory mode situates the statist orientation as entirely hostile to Charter law. For the third issue, Alston sees arguments seeking to enlarge the time limits for legitimate exercise of Article 51 as unsupportable.³¹⁴ The best view here, according to Alston, “includes the right to use force against a real and imminent threat when the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”³¹⁵

When Alston turns more directly to the question of whether there is presently a noninternational armed conflict between the United States and al Qaeda and its associated forces, he expresses suspicion about the organizational coherence of these groups,³¹⁶ as well as for the idea that the violence has been so protracted that it can satisfy the requirements of the *jus in bello*.³¹⁷ Similarly, Alston is pessimistic about the plausibility of drones’ ability to adequately discriminate lawful targets. “Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal.”³¹⁸ If a state were to authorize drone killings on its own territory, Alston sees this as a likely human rights violation; if they are authorized on foreign territory—again, outside of an armed conflict—there are very few real-life examples where the necessity of

311. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 224, at ¶ 40.

312. *Id.*

313. *Id.*

314. *Id.* at ¶ 45.

315. *Id.* at ¶ 45.

316. *Id.* at ¶ 55 (“With respect to the existence of a non-state group as a ‘party’, al-Qaeda and other alleged ‘associated’ groups are often only loosely linked, if at all. Sometimes they appear to be not even groups, but a few individuals who take ‘inspiration’ from al-Qaeda. The idea that, instead, they are part of continuing hostilities that spread to new territories as new alliances form or are claimed may be superficially appealing but such ‘associates’ cannot constitute a ‘party’ as required by IHL—although they can be criminals, if their conduct violates US law, or the law of the State in which they are located.”).

317. *Id.* at ¶ 42.

318. *Id.* at ¶ 85.

ordering a drone kill would be instant and overwhelming, leaving no time for deliberation or other less drastic options.³¹⁹

Why, we can ask, is Alston telling the story this way? Why doubt the organizational coherence of al Qaeda in the Arab Peninsula where others do not? Why doubt that the intensity of violence can reach the relevant standards? Why doubt that the exercise of an inherent right of self-defense could include and be disciplined by the *jus in bello*? One answer is that these doubts motivate the kind of narrative Alston has chosen to explain the problem of drone strikes. Does this mean that Alston is somehow insincere, or that, if he was more honest, his argument would have taken a different narrative form? Of course not. But what it does suggest is that having moved from a communitarian orientation into the peacetime framework, the linguistic protocols of these choices are doing more of the work than we might otherwise suspect.

Consider another example in the work of Mary Ellen O'Connell.³²⁰ Article 2(4), in her view, is "the most important rule on resort to force, and perhaps in all of international law."³²¹ Why? Why would anyone say something like that? Again, this is a statement that makes perfect sense in tropological terms. Article 2(4) emerges as the most important rule in all of international law if we have already prefigured the field in such a way that the Charter would be intensely foregrounded. To be sure, O'Connell explains that Article 51 is a legitimate exception to Article 2(4), but she sees it as a very narrow exception—a "term of art" referring to a technical legal understanding, not as a metaphor about the human right of self-preservation.³²² O'Connell emphasizes that Article 51 can only be triggered when the injured states have suffered an "armed attack" by another sovereign state,³²³ conjuring up two immediate obstacles in the way of legitimating drone kills: The arguer will need to explain both how the United States is responding to an armed attack and that another state is responsible for the attack.³²⁴ Drawing on the jurisprudence of the ICJ, O'Connell also claims that even if the injured state can show that another state was responsible for an assault amounting to an "armed attack," the response must be necessary and proportionate.³²⁵

In the case of assaults on sovereign governments by nonstate actors, O'Connell suggests that "an armed response to a terrorist attack will almost never meet these parameters for the lawful exercise of self-defense."³²⁶ Again, why would some scholars suggest that it could "almost never" be the case, while others argue that it most certainly is? Are some of them lying, or just not as sharp as the others? O'Connell defends her claim by suggesting that it is often unclear just who was responsible for a terrorist attack, given the fleeting character and amorphous

319. *Id.* at ¶ 86.

320. O'Connell, *supra* note 303, at 13.

321. *Id.*

322. *Id.* at 14.

323. *Id.*

324. *Id.*

325. *Id.* at 14–15.

326. *Id.* at 14.

nature of terrorist organizations. “It usually takes some time to find out who the perpetrators are and where they are. But force may not be used long after the terror act as it loses its defensive character and becomes unlawful reprisal.”³²⁷ With respect to the U.S. War on Terror, O’Connell suggests that al Qaeda’s 9/11 attacks were indeed sufficient to constitute an armed attack, that Afghanistan was complicit in the attacks, and that the United States had a legitimate claim to self-defense under Article 51 to pursue al Qaeda and the Taliban in Afghanistan.³²⁸ But in terms of duration, O’Connell argues that the war of self-defense, which began in late 2001, ended in 2002 upon the election of Hamid Karzai.³²⁹ Continued U.S. military operations after that point should be justified on Afghanistan’s request for U.S. assistance in its internal armed conflict with Taliban and al Qaeda agents. Thus, O’Connell believes that the use of drones in Afghanistan is justifiable so long as their use complies with the *jus in bello*. This belief is part and parcel of the narrative form of this argument. It *belongs* here.

As a consequence of having chosen this narrative mode, Alston and O’Connell agree that a severely restricted view of Article 51 is desirable, as the injured state will need to justify a military response through a showing that (1) the initial assault was severe enough to amount to an “armed attack”; (2) there is evidence that a sovereign state was responsible for the attack; and (3) the injured state’s response comes immediately after the initial assault.³³⁰ O’Connell further suggests a separate limitation: The injured state cannot safely rely on the consent of the host state for the introduction of military engagement in the foreign sovereign’s territory.³³¹ The foreign sovereign can only consent to the sort of force that it could itself use in its own territory, regulated both by its own domestic law, human rights law, and the Responsibility to Protect doctrine.³³²

Having arranged the argument in this way, O’Connell has little trouble concluding that drone killings are prohibited under international law. There is no justification for using drones to target and kill people in foreign territory because there is no armed conflict in place that might trigger the laws of war. Since there is no armed conflict, drone kills demand justification under peacetime rules, and they find none. Prohibitions on the extension of criminal law enforcement in the territory of foreign sovereigns, human rights norms protecting individuals from arbitrary killing, and, in the case of the United States, the federal ban on assassinations, all push toward the conclusion that drone warfare is illegal.

In sum, the explanatory narrative supplied by the Charter Peacetime framework has the following characteristics. First, the jurist shows that the choice between the wartime and peacetime models is not all that hard, and that the peacetime framework makes the most sense when dealing with questions about drone strikes and al Qaeda. Second, this choice is, in part, prefigured by the jurist’s

327. *Id.* at 15.

328. *Id.* at 16.

329. O’Connell, *Seductive Drones*, *supra* note 306, at 11.

330. *Id.* at 15.

331. *Id.*

332. *See generally id.*

interpretive orientation. For scholars like Alston and O'Connell, there is palpable sympathy for a particular view of the ICJ's jurisprudence and the applicability of human rights law. While I have not emphasized this aspect of the discussion, it is also the case that a statist orientation could align quite nicely with this narrative: The explanatory form of the Charter Peacetime framework will emerge in the foreground of the statist orientation when the jurist has chosen the sovereign right of self-determination as a trump over the sovereign right of self-defense. Third, the Charter Peacetime framework reduces the relevance of humanitarian law, thereby keeping in place the rules of *lex generalis* prohibiting targeted killing. Wartime takes on an abnormal appearance. Finally, as constrained by a reasonable application of human rights law, and in light of the sovereign right of autonomy, drone killing of al Qaeda members will usually be illegal.

2. The Charter Wartime Framework

In a 2010 speech to the American Society of International Law,³³³ Harold Koh began his treatment of drone killing by stating, "it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."³³⁴ Though Koh's argument is certainly based in the U.N. Charter, and not in the state of nature, it actively contests the relevance of the ICJ's jurisprudence and human rights law.³³⁵ Koh's position is better understood as proceeding from a statist orientation. The second point is that while Koh's argument does not operate in the state of nature framework, it appears to proceed from a statist orientation.³³⁶ The explanatory narrative's distinctiveness is found in the jurist's tendency to adopt a naturalist sovereign right of self-defense and combine this with an affirmation of Article 51's wartime paradigm, thus at once undermining the court's jurisprudence on the use of force as outdated and reducing the relevance of human rights law.

Since the 9/11 attacks, Koh suggested, the United States has been in armed conflict with al Qaeda, the Taliban, and associated forces, and thus "may use force consistent with its inherent right of self-defense under international law."³³⁷ This armed conflict continues to the present, as evidenced by al Qaeda's

333. Harold Hongju Koh, The Obama Administration and International Law, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>). Koh and Holder's analyses are pretty similar to the one presented in the DOJ's recently leaked White Paper. See generally Benjamin Wittes & Susan Hennessey, *Just Calm Down About That DOJ White Paper*, LAWFARE (Feb. 5, 2013, 11:56 PM), <http://www.lawfareblog.com/2013/02/just-calm-down-about-that-doj-white-paper/>.

334. Afsheen John Radsan & Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. NAT'L SECURITY L. & POL'Y 439, 447 n.20 (2012).

335. Koh, *supra* note 333.

336. This is not to say that Koh himself bears such an orientation.

337. Koh, *supra* note 333.

persistent attacks against U.S. personnel.³³⁸ In this context, Koh suggested that the United States has authority under international law to use lethal force in the targeted killing of individual al Qaeda members.³³⁹ Shifting from arguments about self-defense to arguments about the boundaries of permissible fighting during hostilities, Koh defended U.S. efforts on the rationale that they have taken the principles of distinction and proportionality into account: Drone attacks are limited to military objectives, eschew civilian populations, and are formulated to produce the least possible damage on civilian centers whenever possible.³⁴⁰ Thus, for Koh, drone killing is legitimate under international law both as an argument about the rights of states to defend themselves and as an argument about the proper scope of legitimate fighting in armed conflict.³⁴¹ Koh's transition between the two strategies is presented seamlessly.

In contrast with scholars who feel that the conflict with al Qaeda is either outside the wartime paradigm or is simply a poor fit, Koh affirmed the relevance and applicability of the Charter's *jus ad bellum* rules and the *jus in bello* rules of the Geneva Conventions.³⁴² A critique Koh is ready to brush aside is that traditional ideas of international law forbid the very concept of drone killing.³⁴³ Koh does not suggest that international law required a facelift or even progressed in order to now govern drone warfare. Targeted killing has always been legal, at least since World War II, anyway. Of course, drones were not used in the past, but this does not pose a problem either: "[T]he rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart bombs—so long as they are employed in conformity with applicable laws of war."³⁴⁴ In fact, Koh suggested, drones are likely to be better optimized with respect to achieving the most properly proportional effects on civilian populations.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. Many have suggested that postwar international law is not equipped for and therefore cannot regulate conflict with the likes of al Qaeda, and that new norms need to be built. See, e.g., John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201 (2011); W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711 (2007); Frederic Margret, *War and the Vanishing Battlefield*, 9 LOY. U. CHI. INT'L L. REV. 131, 132 (2011) ("[T]he death of the battlefield significantly complicates the waging of war and may well herald the end of the laws of war as a way to regulate violence."); Michael A. Newton, *Flying into the Future: Drone Warfare and the Changing Face of Humanitarian Law Keynote Address to the 2010 Sutton Colloquium*, 39 DENV. J. INT'L L. & POL'Y 601, 608 (2011); Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101 (2010); Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT'L L. 429, 432 (2010).

343. Koh, *supra* note 333.

344. *Id.*

Koh also objected to the application of a human rights mindset to drone killing.³⁴⁵ Do drone killings represent a violation of due process or an instance of extrajudicial killing? Do the victims of drone warfare not enjoy the protections of human rights instruments? They certainly do, Koh would surely say, if we were not in the context of an armed conflict.³⁴⁶ Here, the argument for a wartime paradigm trumps arguments for human rights.³⁴⁷ Further, human rights strategies are almost redundant here, since the acceleration of killing technology has advanced at such a pace that the targets are most assuredly military targets and these targets are acquired efficiently.³⁴⁸ Similarly, Koh displaces argumentative strategies based on the U.S. ban on assassinations because the more “relevant” argument frames the issue as one sounding in war.

But why defend any of these positions? Why choose this side over the side O’Connell and Alston present? Is Koh more clever? Has he read more widely? Again, the answer seems to have much more to do with the way Koh’s preconceptual interpretive orientation has already organized the field of argument. And once it has done the organizing, the wartime framework emerges as a more likely way of explaining the problem of the legality of drone killing. Is Koh disingenuous and insincere? There is certainly no reason to think so on the face of the text, just as there was no reason to make a similar claim about Alston and O’Connell. What makes more sense is to suggest that Koh makes the moves that he does because the narrative form into which he has fallen suggests that the state’s right of self-defense will be foregrounded in the story.

Robert Chesney presents a similar illustration.³⁴⁹ Chesney argues that an attacked state does not have a total right of self-defense to attack nonstate actors on the territory of a foreign state.³⁵⁰ If the foreign state is able and willing to engage the antagonist, the injured state should allow the foreign state a chance to intervene.³⁵¹ Chesney suggests that arguments are available with respect to positing an armed conflict between the United States and al Qaeda,³⁵² thus placing him in the Charter Wartime framework. The question then would turn on more specific inquiries, such as whether the particular act in question can be meaningfully connected with the 9/11 attacks, or if it cannot, whether there is

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. Chesney, *supra* note 199.

350. *Id.* at 23.

351. *Id.*

352. Chesney suggests that there are few who would deny that the post-9/11 violence has constituted an armed conflict that should be governed by the *jus in bello*, and Chesney cites Paust for support, but I do not think this is right. Paust does not believe that an “armed conflict” exists between the United States and al Qaeda, though he does believe that the *jus in bello* should govern the present hostilities. This is because the rules of necessity, distinction, and proportionality also govern the “inherent” right of self-defense. *Id.* at 20 n.77.

sufficient intensity of conflict and organization on the part of the nonstate actor to satisfy the requirements of humanitarian law.³⁵³

Chesney also suggests that a finding of an armed conflict on one territory triggers an assumption that the laws of war should follow that conflict wherever it might travel.³⁵⁴ Why? In contrast to a formalistic approach that would restrict legitimate fighting only to those territories where the conflict is sufficiently intense and organized, Chesney's view is that a more practical sense of the law allows for states to pursue nonstate aggressors, wherever they are engaged (minding the limits on the will and capacity of host states).³⁵⁵ Assuming that the injured state has a strong Article 51 argument, can it respond to its attacker anywhere in the world? Could the United States justifiably use drones against al Qaeda in France as well as Pakistan? Chesney's view is that the right of self-defense can be exercised in any territory where the host state is unwilling or unable to neutralize terrorists, at least in theory.³⁵⁶

Of course, there will be disagreements about which states are unwilling, unable, failed, or rogue, but the basic proposition should be one in which states are free to defend themselves against attacks, whatever the origin of those attacks.³⁵⁷ This proposition will then be limited to the extent that the host state is rational and capable of handling the threat and is actually working toward that end.³⁵⁸ In the event that the injured state does attack, its targets should be strictly limited to the terrorists themselves, avoiding the infrastructure and people of the host state wherever possible.³⁵⁹ This last point leads Chesney to the question of how the right of self-defense should be implemented, after any objections regarding the territorial integrity of the host state have been resolved. Chesney concludes that the injured state's exercise of military power must conform to the requirements of necessity and proportionality defined by the *jus in bello*.³⁶⁰

Obviously, Chesney's configuration of the argumentative terrain is quite different than Alston and O'Connell's. When Chesney looks at the materials, the image is one of sovereigns, some strong, some weak, some rational, and others not so much. This image of a sovereign free-for-all is foregrounded, and many of the subsidiary questions about the relevance of the Charter, the relevance of nonstate actors to the Charter's provisions, and the relevance of the ICJ's jurisprudence and human rights law are backgrounded. Of course, Chesney could take the image further, and push the Charter and the ICJ off the image completely. But he does not, which is why I still take his narrative as representative of the explanatory form found in the Charter Wartime framework.

353. *Id.* at 25.

354. *Id.* at 37.

355. *Id.* at 37–38.

356. *Id.* at 22–23.

357. *Id.* at 25.

358. *Id.*

359. *Id.*

360. *Id.* at 39.

To sum up, the Charter Wartime framework has the following characteristics. First, the jurist has decided that the choice between the wartime and peacetime models is not all that hard, and that the wartime framework makes the most sense when dealing with questions about drone strikes and al Qaeda. Second, this choice is prefigured by the jurist's interpretive orientation. For scholars like Koh and Chesney, there is little interest in highlighting the ICJ's jurisprudence and the applicability of human rights law. With that said, and while I have not emphasized this aspect of the discussion, it is also the case that a statist orientation could move *against* the Wartime framework, rather than lead the jurist toward it. That is, the explanatory form of the Charter Wartime framework will emerge in the foreground of the statist orientation when the jurist has chosen the sovereign right of self-defense *as a trump* over the sovereign right of self-determination. Third, the Charter Wartime framework reduces the relevance of human rights law, and as the jurist has less and less sympathy for the human rights orientation, human rights law may be excluded in its entirety. The restrictions of humanitarian law continue to be in play, and wartime increasingly takes on a sense of normality. Finally, as constrained by a reasonable application of humanitarian limitations, drone killing of al Qaeda members may be legal.

Summary of Orientations & Frameworks

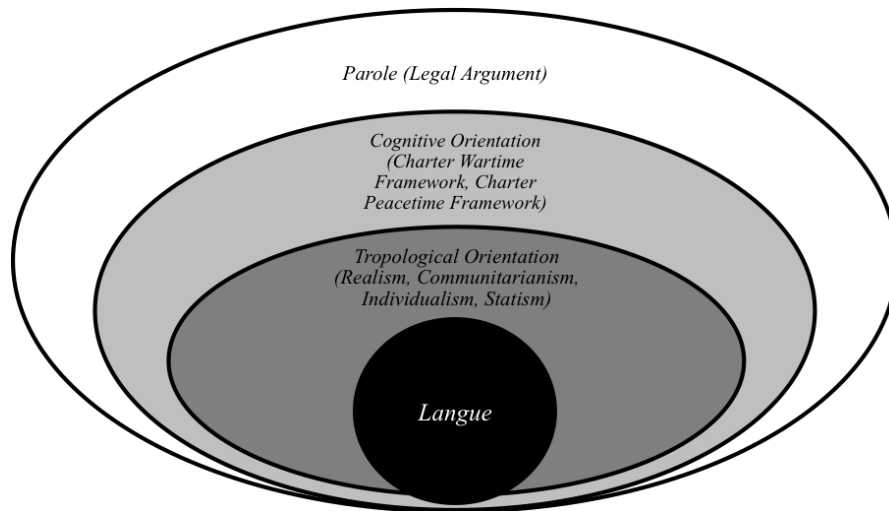
Communitarianism	Individualism	Statism
<ul style="list-style-type: none"> • The ICJ and the U.N. Charter Are the Orienting Concepts for Thinking About International Law • Likely to Lead to the Charter Peacetime Framework • High Threshold for Self-Defense Under UN Charter • Drone Strikes Likely to be Illegal, but Uncertain 	<ul style="list-style-type: none"> • The Individual Is the Orienting Concept for Thinking About International Law • Likely to Lead to the Charter Peacetime Framework • Killing May Never Be the Sole Purpose of State Action • Drone Strikes Very Likely to Be Illegal 	<ul style="list-style-type: none"> • The Sovereign Is the Point of Departure in Thinking About International Law • May Lead Either to Charter Peacetime or Charter Wartime Frameworks • Strong Arguments for and Against Self-Defense Are Equally Plausible • Drone Strikes May Be Legal

III. THE JUDGE AND THE DRONE

In this Part, I bring together the structuralist approach to legal interpretation and the law of killing in a hypothetical adjudication of a drone strike. The essential point I highlight is the tension at the heart of Dworkin's project in *Law's Empire*. It is a tension between the jurist's *freedom* to make various choices along a chain of legal reasoning on the one hand, and on the other the *constraints*

forcing that chain into certain twists rather than others. In the discussion that follows, I show how a judge's work on the legality of drone strikes should be understood as an iterative process in which a distinctly legal structure is constantly operated through ideological influence. Consequently, this presentation aims to neutralize the three "mistakes" in international law discourse I described in Part I.D. First, the judge will find himself legally constrained in ways that proponents of the "it's all politics" point of view disregard. Second, the judge will enjoy far more freedom than proponents of the "it's all law" perspective recognize. Third, the judge will confront the concept of sovereign rights as providing arguments both in favor of and against the plaintiff, rather than encountering a dilemma between sovereignty and human rights.

The discussion also foregrounds the semiotic and rhetorical elements canvassed in Part I. In particular, the hypothetical judge that I will personify will prefigure the field of legal materials in an ironic mode.³⁶¹ As a tropological orientation, White described irony as a self-conscious prefiguration of the field, which means that the person doing the prefiguring is fully aware that there is no one true way in which to collect and categorize the materials.³⁶² There are many ways, and while some are wrong, there is no manifestly correct form of argument. In this sense, this Article's structuralist orientation has been ironic, casting the different ways of narrativizing the law of killing as just that—different, not right and wrong ways. Some modes will be more edifying, more instructive, and morally more desirable. But so long as a mode is conforming to the formal requirements of the *langue*, no one mode is more correct than another. To recap, here is a figure of *langue*, *parole*, and its liminal structures.



361. WHITE, *METAHISTORY*, supra note 34, at xii.

362. *Id.*

A. *Two Judges, Two Mistakes*

Anthony and Ricardo are appellate judges and longtime friends.³⁶³ Now in their golden years, the two like-minded jurists find themselves at the peak of their power, as fluent in the history of American legal thought as they are nimble in the exercise of technical argument. But despite their friendship, Anthony and Ricardo often find themselves in a recurring debate. Their conflict turns on the problem of legal interpretation—interpreting the facts,³⁶⁴ interpreting statutes,³⁶⁵ interpreting the decisions of prior cases.³⁶⁶ It is a disagreement about what it means for a judge to look out at the universe of legal materials, cabin and collect it in some way, and transform that material into a legal argument and conclusion.

In Judge Anthony's view, a judge's interpretive orientation is necessarily constrained by the contents of the materials being interpreted. For Anthony, there's really very little of this "cabining and collecting" of the legal materials. It is already ready, waiting for him, at least most of the time. It is for this reason that some certain interpretations of the Fourteenth Amendment are better than others, since those better interpretations pay better respect to the Amendment's text. Or, some interpretations of the history of the French Revolution are better than others, since these interpretations carry more sophisticated understandings of the Revolution's players, causes, and so on. According to Anthony, an interpretation of either the historical or the legal kind is constrained by the textual materials and, of course, the wit of the person doing the interpreting. There is, more often than not, an answer out there in the material, and the judge's role is to find it and apply it. To be sure, Anthony is happy to concede, historical and legal analysis are not "scientific" in the fashion of physics or chemistry. But they are not in the category of literature either.³⁶⁷

As fond of Anthony as Ricardo is, he believes this to be an embarrassingly bad way of understanding how judges actually work. For Judge Ricardo, a text has no meaning whatsoever prior to the reader's act of interpreting the text. There is nothing "out there" waiting in the materials to provide the judge with an answer. In fact, there is nothing in a legal text that can constrain interpretation at all. Texts have no meaning unless and until they have been read. Neither the French Revolution nor the Fourteenth Amendment has any literal

363. This portrayal is only intended to hint at, rather than actually demonstrate, the old fight between "textualists" and "purposivists." A representative example of the textualist view can be found in SCALIA & GARNER, *supra* note 7. A purposivist view is illustrated in RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2005). *See generally*, SHAPIRO, *supra* note 2, at 355–87.

364. *See, e.g.*, Kennedy, *supra* note 21, at 532–33.

365. *See, e.g.*, William Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); William Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

366. *See, e.g.*, Karl Llewellyn, *Remarks on the Theory of Appellate Decision & the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

367. For recent discussions, see Mitchell Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Richard A. Epstein, *Plain Meaning in Context: Can Law Survive Its Own Language?* 6 N.Y.U. J. L. & LIB. 359 (2012).

meaning that might be set against the meaning offered by an Eric Hobsbawm or an Akhil Amar.³⁶⁸ For Judge Ricardo, adjudication is highly discretionary. It's up to the judge to decide which materials to collect and cabin, and to decide what sort of story to make out of those materials. A legal text only takes on the *appearance* of being highly constrained when someone like Judge Anthony brings his own preferences into the picture and masquerades them as principles that had been lying in the text all along.

Now, it might seem plausible that Ricardo has gotten the better of Anthony, were it not for the fact that we all know that Ricardo is wrong. The field of legal argument is not radically indeterminate, since there obviously *are* better and worse readings of certain texts. After all, Ricardo seems to suggest that anything goes when it comes to interpreting a set of materials, whether the object of analysis is a novel, an archive, or a stack of judicial decisions. But surely it is nonsense to suggest that anything goes, since it never does. If Ricardo interprets the Fourteenth Amendment as the joint work product of Bugs Bunny and Elmer Fudd, or suggests that its proper meaning is to restrict government action only when such action is of a religious sort, we are unlikely to be persuaded. But why? Must it be that Anthony has got it right, and that there really *is* some inherent meaning in the Amendment's text, and an essential way of accounting for its origin?

A judge operating under the structuralist orientation described in the foregoing Parts of this Article would reject both Anthony and Ricardo's understandings of legal indeterminacy and judicial interpretation. In the act of interpreting a mass of material, whether it lie in the telling of a history or crafting a judicial decision, we face neither a choice between strong discretion nor a strong form of meaning preceding us, dictating the conclusion in advance.³⁶⁹ The structuralist understands that Dworkinian attempts to secure a middle way or mediation between subjective and objective forms of interpretation are always misconceived, precisely because neither the subjective nor objective accounts are actual possibilities. Interpretive practice is itself a "structure of constraints, a structure which, because it is always and already in place, renders unavailable the independent or uninterrupted text and renders unimaginable the independent and freely interpreting reader."³⁷⁰

Consequently, the judge does not choose between personal freedom and impersonal constraint, and could not even if she wanted. The constraints that constitute interpretive practice are always, in the first instance, personal, and the very notion of a personal preference is already a reflection of communal norms.³⁷¹ Oddly enough, while Anthony and Ricardo were wrong in their separate ways, they approach rightness in combination. As has been argued above, interpretation is impersonal to the extent that the interpreter is always prefigured by constraints

368. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2006); ERIC HOBSBAWM, *THE AGE OF REVOLUTION: 1789–1848* (1996).

369. FISH, *supra* note 13, at 97.

370. *Id.* at 98.

371. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 13 (1980).

prior to his voluntary preferences, and at the same time always free to follow those prefigured preferences wherever they might lead.

B. An Ironic Adjudication

In the hypothetical that follows, I will imagine myself as a judge oriented toward this structuralist posture, and one pushing against Anthony and Ricardo's interpretive positions. The result, I believe, is a more self-consciously fluid and ironic disposition in which the legal materials are encountered in terms that are simultaneously indeterminate and constraining. As with most legal hypotheticals, the case draws substantially on real-world events, blending the facts of an actual complaint submitted to the U.S. District Court for the District of Columbia in 2012,³⁷² recent developments in the Middle East that have become generally known as the Arab Uprisings,³⁷³ and the consequent emergence of an ultraconservative Nur party in Egypt.³⁷⁴ One reason that I see this as a helpful hypothetical is that it explicitly draws attention to a state and political party that are clearly *not* relevant to the Administration's present construction of "al Qaeda and associated forces." In other words, my intention is not at all to suggest that Egypt is or should be thought of as a "hot" battlefield. The point is rather to examine how the current argumentative structure of the law of killing is quite easily manipulated to accommodate legal questions that go "beyond al Qaeda."³⁷⁵

372. See Complaint, *Al-Aulaqi v. Panetta*, No. 1:12-cv-01192-RMC (D.D.C. July 18, 2012); Robert Chesney, *Reactions to the ACLU Suit: There is Armed Conflict in Yemen, and the US is Party to It*, LAWFARE (July 18, 2012, 12:48 P.M.), <http://www.lawfareblog.com/2012/07/reactions-to-the-aclu-suit-there-is-armed-conflict-in-yemen-and-the-us-is-party-to-it/>; Stephen A. Vladeck, *Al-Aulaqi and the Futility (and Utility) of Bivens Suits in National Security Cases*, ACSBLOG (July 23, 2012), <http://www.acslaw.org/acsblog/al-aulaqi-and-the-futility-and-utility-of-bivens-suits-in-national-security-cases>.

373. See generally Daniel Kanstroom, "Passed Beyond Our Aid:" U.S. Deportation, Integrity, and the Rule of Law, 35 FLETCHER F. WORLD AFF. 95 (2011); Margaret MacMillan, *The Arab Uprisings: How Did We Get Here?*, Address to the Council on Foreign Relations (Mar. 30, 2012) (transcript available at <http://www.cfr.org/middle-east/arab-uprisings-did-we-get-here/p27840>).

374. On Egypt's Salafist Nur party, see Khalil al Anani, "Egypt: The New Puritans," in *THE ISLAMISTS ARE COMING: WHO THEY REALLY ARE* (Robin Wright ed., 2012); Will McCants, *The Lesser of Two Evils: The Salafi Turn to Party Politics in Egypt*, BROOKINGS (May 2012), available at http://www.brookings.edu/~media/research/files/papers/2012/5/01%20salafi%20egypt%20mccants/0501_salafi_egypt_mccants.pdf.

375. See Robert Chesney, *Beyond the Battlefield, Beyond al Qaeda: The Destabilizing Legal Architecture of Counterterrorism* (U. of Texas Law, Public Law Research Paper No. 227, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138623. In a recent interview, CIA director John Brennan Spoke to this issue. Transcript: *CIA Director John Brennan Says His Agency Has Done Nothing Wrong*, WASH. POST (Mar. 11, 2014), http://www.washingtonpost.com/world/national-security/transcript-cia-director-john-brennan-says-his-agency-has-done-nothing-wrong/2014/03/11/21d1dde8-a944-11e3-8599-ce7295b6851c_story.html ("There are a lot of other, though, groups, you know, throughout the region that may have an ideological affinity with, sort of, al- Qaida, but have not sworn bayat, do not follow their direction and guidance, pursue a Salafist, even Takfiri sort of agenda. It's a loose confederation of groups, and as

Imagine a U.S. Air Force pilot, sitting in a darkened control room at Holloman Air Force Base in New Mexico.³⁷⁶ The pilot sits alone before the glow of a large monitor, hand at the joystick, watching the video feed of a Reaper hovering somewhere over Pakistan or Libya or maybe even Egypt.³⁷⁷ The pilot gets the green light to launch, and at the squeeze of a trigger in New Mexico, a human being 6,000 miles away dies at the other end of a Hellfire missile.³⁷⁸

Next, imagine that a claim has been brought against several members of the Executive branch, including the U.S. Secretary of Defense, the Commander of Joint Special Operations Command, and the Director of the Central Intelligence Agency. The plaintiff is Harold Pickles, a U.S. citizen residing in Boulder, Colorado. Pickles's sixteen-year-old son, Peter, was invited to a youth conference hosted by the American University in Cairo, Egypt. Peter made a side trip to Alexandria, and while dining at an open-air restaurant, he was killed in an explosion that the United States subsequently explained to have been the result of a drone strike. The strike was directed at a known terrorist, Omar Abdel-Rahman, commonly known as "The Blind Sheikh."³⁷⁹ Recently released from a U.S. prison, Abdel-Rahman joined up with newly elected officials in Egypt's Nur party. Harold Pickles's claim, as personal representative of the estate of his son Peter, is that Peter was deprived of his life by U.S. actors, in violation of the Due Process Clause of the Fifth Amendment.

I will imagine myself as a federal judge sitting in the U.S. District Court for the District of Colorado in Denver, and describe the interpretive work as I think I would experience it. What do I know so far?

- There is the occurrence of a U.S. drone strike.
- There is the death of a U.S. citizen as a result of the strike, on foreign soil.
- The question is whether the strike was legal.
- There are likely other material facts relating to the question of the strike's legality, and which I will need to identify.

you point out, you know, al- Qaida has metastasized and -- which makes it all the more challenging, because a lot of these groups have local agendas, but also are being exploited by al-Qaida core for more sort of violent global jihadist purposes. So, the, you know, Islamic extremism and terrorism -- the Salafi, Takfiri sort of dimension, has some political implications, clearly, with -- you know, a number of the countries in the Arab Spring are dealing with that, but the violence that is attendant to a number of these groups is very, very challenging. And that's why I pointed out that building up the capacities and capabilities of our partners really is going to be the key to success here.").

376. Mark Mazzetti, *The Drone Zone*, N.Y. TIMES MAGAZINE, Jul. 6, 2012, at MM32.

377. *Id.*

378. See David Kilcullen & Andrew McDonald Exum, *Death from Above, Outrage Down Below*, N.Y. TIMES, Mar. 17, 2009, at WK13; Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, at 36.

379. Omar Abdel-Rahman, WIKIPEDIA, http://en.wikipedia.org/wiki/Omar_Abdel-Rahman (last visited Jan. 24, 2014).

As a judge, I will need to identify a body of law that will persuasively explain why the strike was legal or illegal. It is not immediately obvious what this body of law might be. I will also need to survey and collect other facts of material relevance. But how? There is a lot of law out there, spread throughout a huge domain of apparently diverse and unrelated legal materials. And how will I choose among the facts? How far back in time should I go? No doubt, precedent will be instructive. But I will first need to figure out what counts as precedent, and in all likelihood once I do I will find that the authority of these decisions will be limited by other decisions. The narrative that will form the backbone of the legal argument is not going to simply proclaim itself. But then from where should the narrative line come? How should I choose?

Thinking about these questions, I wonder how my friends Anthony and Ricardo might go about all of this. It strikes me that they will be in exactly the same position, one difference being that Anthony will believe that there is an answer out there waiting for him. I do not think that is right. Similarly, Ricardo would suggest that the most sensible way to move forward through the material is merely to select the most reasonable or practical path. That does not strike me as making much sense either, given the highly elastic nature of what might count as reasonable or practical. Besides, I suspect that reasonableness is too low a threshold of decision—there will be some conclusions that seem more persuasive than others regardless of the criterion of reasonableness. In any case, whether you are of the mind that the right answer is out there waiting for you, or you believe that practical considerations will be determinative, we are all in the same boat: We have to get on with the work of actually sifting through the materials.

Once I begin, assuming that the plaintiff is able to persuasively eliminate what would be some substantial jurisdictional hurdles, I immediately notice a creeping sensation. I start to worry about what I think will be a likely gap between my own preferences in favor of the plaintiff, and my sense that the relevant law is against him.³⁸⁰ I think about this for a moment, and do a double take. I have already made a mistake. Why do I have a sense that the law is against the plaintiff, and that there is a gap between such a law, preexisting my own interpretive work, and my preferences for how the law ought to be? Where did this gap come from? Is it really there? To think that there is a gap is already to presume that there is a narrative in the legal materials waiting for me. This is Anthony's approach, which I already know to be wrong.

Nevertheless, the specter of a gap keeps nagging at me. Why? On the one hand, I am aware of my general disposition in favor of both the individualist and communitarian positions. I also know that I am disposed against the idea that the United States should be free to execute American citizens abroad without due process of law. Recognizing these dispositions is helpful, since it is obvious that there is nothing legally obligatory about my having or not having them. To put it another way, there is nothing in this prefigurative stage of the legal reasoning process that might tell me in an objective way whether I should be more inclined

380. Kennedy describes the "panic" in this situation, *supra* note 21, at 523.

toward human rights law or the laws of war. My gut feeling here is to find for Pickles. His claim is heart-wrenching: He has lost his son, and it just seems wrong that he should have died this way. Justice seems to be on Pickles's side here, so I want to be as well. Is it possible to see how justice might be on the side of the drones? Sure, but I am not inclined to do so. That just is not the way the story seems to want to be told.

On the other hand, knowing something of the legal fields in play, I suspect that the United States has a great deal of discretion here, and that while the death of the boy is tragic, it may be difficult to conclude that it was actually illegal. While I have a preference to find in favor of the plaintiff, I have a feeling that the law will push me in favor of the United States. Sensing Judge Anthony's positivism hovering overhead, I have a feeling that this case is "governed by a rule" that I do not like. This awareness of a gap between my preference and the law is important, for at least two very different reasons. One is that I do not want to be overturned on appeal, and so I know that I cannot just decide in favor of finding a constitutional violation if it is unlikely that any of my colleagues will agree. Another reason has to do with the obvious fact that some legal arguments are weaker than others, and my genuine desire as a judge is to generate holdings that are arguably *right*. Some legal arguments just do not let you get to certain conclusions, and I do not want to find myself making an obviously ideological error.

With this intuition about an apparent gap between my preferences and the likely outcome, as well as the intuition that gaps are the ghostly fabrication of positivist fairy tales, my working position is deeply ironic. As much as I can, I shake off the worry about a rule governing the case—my worry about a hostile rule was, after all, simply a first impression—just a feeling. And no lawyer worth his salt draws conclusions based on first impressions. Work must be done in order to identify a whole constellation of rules that seem relevant. No rule will govern the case until I make my decision—then and only then will a rule govern the case, a rule that I have chosen. In this view, the notion of a gap seems to fade again—at least, it fades away at this very initial phase of the work.

Acknowledging that my possibly unconscious preferences have already shaped the field in such a way as to foreground those arguments that will be more favorable to the plaintiff (and also acknowledging that such a prefiguration is only one among many ways to do it), my task appears to be one in which I need to figure out a way to find for the plaintiff, but in a convincing way. I realize that there are a number of choices in front of me with respect to forming an argument. There are no precedents on all fours, and this initial research sweep discloses that the question very quickly turns into whether the strike was an incident of war. If I decide that it was, then I see how easy it will be to move into the explanatory apparatus of the Charter Wartime framework. If I decide that it was not, I can move into the Charter Peacetime framework, which is where I would rather be. Or, in contrast with both of these decisions, I could avoid international law altogether and decide the case purely as a matter of domestic law. Given the absence of any strict guidance forcing me to ignore international law, and my natural inclination to find in favor of the plaintiff, I focus on the Charter Peacetime framework. The next step involves figuring out how to justify the choice to use it, though I do see

that there is not anything necessarily compelling me in this way, and that the option to pursue the laws of war is equally available.

My first question: Did Peter pose an immediate danger and concrete threat to American lives? There is no evidence at all that Peter was the actual target of the strike, and so his death was only incidental to the U.S. attack on the Blind Sheikh. The United States would have preferred Peter remain unharmed, but in its calculus, the strike against the Sheikh was apparently seen as necessary and proportional. I am unable to make any judgments here one way or the other, however, unless I know how to define necessity and proportionality, and in order to know this I need to decide if the strike was an incident of war. But as I already know, there are different ways to foreground and background particular interpretations of these concepts. I will need to figure out how to choose.

This impasse leads to my second question: Does the armed conflict between the United States and al Qaeda extend to Egypt? Should Peter's killing be understood as collateral damage? Thus far, there are no precedents for such an extension and no briefings from the State Department, the Department of Defense, or anywhere else suggesting that this might be the case. The conflict, regardless of whatever legal status we may bestow upon it, has been limited to Pakistan, Afghanistan, and arguably Yemen. Further, as explained in President Obama's address from May 2013, the drone wars seem to be winding down.³⁸¹ There is no question about al Qaeda's presence in certain territories, and we need not rehearse whether the degree of violence instigated by al Qaeda forces in those territories is enough to constitute an armed conflict. The question is whether the level of hostilities in Egypt is enough, and the answer plainly is no. There is no substantial element of al Qaeda operating in Egypt at all.

Relieved, I start thinking that there is a clear case for slipping into the Charter Peacetime framework. And to think I was all worked up about that gap. If there is no colorable claim about the rules of war governing the U.S. strike in Egypt, then perhaps my early worry about not being able to find for Pickles was misplaced. Even my less ironic colleagues on the bench would have trouble finding their way into the laws of war here if there is no credible argument for extending the armed conflict with al Qaeda into Egypt. If this dispute is properly characterized as geographically beyond the conflict with al Qaeda, the plaintiff's chances rise dramatically, as do my own chances of being affirmed on appeal.³⁸²

But just as I gain confidence, I receive a memo from a clerk. The clerk explains that she has researched the background of this particular drone strike, and the separation between Egypt and the conflict with al Qaeda is murkier than I thought. I must consider as well the context of the Arab Uprisings and the recent victories of Political Islam in their wake.³⁸³ Citing West Point's Combating

381. Obama, *supra* note 226.

382. At least on these grounds.

383. Political Islam is a theory of government that counsels its operators to use the Quran and traditions associated with the Prophet Mohammed as guides for the constitutional and legislative pillars of the state. *See generally*, OLIVIER ROY, THE FAILURE OF POLITICAL ISLAM (Carol Volk trans., Harvard University Press 1998). The most eye-

Terrorism Center and its “Militant Ideology Atlas,” the clerk’s extensive memo explains that adherents of Political Islam, or Islamists, are Muslims desiring the use of Islamic Law (*sharia*) as the constitutional structure of a religious state.³⁸⁴ There are many strands of Islamists, and among them are the Salafis. Most Muslims in the Middle East and North Africa believe in Salafism, which involves a tradition that instructs its adherents on the necessity of grounding the law of the state exclusively in the Quran, and in the lived example of Muhammad and the first three generations of his followers (*hadith*). However, while Salafis are committed to extremely conservative and fundamentalist notions about the exclusive nature of God’s law as law of the land (*tawhid*), Salafis are by no means required to believe in the use of violence as a means of furthering their ends. This is rather the view of the *jihadi* Salafis who interpret the Quran as demanding war on the nonbelievers.³⁸⁵ Importantly, while all jihadists like those fighting for al Qaeda—those Muslims claiming holy war on their adversaries, and typically labeled as terrorists—are Salafis, not all Salafis are jihadists. Thus, where Islamist groups like Egypt’s Muslim Brotherhood might be more likely to trend in favor of liberal-democratic reforms, Salafis are extreme social conservatives³⁸⁶ “ideologically akin to the medieval Puritan movement in England and America.”³⁸⁷ Further, with Mohammad Morsi’s recent fall from power, both the Brotherhood and the Salafis are feeling more dispossessed than ever.³⁸⁸

The clerk’s memo is troubling, and it just gets worse. While there is certainly a sure lack of evidence as to an international armed conflict involving Egypt, the Obama Administration has been very clear about its adversary: al Qaeda and its associated forces. There is no reason to think that the Nur party is organizationally associated with al Qaeda, but the Blind Sheikh has been known as an incendiary leader in al-Gama’a al-Islamiyya, an Islamist organization in Egypt that the United States has identified as a terrorist network. The problem here, in making what at first appeared to be a smooth transition into the Charter Peacetime framework, now involves a tricky question of U.S. foreign policy. If the United

popping example is Egypt. David D. Kirkpatrick, *After Victory, Egypt Islamists Seek to Challenge Military*, N.Y. TIMES, June 18, 2012, at A4; see also THE ISLAMISTS ARE COMING: WHO THEY REALLY ARE (Robin Wright ed., 2012); Jessica Matthews, President of the Carnegie Endowment for International Peace, Opening Remarks at Islamists in Power: Views from Within (Apr. 5, 2012).

384. WILLIAM MCCANTS, MILITANT IDEOLOGY ATLAS, COMBATING TERRORISM CNTR. (Nov. 1, 2006), available at <http://libweb.uoregon.edu/ec/e-asia/reada/aer.pdf>.

385. Thomas Hegghammer, *Jihadi-Salafis or Revolutionaries? On Religion and Politics in the Study of Militant Islam*, in GLOBAL SALAFISM: ISLAM’S NEW RELIGIOUS MOVEMENT (Roel Meijer ed., 2009).

386. MCCANTS, *supra* note 384, at 6; see also, Bernard Haykel, *On the Nature of Salafi Thought and Action*, in GLOBAL SALAFISM: ISLAM’S NEW RELIGIOUS MOVEMENT (Roel Meijer ed., 2009).

387. MCCANTS, *supra* note 384, at 6.

388. Edmund Blair, Paul Taylor & Tom Perry, *Special Report: How the Muslim Brotherhood Lost Egypt*, REUTERS (July 26, 2013, 6:51 AM), <http://www.reuters.com/article/2013/07/26/us-egypt-mistakes-specialreport-idUSBRE96O07H20130726>.

States is now claiming that the armed conflict with al Qaeda and its associated forces extends to militant Salafi leaders in Egypt like the Sheikh, there is on the one hand good reason to defer to that judgment. According to the clerk's memo, al Qaeda and Nur claim a fundamentally similar approach to Islamic government, and the justified use of violence against so-called heretics.

Compounding my woes, my second clerk has brought me another memo, outlining the work of prominent international law scholars who have argued pragmatically for the right of a sovereign state to eliminate foreign threats to its security when the host state is "unable or unwilling" to deal with that threat itself.³⁸⁹ The memo also discusses a recently leaked document from the Department of Justice, similarly espousing an unable/unwilling standard.³⁹⁰ Thus, on this view, the United States has an inherent right of self-defense that may be triggered even in the absence of a formally identifiable international armed conflict. My hopes for Pickles are now almost gone. If the United States has a solid legal justification for this sort of strike, without proof of the existence of an international armed conflict, it looks like I would have to make a determination that the Executive branch has failed to properly articulate its interest and how the Sheikh was a threat to U.S. integrity. Thus, to the extent that the Executive branch has determined that the Sheikh's affiliation with al Qaeda-like militancy posed an immediate and substantial threat to U.S. interests, and that Egypt's government—once again in political turmoil—has proved either unwilling or unable to nab the Sheikh, Peter's death seems to fall in an area governed by the discretion of the Obama Administration. While this line of argument is novel, it certainly has enough supporters to give me sufficient credibility, were I to choose this path.

Thankfully, however, the memo also points out that these pragmatist justifications of the new unable/unwilling standard seem to collide head-on with another, equally strong sovereign rights argument: the sovereign right of Egypt to be free of any interference with its "absolute and exclusive" right of territorial autonomy and self-determination. So long as Egypt is recognized as a sovereign state, and as far as I can tell, neither the United States nor the United Nations has attempted to undermine Egypt's status in this way, it is difficult to see why or how the right of the United States to defend its interests should trump the right of Egypt to territorial autonomy. But it is equally difficult to see why Egypt's sovereign right should trump the sovereign rights of the United States, or how something like Judge Ricardo's pragmatism might better counsel in one direction rather than the other. Depending on the interests that are labeled as the more important ones, and depending on which "problem" is the better problem to solve, not to mention what might count as having solved it, pragmatism seems like little more than a masquerade. These arguments appear equally cross-cutting, but given my disposition to show a violation here, the Egyptian argument in favor of sovereign equality is more appealing.

389. See generally Ashley S. Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483 (2012).

390. WHITE PAPER, *supra* note 222.

Regrouping, I try to sum up the various positions in order to get a sense for how I will be able to go about crafting my opinion in detail. I begin by noting the substantial amount of freedom I appear to enjoy. There are clearly a number of ways to go. There is no rule governing this case somehow existing prior to my own interpretive work. There was never a gap, despite my worries. There were only first impressions and hunches, and certainly good judicial work is much more than that. The rule that I feared would be against me only emerged in the context of my work—it was never out there, preceding me. Acknowledging this apparent freedom to maneuver, I then encountered the availability of two ways to explain the legality of the strike. I can adjudicate the claim in the context of cross-border law enforcement, or I can adjudicate the claim as an incident of war. Separately, it seems like I could bypass the U.N. Charter altogether if I take arguments about the unable/unwilling standard seriously.

However, as I moved deeper into the research, I noticed the availability of certain narrative currents attempting to carry me into one or another of these frameworks:

- (1) If I focus on the question of whether there is a traditionally defined international armed conflict between Egypt and the United States, or between any of the Blind Sheikh's affiliations and the United States, I have to struggle to find one. This fact pushes me toward the Charter Peacetime framework, and the likely conclusion that Peter's death was unjustifiable in terms of preventing an immediate and concrete threat to human life.
- (2) If I focus on the nature of the deep ideological connections between Salafism and al Qaeda, however, the possibility of whether Peter's death is implicated in the "armed conflict with al Qaeda and associated forces" becomes harder to reject.
- (3) If I focus on the inherent right that the United States enjoys to self-defense, I can avoid the question of an armed conflict altogether, but at the same time I might focus on the Egyptian right of nonintervention, which appears to collide with the U.S. right of self-defense in the same way as an unstoppable force collides with an unmovable object.

While it strikes me as easily debatable which of these routes seem like the right way to tell the story, I cannot help but visualize the legal materials in the way that my prefigurative interpretive orientations demand. Due to my combination of individualist and communitarian orientations, the field lays out in such a way that it foregrounds arguments leading me toward the Charter Peacetime Framework. I will argue first that there is no international armed conflict between the United States and Egypt, and that the armed conflict between the United States and al Qaeda does not extend to the Blind Sheikh's activities with Egypt's Nur party. This will then lead me to a question of whether, under human rights law and the Due Process Clause of the Fifth Amendment, Peter's death was necessary and proportional to a U.S. interest in eliminating an immediate and concrete threat to human life. In the alternative, I will argue that the U.S. deployment of a drone on a mission to kill a person residing in Egyptian territory was a violation of Egypt's sovereign right of nonintervention, as well as Article 2(4) of the U.N. Charter. I will nod in the direction of the Executive branch's discretion to make foreign

policy decisions, but I will counter with language about the role of the Judicial branch and the important work of checks and balances.

I realize that my decision in the case will be vulnerable on appeal, but it strikes me that whichever way I go here, I will be vulnerable on appeal. I then get to work, constructing the rule that will govern this case.

CONCLUSION

This Article has brought a structuralist perspective to the law of killing. To do so, it began with a review of the relation between semiotics and rhetoric. Semiotics was described in the terms given it by Ferdinand de Saussure and Claude Levi-Strauss, and rhetoric was described in the terms given it by Hayden White. With this structuralist perspective in place, the discussion reviewed White's analysis of the distinction between history and literature, and then used that analysis as a predicate for thinking about the distinction between law and politics. In both cases, the distinction between history and law and between literature and politics traded on a binary relation between objectivity and subjectivity. Structuralist analysis rejects this dichotomy, and offers an epistemological mode rooted in the notion of style, a shorthand for a kind of knowledge production that asserts a truth value mirroring neither the apodictic appearance of positivist science nor the imaginary appearance of the arts.

A structuralist perspective on international law claimed to resolve three chronic problems in its conventional discourse. These were the tendency to dismiss international law as nothing but politics, to regard international law as formally autonomous from politics, and to think of sovereignty and human rights and community as polarities. This perspective confronted the first problem by highlighting the constraining effect of international law as a language-system—an effect in play in all language-systems, international law included. It confronted the second problem by highlighting the discretionary and political aspects of *parole*—the discretionary crafting of legal argument. It confronted the third problem by highlighting the idea that sovereignty is itself a language-system, spoken in recurring and contradictory modes.

The Article brought these insights to a special domain in the language of international law: the law of killing by drone. It began by following Mark Kelman and Pierre Schlag's work on interpretive orientations, and more specifically, Hayden White's structure of tropological orientations: metaphor, metonymy, synecdoche, and irony. In the context of the law of killing, jurists tend to prefigure the field of legal argument through one of four interpretive positions. These are realism, communitarianism (synecdoche), individualism (metonymy), and statism (metonymy plus metaphor). These interpretive orientations prefigure the field in such a way that they foreground the explanatory reasonableness of one legal framework rather than another. The two dominant frameworks are the Charter Peacetime and Charter Wartime frameworks. Depending on which framework a jurist chooses as the explanatory mode for his narrative, certain materials emerge as necessary to the conclusion. This effect was illustrated through a brief survey of the work of four respected scholars of international law: Phillip Alston, Mary Ellen O'Connell, Harold Koh, and Robert Chesney.

The Article concluded by exploring a hypothetical case of drone killing in Egypt. This exploration was intended to serve a number of tasks. First, it sought to illustrate the structuralist (ironic) orientation of interpretive configuration. The judge claimed to be very sensitive to the individualist and communitarian orientations, but also seemed very conscious of the fact that there was nothing actually right about them. His prefiguration was, as a consequence, much more fluid than would be the case for a judge that either had never reflected on his preconceptual attitude, or believed his attitude to be correct in some way. In this ironic mode, there is substantial tension between the judge's work in the direction of crafting a single narrative and the judge's apprehension that the narrative is fragile at best.

Second, the hypothetical highlighted the three problems of international law and showed how they are problems only from a mistaken point of view. The judge's foray into the material disclosed that international law was neither all politics nor all law. This just did not seem to be the right way to think about what was happening at all. At first, the judge seemed dogged by an anxiety about a gap between his politics and the law standing out there, waiting for him. This was the gap he feared might open up in between the way he wanted the case to come out and the way the law would force it to come out. But such a gap was mostly illusory. There was no rule awaiting the judge; this much was clear. Rules only emerged through his active construction of the legal field. And they only emerged as a consequence of his inevitable and unavoidable prefiguration of the field, and still further, they only emerged in the forms that they did as a result of the narrative demands of the available explanatory frameworks. There was no rule waiting to be applied, just as there is no history waiting out there to be told. The rule and the history alike require a construction, and the construction is never a purely political act or a formally legal one. It is an act that is at once wholly constrained and discretionary. Understanding this is to see the crafting of a legal argument as an instance of language-performance, and not as an act either in the mode of judicial activism or judicial fidelity.

Third, the hypothetical focused on the manner in which sovereignty itself functions as a subsystem in the broader grammar of international law. As the judge navigated the field, sovereignty never emerged as a position against which could be countered the human rights perspective, or the interest in peace. The individualist position, for example, aligned nicely with sovereignty when the sovereign right to self-determination was in play. And while the example did not go in this direction, it would be equally plausible to align the sovereign right to self-defense with human rights. Sovereign rights are, after all, based on a metaphor. They are rights attributed to an object known as the state because we are meant to assume deep similarities between that object and another rights-bearing object: the human being.

These rights, conventionally elucidated in the canonical texts of liberal political theory, are famously in tension. To foreground this tension, as well as the metaphor that brings it to light in the context of sovereign states, should not be mistaken for nihilism. What it does demand, however, is our attention to the following: To the extent that law is indeed helpfully described as a language-system, and to the extent that the language-system is commonly spoken in the

vernacular of liberal theory, we should be wary of liberal legalism's fundamentally contradictory grammar. If we do not like the fact that our language is so conditioned, and if we *really* do not like that it is so conditioned in fields as deadly as the law of killing, perhaps it is time to learn a new language.