



HUGO GROTIUS

A CASE OF DUBIOUS PATERNITY

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Reviewing

HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*

(Richard Tuck, ed., Liberty Fund 2005)

HUGO GROTIUS' PATERNITY IS WELL-ESTABLISHED by judicial authority. He has been proclaimed by Stephen Field, one of the most eminent nineteenth-century Supreme Court justices, to be the "father" of international law.¹ Stephen Field was not alone in this judgment. The Ninth Circuit has proclaimed Grotius "the father of modern international law."² Not as persuaded of paternity, perhaps, as the Ninth Circuit, judges on the Court of Claims twice asserted – once in dissent, once in a majority opinion – that Hugo Grotius is "sometimes called the father of international law."³ Without any qualification at all, on the other hand, the Virginia Supreme Court pronounced Hugo Grotius the "father" of international law, from whom can be traced progeny

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¹ *Sprott v. United States*, 87 U.S. 459, 471 (Field, J., dissenting) (1874).

² *Ivancevic v. Artukovic*, 211 F.2d 565, 573, note 20 (9th Cir. 1954).

³ *The Brig "Sally" v. United States*, 50 Ct. Claims 129, 146 (Howry, J., dissenting) (1915); and *The Schooner Atlantic v. United States*, 39 Ct. Claims 193, 195 (1904).

such as Henry Wheaton (1785-1848) and Sir Robert Phillimore (1810-1885).⁴

Scholars of international law have been as willing as their colleagues on the bench to ascribe a lofty pedigree to Grotius. Joseph Sweeney has thus echoed Stephen Field in declaring Grotius to be “the father of modern international law.”⁵ David Bederman has mused that Grotius certainly “earned” the title “father of international law,” although he noted that paternity might also be ascribed to Emmerich de Vattel (1714-1764).⁶ John Yoo, for his part, has confidently asserted Grotius’ paternity not once, but twice.⁷ Major international statesmen and stateswomen – Boutros Boutros Ghali and Mary Robinson to name two – have made similar assertions.⁸ And at the very founding of the American moment, James Madison declared that Grotius “is not unjustly considered . . . the father of the modern code of nations.”⁹

Serious books have been written seeking to ascribe paternity elsewhere. James Brown Scott (1866-1943) is perhaps the most important example. Scott was very much a product of his time – a staunch believer, for instance, in historical jurisprudence, which

⁴ *Dinwiddie County v. Stuart, Buchanan, and Company*, 69 Va. 526, 539 (1877).

⁵ Joseph C. Sweeney, “The Just War Ethic in International Law,” 27 *FORDHAM INT’L L. J.* 1865, 1873 (2004).

⁶ David J. Bederman, “The Foundations of Law: World Law Transcendent,” 54 *EMORY L. J.* 53, 55 (2005).

⁷ John C. Yoo, “Clio at War: The Misuse of History in the War Powers Debate,” 70 *COLO. L. REV.* 1169, 1193 (1999); and John C. Yoo, “Using Force,” 71 *U. CHI. L. REV.* 729, 778 (2004).

⁸ Thus Mary Robinson wrote: “[M]y remarks today will seek to reflect the spirit of Hugo Grotius, one of the founding fathers of internationalism” 19 *AM. U. INT’L L. REV.* 1, 2 (2003); and Boutros Boutros Ghali, while not precisely ascribing paternity, described Grotius as responsible for “[t]he foundations [of] a stable and progressive relations among States” “The Role of International Law in the Twenty-First Century: A Grotian Moment,” 18 *FORDHAM INT’L L. J.* 1609, 1609 (1995).

⁹ James Madison, “Examination of the British Doctrine, a Neutral Trade Not Open in Time of Peace,” in 2 *LETTERS AND OTHER WRITINGS OF JAMES MADISON 1794-1815* at 230, 234.

A Case of Dubious Paternity

taught that law was a progressive development that simultaneously reflected the thoughts and ideas of the past and required fidelity to those time-tested principles for stability and security.¹⁰ For someone possessed of such a jurisprudential commitment, the search for the founder of a particular way of organizing and articulating the law mattered greatly – because fidelity to founding principles was nothing less than a requirement of future success. For Scott, Grotius was important – “a master of international law as regards both its theory and its practical application,” and “a master compiler and expounder”¹¹ – but real paternity should be assigned to Francisco de Vitoria.¹²

With Scott, however, as with the others, we remain enmeshed in the language of paternity and offspring. In Scott’s case, Grotius is made into the heir rather than the parent. But clearly, Scott, as much as the others, felt the need to identify a single clear *fons et origo* of the system of international law.

Having laid bare this way of speaking about the historiography of international law, we should explore what was generally meant by this sort of ascription of paternity. When we speak of “paternity,” it obviously must not be understood in the strictly literal sense. Still, however, it can be said that writers like Stephen Field and James Madison and James Brown Scott meant the word to be understood in a sense only slightly removed from its literal meaning – they were, in short, confidently ascribing the invention of an entire system of thought to the genius of a single great intellect. It is with an awareness of this way of speaking and thinking about Hugo Grotius and, indeed, the historiography of international law generally, that

¹⁰ JAMES BROWN SCOTT, *LAW, THE STATE, AND THE INTERNATIONAL COMMUNITY*, vol I, 8-9 (1939).

¹¹ *Id.*, pp. 521, 522.

¹² “Francisco de Vitoria [1483-1546] has long been known as a theologian, moralist, and humanist; to-day his reputation is that of a jurist and a philosopher as well; tomorrow it will be that of an internationalist and a humanitarian; and many believe that he is destined to be regarded as the founder of the modern law of nations.” JAMES BROWN SCOTT, *THE SPANISH ORIGINS OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS* 68 (1934).

we should approach the new edition of Hugo Grotius' *The Rights of War and Peace*, produced by the Liberty Fund with an introduction by Richard Tuck.



Before discussing this text and the proper role played by Grotius in the historiography of international law, it may be wise to discuss briefly the historical figure of Hugo de Groot (young Hugo would subsequently adopt the Latinized “Grotius”). Grotius was a genuine child prodigy. Born to one of the leading Protestant families of the City of Delft in 1583, it is reported that young Hugo was able to read Latin and Greek by the age of eight and was capable of composing passable Latin poetry by the age of nine. He enrolled in the University of Leiden at the age of eleven and was feted at the court of King Henry IV of France at the age of fifteen as the young “miracle of Holland.”¹³

Grotius did not at first turn his attention to law. A biographer has recorded that “he did not devote himself to any one discipline; rather, he saturated his mind with a broad choice of courses representative of the scholarly offerings of the university. In addition to his curriculum work, Grotius continued to write verse, took part in philosophical debates, and delivered public discourses on mathematics, philosophy, and law.”¹⁴ He eventually chose a legal career, however, rather than a literary or humanist one, and by the early 1600s, he was practicing law at the Hague (which was a political and commercial center but not then the seat of international legal learning that it would later become).¹⁵ He would be named attorney general of Holland in 1607 – at the age of twenty-four!¹⁶ Even though he

¹³ CHARLES S. EDWARDS, HUGO GROTIUS: THE MIRACLE OF HOLLAND (A STUDY IN POLITICAL AND LEGAL THOUGHT) 1-2 (1981).

¹⁴ *Id.*, p. 2.

¹⁵ Grotius' choice of law was made all the more remarkable because he never actually received any training as a lawyer. RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 978 (1999).

¹⁶ EDWARDS, *supra*, p. 2.

A Case of Dubious Paternity

would focus on law for the remainder of his career, he never lost interest in other scholarly pursuits (his *De veritate religionis christianae* – “On the Truth of the Christian Religion” – published in 1632, remains a classic defense of Protestant Christianity); his classical training, furthermore, showed through in all that he did and wrote. Grotius would die in 1645, becoming ill following a shipwreck off the coast of Pomerania.¹⁷

Grotius’ major legal work, however, the work that Richard Tuck has edited and that is being reviewed here, the *De Jure Belli ac Pacis Libri Tres*, known commonly as “The Rights of War and Peace,” was the result of what must have seemed at the time as most distressing circumstances, but that seem in retrospect almost fortuitous. In the 1610s, Grotius was drawn into Dutch politics; he served as an advisor and secretary to Jan van Oldenbarnevelt, “who was in effect prime minister of the Dutch Republic.”¹⁸ Oldenbarnevelt was himself engaged in a delicate balancing act, trying to promote a more liberal and inclusive Calvinist theology over the opposition of more traditional religious believers. Eventually, Oldenbarnevelt and Grotius attempted a coup and found themselves arrested and charged with treason in 1618. “Grotius gave evidence against his old friend and was sentenced to life imprisonment, while Oldenbarnevelt was publicly beheaded in May 1619.”¹⁹

Grotius actually spent only three years in confinement. His confinement, furthermore, gave him the enforced leisure necessary to carry on sustained projects. The conditions of confinement were far from harsh – he lived in Louvestein Castle; his wife and children were given two rooms of their own in the Castle; and Grotius was permitted to make extensive use of books, which were brought to and from the Castle to meet his research needs. Many sabbaticals have been spent less pleasantly. A prison, however, is still a prison, and Grotius escaped his in dramatic fashion, hiding in a trunk full of

¹⁷ *Id.*, p. 8.

¹⁸ Richard Tuck, “Introduction,” at xiii, in HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Richard Tuck, ed. 2005) (hereinafter “Introduction”).

¹⁹ *Id.*, pp. xiv-xv.

books as they were transported out of the Castle.²⁰ He fled to France, where he would spend most of the rest of his life.

Concerning the impact these years of confinement had on Grotius' scholarship, Richard Tuck notes: "Though it was not published until four years after his escape, *De Jure Belli ac Pacis* really grew out of Grotius' time in prison."²¹ It was during those years that Grotius returned to some of his youthful unpublished material and reflected on those early themes in a new light. Having gained his freedom, Grotius wrote the actual text of the *De Jure Belli* quickly, in the eighteen months between the fall of 1622 and the spring of 1624.²²

Written in an elegant, humanist Latin, Grotius' work was made available for sale at the Frankfurt Book Fair in the spring of 1625, and it proved to be an immediate sensation. "By the end of the seventeenth century there had been twenty-six editions of the Latin text, and it had been translated into Dutch ... English ... and French. Its popularity scarcely slackened in the eighteenth century: there were twenty Latin editions, six French, five German, two Dutch, two English, and one Italian (and one Russian, circulated in manuscript)."²³

The text that Richard Tuck edited and the Liberty Fund has published is a 1738 English-language translation of the Latin edition prepared by the French Protestant lawyer Jean Barbeyrac in 1720 and published with a large set of notes. The notes, translated into English, are retained. This particular edition was extremely popular; George Washington himself owned a copy.²⁴ The work fills three volumes spanning almost two thousand pages.



²⁰ EDWARDS, *supra*, pp. 5-6.

²¹ Introduction, p. xv.

²² *Id.*, p. xvi.

²³ *Id.*, p. x.

²⁴ *Id.*, p. xi.

A Case of Dubious Paternity

Now, what of the historiographical tradition alluded to above, which sees Grotius as the father of international law? This is, after all, a tradition that is very ancient, traceable in the American context to the founding period itself. Richard Tuck himself raises some doubts over whether Grotius really deserves this label. Tuck expresses his misgivings while trying to situate Grotius in his own historical context. Western Europe in the seventeenth century was still grappling with a series of disorienting changes to its entire universe. Two hundred years before, European writers could confidently assert the universality of principles of natural law derived from ancient Greek and Roman sources, but now, with the whole world opened up to exploration and colonization, European thinkers were increasingly less sure of themselves. Even a writer like the French Catholic Michel Montaigne, active in the 1570s and 1580s, despaired of the possibility of knowing universal truth. How, then, in a climate of increasing cultural self-doubt, to explain this new awareness of the diversity of human experience?

If Europeans were grappling with the unsettling shifts in mental landscape that the opening of the world brought with it, they also had to deal with the juridical reality that much of the process of world exploration – indeed, much of the economic exploitation and colonization also – was placed in the hands of private business ventures. The English joint-stock companies of the time probably need no extended explanation²⁵ – the British East India Company, first chartered in 1600, was granted exclusive trading privileges in India; the Hudson's Bay Company, chartered in 1670, once exercised po-

²⁵ The classic article by Frank Evans, "The Evolution of the English Joint-Stock Limited Trading Company," 8 *COL. L. REV.* 339 (1908) retains some value. See also, e.g., Ann M. Carlos and Stephen Nichols, "'Giants of an Earlier Capitalism: The Chartered Trading Companies as Modern Multinationals,'" 62 *BUSINESS HIST. REV.* 398 (1988).

Economic historians, concerned principally with the development of ways of doing business, have seen in these joint stock companies much that was useful for future development. See Ann M. Carlos, Jennifer Key, and Jill L. Dupree, "Learning and the Creation of Stock-Market Institutions: Evidence from the Royal African and Hudson's Bay Companies, 1670-1700," 58 *J. ECON. HIST.* 318 (1998).

litical and economic power over an area extending from Baffin Island in the northeast to an area south and west of modern-day Edmonton; and the Royal African Company, chartered in 1672, transported slaves to the British colonies in the Caribbean and Atlantic seaboard and gold back to England. The Dutch played the same commercial game. The Dutch East India Company, founded in 1602, was a rival in both a political and economic sense, to the British venture in India.²⁶ It was the Dutch Company whose interests Grotius served in the early 1600s, when he authored a memorandum defending “the military and commercial activity of the Dutch East India Company” – a memorandum to which Grotius returned when he wrote the *De Jure Belli et Pacis*.²⁷

Tuck wishes to see Grotius not so much as the founder of international law, but as the “creat[or] [of] a new science of morality.”²⁸ This new science would find its most important application in the moral analysis of warfare. Regarding the morality of war, Tuck looks to the European context outlined above and sees two broadly different approaches in a world whose full expanse had only recently been discovered. The first approach looked back to medieval scholasticism, especially as restated by the Spanish Dominicans and Jesuits of the sixteenth century. These writers tended to be critical of European wars of expansion, judging them to be little more than unjust acts of aggression. The other school of thought, which Tuck calls “humanist,” “applauded warfare in the interests of one’s *respublica*, and saw a dramatic moral difference between Christian European civilization and barbarism.”²⁹

Grotius was able to create a new synthesis, on this argument, by taking a steely-eyed view of the human condition as essentially Hobbesian while accepting a large role for private violence, especially as

²⁶ For a comparison of English and Dutch companies, see Jelle C. Riemersma, “Oceanic Expansion: Government Influence on Company Organization in Holland and England (1550-1650),” 10 J. ECONOMIC HIST. 31 (1950) (supplement).

²⁷ Introduction, p. xvii.

²⁸ TUCK, THE RIGHTS OF WAR AND PEACE, *supra*, p. 78.

²⁹ *Id.*

A Case of Dubious Paternity

conducted by the European trading companies that were in the process of expanding their interests and influence across the globe.

First, a word about the Grotian conception of the human condition. Synthesizing Grotius' treatment of this subject in his *De Jure Praedae* (1604) and in the first and second editions of the *De Jure Belli ac Pacis*, Tuck observes that Grotius believed in two fundamental natural rights – self-defense and the right to acquire property necessary and useful for survival.³⁰ He was, furthermore, willing to extend the right of self-defense far beyond its usual limit, granting to individuals not only the right to repulse an immediate threat to safety but also the power to punish a transgressor. He balanced this right, however, by simultaneously teaching that it belonged to no one to injure another or to take another's property.³¹ Grotius was reluctant, finally, to ground any of his claims on a robust theory of divine law, preferring instead to rely on his "impious hypothesis" – "that law, politics, and society would continue 'even were we to accept the infamous premise that God did not exist or did not concern himself with human affairs.'"³² We were rather, in Grotius' judgment, dependent on the resources of our reason and experience in fashioning rules satisfactory for social organization.

Grotius derived from this complex of ideas his theory of the right of private violence. Just like individuals or states, business entities had a robust right of self-defense that extended beyond the immediate repulsion of attack to include the infliction of punishment on others. Tuck explains the implications of this teaching for the global trading companies that had begun to penetrate the far reaches of the globe: "[P]rivate war was legitimate. The East India Company, though legally a private individual, could indeed make war as if it

³⁰ Introduction, p. xix.

³¹ *Id.*, p. xx-xxi.

³² John Witte, Jr., "Law and Religion: The Challenges of Christian Jurisprudence," 2 U. ST. THOMAS. L.J. 439, 451 (2005). An important essay that seeks to read Grotius, and the impious hypothesis, as consistent with the Christian tradition is M.B. Crowe, "The 'Impious Hypothesis:' A Paradox in Hugo Grotius?" in GROTIVS, PUFENDORF, AND MODERN NATURAL LAW 3 (Knud Haakonssen, ed., 1999).

were a state when it encountered any people with whom it did not already have some kind of civil association.”³³ This right, furthermore, was capable of easy extension; it is a short move, after all, from a right to punish to the additional right of conquest – a right of particular utility in the appropriation of native lands by the European settlers of North America.³⁴

Speaking more generally of Grotius as a moral and political thinker, Tuck sees great originality in his synthesis and makes it clear that this was the common consensus of seventeenth- and eighteenth-century thinkers. As Tuck puts it, “we have indeed found that many of the central themes of modern political theory” were brought together for the first time in Grotius’ *De Jure Belli ac Pacis*. Grotius’ work, in Tuck’s estimation, is “the formative work of modern moral and political theory.”³⁵ On this account, Grotius retains his paternity, but he has become the father not of international law or the law of nations, but of an entirely new way of viewing everything from political obligation to natural rights.



There are a number of observations that need to be made at this point. Most importantly, Grotius cannot truly be viewed to be a creator *ex nihilo* of modern political theory. Tuck does not quite say that Grotius should occupy this status, but an impression that this is so might legitimately be formed based on some of his remarks. In fact, Grotius did not write on a blank slate but drew deeply not only from classical sources but from distinctively medieval ways of viewing the world. One can consider three examples –

³³ Introduction, p. xxvii.

³⁴ *Id.*, pp. xxvii-xxviii. On Grotius’ theory of the right of conquest, see SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 18-31 (1996). According to Korman, Grotius found the rights a conqueror enjoyed over subjugated territory to be “absolute and unlimited,” including even the right “to kill or enslave any person captured on enemy territory.” *Id.*, p. 29.

³⁵ Introduction, pp. xxxiii, xi.

A Case of Dubious Paternity

his use of rights language, his treatment of marriage, and his debt to older ways of viewing relations among states – although still other examples might also be adduced.

Turning first to Grotius' use of rights language, Brian Tierney has called Grotius' work "a last, indispensable arch" on the bridge between the medieval and the modern worlds.³⁶ This transitional role, Tierney makes clear, is especially evident in Grotius' use of the vocabulary of natural rights. Grotius was not hostile to revealed religion, Tierney demonstrates;³⁷ and his theory of natural rights had much in common with the overtly Christian conceptions of natural rights that had been in common currency since the twelfth century: "In the work of Grotius, as in that of his scholastic predecessors, we find natural rights and natural law existing side by side, both associated with traits of human nature that were taken to be implanted by God."³⁸

One can also gain an appreciation for Grotius' dependence on medieval sources by turning to his discussion of marriage. Grotius commences Chapter Five of Book II of the *De Jure Belli ac Pacis* by noting that it is possible for persons to acquire rights over other persons, and gives the example of young children resident in the households of their parents.³⁹ One gains a sense of how indebted Grotius was to his medieval predecessors by considering briefly not the English translation of the *De Jure Belli*, but Grotius' Latin original. Parents, Grotius asserted, acquire a *ius* (a "right") over their children.⁴⁰ Both mother and father possess this right, but where they disagree, the father's will is to be preferred. Part of this right embraces, fur-

³⁶ BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW, 1150-1625* 316 (1997).

³⁷ Tierney, for instance, describes the "impious hypothesis" as "a rather common topos of late scholastic discourse . . . Grotius could have picked it up from Suarez or any one of a half a dozen sixteenth-century authors." *Id.*, pp. 319-320.

³⁸ *Id.*, p. 319.

³⁹ GROTIUS, vol. II, pp. 508-509.

⁴⁰ I am here following the 1646 edition of Grotius' *De Jure Belli ac Pacis*, reproduced as volume I of *The Classics of International Law*, and published in 1913 under the general editorship of James Brown Scott. See Book II, ch. V, part 1, pp. 145-146.

thermore, the subordinate right to discipline (*ius ... emendandi*) one's children. What is remarkable about this passage is the extent to which Grotius' vocabulary mirrors medieval canonistic discussions of the rights of parents over offspring, right down to the *ius emendandi*.⁴¹

Much of the rest of Grotius' treatment of marriage can be subjected to the same sort of analysis. Thus he stated that the "husband is the head of the wife" (*maritus uxoris caput*) in Latin phrasing similar to that which is found in any number of medieval canonistic or scholastic texts.⁴² And when he came to discuss the conjugal debt, as established by St. Paul in the First Letter to Corinthians, once again we see Grotius using a rights vocabulary developed by canonists in the twelfth and thirteenth centuries.⁴³ These examples could be further multiplied.

If Grotius relied upon peculiarly medieval forms of analysis in his use of natural rights and his discussion of marriage, we need to modify claims about his originality. He was not the great founder of modern political and moral thought, although he is certainly an important figure. Although he certainly worked his sources into a new and important *ensemble* of ideas, he was not writing on a blank slate. Rather, he stood as an heir to a juristic tradition that was already several hundred years old.⁴⁴ It was a tradition that a capacious intel-

⁴¹ On the right of parents to discipline children in medieval canon law, see CHARLES J. REID, JR., *POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW* 92-93 (2004); on "the right to govern the family" in Roman and canon law more generally, see *id.*, pp. 82-93.

⁴² See *id.*, note 89, p. 244 and note 92, p. 245.

⁴³ As St. Paul conceived it, the conjugal debt was an obligation that each party to a marriage owed the other party to be open to sexual intercourse. See 1 *Corinthians* 7:3-6. This Scriptural exhortation was transformed into an intricate series of legally enforceable reciprocal rights and duties by the medieval canonists. When Grotius employs rights language to describe St. Paul's admonition, as he does at Bk. II, chapter V, part 9, p. 148, he is employing not a scriptural vocabulary but a medieval canonistic one. See REID, *supra*, pp. 103-126.

⁴⁴ This is a tradition that has come to be known as the first European *ius commune* – the common law of the European Continent, which was derived from canonistic and civilian sources and which flourished in the later middle ages and early mod-

A Case of Dubious Paternity

lect like Grotius was capable of reworking; but to appreciate Grotius' accomplishments, we must also acknowledge this large and important source.

If we need to temper our enthusiasm about Grotius' originality on the subject of politics and morality, we should be similarly cautious in assessing his role in the development of what is now called "international law" but what was called in Grotius' time "the law of nations." Since at the least the twelfth century, popes and canonists had to confront the reality of non-Christian peoples living on the periphery of Europe – including the Muslim peoples of Spain and North Africa, the Mongolian conquerors of the Russian steppes,⁴⁵ and the richly diverse peoples of the Holy Land. Pope Innocent IV (reigned 1243-1254) took an important step in recognizing the legitimacy of these non-Christian kingdoms and principalities in his commentary to the decretal letter *Quod super his*.⁴⁶ An analysis of this commentary, and of many other medieval papal contributions to the shaping of the earliest law of nations, can be found in the scholarship of the Brown University scholar James Muldoon.⁴⁷ The popes felt the need to describe and define the legal status of these peoples for a number of reasons – ranging from the protection of Christian minorities within their boundaries to the desire to develop diplomatic and trading relationships. These efforts led to the creation of a constellation of sophisticated doctrines that in turn provided a founda-

ern period. Important studies of this tradition, with special application to the subject of natural law and natural rights include: Richard H. Helmholz, "Natural Human Rights: The Perspective of the *Ius Commune*," 52 CATH. U. L. REV. 301 (2003); and Kenneth Pennington, "The Spirit of Legal History," 64 U. CHI. L. REV. 1097 (1997).

⁴⁵ An important study of papal/Mongolian relations is IGOR DE RACHEWILTZ, *PAPAL ENVOYS TO THE GREAT KHANS* (1971).

⁴⁶ INNOCENT IV, *COMMENTARIA DOCTISSIMA IN QUINQUE LIBROS DECRETALIUM* (Turin, 1581), at X.3.34.8, v. *pro defensione*.

⁴⁷ JAMES MULDOON, *POPES, LAWYERS, AND INFIDELS: THE CHURCH AND THE NON-CHRISTIAN WORLD 1250-1550*, 5-15 (1979) (discussing Innocent IV's commentary); see also, e.g., JAMES MULDOON, *EMPIRE AND ORDER: THE CONCEPT OF EMPIRE, 800-1800* (1999).

tion for the Spanish writers of the sixteenth century – Francisco de Vitoria, Francisco Suarez, and the Jesuit and Dominican fathers thought by James Brown Scott and others to be the founders of international law.⁴⁸

If Grotius depended upon this earlier body of scholastic writing for some parts of his theory on the relations of states, his departures from this tradition cannot invariably be judged to be improvements. One example is the wide latitude Grotius allowed for private violence. The medieval canon lawyers and scholastic philosophers, from the twelfth century onward, had been concerned with the identification of the locus of the authority for the just prosecution of war.⁴⁹ These medieval writers were fairly obsessed with this question because the world that they inhabited was filled with private violence – every small-time warlord with a castle full of men sought to expand his influence and reach. The recognition, by Grotius and others, that private business enterprises might also engage in the making of war removed the barriers that the medieval lawyers erected and allowed for some of the more grotesque abominations of the early modern and modern world – one need only think of the concentrated exertions of private violence required to sustain the slave trade.⁵⁰ There is reason to conclude, furthermore, that in today's time, preoccupied as it is with eroding national sovereignty and failing states, the scholastic preoccupation with determining which institutions possess the power to make war might remain valuable.

⁴⁸ Especially useful in demonstrating this line of transmission is James Muldoon, "The Contribution of the Medieval Canon Lawyers to the Formation of International Law," 28 *TRADITIO* 483-497 (1972).

⁴⁹ The issue of the authority to wage war is a constant theme in FREDERICK H. RUSSELL, *THE JUST WAR ON THE MIDDLE AGES* (1975). Cf. James A. Brundage, "The Limits of the War-Making Power: The Contribution of the Medieval Canonists," in *PEACE IN THE NUCLEAR AGE: THE BISHOPS' PASTORAL LETTER IN PERSPECTIVE* 69 (Charles J. Reid, Jr., ed., 1986).

⁵⁰ An excellent study of the role played by Grotius' own company – the Dutch East India Company – in the slave trade is Julia Adams, "Principals and Agents, Colonialists and Company Men: The Decay of Colonial Control in the Dutch East Indies," 61 *AM. SOCIOLOGICAL REV.* 12 (1996).

A Case of Dubious Paternity

Thus, although Grotius was a “father,” he was no Adam – clearly he was not the first person to think important thoughts about politics or morality or even the relations among states. Perhaps, it is best not to think about paternity at all when we consider the historical personage Hugo Grotius. He remains an important figure who speaks to us today through works such as the *De Jure Belli ac Pacis*, which is a magnificent *tour de force* of philosophy and classical learning. But his theories are not always original and when they are they do not necessarily lead us to a better life.



THE GROTIUS

12 U.S. (8 Cranch) 456 (1814) (headnote)

The *Grotius*, an American ship owned by Thomas Sheafe and Charles Coffin, the Claimants, sailed from Portsmouth, New Hampshire, March 2d, 1812 ... and arrived at Cronstadt on the 17th of June, 1812. The cargo ... was consigned to a house at St. Petersburg. The consignees furnished a return cargo on the credit of the outward cargo. After the return cargo was put on board, the French armies having entered Russia and threatening to approach St. Petersburg, the consignees were apprehensive that their security for the return cargo might be lost. They arrested the ship ... and would not permit her to depart, but on condition that she should proceed to London with the cargo then on board, and that the captain should sign bills of lading to deliver the property in London to the order of the consignees; they stipulating that if they should have obtained payment from the proceeds of the outward cargo, the bills of lading should be given up to their owners or agents in London, and the cargo then to be at the disposition of the captain.

The news of the war between the United States and Great Britain having reached St. Petersburg, the American ships in that port, ... with the knowledge and approbation of Mr. Adams, the American minister at the Court of St. Petersburg, sailed for England with British licenses. This was resorted to as the only course in which it was possible to get home. The *Grotius* sailed ... with such license. ... On the 2d day of May following, she arrived at London, and there discharged her cargo consisting of iron, hemp and cordage, and, on the 17th of June following, departed for the United States, in ballast. On the 29th of July, she was captured by the privateer *Frolic*, John O'Diorne commander, who put one man on board of her from the privateer. The captain of the *Grotius* kept his papers and the command of his ship, and navigated her to Boston. On her arrival, she was libelled in the district Court of Massachusetts.