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978-1-107-09290-7 - Roman Law in the State of Nature: The Classical Foundations
of Hugo Grotius' Natural Law
Benjamin Straumann
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ROMAN LAW IN THE STATE OF NATURE

Roman Law in the State of Nature offers a new interpretation of the foundations of Hugo Grotius' natural law theory. Surveying the significance of texts from classical antiquity, Benjamin Straumann argues that certain classical texts, namely Roman law and a specifically Ciceronian brand of Stoicism, were particularly influential for Grotius in the construction of his theory of natural law. The book asserts that Grotius, a humanist steeped in Roman law, had many reasons to employ Roman tradition and explains how Cicero's ethics and Roman law – secular and offering a doctrine of the freedom of the high seas – were ideally suited to provide the rules for Grotius' state of nature. This fascinating new study offers historians, classicists, and political theorists a fresh account of the historical background of the development of natural rights, natural law, and international legal norms as they emerged in seventeenth-century early modern Europe.

BENJAMIN STRAUMANN is Alberico Gentili Fellow at New York University School of Law. He is the editor, with Benedict Kingsbury, of Alberico Gentili's *The Wars of the Romans: A Critical Edition and Translation of De armis Romanis* (2011). With Nehal Bhuta and Anthony Pagden, Straumann edits the new series in the History and Theory of International Law for Oxford University Press.

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BENJAMIN STRAUMANN

TRANSLATED BY
BELINDA COOPER



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“[Moral] science had been most highly esteemed by the wisest of the ancients, who devoted themselves to its study with great care. It then lay buried under debris, together with almost all the other noble arts, until a little after the beginning of the last century, when it was restored to more than its pristine splendor . . . by the incomparable Hugo Grotius in his outstanding work *The Rights of War and Peace*.”

Gershom Carmichael (1724)

“[L]es compilations de Grotius ne méritaient pas le tribut d’estime que l’ignorance leur a payée. Citer les pensées des vieux auteurs qui ont dit le pour et le contre, ce n’est pas penser.”

Voltaire (1768)

“The system of Grotius is implicated with Roman law at its very foundation, and this connection rendered inevitable – what the legal training of the writer would perhaps have entailed without it – the free employment in every paragraph of technical phraseology, and of modes of reasoning, defining, and illustrating, which must sometimes conceal the sense, and almost always the force and cogency, of the argument from the reader who is unfamiliar with the sources whence they have been derived.”

Henry Sumner Maine (1861)

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Preface and acknowledgments

This book presents an argument about the foundations of Hugo Grotius' system of natural law. While Grotius provided a very wide variety of citations to develop and bolster his theory, only certain kinds of sources were authoritative, namely Roman law and Ciceronian ethics – or so this monograph argues. My book does not simply take Grotius' practice of citation as conclusive, but instead offers an argument that specific Roman sources were much more important to Grotius than the other texts he cites and indeed provided the foundations for his highly influential system of natural jurisprudence.

Parts of this book have appeared previously in various places, and I am grateful to the editors and publishers of that material for allowing republication in the present book: “*Appetitus societatis* and *oikeiosis*: Hugo Grotius' Ciceronian Argument for Natural Law and Just War,” *Grotiana* 24–25 (2003–4); “The Right to Punish as a Just Cause of War in Hugo Grotius' Natural Law,” *Studies in the History of Ethics* 2 (February 2006); “Ancient Caesarian Lawyers' in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius' *De iure praedae*,” *Political Theory* 34, no. 3 (2006); “Natural Rights and Roman Law in Hugo Grotius's *Theses LVI, De iure praedae* and *Defensio capitis quinti maris liberi*,” *Grotiana* 26–28 (2005–7), also published in H. W. Blom, ed., *Property, Piracy and Punishment: Hugo Grotius on War and Booty in De iure praedae* (Leiden: Brill, 2009); “Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius' Early Works on Natural Law,” *Law and History Review* 27, 1 (Spring 2009); “Introduction” (with Benedict Kingsbury), in Alberico Gentili, *The Wars of the Romans: A Critical Edition and Translation of De armis Romanis*, ed. B. Kingsbury and B. Straumann (Oxford: Oxford University Press, 2011).

Significant parts of this book are based on my previous *Hugo Grotius und die Antike. Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht*, which appeared with Nomos Verlagsgesellschaft (Baden-Baden) back

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Preface and acknowledgments

in 2007 and had grown out of my Zurich doctoral thesis written under the supervision of Beat Näf. I am grateful to Nomos for allowing me to use material from that book. The present book represents a thoroughly revised, restructured, and updated version of the previous study, to which quite a bit of newly written material has been added that reflects my latest thinking on the subject. Substantial parts have been expertly translated from the original German by Belinda Cooper. To the extent that the language is comprehensible and clear this is Belinda's achievement. I have hugely profited not only from her knowledge of German and general linguistic sensitivity but also from her expertise in law and history.

This monograph and its German predecessor have been a long time in the making, and I have incurred many debts on the way. Beat Näf invited me to write the article on Rome in the reception section of *Der Neue Pauly* (*Brill's New Pauly*) and furthered my interest in the classical tradition early on; what this kind of research can contribute to the study of the history of political thought shall become apparent, I hope, from the present book. An invitation to a conference at the Netherlands Institute for Advanced Study assisted me in thinking about my main arguments. Thanks are due especially to Hans Blom, Laurens Winkel, Peter Haggenmacher, Peter Borschberg, and Martine van Ittersum (who let me read a draft of her *Profit and Principle*). Laurens Winkel later was to provide very useful critical comments at the thesis defense, and Jörg Fisch and Wilfried Nippel helped to get the research off the ground and supported my application for funding from the *Forschungskredit* of the University of Zurich. The *Forschungskredit* and the Swiss National Science Foundation deserve ample thanks for their generous support over the years.

In the United States and further afield, many excellent scholars have provided support, read drafts and provided input over the years, chief among them Clifford Ando, David Armitage, Lauren Benton, Nehal Bhuta, Andrew Fitzmaurice, Jacob Giltaij, Leslie Green, Kinch Hoekstra, Benedict Kingsbury, Martti Koskeniemi, Randall Lesaffer, David Lupher, Jon Miller, Anthony Pagden, Peter Schröder, Kaius Tuori, Jeremy Waldron, Joseph Weiler, James Whitman, and James Zetzel. At New York University School of Law, William Nelson, Daniel Hulsebosch, and the Golieb fellows were hospitable to my distinctly un-American legal historical activities. I have much profited from Annabel Brett's impressive erudition and would like to thank Chris Brooke, Knud Haakonssen, and Peter Garnsey for their help and scholarly and friendly correspondence. The late István Hont, whose own work is a model to aspire to, provided me the opportunity to make a presentation in Cambridge and kindly hosted me at King's

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College, which allowed me to get a taste of the Cantabrigian way of doing intellectual history. Further, I would like to express thanks to Chris Brooke and Leslie Green for facilitating my visit to Oxford and Balliol in 2009, and to Oxford's Faculty of Classics and Andrew Lintott for receiving me there very kindly.

Over the years, Tobias Schaffner has been an extremely incisive reader of various drafts and, more importantly, an interlocutor very well versed in, and passionate about, Grotius' ideas. More recently, Daniel Lee has emerged as a major and original scholar of the Roman tradition in political thought with many overlapping interests, and I owe him thanks for stimulating conversations, criticism, and correspondence. During my years at NYU Law School, Benedict Kingsbury has been an unfailing source of support and a very warm, open-minded, erudite, entrepreneurial, and cheerful collaborator, and the Institute for International Law and Justice an excellent institution to conduct research at. I should like to thank Liz Friend-Smith at the Press for her efficient work and the two anonymous readers for their reviews, and I am grateful to the Ideas in Context editors for including my manuscript in their series. I am very grateful to the copy-editor, Andrew Dyck, whose erudition saved me from many mistakes; any remaining errors are my own. The longstanding intellectual exchange and friendship with Andreas Gyr has been a crucial stimulus and source of ideas; my brothers Till and Patrick, the Wolffs in Basel, Jascha Preuss and Naomi Wolfensohn, and Eva Kim have provided major sustenance and a congenial framework for a few quiet ones on both sides of the Atlantic.

Abbreviations

- ARPB* Grotius, Hugo. *De antiquitate reipublicae Batavaeae*. *The Antiquity of the Batavian Republic*, with the notes by Petrus Scriverius, ed. and trans. Jan Waszink et al. (Bibliotheca Latinitatis Novae 2). Assen, 2000.
- BHG* Molhuysen, P. C. (ed.). *Briefwisseling van Hugo Grotius*. 17 vols. The Hague, 1936.
- BR* Blair, Emma Helen and James Alexander Robertson (eds.). *The Philippine Islands 1493–1898*. Vol. 1. Cleveland, 1903.
- CC* Clark, George N. and Willem J. M. Eysinga. *The Colonial Conferences between England and the Netherlands in 1613 and 1615*. Vol. 1 (Bibliotheca Visseriana 15). Leiden, 1940.
- CD* Vázquez, Gabriel. *Commentariorum ac disputationum in primam secundae S. Thomae*. Vol. 2. Alcalá, 1605.
- CI* Vázquez de Menchaca, Fernando. *Controversiarum illustrium aliarumque usu frequentium libri tres*, ed. F. Rodríguez Alcalde. Vol. 2. Valladolid, 1931.
- CLP* Hugo Grotius. *Commentary on the Law of Prize and Booty*, ed. and with an Introduction by Martine J. van Ittersum, trans. Gwladys L. Williams. Indianapolis, 2006.
- CT* Borschberg, Peter. *Hugo Grotius 'Commentarius in theses XI'. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*. Bern, 1994.
- DC* Hobbes, Thomas. *De cive*, ed. H. Warrender. Oxford, 1983.

Abbreviations

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- DCQ* Grotius, Hugo, *Defensio capitis quinti Maris liberi oppugnati a Guilielmo Welwodo*, in Samuel Muller, *Mare Clausum: Bijdrage tot de Geschiedenis der Rivaliteit van Engeland en Nederland in de Zeventiende Eeuw*. Amsterdam 1872: 331–61.
- EL* Hobbes, Thomas. *The Elements of Law, Natural and Politic (1640)*, ed. F. Tönnies. 2nd edn. London, 1969.
- Encyclopédie* Boucher d'Argis, Antoine-Gaspard, "Law of Nature, or Natural Law," in *The Encyclopedia of Diderot and d'Alembert Collaborative Translation Project*, trans. Susan Rosa. Ann Arbor, 2002. <http://hdl.handle.net/2027/spo.did2222.0000.021> (orig. "Droit de la nature, ou droit naturel," *Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers*, vol. 5, 131–34, Paris, 1755).
- EPM* Hume, David. *An Enquiry concerning the Principles of Morals*, ed. Tom L. Beauchamp. Oxford, 1998.
- IB* Gentili, Alberico. *De iure belli libri tres*. 2 vols. (The Classics of International Law 16). Oxford, 1933.
- IBP* Grotius, Hugo. *De iure belli ac pacis libri tres, in quibus ius naturae et gentium item iuris publici praecipua explicantur*, ed. B. J. A. de Kanter-van Hettinga Tromp. Leiden, 1939 (rpt. Aalen, 1993, with additional notes by R. Feenstra and C. E. Persenaire).
- IBP Barbeyrac* Grotius, Hugo. *The Rights of War and Peace, in three books. Wherein are explained, The Law of Nature and Nations, and The Principal Points relating to Government, translated into English. To which are added All the large Notes of Mr. J. Barbeyrac*. London, 1738 (= Ter Meulen and Diermanse 1950, no. 635).
- IBP Gronovius* Grotius, Hugo. *De iure belli ac pacis libri tres, in quibus jus naturae & gentium, item juris publici praecipua explicantur. Cum annotatis auctoris, ejusdemque dissertatione De mari libero; ac libello singulari De aequitate, indulgentia, & facilitate; nec non Joann. Frid. Gronovii notis in totum opus De iure belli ac pacis. Editionem omnium, quae hactenus prodierunt, emendatissimam, ad fidem priorum & optimarum recensuit; loca pleraque auctorum*

- laudatorum distinctius designavit; innumeros in illis errores sustulit aut indicavit, notulas denique addidit Joannes Barbeyrac.* Amsterdam, 1720 (= Ter Meulen and Diermanse 1950, no. 602).
- IBP* Schätzel Grotius, Hugo. *De jure belli ac pacis libri tres, Drei Bücher vom Recht des Krieges und des Friedens Paris 1625*, tr. with introduction by Walter Schätzel (Die Klassiker des Völkerrechts 1). Tübingen, 1950.
- IBP* Scott Grotius, Hugo, *De jure belli ac pacis libri tres*, trans. Francis W. Kelsey, with introduction by James Brown Scott (The Classics of International Law, ed. J. B. Scott, 3.2). Oxford, 1925.
- IPC* Grotius, Hugo. *De iure praedae commentarius. A ColloTYPE Reproduction of the Original Manuscript of 1604 in the Handwriting of Grotius belonging to the State University of Leyden* (The Classics of International Law, ed. J. B. Scott 22.2). Oxford, 1950.
- IPC* Hamaker Grotius, Hugo. *De jure praedae commentarius*, ed. H. G. Hamaker. The Hague, 1868.
- IPC* Scott Grotius, Hugo. *De iure praedae commentaries*, trans. from orig. ms. of 1604, by Gwladys L. Williams and Walter H. Zeydel (The Classics of International Law, ed. J. B. Scott 22.1). Oxford, 1950.
- Leviathan* Hobbes, Thomas. *Leviathan*, ed. Noel Malcolm 3 vols. Oxford, 2012.
- LJ* Smith, Adam. *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein. Oxford, 1978.
- LS* Long, A. A. and D. N., Sedley. *The Hellenistic Philosophers. Volume 2: Greek and Latin Texts, with Notes and Bibliography*. Cambridge, 1987.
- MC* Selden, John. *Mare clausum, seu, De dominio maris libri duo. I. Mare, ex iure naturae seu gentium, omnium hominum non esse commune, sed dominii privati seu proprietatis capax, pariter ac tellurem, esse demonstratur. II. Serenissimum Magnae Britanniae regem maris circumflui, ut individuae atque perpetuae imperii britannici appendicis, dominum esse asseritur: accedunt Marci Zuerii Boxhornii apologia pro navigationibus Hollandorum adversus Pontum*

Abbreviations

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- Heuterum, et Tractatus mutui commercii & Navigationis inter Henricum VII. regem Angliae & Philippum archiducem Austriae.* London, 1636.
- ML* Grotius, Hugo. *Mare liberum, The Freedom of the Seas, or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, trans. with a revision of the Latin Text of 1633 by Ralph van Deman Magoffin, ed. with an introductory note by James Brown Scott. New York, 1916.
- ML Armitage* Grotius, Hugo. *The Free Sea, Translated by Richard Hakluyt with William Welwod's Critique and Grotius's Reply*, ed. and with an introduction by David Armitage. Indianapolis, 2004.
- PE* Hume, David. *Political Essays*, ed. Knud Haakonssen. Cambridge, 1994.
- RWP* Grotius, Hugo. *The Rights of War and Peace*, ed. Richard Tuck and Jean Barbeyrac. Indianapolis, 2005.
- SVF* Arnim, J. von (ed.). *Stoicorum veterum fragmenta*. 4 vols. Leipzig, 1903–1924.
- Theses LVI* Grotius, Hugo. *Theses sive Quaestiones LVI de iure hominis in actiones et res suas*. MS University Library Leiden, BPL 922 I foll. 287–90.
- THN* Hume, David. *A Treatise of Human Nature*, ed. D. F. Norton and M. J. Norton. 2 vols. Oxford, 2007.
- TLL* Suárez, Francisco. *Tractatus de legibus ac Deo legislatore*. Naples, 1872.
- TMS* Smith, Adam, *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie. Oxford, 1976.
- WR* Gentili, Alberico, *The Wars of the Romans. A Critical Edition and Translation of De armis Romanis*, ed. and with an introduction by Benedict Kingsbury and Benjamin Straumann, trans. David Luper, Oxford, 2011.

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De iure praedae (abbreviated as *IPC*) is cited after Hugo Grotius, *De iure praedae commentarius*. A Collotype Reproduction of the Original Manuscript of 1604, ed. J. B. Scott, The Classics of International Law 22, vol. 2 (Oxford, 1950); when *IPC* is cited in English, the following translation was used: Hugo Grotius, *De iure praedae commentarius. Commentary on the Law of Prize and Booty*, trans. G. L. Williams, with W. H. Zeydel, ed. J. B. Scott, The Classics of International Law 22, vol. 1 (Oxford, 1950). *Mare liberum* (*ML*) too is cited after this *IPC* edition, except for passages not contained in *IPC*, which have been taken from James Brown Scott's 1916 edition. *De iure belli ac pacis* (*IBP*) is cited after the reprint, with added notes by Robert Feenstra (Aalen 1993), of the edition of 1939. For the translation, I have used Richard Tuck's edition of the anonymous English 1738 translation of Barbeyrac's annotated edition (Indianapolis, 2005); translations of the 1625 edition are my own. Some of the translations have on occasion been modified. The translations of the *Theses LVI* are mine. For Cicero's *Republic* and *Laws* as well as the relevant fragments by Lactantius and Augustine I have used the translations by James E.G. Zetzel in the Cambridge Texts in the History of Political Thought (Cambridge, 1999) and for Cicero's *De officiis* the translation by Margaret Atkins in the same series (Cambridge, 1991). For Cicero's *De finibus* I used Julia Annas' edition, translated by Raphael Woolf (*On Moral Ends*, Cambridge, 2001). Translations of Justinian's *Digest* are taken from the edition by Alan Watson (revised edition, Philadelphia, 1998). Classical authors are cited according to prevailing scholarly standards, and medieval, early modern and modern authors are cited by name and date as indicated in the Bibliography below. With regard to classical authors as well as legal compilations I have used standard editions and methods of citation.