THE FREEDOM OF HISTORIES:
REASSESSING GROTIUS ON THE SEA

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INTRODUCTION

You might think it was obvious that Hugo Grotius was a man of his age. Yet the majority of historical accounts have failed to consider his work as the product of a life lived during a particular epoch. Instead historians have tended to particularise, through extraction and emphasis, various claims seemingly apparent in his work. In so doing they have created sanitised and deformed interpretations which fail to render substantive coherence to the whole of his work. The work has been described as the inauguration of a matured conceptualisation of international law and relations reflecting modern perceptions. Such analysis fails to adequately explain the coexistence, within the work, of both archaic and modern conceptions. Antiquated or accretious components have been glossed over or ignored. This has been the case for the majority of interpreters of *Mare Liberum*. With the infusion of new assumptions about historical methodology, texts are less likely to be conceived *in vacuo*. No longer can historians invoke a parthenogenetic explanation for knowledge claims. Rather the historian's role has shifted to include the consideration of more sociological and contextual influences in unravelling the history of ideas. These techniques involve an attempt to render historical texts as coherent and rational, but by the standards of argument and rationality available at the time of their construction, as understood by modern historians.

This paper is divided into several parts. The first sections provide a succinct introduction to Grotius, then briefly examine his social milieu and the existing Grotian historiography. There follows an analysis of, arguably, the most seminal work by Grotius – *Mare Liberum*. *Mare Liberum* is not retrospectively granted the status of a classic because of some inherent or essential characteristic. Rather its apparent *greatness* is understood as an *ex*

post facto interpretation in which *Mare Liberum* was *captured* and *deployed* in on going debates over some of the issues which Grotius sought to address. These issues and their attendant social and political meanings have not remained static over time. *Mare Liberum* is considered as a knowledge claim in early seventeenth century international relations and law. Its persuasive techniques and argumentative strategies are examined, notably in reference to others who challenged the very ideas Grotius and subsequent ages thought were so valuable and occasionally *obvious*.

HUGO GROTIUS

Hugo Grotius (1583-1645) was born in Delft, to a distinguished Calvinist family. Hugo graduated from the University of Leyden at the age of fifteen. Whilst such youth was not unusual at the time, Grotius was widely acknowledged as an intellectual prodigy. Despite being admitted to practice law when sixteen he remained preoccupied with his interests in the humanities. In 1603 he was appointed, before other eminent scholars, official Historiographer of Holland.

Grotius turned his attention to legal issues when approached by the Dutch East India Company to provide an opinion concerning whether the Company was entitled to retain valuable cargo which one of its ships had taken from the Portuguese. At the time the Netherlands were at war with Spain, and the Portuguese were effectively under Spanish control. An opinion, or defence of the Company's actions was important because there was concern among the shareholders that it was morally reprehensible for Christians to wage war, or benefit from war by the sale of seized cargo. Grotius' response was a potent vindication of the Company's position. One Chapter of this defence was published in 1609 as *Mare Liberum* (*Freedom of the Seas*).[1]

Despite widespread acclaim for his academic prowess, Grotius' political career was often imprudent. His involvement in the Dutch diplomatic mission to England to negotiate fishing rights in 1613 was unsuccessful. Indeed, many of the ideas and arguments presented in *Mare Liberum* were employed against the Dutch. Of greater concern was Grotius' involvement in internal political unrest over the doctrine of predestination and the structure of the Dutch Republic. Grotius favoured the more liberal Arminians (Remonstrants) against the Gomarist (counter-Remonstrants) who were supported by Prince Maurice of Orange. Prince Maurice eventually triumphed and in May 1619 Grotius was sentenced to life imprisonment. With the assistance of his wife Grotius escaped in March 1621. He fled to France where he completed *De Jure Belli ac Pacis* (*On the Law of War and Peace*) in 1625 under the modest patronage of Louis XIII to the backdrop of the Thirty Years' War.

For a decade after the publication Grotius lived in Germany and furtively

in Holland where he failed to achieve repatriation after Maurice's death. He was appointed Swedish Ambassador to Paris in 1634. Despite Grotius' authority as a jurist and scholar combined with his personal favour with the French King he was unable to maintain and develop satisfactory relations between the Swedish and the French. The French diplomat Cardinal Richelieu called for his replacement on several occasions. In 1644 Grotius was recalled by the Swedish. On his return he was treated favourably by Queen Christina but given no new office. In 1645 he left Sweden on board a ship which encountered a violent storm off the Pomeranian coast. Exhausted and ill Grotius was transported by cart to Rostock where he died on 29 August 1645.

THE WORLD OF GROTIUS

Rabb contended that early modern Europe was characterised by instability. This instability extended to most fields of human endeavour (Rabb 1975, Easlea, 1980). By the turn of the seventeenth century the Aristotelian corpus and commentaries remained entrenched within the majority of European universities, though the Stagirite lacked the philosophical domination he had once exerted (Schmitt 1973, 1975, 1985). The discovery by Europeans of a more extensive corpus of the works of classical antiquity especially those of Plato, Plotinus, and new scripts from Aristotle added to the discovery of the New World in eroding the predomination of any singular theoretical framework. The standardisation introduced through print allowed more critical exegetical exploration and comparison by multitudes of experts with effectively the same text (Eisenstein 1979). The competition between the nascent states in Europe encouraged developments in weaponry, navigation and the natural sciences (Hessen 1931, Bernal 1969).

Mare Liberum provides insight into the form of academic and political debates in early modern Europe. Even a narrow view of sixteenth and seventeenth century literature, natural philosophy and legal writings evidences, like any culture(s), a discursive matrix which loosely imposes limits and tacit commitments available for deployment as a means of legitimising and deriving knowledge in given disputes (Gadamer 1989, Dear 1991).

> Within the lexicon of primitivism, it was possible to carry on elaborate discussions about doctrine, and indeed about the foundations of the moral/legal order whose existence seems to have been presumed (Kennedy 1985: 10).

The emergence of a more internationally oriented Europe composed of warring nation-states and crumbling archaic empires, simultaneously – though not coincidentally, with the development of radical new discoveries

in the natural sciences, law, philosophy, geography and philology introduced an enormous variety of sources of authority. These sources could be utilised to justify or alternatively assail both traditional and, if they differed, current beliefs and values.

This is the world in which Grotius lived. Traditionally most historians and international lawyers with few exceptions have represented Grotius as one, if not the, foremost proponent of international relations pertaining to seas, oceans and natural law. Whilst it is accurate to suggest that these are subjects which Grotius addressed there have been many extremely problematical assertions. Overall it would appear that inadequate philosophies of history have failed to capture the social milieu of which Grotius and his writings form part. Put simply the major limitation to existing historical accounts of Grotius is that they attempt to explain his life and works as part of a simple almost linear progression to modernity. Grotius appears as a theorist who, more completely than many of his contemporaries, grasped the eternal concerns of humanity which appear to be finally consummated in our own contemporary and theoretically urbane world. But is this the historical Grotius? David Kennedy described this tendency as a distortion of primitive texts against modernity. To identify primitive legal scholarship as evidence of a continuity in international law misses much of their internal coherence, diversity and historical function (Kennedy 1985).

GROTIAN HISTORIOGRAPHY

Whilst traditional, ostensibly hagiographic, historical accounts of Grotius fit neatly into conceptions framed by modern sensibilities and scruples, they do so at the price of immodest distortion of an historical reality. It is not the purpose of this paper to argue for the possibility of veracious historical knowledge but rather to attempt to expand the context in which Grotius lived to enhance our understanding of the nature of his writings and influence. Of course this entails a restricted contemporary, and therefore distorted, elaboration of Renaissance Europe (Popper 1960: 152-159). There is no longer any need for proponents of modern secularised legal systems to overlook what might be classified as egregious or archaic in the writings of Grotius. The religious influence in international law as much as natural philosophy has often been overlooked or played down to legitimise anachronistic distinctions which emerged in later analyses (Lindberg 1986, 1990). Renaissance society was completely immersed by religious questions and conflicts.

Within the existing historiography Grotius fulfils a number of irreconcilable roles. The two most common portrayals are antithetical, although there a number of modified and qualified versions of these positions. One group of historians have tended to emphasise Grotius'

contribution to the law of the sea and international relations as essentially original. The other have placed Grotius in a tradition of international legal writing which often deliberately fails to acknowledge features of that very tradition. Our historical overview will commence with a succinct examination of Grotius as progenitor.

The historian Scott enlisted Grotius as one of the founders of modern international law. For Scott, an earlier jurist, Vitoria (1480-1546) was effectively a precursor to Grotius who single-handedly completed the field of international justice. Vitoria provided the:

> first sketch, as an architect would say, of the Temple of International justice to which Grotius was to add with his own hand the details of the completed drawing (Scott 1934: 288).

Scott's sentiments reflect teleological history, or a form of historicism. He explains that Grotius was born 'at a critical moment in history as well as of International Law' (Scott 1934: 66). Delineating a history of ideas without considering external influences upon those ideas avoids the opportunity of providing a broad framework for the devolution and assessment of those ideas and their development, advocacy and exposition in context (Diggins 1969).

Similarly A.P. D'Entreves appears to have incorporated positivist and progressivist elements from the conflict thesis in his account of Hugo Grotius. The conflict thesis had gained prominence with the secularisation of society and science from the later nineteenth century.[2] This thesis contrasted science and religion suggesting that they must exist in direct opposition to one another. It was a version of much older historical practice which explained human achievement through value laden metaphors of lightness and darkness or progress and reaction (Collingwood 1986: 327, Moore••••, Brooke 1991). Following the claims of Samuel Pufendorf D'Entreves rendered Grotius as the *vir imcomparabilis:*

> who dared to go beyond what had been taught in the schools, and to draw the theory out of the darkness in which it had lain for centuries ... Along with Bacon and Descartes in the field of philosophy, with Galileo and Newton in the field of experimental science, Grotius has a special place reserved in the field of jurisprudence as one of the prophets of the brave new world (D'Entreves 1951: 50).

Pollock acknowledged a long development in natural law based upon the Aristotelian corpus, the later Stoics, the Church fathers and the technical expositions of the Roman jurists (Pollock 1902: 518). Grotius was conceived as the apotheosis of the natural law tradition; transforming the enterprise into

the modern law of nations.[3] Pollock saw the production of the law of nations with a more 'secular and legal cast' as one of the attractive features in the so called Grotian achievement (Pollock 1901: 11).

Lauterpacht provided a similar reading:

> He [Grotius] secularised the law of nature. He gave it added authority and dignity by making it an integral part of the exposition of a system of law which became essential to civilised life. By doing this he laid, more truly than any writer before him, the foundations of international law (Lauterpacht 1946: 76).

Nussbaum described another work by Grotius, *De Jure Belli ac Pacis*, as initiating:

> the doctrine of modern international law, which we have seen is bound to be secular and indiscriminate. Rightly, therefore, Grotius has been considered the 'founder' or 'father' of international law (Nussbaum 1954: 112).

These readings with their secularised emphases are now quite difficult to sustain. Grotian argument is predicated upon a metaphysical framework advancing design arguments and naturalistic interpretations which are fundamentally theistic. For Grotius the law of nations exhibited a natural origin and derivation because Nature had been created by an omniscient being. Nature bequeathed glimpses of God's perfection through its structure. To describe this as secular would be to overlook interwoven religious precommitments and assumptions (Burtt 1950, Collingwood 1986, Strong 1978, Kuhn 1974).

Other historians have understood Grotius and the Grotian legacy quite differently. Within the secondary literature there is considerable controversy over influences upon Grotius. The second *category* of historians have tended to employ the abundance of sources to demonstrate correlations and the existence of a tradition in which Grotius operated. Rather than emphasise original elements in Grotius' work these historians have placed weight upon his use of authority and the legal tradition in which he operated. Neither view is adequate. For through shifting emphasis both historiographical approaches exaggerate and underestimate either the tradition and importance of influential scholars or the originality in Grotius' thought (Schuster 1990).

The second approach offers notably less deference to the Grotian legacy. Put simply, earlier historiography, before Thomas E. Holland's inaugural lecture, tended to emphasise the original aspects of Grotius' works. After Holland, accounts lauding Grotius' achievement were susceptible to the ascriptions – overstated or misguided. Holland had noted a profound influence which the Protestant Alberico Gentili (1552-1608) had exerted

upon Grotius. Gentili had been professor of law at Oxford and, like Grotius, a religio-political outcast from his own country. van Der Molen supported Holland's recognition that Gentili was a vital, if not constituting, force in the work of Grotius. Indeed van Der Molen implied that Grotius was better understood as a compilator than innovator (van Der Molen 1937). Despite recognising Grotius' originality and consummative genius even J.B. Scott acknowledged a debt owed to Vitoria (Scott 1934).

Walker emphasised Grotius' continuity with existing perspectives.

> If there was little novel in the legal system of Grotius, there was equally but little original in either the arrangement or the matter of his work (Walker, 1899: 333, Newton 1981: 370).

The work of Oppenheim and Remec resulted in similar conclusions regarding the contribution of other authors upon the work of Grotius. Though both acknowledged that Grotius made some type of qualified achievement (Oppenheim 1928, Remec 1960).

More recently Haggenmacher has perpetuated Holland's belief that Gentili was particularly influential on the major legal works of Grotius (Haggenmacher 1992: 151). He expressed it as a debt considerably greater than that acknowledged by Grotius. Haggenmacher examined the frequency of citations in Grotius' *De Jure Praedae Commentarius*. Amongst contemporaries and near contemporaries cited the vast majority were Portuguese or Spanish. Other Catholics such as Francisco de Vitoria (1480-1546), Francisco Suárez (1584-1617) and Fernando Vásquez de Menchaca (1509-1566) are now seen as more influential than previously acknowledged.[4] Given the influence by the Iberian powers upon politics and culture in the United Netherlands it would appear likely that Grotius was following a tradition which he manipulated to emphasise contradictions in the postulations of his opponents and their preeminent theologians and philosophers.

A cursive glimpse reveals that Grotius has been understood from a number of different perspectives. These perspectives are not entirely monolithic or homogenous for there are different emphases in the degree of originality and influence accorded various ideas. However the majority of this historical writing has failed to draw attention to fundamental differences between the context and purpose of the legal writings produced by Grotius during the sixteenth century aimed at resolving contemporary disputes with existing resources and the value such writings have for the present day.

An old, but eminent illustration of partisanship for the cause of *modernity* is found in J.B. Scott's introduction to the English translation of *Mare Liberum*. Scott's positivist assumptions reveal an attenuated belief in a linear progress as the basis of historical development. As soon as Grotius

uncovered transhistorically compelling material all those who disagreed automatically became reactionary regardless of the canons of rationality and legitimation available within their own social world. Scott asserted:

> It will be observed that the Mare Liberum was written to refute the unjustified claims of Spain and Portugal to the high seas and to exclude foreigners therefrom (Scott 1916: vii).

The positioned championed by Grotius accorded with that held by Scott. Having accepted Grotius at face value without considering the variety of historical contingencies which led to the construction of his treatise, Scott could describe Grotius as essentially modern. In contrast, nations which opposed these *modern* premonitions inevitably became obscurantist, irrespective of motive. Representing claims made by Grotius almost four centuries ago as the completion or fulfilment of modern international law can be broadly captured under the panoply of whiggism.

This process was masterfully expounded by Herbert Butterfield. Butterfield described Whiggism as a technique which involved the study of:

> the past with reference to the present ... Through this system of immediate reference to the present day, historical personages can easily and irresistibly be classed into men who furthered progress and men who tried to hinder it ... The whig historian stands on the summit of the 20th century and organises his scheme of history from the point of view of his own day (Butterfield 1931: 11-12, Mayr 1990, Hall 1983).

The commitment by many historians to a simple progressive picture of history ordered their research programmes. Historians concerned themselves with identifying the origin of ideas which were either close to modern conceptions or assisted in the development of other ideas retrospectively assessed as valuable. The whig historian is therefore characterised by a search for the traces of modern ideas:

> The consequence of his fundamental misconception are never more apparent than in the whig historian's quest for origins (Butterfield 1931: 43).

The attempt by historians to uncover hints of modern conceptions in the past is misguided. The whig historian:

> will find it easy to say that he has seen the present in the past, he will imagine that he has discovered a 'root' or an 'anticipation' of the 20th century, when in reality he is in a world of different connotations altogether, and he has

> merely tumbled upon what could be shown to be a misleading analogy (Butterfield 1931: 12).

A particularly inadequate modern historical account portrayed Grotius as the precocious lawyer, the 'miracle of Holland', who solved the problem of the *Santa Catherina* in favour of Dutch interests by applying law to facts allowing Grotius to consequently develop a thesis supporting the freedom of the seas (Kwiatkowska 1984: 23).[5] Such an assessment allows a number of questionable assumptions to pass uncontested. Kwiatkowska provides no evaluation of the process in which Grotius resolved this dilemma, and whether politics and external considerations were involved. Secondly Kwiatkowska appears to advance and support a simplistic application of a legal methodology to a fact situation. This process is extremely complex. Ironically for Grotius the complexity would have been accentuated. No systematised body of law could have existed before his seminal contribution, otherwise that contribution would have been rendered inconsequential if he had merely applied available methodological resources: *contradictio in adjecto*.[6]

Within the existing Grotius historiography whiggism involves, the often painful, extraction of elements of Grotius' philosophy as if it possessed transcendent value. Put succinctly the issue concerns whether Grotius was prescient or, alternatively, have his legal writings been interpreted so they correspond with modern conceptualisations and therefore conducive to application in subsequent disputes. International relations are particularly susceptible to historical argument and this gives the seminal historical works great rhetorical utility regardless of the relationship of the claims made by the historical personages in their own social context. The majority of available historical accounts have perpetuated certain contortious assumptions, especially a distinction between Grotius' legal writings and his political context. A succinct overview of his writings on the freedom of the seas will provide a useful basis for discussion and illustration.

MARE LIBERUM

Mare Liberum captures the competitive international orientation of states in early modern Europe. As mentioned earlier *Mare Liberum* was written in response to the capture of Portuguese booty. The newly independent United Provinces had been asserting their independence through a competitive trading strategy against the Iberian powers. Dutch relations with Portugal — which had been under the influence of King Philip II (1527-1598) of Spain since 1580 — were uneasy and belligerent. The use, by Portugal, of a Papal Bull to legitimise monopolistic trading in the extremely lucrative Asian spice market was ultimately tested by the Company with the implicit sanction of the States-General: despite their ongoing attempts to negotiate peace with

Spain. The situation was aggravated by the seizure of the richly laden Portuguese galleon *St Catherine*, in the Straits of Malacca in 1603 by a Dutch East India Company vessel. Despite the covert support offered by the States-General it was condemned by a Dutch Admiralty Court in 1604. Grotius was commissioned by the Company (formed in 1602) to write a defence which justified the Company's actions both legally and morally to quell shareholder concern. The work produced, *De Jure Praedae Commentarius* was not published during Grotius' lifetime. Only a modified version of Chapter XII was published as *Mare Liberum*. The following is a brief exposition of some of the central themes in *Mare Liberum*.

According to Grotius nations were not permitted to occupy the sea because that defied the 'natural order' and 'public utility' (*ML*: 37, *DJPC*: 238). Grotius described the claimed dominion of so large a portion of the world's oceans and markets by Spain and Portugal as constituting a social evil. This was exacerbated by their aggression in defending that dominion. In an earlier work, *De Jure Praedae Commentarius* (c.1604-6), Grotius implored those nations who, like the Dutch, had been victims of Iberian inaugurated aggression to restore equilibrium by demanding reparations or actively seeking restitution (*DJPC*: 263). Given that Grotius believed that God, through nature, encouraged social relations the obvious response was for the Dutch to repair their losses from the legendary affluence of Spain and Portugal.[7] To this end the instant case of the seizure of the Portuguese galleon *Santa Catherina* and her valuable cargo by the Dutch raised pertinent international legal issues concerning the restoration of losses inflicted by the Spanish upon the Dutch as well as the legal character of the oceans (*DJPC*: 265, 275).

Mare Liberum subsequently served as a modified version of the argument which did not address the seizure of booty but discussed the freedom of the seas. Grotius maintained that the oceans were vast, inexhaustible and not capable of possession nor dominion. Rather they provided a resource for all peoples (*ML*: 4).

> those things which are incapable of being occupied, or which never have been occupied, cannot be the private property of any owner, since all property has its origins as such in occupancy (DJPC: 230).

Mare Liberum served a predominantly polemical function in rationalising this central precept. Gellinek described the process as 'grafting pseudological arguments onto practical necessities' (Gellinek 1983: 99, de Pauw 1965: 21).[8] *Mare Liberum* characterised Grotius' considered opinion as some self-evident and natural transhistorical phenomenon.

Grotius responded to Spanish arguments concerning rights to dominion by prescriptive use. He described prescription as merely a form of usurpation

(*DJPC*: 253). It could not be applied to public places which had been left in their primitive state such as the vast bulk of the world's seas (*ML*: 47, 63, *DJPC*: 246). For prescription was specifically a municipal right, not applicable to the *res communis* (*ML*: 54). Added to this theoretical imposition was the practical difficulty of determining original owners. The majority of oceans had been explored for centuries by vessels from numerous countries (*DJPC*: 254). The longevity of sailing, trade and exploration, much of which Grotius and his contemporaries believed was described by classical antiquity, enabled him to suggest: 'therefore they lie, who today boast that they discovered that sea' (*ML*: 41).

Even if prescription were available as a means of laying claim to the oceans, Grotius coincidentally produced a requisite figure of 100 years for the establishment of any prescriptive claim. Conveniently the Dutch had actively explored and traded within the required period thereby precluding the possibility of monopolistic Portuguese ownership (*ML*: 59-60).

Grotius argued that navigation actually facilitated social interaction rather than deplete resources. This led to his belief that it should be allowed without restriction. Grotius applied this principle to fishing.

> The principle applicable in regard to navigation — namely that the activity in question shall remain open to all — should also be applied in connexion with fishing (DJPC: 234).

And,

> because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries (ML: 28, 37).

Grotius supported his proposition regarding the freedom of navigation by suggesting that any person attempting to control fishing would be considered to be 'a seeker after immoderate power' and 'would not escape the stigma of cupidity'. Therefore a person who restricted navigation must be much worse (*ML*: 38, *DJPC*: 239, 234). For unlike fishing, navigation supposedly made no impact. Grotius did not discuss the relationship between trade and navigation. To claim that free navigation was not detrimental to commerce or trade monopolies was quite contentious.

Grotius argued from analogy that the seas should be free, as a common human resource as is the air (*ML*: 28). By extolling the natural basis of the freedom of navigation and its harmless effects Grotius removed attention from considerations that monopolies and special trading contracts could result in substantial benefits and detriment flowing to those involved in trade and commerce.

> Why, then, since it is possible to do so without injury to oneself, should one not bestow upon another a share in those things which will be useful to the recipient and whose bestowal will not harm the giver? (DJPC: 239)

To ignore the fierce and nationalist based nature of mercantile competition would distort the historical picture. Grotius conveniently omitted such considerations from his argument. Free navigation and access to Portuguese commercial routes detrimentally effected Portuguese trade. Grotius contended that the Dutch, who would unquestionably trade at fair prices, would not interfere with Portuguese trade despite a parody of Portuguese opposition to such action (*DJPC*: 262).

In examining possession Grotius portrayed the position of his rivals as untenable. He declared that the Portuguese assertions did not merely 'concern a gulf or a strait in this ocean, nor even all the expanse of sea which is visible from shore.' Though these claims would have been against natural law their finite nature may have rendered them less odious. But the 'Portuguese claim as their own the whole expanse of the sea' (*ML*: 37). The contrast serves to amplify the Portuguese declarations to a point where they appear excessive and unreasonable.

When Grotius quoted de Castro in regard to the sovereignty of the sea,

> which from the beginning of the world down to this very day is and always has been a res communis, and which as is well known, has in no way changed from that status (ML: 54 my italics).

he chose to ignore contradictory articulations and/or inconsistent practice by the Pope, Portugal, Spain, Venice, England, Scotland and Denmark.[9] These contradictions were not overlooked by opponents of the freedom of the seas (Selden 1663: 118).[10] Individuals who had outlined justifications for acquisition such as Faber, Angeli, Baldus and Balbus were accused of falsehoods and 'teaching which is both obscure and vague, which lacks the faintest glimmer of reasonableness, and which sets up a law in word but not in fact.' Their arguments opposed Grotius' understanding of natural equity and became more iniquitous and injurious with the 'lapse of time' (*ML*: 56).

The idea of free trade delineated in *Mare Liberum* served the Dutch interests to some extent at the 1613 Conference in London (Clark 1951: 56).[11] It also gave the English a theoretical and polemical platform to base their own excursions into Asia as well as reject the Dutch demand for a contribution to the cost of maintaining free trade against the militancy of the Portuguese. It provided yet another function. The Dutch sought to legitimate the history of their trading activity and increasing domination in the East Indies. To this end they argued that the conception of international contract

outlined by Grotius could exclude free trade. For once states had contracted this could effectively circumvent the law of nations. This advanced Dutch aspirations for their own trading monopoly. States, like individuals, were bound by their contractual obligations. In response to the existence of contracts the English accused the Dutch of extorting contracts through cruelty (Clark 1951:146). The contracts were imbalanced, openly and unashamedly favouring Dutch causes. For example two of the terms of the Dutch Treaty with Ternate, May 1607, were as follows:

> 6. The Ternatians in return will accept and recognise the States General as their protector. They will testify to this oath whenever the States General so wish.
>
> 7. The Ternatians will, as soon as they are capable, pay the costs of past and future wars, time and amount to be fixed by the States General (Grewe 1988: 65).[12]

Grotius portrayed the Dutch as a people reluctant to act even in situations where they were undoubtedly entitled to (*DJPC*: 2). Embellishing his argument with Christian nomenclature, enabled Grotius to introduce morality. In emphasising Dutch rights Grotius exaggerated Portuguese affluence and decadence.

> a people, previously for a long time poor, have leaped suddenly into the possession of great riches, and have surrounded themselves with such outward signs of luxurious magnificence as scarcely the most prosperous nations have been able to display at the height of their fortunes (ML: 42).

Despite Grotius' persistent references to the wealth and grandeur of Portugal, Dutch trade in the East Indies was lucrative enough to be a major factor in the formulation of the Hispanic-Dutch Truce of Antwerp, April 1609 (Clark 1951: 33).[13]

De Jure Praedae Commentarius inveighs against Spanish and Portuguese oppression of the Dutch. The Dutch 'a people surpassed by none in their eagerness for honourable gain' have suffered the 'most grievous personal injuries' at the hand of an 'exceedingly cruel enemy who has already violated the rules of international commerce'.[14] Grotius exaggerated the impediment caused by Iberian domination, claiming that:

> the shores of the world will soon be blocked off, and all commerce with Asia will collapse – that commerce by which (as the Dutch know, nor is the enemy ignorant of the fact) the wealth of our state is chiefly if not entirely sustained (DJPC: 1).

Grotius substantiated his claim that those who prevented trade did

'violence to nature herself' by representing the East Indians as individuals unhesitatingly desirous of trade (*DJPC*: 218, 220). In contrast to Grotius' altruistic and temperate Dutch, Clark and Eysinga have painted a more modest portrait. It is their contention that after the formation of the *VOC* (*United East India Company* or, as it is better known, the *Dutch East India Company*) the 'company was aggressive on every voyage'. Dutch contemporaries of Grotius had noted that it was impossible to separate war from trade because they were essentially symbiotic (Clark 1951: 23, 25, Roelofsen 1992).

GROTIUS, THE PAPACY AND THE SEA

It might be disconcerting to the modern reader to find Grotius consumed with the role of Papacy in international affairs. Indeed he dedicates three of the thirteen chapters in *Mare Liberum* to the issue of Papal donations and sanctions.[15] There are probably two reasons for such considerable attention. The first is that Grotius, genuinely appeared to believe that he was representing natural law. This hermeneutic strategy allowed him to silence an institution with the standing of the Papacy. Grotius explained that the 'Pope has no authority to commit acts repugnant to the law of nature' (*ML*: 46). The second reason was that Grotius, even as a moderate Protestant ecumenical, did not wish to attack the legitimate spiritual authority of the Papacy given his religious commitment to a loose multi-denominational confederation of Christendom (*ML*: 16).

In 1493 Alexander VI issued a Papal Bull *Inter caetera* which claimed to divide the New World between Spain and Portugal, the Spaniards to the West, and the Portuguese to the east of a line which first went through the Azores but later through Brazil. Not wishing to denounce the Papal office yet highly critical of exaggerated claims, Grotius provided various qualifications and explanations which challenged the apparent universal efficacy of this Papal Bull. Firstly he contested the assertion that Indians were either 'insane or irrational'. The purported independence of the Indians precluded their subjugation and provided a front for the mutually desirable trade contracts in favour of the Dutch. Alternatively the Papal Bull could be easily circumvented by arguing that it simply applied to the resolution of Portuguese and Spanish disputes (*ML*: 15, *DJPC*: 245). This is not supported by its text. Even if the Pope had donated so much of the Earth to the Iberian powers, Grotius protested that the donation was inadequate because the donor must be in possession to deliver. Otherwise 'the geometers must have taken the earth from us long since, just as the astronomers must also have taken the heavens' (*DJPC*: 240, *ML*: 39). Another reason for the supposed failure of the donation was that the Pope held no power to rule on issues of commerce (*DJPC*: 222-223, 244-245). Grotius suggested that Alexander VI

was outside his domain of legitimate spiritual authority when he made the pertinent pronouncement (*ML*: 45, *DJPC*: 244, 258).[16] This position found support amongst Spanish, French and Italian theologians. Indeed it is illustrative of Grotius' truly ecumenical preferences that he contained his criticism to the excesses of the Papacy and not the Papacy itself as the majority of Protestants had done. This equanimity did not prevent *Mare Liberum* joining the Catholic Index of Forbidden Books on 30 January 1610.[17]

RHETORIC AND PERSUASION IN MARE LIBERUM

Grotius falls into a tradition of theologically sophisticated lawyers who continued and transformed their tradition as the availability of discursive resources expanded. Within Renaissance scholarship it is unusual for authors to acknowledge all their influences. Indeed, as in our own society great prestige and fame could be won through the publication of apparently innovative works. In Renaissance texts the author invariably employed techniques of persuasion. One was the deployment of authorities in new ways, thereby continuing the deference to great thinkers and authorities of the past – both religious and secular (*DJB*: 40). Another approach was to emphasise authority, however tenuous, in those areas where the novel claim is, or appears unusual. Alternatively the author could attempt to discredit competing models or understanding. The techniques were mostly employed concurrently and reflect our own persuasive methods. As discussed earlier, many historians have accepted Grotius' hyperbole and rhetorical strategy uncritically.

At the outset of his treatise, *Mare Liberum*, Grotius candidly stated his purpose:

> My intention is to demonstrate briefly and clearly that the Dutch ... have the right to sail to the East Indies ... I shall base my argument on the following most specific and unimpeachable axiom of the law of nations, called a primary or first principle, the spirit of which is self evident and immutable, to wit: every nation is free to travel to every other nation and trade with it (ML: 7).

Even though this opening paragraph implies that Grotius was simply delineating his findings predicated upon that which was 'self evident and immutable' the ascription of the label argument and the permeation of its presentation and structure often as a geometric analogy illustrates that he was relying upon persuasive strategies which captured some of the powerful epistemological resonances and precommitments of his age. The appeal to

demonstration based upon some putative methodological programme functions as an apparently compelling mode of discourse (Gilbert 1958, Galilei 1967). Indeed even those antagonists who contested Grotius' claims often made recourse to the same procedural framework.

The following paragraph provides an illustration of the rhetorical eloquence and manipulation which Grotius employed to support his advocacy. Grotius incorporated contemporaneously pervasive teleological assumptions to strengthen his conception of nature and advance the theological validity of his argument.

> God Himself says this speaking through the voice of nature; and inasmuch as it is not His will to have Nature supply every place with all the necessities of life, He ordains that some nations excel in one art and others in another. Why is this his will, except it be that He wished human friendships to be engendered by mutual needs and resources, lest individuals deeming themselves entirely sufficient unto themselves should for that very reason be rendered unsociable? (ML: 7, DJPC: 9, 218, 244, 255, 256).

And quoting Chrysippus from Plutarch:

> No beginning, no origin, can be assigned to justice other than from its derivation from God and from the universal aspect of nature (DJPC: 9).

The teleological commitment is further illustrated by the claim that not only are the oceans themselves navigable but,

> the occasional winds which blow now from one quarter and now from another, offer sufficient proof that Nature has given to all peoples a right of access to all other peoples (ML: 8).

Grotius presupposed that 'Man's reason from God's reason takes its being' (*DJPC*: 12, *DJB*: 12). Grotius argued, as Cicero, Heraclitus and Vásquez had proposed before him, that where there was a consensus of nations on some issue that rational faculty represented God's immutable law (*DJPC*: 12, 26-27, *DJB*: 30). 'Divine law is superior to human law and the latter to civil law' (*DJPC*: 29). Conclusions drawn from principles of nature represented Divine law and those from unanimous or common consent constituted the law of nations. Civil, positive and municipal law were shaped by the particular society and its traditions (*DJB*: 40). Grotius' task then became an empirical inquiry to discover beliefs and practices similar to his own amongst the major Judaeo-Christian and classical cultures. Grotius manifested almost no reticence in overstating his position. Examples abounded in his own age of states which had claimed dominion over the

waters. Yet Grotius often contended that the Dutch position offering a right to navigate upon the seas was 'admitted by *all*' (*ML*: 4, 13, 29, 44, *DJPC*: 244, 247). In reply to claims that the Romans of antiquity had claimed dominion over adjacent oceans, as the Venetians had asserted more recently, Grotius eliminated this apparent dissonance by proposing that these nations merely extended jurisdiction and protection over the waters. This domain was supposedly commensurate with trade, especially if it included the removal of those universally condemned debauchers of the seas – pirates (*ML*: 10, 35).

As mentioned earlier Grotius had employed design arguments to support his contention that a grand plan permeated the development of world trade. Whilst it is certainly possible that a creator may have deigned variation of commodities as part of his design, even to facilitate social interaction, it does not follow. Nor does the claim that all places are not supplied 'with all the necessaries of life'. Grotius, avoided confronting historical evidence which might have challenged these assumptions. For did Grotius really suggest that the spice trade with the Indies was in any sense necessary or that societies had never existed in which all their needs, as opposed to luxuries, were met? This is what Grotius appears to be implying through his correlation of trade with God's plan for the proselytisation of the world via the soteriological journey of Christian Europe.

In an earlier and larger manuscript Grotius stated the following as a law: *'It shall be permissible to acquire for oneself, and to retain, those things which are useful for life'*. Here Grotius preferred *useful* to *necessary*, a word later amended to bolster his cause. Grotius also explained that access to the necessities of life combined with collective security to form the basis of a commonwealth (*Respublica*) (*DJPC*: 19, 263). In *De Jure Belli ac Pacis*, Grotius reversed his emphasis to produce the same result by proposing that: 'the Author of nature willed that as individuals we should be weak, and should lack many things needed in order to live properly' (*DJB*: 16).

Grotius cited Aristotle to assist the apparent potency of his claim. Aristotle's *Politics* is in one important respect different to the position championed by Grotius. Aristotle observed: 'barter supplies what nature lacks in order to meet properly the *needs* of all men' (Aristotle••••politics I ix, *DJPC*: 255-256). The trade in luxuries might not have assumed this mantle.

An upshot to Grotius' position on the need for trade is that goods must be sold at reasonable prices and that monopolies and speculation affronts nature (*DJPC*: 70, 261, 264). Monopolies were generally to be avoided because they provided acute trade advantages often leading to the levying of extortionate prices. Grotius defended Dutch monopolies by emphasising and extolling human virtues as essentially Dutch national characteristics.

Because the Dutch conducted trade in ways that were almost entirely beyond reproach other nations had no reason to be concerned: even by effective monopolies in the East Indies. Conversely, the Portuguese were implored to renounce their existing monopolistic foreign policy and remain content with a combination of glory from their navigational exploits and the benefits received by being the first to trade in such lucrative commodities (*ML*: 42).

The candle metaphor from Ennius: 'No less shines his, when he his friend's hath lit' ingeniously engaged, functioned to distort the impact which Dutch trading would have on Portuguese commerce. One of the main motivations for the States-General encouraging the VOC to trade with the East Indies was because it would challenge the position of its oppressor.[18] Perhaps the major catalyst toward the formation of the English East India Company was the success of Dutch traders in raising the price of pepper on the European market (Clark 1951: 30-32, 73).

Grotius had been trained in classical languages and philology and was educated in an environment which challenged many traditions but remained quintessentially Aristotelian (*DJB*: 18).

> Our purpose is to make much account of Aristotle, but reserving in regard to him the same liberty which he, in his devotion to truth, allowed himself with respect to his teachers (DJB: 45).

And,

> Among the philosophers Aristotle deservedly holds the foremost place, whether you take into account his order of treatment, or the subtlety of his distinctions, or the weight of his reasons (DJB: 42).

Grotius, familiar with the various developing critiques of Aristotle, attempted to differentiate his own interpretation from the supposedly impoverished versions of others through a preference for the original, pristine Aristotle: devoid of the accretions heaped on throughout the middle-ages. For Grotius tells us:

> Would that this pre-eminence had not, for some centuries back, been turned into a tyranny, so that Truth, to whom Aristotle devoted faithful service, was by no instrumentality more repressed than by Aristotle's name (DJB: 42).

Aristotelianism has too often been tainted by historians as reactionary and oppressive simply because those views subsequently relinquished their privileged epistemological status. Grotius continued to acknowledge and supplicate the authority of the Stagirite, whose oeuvre remained the most persuasive and influential in Europe at the time.

But Grotius was not completely immersed in Aristotelian thought for he appeared willing to suggest that Aristotle had erred. Grotius' Christianised sensibilities conflicted with those of Aristotle the pagan philosopher. An example was whether passion could excuse certain reprehensible acts.

> By equally faulty reasoning Aristotle tries to make out that adultery committed in a burst of passion, or a murder due to anger, is not properly an injustice (DJB: 44).

The conflict was not restricted to differences on Mosaic law but extended to contradictions in Aristotle's own works. Retaining an Aristotelian methodology of classification Grotius criticised Aristotle for categorising elements incorrectly.

> Aristotle sought each extreme in the things themselves with which justice is concerned. Now in the first place this is simply to leap from one class of things over into another class, a fault which he rightly censures in others (DJB: 44.)

Despite an apparent preference for Aristotle, Grotius remained eclectic. Eclecticism suited his endeavours. It provided a plenitude of sources for opinions and in turn allowed the production and contradiction of authorities even those already cited if they happened elsewhere to disagree with some other of his postulates (*DJB*: 6).

Grotius' espoused moderate religious temperament seems reflected in his philosophy.[19] Supposedly availing himself of the approach of the early Christians, conceived as a pristine body, Grotius explained that he intended to swear allegiance to no single sect. Rather:

> they believed that to gather up into a whole the truth which was scattered among the different philosophers and dispersed among the sects, was in reality to establish a body of teaching truly Christian (DJB: 42).

Grotius highlighted existing sources from which he could glean *truths* to support his writings. He also expressed and justified a willingness to depart from available traditions where necessary always allegedly desirous of truth.

How did Grotius describe the existing works in the area of freedom of the seas and international relations? Not surprisingly the efforts of previous writers were undervalued and criticised. The relevant writings from classical antiquity were widely believed to have been lost so the possibility of conflict with major classical authorities was limited. It is not clear whether there were any earlier writings. Of his near contemporaries:

> All of these, however, have said next to nothing on a most fertile subject; most of them have done their work without system (DJB: 37, 30, 36, Holland 1898: 2).

Here we find Grotius making claims about the paucity of material on his subject, yet he dedicates substantial space in all his works to the tradition and extant writings. Spanish authors in particular are referenced and often chastised. Notably, this admonishment does not concern the scarcity of material but rather conceptual differences to those which Grotius sought to promulgate. Notable too is the critique of method. Grotius decried the apparently random and ill-considered approach of, ironically, those he had already labelled as having 'said next to nothing'.

Grotius was critical of those who failed to discover his propositions because they were supposedly obvious from nature and history. His tautological invective conveys this and reinforced claims for the transcendence and idealisation of his system.

Most of them have done their work without system, and in such a way as to intermingle and utterly confuse what belongs to the law of nature, to divine law, to the law of nations, and to the Within Renaissance debates there existed a tacit commitment to a hierarchy of authorities. The following claim by Grotius in this world of competing sources of authoritative legitimation is therefore unremarkable.

> We use the authority and definition of those whose natural judgment admittedly is held in highest esteem (ML: 22, Def: 156).

The hierarchy was basically composed of sacred sources especially the Bible or the Church and its major Councils and patriarchs such as St. Augustine, depending to some extent upon denomination. Ranked after the religious authorities were classical authors especially Aristotle (*ML*: 19-20). Their privileged place was a combination of tradition and their apparent consideration of pertinent issues. Then other, more recent eminent writers and commentators such as Aquinas were considered. For Grotius there was invariably a deprecatory tone in any consideration of practice and recent history.

Given the limited classical authority on his subject, and differences amongst more recent rivals Grotius required another legitimating mechanism and found this in an appeal to history.

> What all these very learned writers especially lacked, the illumination of history (ML: 5, DJB: 38).

But history did not include all history. Classical and sacred history warranted especial consideration in contrast to more recent events.

> History in relation to our subject is useful in two ways: it supplies both illustrations and judgments. The illustrations have greater weight in proportion as they are taken from better times and better peoples; thus we have preferred

> ancient examples, Greek and Roman, to the rest ... I frequently appeal to the authority of the books which men inspired by God have either written or approved (DJB: 48, 48).

Grotius contrasted his own work to that of Gentili who had impliedly contaminated his work through the inclusion of more recent experience and events.

In his earlier treatise *De Jure Praedae Commentarius* Grotius had not lauded history with his later enthusiasm. He suggested that analysis of history would not always be fruitful because most often the wrong approaches had been followed. He lamented that too often, civil and divine law had been conflated. History certainly raised questions in this earlier approach but failed to provide the answers which Grotius later claimed for it:

> materials collected indiscriminately from the annals of all nations, while they are extremely valuable in elucidating the question, have little or no value in providing a solution, since as a general rule the wrong course is the one more often followed (DJB: 6).

Grotius attempted to displace himself from the world of practice and claim that his work somehow represented an abstracted, and legitimate representation of how things are or should be. In doing this, he juxtaposed Gentili and other modern jurists whose opinions were:

> formulated in arguments of which not a few were accommodated to the special interests of clients, not to the nature of that which is equitable and upright (DJB: 38).

Decades after writing *De Jure Praedae Commentarius* Grotius produced and published a comprehensive treatise *De Jure Belli Ac Pacis Libri Tres*. In the *Prolegomena* to this work he argued, and I assume makes a representation of a sustained view throughout his adult life that law had not only the potential to be distinguished from other more contemptible pursuits such as politics but that it should be separated from practical concerns. Any reference he makes to practice is excused as expediency. This attitude served as the theoretical basis to most legal philosophies until well into the twentieth century, where it retains prominence. Grotius was not the originator of such a perspective for the distinction was noted as early as Aristotle. Grotius perpetuated the separation to legitimise claims which possessed resonances of the eternal nature of law. By abstraction Grotius was claiming transcendency and permanency for his legal writings.

The knowledge ferment in Early Modern Europe provided any polemicist with more discursive resources than had been previously available. Grotius

employed the two most popular rhetorical devices of his age. The first concerns his *a posteriori* method of employing classical authority as the supposed source of his propositions (*DJPC*: 226, Kennedy 1985: 7). In this sense Grotius remained quite conservative (Newton 1981: 381). Earlier authorities and history provided a potent means of justification but their finite corpus could only be contorted so far. Secondly Grotius attempted, through a supposedly historical argumentative base, to suggest that his statements merely represented that which was obvious and unquestioned. The most powerful means of achieving this end in an age immersed in teleological pre-commitments was through the ascription of the category *natural* to his propositions (*ML*: 2, 5, 24, 28, 50, *DJPC*: 231, 256). This was orchestrated through appeals to common sense, the self evident and nature itself.[20]

> For the principles of that law [law of nature], if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses (DJB: 39).

And,

> the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it (ML: 7).

Recent studies in hermeneutics and the sociology of knowledge have contended that classical authorities, history and nature, are all categories which remain indeterminate (Berger 1973, Gadamer 1989). That is, these fields of inquiry are not static but pliable and depend upon values and assumptions of the interpreter more than any inherent quality of that which is the subject of study (Shapin 1982, Schuster 1986, Barnes 1990). All knowledge claims are seen to be socially contingent (Latour 1979, Mulkay 1979, Foucault 1991). Specialised knowledge claims are manufactured and negotiated predominantly by specialists trained or working in specialised pedagogical institutions and imbued with certain shared assumptions or beliefs (Latour 1979, Knorr-Cetina 1981). The success of the various knowledge claims are shown to be dependent upon their interpretation and expediency as well as judgments and negotiation in debates within expert and wider communities. Knowledge claims are accepted and debates resolved; not when *the facts* are revealed; but rather closure, decision and acceptance are social outcomes, resulting from complex, subtle and minutely conditioned processes of negotiation, struggle, persuasion and enrolment within and across expert communities (Schuster 1989).

In Renaissance Europe, natural law and God were inextricably linked. Grotius described his principles as reflections of nature because nature

offered glimpses of his Creator's omniscience.

> I have made it my concern to refer to proofs of things touching the law of nature to certain fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself (ML: 2, DJB: 39, DJPC: 249).

Rendering his argument as naturalistic allowed Grotius to make assertions which portrayed his postulates as implicit in the fabric of the world.

> It is, then impossible for the sea to be made the private property of any individual; for nature does not merely permit, but rather commands, that the sea shall be held in common (DJPC: 232).

Grotius incorporated these elements with a classical orientation. He summoned Cicero to support the contention that law and government could be discerned ultimately from 'the very fount of nature'.

> Accordingly, we must concern ourselves primarily with the establishment of this natural derivation. Nevertheless, it will be of no slight value as a confirmation of our belief, if the conviction already formed by us on the basis of natural reason is sanctioned by divine authority, or ... approved in earlier times by men of wisdom and by nations of the highest repute (DJPC: 7).

With respect to the law of nations and of nature, Grotius simultaneously legitimised and reinforced his epistemological programme with the authoritative words of Hesiod, Heraclitus, Aristotle, Cicero, Seneca and Quintilian. For example, Aristotle is quoted reflecting that:

> The strongest proof is if all men agree upon what we say.

Cicero provided a refinement:

> The agreement of all nations upon a matter ought to be considered a law of nature (DJB: 42-43).

Against the capture of Grotius as the progenitor of international law due to some innate greatness or propensity the historian must balance Grotius' incessant and personally disastrous involvement in contemporary political debates. He was no visionary, or prophet, rather, his writings addressed prevailing concerns. The attempt to write in a realm of theory was partially a means of camouflaging his interest in the resolution of practical matters of his own era. As mentioned earlier, Grotius made these assertions in a world of considerable fluctuation. Traditional authorities faced rising criticism from Protestants and Catholics. As a pundit in the dawning Dutch Republic,

Grotius appeared willing to develop and extend his conception of freedom of the seas to assist not only his employer, but also the United Netherlands.

AGAINST THE FREEDOM OF THE SEAS: ENGLISH ANTAGONISTS

Tension in international relations were heightened during the sixteenth and seventeenth centuries with the diminution of Papal influence and Catholic and Protestant rulers asserting increasing control over the developing states (Giddens see essay War & peace). The first two decades of the seventeenth century witnessed uneasy relations between Spain, France, England. These countries were particularly influential upon the affairs of Europe but their policies were important for the emerging Dutch nation. Upon accession to the English throne (1603) James I sought a treaty with Spain: *Anglo-Spanish Peace Treaty*, London, August 1604. He subsequently nurtured and steadfastly guarded cordial relations. The text of the treaty forbade privateering and restricted the supply of various goods especially munitions to 'the *Hollanders*, or other enemies of the King of Spaine' (Grewe 1988: 52-53). In his instructions to the English Commissioners to a conference with the Dutch in 1614/15 James I enunciated a continuing policy avoiding prejudicing his treaty with Spain: 'Lastly you shalbe careful not to assent or agree unto anything propounded or offered unto you that shalbe preiudiciall to the treatie of peace made with our Brother the King of Spaine' (Clark 1951: 150). The United Netherlands was emerging as an independent power. However it was generally conceived as less significant than the established major powers. Indeed the attitude of James I toward the Dutch reflects this disposition. He acknowledged their growing prosperity and economic capacity but remained pre-occupied with relations among the Spanish, French and Holy Roman Empire.

In an attempt to better appreciate the contextual and intellectual milieu in which Grotius wrote, as well as serving to detect elements of exaggeration or misrepresentation in his thesis which might have been contemporaneously criticised, the paper will consider the writings of the two most vociferous English critics of his age. Like Grotius, William Welwood and John Selden were both embroiled in international politics. To varying degrees their works served as apologetics for the policies of James I.[21] Both Englishmen were lawyers. Selden provided an extensive examination of the issues regarding dominion of the sea. Welwood was more concerned with the fishing industry and the effects of the doctrine of freedom of the sea upon that domain.

JOHN SELDEN

The title of Selden's work, *Mare Clausum*, itself suggests that he was responding directly and antagonistically to the claims which Grotius had made. Selden explained that *Mare Clausum* was 'the sea possessed in a

private manner, or so secluded both by Right and occupation, that it ceaseth to be common' (Selden 1663: *Preface*) Selden's work, the full title of which is *Mare Clausum; the RIGHT and dominion of the SEA in two books*, aimed to justify two propositions:

> The one, That the Sea, by Law of Nature or Nations, is not common to allmen, but capable of private Dominion or proprietie as well as the land; The other, That the King of Great Britain, is Lord of the Sea flowing about, as an inseparable and perpetual Appendant of the British Empire (Selden 1663: Preface and Dedication).

Given these propositions and the earlier discussion of discursive and persuasive resources permissible within any tradition it is not surprising that in championing the opposite cause to Grotius Selden invoked many of the same argumentative methods and devices. Having affirmed his intention, Selden commenced his justification via an historical inquiry. Like Grotius, Selden's work is weaved with a fabric of literary antiquity. In support of dominion Selden cited Valerius' comments to Tiberius 'that hee would have the regiment of the Sea and land bee in thy power' (Selden 1663: *Preface*). Numerous other examples functioning as attestation of a long tradition of possession or control of the sea are given including Pliny, Tacitus and Ambrose (Selden 1663: *Preface*). From recent history Selden offered the example of the Papal dispensation to the Iberians:

> [The] prodigious gift of Pope Alexander VI in the former age, which is bounded by an imaginary line from the Arctic to the Antarctic Pole, are closed by lines of longitude and Latitude drawn through the degrees of Heaven, that they may be possessed in a private manner (Selden 1663: Preface).

This historical overview is affirmed with:

> But this, I suppose, it is sufficiently manifest to the more intelligent sort of man, without any Advertisement

and concludes:

> Other passages there are everywhere of the same kinde. But I enlarge my self too much in a thing so manifest. Therefore I forbear to light a Candle in the Sun (Selden 1663: Preface).

Selden summed the major arguments against dominion into three types.

> Som are drawn from freedom of Commerce, Passage and travel; others from the nature of the Sea; and a third sort from the Writings and Testimonies of learned men (Selden

1663: 3).

In regard to commerce Selden chastised those predecessors who did not acknowledge the wealth of examples which history provided supporting acquisition and dominion of the sea. Selden referred to the practices of Spain in the West Indies and the English *Company of Muscovie*. There is even a passage from Virgil which Grotius had also cited.

> What barb'rous land this custom own's;
> What sort
> of men are these: were are forbid their port (Selden 1663: 4).

Selden employed events from *The Aeneid* as support for the proposition that people across history had exerted control over the seas and shores. In contrast Grotius had used the authority of Virgil, and the indignation the passage engendered to protest against immoral conduct (*ML*: 8)

Selden could not accept the supposedly inseparable association of commerce and travel with nature which Grotius had introduced. Selden retorted, these people argue that dominion of the sea 'would bee in infringement of that Law of Commerce and Travel (by them styled the Law of Nature) which they would not have to be endured' (Selden 1663: 4).

Since the Papal donation the laws of Portugal had changed and Selden referred to a law of Portugal to demonstrate that they undoubtedly claimed dominion, and not as Vásquez and Grotius had tried to explain as a civil law.

> For, therein it is forbidden that any person either forraigner or native in any shipping whatsoever to pass ... *to the said countries, lands and Seas of Guinee, and the Indies, or any other Lands, Seas, and places under our Dominion for Commerce, or Traffick, or making of War without our licence and AUTORITIE, under pain of death and total confiscation of estate, to be inflicted upon any that shall presume to do contrarie* (Selden 1663: 108).

The law undoubtedly purports to deal with Portuguese and foreigners.

Selden continued by offering an explanation of why it was that some states had recently challenged this age old state practice.

> Although forraigners do not acknowledge that Portugal hath acquired any such right. However, that in the Law of Nature which is obligatorie, there is nothing to hinder, but that such a right may be acquired, is (I SUPPOSE) acknowledg'd by all the Nations in Europe, except from perhaps those who are not yet in fair and lawful possession of any Sea, if so bee at least a man may rightly gather their acknowledgments from their received customs (Selden

1663: 108).

Selden avoided direct consideration of the French claims to dominion. The reason for this might have resided in the ongoing tension between the French and English over the English Channel. Selden conveniently described French interests as follows:

> I suppose it sufficiently appear's, that they do also acknowledg, that private Dominion over the sea, is not repugnant to the Law either of Nature or Nations; which serves fully for clearing of the point in question (Selden 1663: 111).

Selden questioned the second proposition which suggested the nature of the sea made it impossible to possess. He recognised that "Vasquis" and Grotius both accepted that land was once held in common like the ocean and yet now through prescription had been reduced to ownership and control. Unlike his antagonists Selden did not perceive any conceptual limitation in the extension of principles derived from land being grafted onto the sea. Grotius had denied the existence of valid historical support for the applicability of such doctrines. Vásquez had recognised this but rather than accept the existence of any nation laying valid claims to the seas he dismissed these claims as civil, thereby binding only the citizens of a certain country (Selden 1663: 9-10).

In addressing the third category, the testimony of learned men, Selden began with an examination of Christian writings. Beginning, appropriately, at Genesis he introduced a verse which Welwood had earlier considered concerning man's authority over animals in the ocean and exclaimed:

> As to what concern's here the Law of God, wee find very plain passages therein, which do not a little favour a Dominion of the Sea (Selden 1663: 27, Genesis 1:28, 9:2).

This tactic was uncomplicated. Through literal exegesis Selden's interpretation appealed to his contemporaries as obvious or sensible. There had been a reluctance among religious groups to move away from literalism because of the interpretative obstacles such a departure raised. Occasionally there was a need to depart from literal exposition. This occurred when contemporary perceptions seemed to challenge the most obvious sense of the Scriptures. Verses capable of or actually offering difficulty, were, therefore, rationalised. The rationalisation involved the use of devices such as difficulties in translation to explain apparent anomalies in the text. Galileo undertook such a textual exercise which he discussed in his *Letter to the Grand Duchess Christina* (Goodman 1972).

A verse quoted by Selden from Ezekiel:

> all the princes of the Sea shall ...

appeared literally to support some kind of dominion over the sea. Selden held it as ample support that 'here the Dominion of the *Tyrians* at Sea is plainly set forth' (Selden 1663: 29). Selden's interpretation of a clause from the following chapter of Ezekiel did not follow the literal sense. There Selden provided his preferred reading:

> The Borders are in the Midest or heart of the Sea ...

Limitations in other versions were explained by the translators of the Hebrew and Arabic not properly capturing the original in their Greek and Vulgar rendering (Ezekiel 27: 4, Dueteronomy 33: 23, Numbers 34: 6, Ezekiel 47: 20).

Selden provided a somewhat unusual Renaissance example because he challenged many of Grotius' teleological precommitments. He did not conceive society as simply a reflection of nature and therefore God's mind.

> It is indeed not to be denied, that a right use of humane Reason, which usually serv's as an Index of the natural Law, cannot well bee gathered from the Customs of several Nations, about things Divine or such as relate unto Divine Worship (Selden 1663: 42).

Unlike Grotius, Selden suggested that reason existed within the brain, and the right use of cognitive abilities gave access to natural law rather than reflection upon the state of society and nature. In critiquing the generalisation of natural law from society Selden adopted fragments from Cicero (1986). Grotius had employed Spanish authorities against the practices of Spain. Selden enlisted material from Cicero to use against Grotius. The following proposition enabled Selden to pose an insidious threat to the so called uniformity of national practice.

> But where are all nations? It is not yet discov'd how many there are, much less upon what customs they have agreed (Selden 1663: 44).

History, as suggested earlier, provides an infinite number of permutations and events to manipulate to support various propositions. Selden acknowledged virtually all of the authorities which Grotius had cited to support his cause but was critical where the body of learning contradicted actual practice. He accused certain modern authors as dealing 'in the same manner, as they have pinn'd their faith, more than was meet, upon the sleeve of Ulpian, or som other such Antient Autor' (Selden 1663: 168). Selden utilised ongoing changes in intellectual traditions to suggest that strict adherence to authority meant subservience to often outmoded systems of thought or belief. He supported this contention drawing illustration from natural philosophy.

> as if a man should so discours upon Aristotle's Astronomie, or the opinion of Thales touching the Earth's floating, like a dish in the sea ... and other opinions of that kinde, which are rejected and condemned, by the observation and experience of posteritie; that he might seem not so much to search into the thing itself, as to represent the person of the AUTOR, likely to trace out his meaning, only for the discovery of his opinion. But as the root being cut, the tree fall's so the AUTORITIE of those ancient lawyers being moved out of the way, all the determination of the modern which are supported by it, must be extremely weakened (Selden 1663: 169).

This citation evinces Selden's self-confessed need to somehow silence or marginalise authorities in conflict with his thesis. The use of these particular examples as a means of demonstrating that ancient wisdom is definitely vulnerable to the discoveries of later ages distorts the prevailing dominance of Aristotelian natural philosophy. Copernicanism, itself championed by Gilbert, Kepler, and Galileo appealed to Neoplatonic and Pythagorean sensibilities of harmony and order, more than notions of common sense, experience or empiricism. Actual corroborating support for the heliocentric system, contra Aristotle, did not arrive until the nineteenth century when stellar parallax was first observed.

This serves to illustrate that the sustenance and manipulation of ideologies invariably includes co-opting resources from various domains to assist in the rendering of arguments as not only legitimate but proper or rational.

The final point to be addressed in our discussion of Selden is the manner in which he actually perceived *Mare Liberum*. Rather than the basis for the unwinding of international law Selden portrayed it as a work of pragmatism, a polemic imbued with political expediency. The inclusion and primacy of the ancients served only to condemn the work as essentially peripheral to Selden's age, a work that had searched the pages of antiquity to discover, what were then largely obsolete ideas.

> As to what concern's Mare Liberum, a Book that was written against the Portugals about trading into the Indies through the vast Atlantick and Southern Ocean; it contein's indeed such things as have been delivered by antient Lawyers touching communitie of the Sea; Yea, and disputing for the Profits and Interests of his Countrie, he draw's them into his own partie, and so endeavor's to prove that the sea is not capable of private Dominion (Selden 1663: 171).

Selden concluded his first book in basically the manner in which he had begun:

> There remain's not in the nature of the Sea it self, or in the Law either Divine, Natural or of Nature, any thing which may so oppose the private dominion thereof (Selden 1663: 179).

WILLIAM WELWOOD

Apart from *Mare Clausum* there was another response to *Mare Liberum* produced by an English lawyer. William Welwood's *An Abridgement of all Sea-Lawes* challenged some of the claims Grotius had made by asserting the right for a nation to claim dominion of adjacent seas for their own fisherman or to control the operation of foreigner fishermen through the sale of licences.[22] Freedom of passage over the oceans was not disputed. The subject of controversy was the 'ridiculous pretence' proposed by the author of *Mare Liberum* 'as a drift against our undoubted right and propriety of fishing on this side of the Seas' (Welwood 1972: 62). Welwood decried that strangers were 'scarring, scattring, and breaking the shoals of our fishes' (Welwood 1972: *Epistle*).

Welwood claimed for his King, as of right, the ability through prescription to 'acquire the proprietie of any such part of the sea' (Welwood 1972: 57). Welwood distinguished between the legal rights of individuals and monarchs, a position which Grotius later rejected (Wright 1928). Welwood resorted to other justifications for his assertion which included an apparent concern at what Grotius had overlooked, namely the exhaustibility of natural resources. In order to preserve the stocks of fish Welwood expressed the need to have minimum mesh requirements for nets (Welwood 1972: 58, 72, Selden 1663: 141).

In reassessing the claims espoused by Grotius, Welwood re-ordered the hierarchy of authority to favour his own position. Because, as Grotius had revealed, the majority of writings from antiquity had not dealt specifically with many of the issues and the adjacent seas were almost unanimously described as common. Welwood needed some countervailing strategy or authority. He did this by emphasising Biblical authority, which appeared to offend the arguments postulated by Grotius, at the expense of classical antiquity.

In response to Grotius' 'verie learned but subtle Treatise' Welwood offered a number of potent criticisms. They concerned Grotius' use of authorities and his exegetical methodology, or lack thereof. Welwood acknowledged the value of various authorities but stressed the need for *the* appropriate hierarchy.

> The Author would make Mare Liberum, to be a position fortified by the opinions and sayings of some olde poets, Orators, Philosophers, and (wrested) Jurisconsultants, that Land and Sea, by the first condition of nature, hathe beene and should bee common to all, and proper to none: against this I minde to use no other reason, but a simple and orderly reciting of the wordes of the holy Spirit, concerning that first condition naturall of Land and Sea from the very beginning; at which time, G O D having made and so carefully toward man disposed the foure elements, two to swimme above his head, and two to lie under his feete: that is to say, the Earth and Water, both wonderfully for that effect ordered to the upmaking of one and a perfite Globe, for their more mutuall service to mans use: according to this, immediatly after the creation, God saith to man, subdue the earth, and rule over the fish : which could not be, but by a subduing of the waters also (Welwood 1972: 62).

This lengthy quotation illustrates the priority certain authors and their readers accord to different sources of authority and argumentative legitimation. Welwood applied a literal reading of God's command in Genesis. Another illuminating feature of the quotation is Welwood's employment of the Aristotelian elements. He introduced accepted contemporary natural philosophy, albeit a pagan inspired one, as a metaphysical framework to his Biblical hermeneutic. Welwood interpreted the Bible by the canons of his age and many assumptions were unquestioned. But Welwood's response left Grotius to develop and make known a Biblical apologetic to oppose what appeared, or at least had been construed to appear, as a straightforward command from the Creator.

CONCLUSION

Grotius indicated that pragmatism played no part in his writings. Yet his works were conceived and written within a highly political context and usually appear to reflect, very straightforwardly, practical political solutions. These resolutions were often novel – disguised as authoritative legal codifications. This claim is not to repeat the puerile assumptions of a simple causal nexus between society and superstructure as did early Marxist historians but to place Grotius in a social nexus, which is examined in order to *best* appreciated his various articulations.

The writings of Selden and Welwood cast serious aspersions on historiography which would describe Grotius as a conduit between the Renaissance and modern society. Differences in perspective and the

simultaneous existence of cogently argued ideas by rivals supports the contention that regardless of what has been subsequently understood, Grotius was responding to a world full of its own nuances and connotations. Authors conscripted these nuances to make their arguments convincing. To simply correlate the methodology and claims of earlier authors which appear to resemble modern conceptualisations avoids consideration of the existence of the same methods and divergent claims in the writings of their most virulent opponents.

There are substantial correspondences between the *Mare Liberum* of Grotius and modern conceptions of freedom of the seas but they reflect more of a common heritage than a causal relationship. Grotius argued that virtually all but the slightest parts of the sea were to remain free. He criticised those who advocated territorial seas, and considered virtually all seas *high*. Grotius based these claims on a theistic orientation and believed the principles he developed represented those which were divinely sanctioned and supported by the *jus gentium*. They were also expedient responses to compromises of his recently ascertained transhistorical explanation of the role of nations and their naturally inspired rights with respect to the seas. The fact that *Mare Liberum* appears to encapsulate perennial values and rules of human action pertaining to the seas is more of a tribute to Grotius' rhetorical mastery than some inherent truth or methodological approach. In comparison with modern conceptions those of Grotius are not irrelevant nor impoverished nor identical. They are merely different, as were the processes and shared precommitments which led to their construction.

NOTES

[1] The Works of Hugo Grotius cited are abbreviated as follows: *Mare Liberum* - *ML*; *De Jure Belli ac Pacis Libri Tres* (On the Law of War and Peace) - *DJB*: *De Jure Praedae Commentarius* (Commentary on the Law of Prize and Booty) - *DJPC*: 'Defense of Chapter V of the *Mare Liberum*' - Def.

[2] There was a strong historiographical programme seeking to equate both religion, and especially, Catholicism as repressive and reactionary. This approach was insensitive to the strong epistemological traditions within both Catholic and Protestant churches, especially with respect to natural philosophy. Holland pejoratively described the early Catholic writers Vásquez, Vitoria and Suárez as "Catholic casuists". These sentiments were popularised in the nineteenth century by Draper J W 1875 *A History of the Conflict of Science and Religion*, and White A D 1896 *A History of the Warfare of Science with Theology in Christendom*.

[3] It must be noted that despite his commitment to progress Pollock acknowledged the rhetorical utility of natural law doctrines as 'every disputant strove to make out that it was on his side' (Pollock 1901: 11).

[4] Haggenmacher contends that Catholic conceptions of natural law, especially those

developed on a Thomistic basis by sixteenth century Hispanic Dominicans and Jesuits were better articulated and more secular than contemporary Protestant works (1992: 170).

[5] In contrast Anand exemplifies an excessive reaction to the Western emphasis in the history of international law (1981). He attempts to reclaim ground for the Asian nations with very limited historical justification. Grotius had limited contact with people who had sailed to the east and the VOC's records to which Grotius had access whilst compiling his treatise do not substantiate Anand's claims. For a fuller discussion see Roelofsen (1989).

[6] On difficulties in legal interpretation and the intrusion of politics, social values, ideology and metaphysics in legal discourse the following is an introduction to an extensive literature: D.H.J. Herman D H J 1982 'Phenomenology, Structuralism, Hermeneutics, and Legal Study: Application of Continental Thought to legal Phenomena', *University of Miami Law Review*. 36/3: 379-410; Norris C1988 'Law, Deconstruction, and the Resistance to Theory' *Journal of Law and Society* 15; Brainerd S 1985 'The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical legal Theory' *The American University Law Review*, 34: 1231-1262; Mallioux S. 'Rhetorical hermeneutics' in Levinson S ed 1988 *Interpreting Law and Literature: A Hermeneutic Reader* Northwestern University Press Evanston; Nerhot P ed 1990 *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* Kluwer Academic Publications Dordrecht; Fiss O 1982 'Objectivity and Interpretation', *Stanford Law Review* 34; Fish S 1987 'Dennis Martinez and the Uses of Theory' *Yale Law Journal*; Goodrich P 1986 *Reading the Law: A Critical Introduction to Legal Method and Techniques* Oxford University Press Oxford.

[7] Grotius caricatured Portugal as an extremely wealthy and prosperous nation despite its spiralling debt from the late sixteenth century (Parker 1979: 133).

[8] One of a number of apparent anomalies in the Grotius historiography is a reason for the non publication of Grotius' *De Jure Praedae Commentarius* (Commentary on the Law of Prize and Booty) written c.1604-6, and the late publication of *Mare Liberum*. For example this issue is discussed by Roelofsen (1992: 103ff), Haggenmacher (1992: 142) and Eyffinger (1984: 55-62). A similar historiographical controversy exists over the publication of Copernicus', *De Revolutionibus* (1543). In response to the question of why was *De Jure Praedae Commentarius* not published and *Mare Liberum* not published earlier most historians remain uncertain (Haggenmacher 1992: 143). Probably the explanation most closing addressing modern canons of historical rationality would be that in pursuing a moderate line during the 1609 treaty with the Spanish, Oldenbarnevelt encouraged publication of only a redrafted version of Chapter XII from *De Jure Praedae Commentarius* to reassure the VOC that in signing a treaty with the Spanish the Dutch would not relinquish their fervent pursuit of trade in the East Indies. This entailed a putative representation and vindication of the Dutch trading policy effectively rejecting the Spanish/Portuguese monopoly. *Mare Liberum* provided a means of asserting Dutch independence, and enlisting support from the French and especially the English who also sought to trade, in assisting the negotiation of the Twelve Years Truce (April 1609). It was

Nussbaum contention that politically weaker nations, like Holland, had a tendency to emphasise a legal point of view, presumably as possibly one of their few options in international negotiations and debates.

[9] The *Anglo-Spanish Peace Treaty of London*, 1604, provides support for at least some recognition of the right to possess parts of the ocean. The Kings of Spain and England agreed to open their 'Land, as Sea, and fresh Waters, in all and singular their Kingdomes, Dominions, Islands, and other Lands, Cities, Townes, Villages, Havens, & Streights of the said Kingdomes.' The assertion of dominion of havens and straits is later extended to preclude the need for licences from the respective sovereigns when travelling in their territories which include the seas and sea routes: 'without any safe conduct, or other Licence generall, or speciall, the Subjects of the one, or other king may freely, aswell by Land as by Sea and fresh Waters, goe, enter, and saile, in and to the said Kingdomes, and Dominions, and all the Cities, Havens, Shores, Sea rodes, and straights thereof'. The distinction which Grotius made concerning rivers and the seas is not recognised (Grewe 1988: 54). Two decades before this treaty, Elizabeth I had lambasted Spain with resemblances to some of the approaches later maintained by Grotius. In a letter to the Spanish envoy in London, Mendoza, 1580, in response to privateering, Elizabeth stated: 'The Spaniards have brought these evils on themselves by their injustice towards the English, whom, *contra ius gentium*, they have excluded from commerce with the West Indies.' She continued against the excessive Spanish claim to the seas flowing from the Papal donation: 'Moreover all are at liberty to navigate the vast ocean, since the use of the sea and the air are common to all. No nation or private person can have a right to the ocean, for neither the course of nature nor public usage permits any occupation of it.' James I took a different view (Grew 1988: 151 156-9, Nussbaum 1947: 107, Cf Grotius 1928: 179).

[10] J. Selden wrote 'Wee finde clear Testimonies in the Customs of other Nations, also of *Europe*, touching private Dominion of the Sea; as the *Danes*, the people of *Norway*, the *Polanders*, to whom may bee added also the *Turks*'. Similarly in the Second Book of *Mare Clausum*, Selden refereed to Frederick II of Denmark and Norway who had leased sole right to trade through the Norwegian Sea to the "English Muscovie Company".

[11] Selden and Grotius, were well versed in Roman law, though the ambiguity of classical authority allowed them both to rely on it for support in their controversy. One on the difficulties experienced at the conference in London in 1613 was that a legal clash occurred where the English and Dutch operated under different legal assumptions. In the decades before the conference there had been a notable decline in the influence of Roman Law in England. In contrast Grotius the leading Dutch negotiator was an expert.

[12] The English did not hesitate to point to a treaty concluded between Sir Francis Drake and the Raja of Ternate (1580) to challenge the supposed contractual basis to the Dutch monopoly (Roelofsen 1989: 109).

[13] This truce only provided for free trade within Europe, the Spanish attempted to maintain their ever dwindling Asian hegemony.

[14] *DJPC*: 266: 'the people of these [Low] countries ... offer a wealth of testimony to the fact that the people ... are extremely zealous in the cultivation not of piracy but of commerce, being moreover free from every rapacious inclination, superior to all others in sexual temperance and in their whole way of life, and characterised by the most profound reverence for the laws, for the magistrates, and above all religion.' Grotius applied his Calvinistic precepts to the Dutch when he described their mission as a people chosen by God, 'in preference to all others'.

[15] *Mare Liberum*, Chap. III: 'The Portuguese have no right of sovereignty over the East Indies by virtue of title based on the Papal Donation'. Chap. VI: 'Neither the sea nor the right of navigation thereon belongs to the Portuguese by virtue of title based on the Papal Donation.' Chap. X: 'Trade with the East Indies does not belong to the Portuguese by virtue of title based upon the Papal Donation.'

[16] Temporal power over the earth had been rejected. It followed therefore that temporal power over the seas could not exist. Grotius was following a line of Spanish authority in his claims which had been enlisted in previous political disputes. Elizabeth I had written, perhaps not personally, to the Spanish envoy, 1580: 'This donation of what does not belong to the donor and this imaginary right of property ought not to prevent other princes from carrying on commerce in those regions or establishing colonies there in places not inhabited by the Spaniards' (Grewe 1988: 151).

[17] Gellenick contends this was part of the reason for delay and anonymity in publication so that it would not interfere with the truce negotiations, especially embarrassing the peace party headed by Oldenbarnevelt (1983: 98).

[18] Article XXXVII of the Dutch East India Company's charter issued by the States-General states: 'If any ships of the Spaniards, Portuguese or other enemies should attack ships of the company, and if in this case hostile ships should be captured, the seized ships and goods shall be distributed according to the law of the Netherlands. First of all damages suffered by the company in battle will be paid out, *thereafter the State and the admiral receive their portions.*' (Grewe 1988: 175 my italics)

[19] It should be remembered that some historians have employed a famous quotation to support the almost ridiculous assertion that either Grotius' system could stand without a God or that Grotius was less theistic than might appear. Grotius suggested that 'What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.' But without God Grotius' system could not stand for it is predicated upon a notion of a commensurate reason placed in all men by God which is demonstrated in universal similarities throughout societies. Without a God all that could exist to explain conformities might be sheer coincidence or copying for there would be no intention manifest throughout creation, or rather material reality. This is not to say that components of Grotius' work could not be used in a secular capacity but they would be extractions severed from his underlying belief.

[20] *DJB*: 42-43: 'For an effect that is universal demands a more universal cause: and the cause of such an opinion can hardly be anything else that the feeling which is called the common sense of mankind'. *DJPC*: 7: 'which will be regarded by many critics as already sufficiently familiar and by everyone as too repetitious in its presentation.' 27: 'The necessity for this precept is indeed self evident, and can be deduced from the observations already set forth.' *ML*: 30: 'Therefore the sea can in no way become the private property of any one, because nature not only allows but enjoins its common use.'

[21] Selden had been active in Parliament's resistance to Charles I in 1629. He was imprisoned, though later released on bond. This bond was discharged at the time of publication of *Mare Clausum* and may well have been a reward.

[22] Grotius included a reference to fishing licences and appeared to be establishing a defence to the proposed policy of James I of England. Grotius explained that freedom of fishing precluded any levy upon fishing, though various states may choose to levy the act of fishing by their own subjects. This statement both allows for the taxing of the English but differentiates the position of foreign fishermen (*ML*: 36, Clark 1951: 36). Elizabeth I, who argued earlier in her reign that the air and the sea should be free, later and somewhat expediently changed her position when insisting the Danes acquire licences to fish in the coastal waters surrounding England. This is indicated in the instructions given by Queen Elizabeth to the British envoys for the Bremen negotiations with Denmark (1602) on fishing licences and sound tolls (Grewe 1988: 153-9).

BIBLIOGRAPHY

Anand R P 1981 'Maritime Practice in South-East Asia Until 1600 AD and the Modern Law of the Sea' *International and Comparative Law Quarterly* 30: 440-454

Barnes B 1990 'Sociological Theories of Scientific Knowledge', in Olby et al 1990

Barnes J ed 1984 *The Complete Works of Aristotle* 2 vols Princeton University Press Princeton

Berger P L and Luckmann T 1973 *The Social Construction of Reality* Penguin Harmondsworth (first published 1966)

Bernal J D 1969 *Science in History* 2 Vols Penguin Harmondsworth

Bettenson H ed 1975 *Documents of the Christian Church* Oxford University Press Oxford (first published 1943)

Brooke J H 1991 *Science and Religion: Some Historical Perspectives* Cambridge NY Cambridge University Press

Bukharin N I ed 1971 *Science at the Crossroads* London (first published 1931)

Bull P and Kingsbury B and Roberts A eds 1992 *Hugo Grotius and International Relations* Clarendon Press Oxford

Burtt E A 1950 *The Metaphysical Foundations of Modern Science* Routledge Kegan & Paul London

Butterfield H 1931 *The Whig Interpretation of History* London

Chroust A H 1943 'Hugo Grotius and the Scholastic Natural Law Tradition' *The New Scholasticism* 17/2: 14-29

Cicero 1986 *The Nature of the Gods* Penguin Harmondsworth

Clark G N and Eysinga W J M van eds 1940 'The Colonial Conferences Between England and the Netherlands in 1613 and 1615' 15 *Bibliotheca Visseriana*

Collingwood R G 1945 *The Idea of Nature* Clarendon Press Oxford

—1946 *The Idea of History* Clarendon Press Oxford

D'Entreves A P 1951 *Natural Law* London

Dear P 1991 *The Literary Structure of Scientific Argument* University of Pennsylvania Press Philadelphia

Diggins J P 1969 'The Oyster and the Pearl: The Problem of Contextualism in Intellectual History' *History and Theory* 23: 151-169

Easlea B 1980 *Witch-hunting, Magic and the New Philosophy* Harvester Wheatsheaf Hertfordshire.

Edwards C S 1981 *Hugo Grotius The Miracle of Holland: A Study in Political and Legal Thought* Nelson-Hall Chicago

Eisenstein E L 1979 *The Printing Press as an Agent of Change* 2 Vols Cambridge University Press Cambridge

Eyffinger A C 1984 'A note on Grotius's Early Pursuits' *Maastricht Hugo Grotius Colloquium* Assen: 55-62

Foucault M 1991 *Madness and Civilization* Trans R Howard Routledge London (first published 1961)

—1991 *Discipline and Punish* Trans A Sheridan Penguin London (first published 1975)

Gadamer H 1989 *Truth and Method* Sheed & Ward London (2nd edn)

Galilei G 1967 *Dialogue Concerning the Two Chief World Systems - Ptolemaic and Copernican* Trans S. Drake Berkeley

Gilbert W 1958 *De magnete* Trans P F Mottelay Dover Publications New York (first published 1600)

Gellinek C 1983 *Hugo Grotius* Twayne Publishers Boston

Goodman D C ed 1972 *Science and Religious Belief 1600-1900* Open University Press Bristol

Goodrich P 1986 *Reading the Law: A Critical Introduction to Legal Method and Techniques* Oxford University Press Oxford

Grewe W G ed 1988 *Fontes Historiae Iuris Gentium 1493-1819* 2 Vol Walter de Gruyter Berlin

Grotius H 1916 *The Freedom of the Seas or The Right which belongs to the Dutch to take part in the East Indian Trade* (*Mare Liberum*) Trans R van Deman Magoffin Oxford University Press New York (first published 1609) [abbreviated *ML*]

—1925 *De Jure Belli ac Pacis Libri Tres* (On the Law of War and Peace) CLASSICS OF INTERNATIONAL LAW Trans F Kelsey Bobbs-Merrill New York [abbreviated *DJB*]

—1964 *De Jure Praedae Commentarius* (Commentary on the Law of Prize and Booty) CLASSICS OF INTERNATIONAL LAW Trans G L Williams and W H Zeydel New York (first published 18??) [abbreviated *DJPC*]

—1928 'Defense of Chapter V of the *Mare Liberum*', in Wright 1928 [abbreviated Def]

Haggenmacher P 1992 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture' in Bull et al 1992: 133-176

Hall A R 1983 'On Whiggism' *History of Science*, xxi: ••

Heere W P ed 1989 *International Law and its Sources* Kluwer Deventer
Hessen B 1931 'The Social and Economic Roots of Newton's *Principia*' in Bukharin et al 1971: 150-212
Holland T E 1898 Studies in International Law Oxford University Press Oxford
Kennedy D 1985 'Primitive Legal Scholarship' *Harvard International Law Journal* 27: 1-98
Knorr-Cetina K D 1981 *The Manufacture of Knowledge* Pergamon Oxford
Koyré A 1968 *Metaphysics and Measurement: Essays in the Scientific Revolution* Chapman & Hall London
Kuhn T S 1957 *The Copernican Revolution* Harvard University Press Cambridge Mass.
—1974 *The Structure of Scientific Revolutions* Chicago University Press Chicago (first published 1970)
Kwiatkowska B 1984 'Hugo Grotius and the Freedom of the Seas' *Maastricht Hugo Grotius Colloquium* Assen
Latour B and Woolgar S 1979 *Laboratory Life: The Social Construction of Scientific Facts* Sage Beverly Hills
Lauterpacht H 1946 'The Grotian Tradition in International Law' *The British Yearbook of International Law* Oxford
Lindberg D C and Numbers R L eds 1986 *God and Nature: Historical Essays on the Encounter Between Christianity and Science* University of California Press Berkeley
—and Westman R S eds 1990 *Reappraisals of the Scientific Revolution* Cambridge University Press Cambridge
Mayr E 1990 'When is historiography Whiggish?' *Journal of the History of Ideas* 51:
Mulkay M 1979 *Science and the Sociology of Knowledge* George Allen & Unwin London
Murdoch J E and Sylla E D eds 1975 'The Cultural Context of Medieval Learning' *Boston Studies in the Philosophy of Science* vol. 26 D. Reidel Dordrecht
Murphy C F 1982 'The Grotian Vision of World Order' *The American Journal of International Law* 76: 477-498
Newton F W 1981 'Inexhaustibility as a Law of the Sea Determinant' *Texas International Law Journal* 16: 369-422
Nussbaum A.1947 *A Concise History of the Law of Nations* MacMillan New York
Moore J •••• The Post-Darwinian Controversies •••
Olby R C and eds 1990 *Companion to the History of Modern Science* Routledge London
Oppenheim L F 1928 *International Law* Longmans Green London
Parker G 1979, *Europe in Crisis 1598-1648* Fontana London
Pauw F de 1965 *Grotius and the Law of the Sea* Trans P J Arthern de l'Institute de Sociologie Brussels
Pollock F 1901 'The History of the Law of Nature: a Preliminary Study II' *Columbia Law Review* 1/1: 11-32
—1902 'The Sources of International Law' *Columbia Law Review* 2/8: 511-524
Popper K R 1960 *The Poverty of Historicism* Routledge & Keegan Paul London (first published 1957)
Rabb T K 1975 *The Struggle for Stability in Early Modern Europe* New York Oxford

University Press
Remec P P 1960 *The Position of the Individual in International Law According to Grotius and Vattel* Nijhoff The Hague
Roelofsen C G 1989 'The Sources of *Mare Liberum* ; the Contested Origins of the Doctrine of the Freedom of the Seas' in Heere ed 1989
—1992 'Grotius and the International Politics of the Seventeenth Century' in Bull et al 1992
Schmitt CB 1973 'Towards a Reassessment of Renaissance Aristotelianism' *History of Science*, xi: 159-193
—1975 'Philosophy and Science in Sixteenth-Century Universities: Some Preliminary Comments' in Murdoch et al 1975: 485-530
—1985 'Aristotle among the Physicians' in Wear et al 1985: 1-15
Schuster J A 1990 'The Scientific Revolution' in Olby et al 1990
—and R R Yeo eds 1986 *The Politics and Rhetoric of Scientific Method* Reidel Dordrecht
—1989 'Constructing Contextual Webs' *ISIS* 80: 493-496
Selden J 1663 *Mare Clausum: The Right and Dominion of the Sea* Trans P Needham London
Scott J B 1934 *The Spanish Origins of International Law: Francis De Vitoria and his Law of Nations* Clarendon Press Oxford
—1916 'Introduction' in Grotius 1916
Shapin S 1982 'History of Science and its Sociological Reconstructions' *History of Science* xx: 157-211
Strong E W 1937 *Procedures and Metaphysics: A Study in the Philosophy of Mathematical-Physical Science in the Sixteenth and Seventeenth Century* Ann Arbor University Microfilms (Reprint 1978)
van der Molen G H J 1937 *Alberico Gentili and the Development of International Law* H J Paris Amsterdam
Walker T A 1899 *A History of the Law of Nations* London
Wear A and French A K and Lonie I M eds 1985 *The Medical Renaissance of the Sixteenth Century* Cambridge University Press New York
Welwood W 1972 *An Abridgement of all Sea-Lawes; Gathered Forth of all Writings and monuments, which are to be found among any people or Nation, upon the coasts of the great ocean and Mediterranean Sea* Amsterdam (first published 1613)
Wright H F ed 1928 'Some less known works of Hugo Grotius' *Bibliotheca Visseriana* 7: 131-238