Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial

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INTRODUCTION: GROTIUS AS NARRATIVE

Hugo Grotius (1583–1645) frequently occupies the title, "'father' of international law."[1] While the origins of professional lineage were a source of professional and personal conflict for jurists in the nineteenth century, scholars today tend to treat Grotius as either a symbolic marker of changing historical thought, or the symbolic figure of a style or school of global governance.[2] In the first instance, Grotius is important because he made a methodological leap in one form or another from a theological to a secular frame of jurisprudential thinking, and in so doing, characterized the dilemmas of governance in familiar

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[1] Mark W. Janis, *Religion and the Literature of International Law: Some Standard Texts*, *in* RELIGION AND INTERNATIONAL LAW 121, 121 (Mark W. Janis & Carolyn Evans eds., 1999).

[2] *See* GESINA H.J. VAN DER MOLEN, ALBERICO GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW 61–62 (2d ed. 1968); *see also infra* notes 3–4 and accompanying text. In the 1870s, international jurists entered into heated contests over who deserved the right to be claimed the "father" of international law. *Id.* For instance, a group of jurists, including Asser, Holland, Mancini, and Twiss, drafted a resolution and formed a committee to erect a national monument in honor of Gentili. Pilgrimages were made to Gentili's hometown, and the Italian government officially requested the United Kingdom for his remains (the grave, however, was unable to be located). VAN DER MOLEN, *supra*. Other international jurists, such as A.J. Levy, objected, arguing that Grotius should have the honor of having his statue erected first. *Id.* at 62. An English committee was formed in 1875 to add weight to the argument for honoring Gentili first, with Prince Leopold sitting as the honorary president and Phillimore carrying out the actual presidential duties. *Id.*

terms to modernity.[3] For other authors, the legacy of Grotius is not directly this shift from ecclesiastic to secular authority, but rather that his efforts are remembered to spark the political aspiration, implied to be at the core of international law itself, towards a more liberal tolerance of difference and a sentiment of restraint towards over-aggrandizing political agendas.[4]

These two contemporary streams of remembrance operate within a dense background of assumptions about the nature and possibilities of the global order, which raise at least three sets of curiosities. First, in light of nuanced scholarship of Grotius's primary materials in recent decades, what does an emphasis on the actual content of Grotius's work impart about the character of his times, and through what lens should we organize our understanding (e.g., political, juridical, theological, and so on)? Second, what inspires the almost cyclical (or perhaps more perversely, fetishistic) attraction to Grotius in the fields of international law and politics, and how might this help us better understand both the psychological and structural underpinnings of contemporary practice and the nature and trajectory of the profession in a broader sense? And third, in lieu of any findings, what, if any, possibility does this attraction to Grotius open up for future strategic, or even imaginative engagement? In sum, what stories does the Grotian rhetoric allow us to tell about the international legal order, and do such stories carry any political, if not personal, impact?[5]

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[3] *See* Hilaire McCoubrey, *Natural Law, Religion and the Development of International Law*, *in* RELIGION AND INTERNATIONAL LAW 177, 183–85 (Mark W. Janis & Carolyn Evans eds., 1999) (arguing that the Grotian revolution, albeit an organic development from what had gone before, led to a change to the modes of more contemporary and secular discourse). In the nineteenth century, Grotius was primarily remembered for a theory of human sociability whereby cosmopolitan society stood in for the "state of nature." *See infra* note 6 and accompanying text. In the twentieth century, Grotius is often recalled as a narrative device to capture what is seen as the historical shift from the insulated hierarchical authority of the Church and Emperor to a rapidly expanding international system of formally equal sovereign states based on normative rules of general agreement. *See infra* note 4 and accompanying text.

[4] *See* Benedict Kingsbury & Adam Roberts, *Introduction: Grotian Thought in International Relations*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 1, 8–9, 13 (Hedley Bulls, Benedict Kingsbury & Adam Roberts eds., 1990) (describing the concept of solidarity and toleration of differences that are clearly discernible in Grotius's writings); *see also* EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: COLONIALISM AND ORDER IN WORLD POLITICS 143–44 (2002).

[5] Without playing into any post-modern angst, it is productive to keep in mind David Kennedy's injunction that the very act of analyzing the past (not to mention casting judgment on it) is to do violence to the doctrinal and theoretical content of earlier scholarship and can often misguide us to think that our vision is somehow more sophisticated and less contradictory. *See* David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1, 95–98 (1986).

It is these questions that this Article attempts to grapple with, in the hopes of providing a concise synthesis of the various engagements within the Grotian tradition to better understand the imaginative contours of our contemporary professional vocabularies and reflect on any emancipatory possibilities this might open up. What seems particularly striking is while ever more scholarship exposes a strong empirical dissonance in respect to the memory of Grotius, such representations continue to exercise a powerful sway over ongoing discussions about the past, present, and future of global governance. In response, this Article is organized into three themes which overlap in some respects, but are nevertheless helpful in parceling out the various approaches and motivations at work in the literature. Parts I and II provide an overview and then a revisionist account of the claims to what might be labeled the turn to "the secular" and "liberal tolerance." In Part III, this Article moves to reflect more broadly on the implications of this attraction, attempting particularly to deduce some possible motivations for the continuous misreading of Grotius's actual work. In conclusion, this Article briefly traces out some initial suggestions about an alternative future towards the legacy of the Grotian tradition, which might be characterized as a shift from a *politics of restatement and denial* to a *politics of truth*.

I. THE SECULARIZATION OF INTERNATIONAL LAW

In the first contemporary stream of argument, Grotius is viewed as setting forth a secularized restatement of natural law whereby political ethics now becomes capable of articulation independent of any theological premise. In the first half of the twentieth century, though still prevalent in mainstream literature,[6] this claim was typically supported by pointing to an early quotation

[6] *See, e.g.*, Deborah Baumgold, *Pacifying Politics: Resistance, Violence, and Accountability in Seventeenth-Century Contract Theory*, 21 POL. THEORY 6, 9 (1993); *see also* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 105 (1947) [hereinafter NUSSBAUM, CONCISE HISTORY OF THE LAW OF NATIONS] ("[Grotius] made an important step toward the emancipation of international law from theology by his famous pronouncement [about] the law of nature."); Josef L. Kunz, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L L. 951, 951–52 (1961) ("The Protestant Grotius, who wrote the first treatise on international law, was still strongly influenced by the traditional natural law, but he secularized it by stating that natural law would be valid even if there were no God. This secularization profoundly changed the character of natural law. . . . [T]he Catholic natural law is . . . discovered by man's *recta ratio*—a term stemming from the Stoics; yet . . . it necessarily presupposes the Christian faith in the Creator . . . . [W]ith Grotius this right reason becomes the basis of natural law."); Arthur Nussbaum, *Just War—A Legal Concept?*, 42 MICH. L. REV. 453, 466 (1943) ("[Grotius] claimed in earnest that the law of nations and international law derived therefrom could subsist without a divine foundation."); Roscoe Pound, *Grotius in the Science of Law*, 19 AM. J. INT'L L. 685, 686 (1925) (arguing that Grotius, along with other Protestant jurists, helped sever theology from jurisprudential thought).

from *De Jure Belli ac Pacis*: "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."[7] More recent scholarship has radically undermined this line of argument, pointing out that Grotius's intent here was not to push Christendom towards some agnostic reappraisal of political order, but quite paradoxically, to silence the seventeenth century Pyrrhonic skepticism of God's existence by demonstrating that Christianity was left unscathed even through the use of human "right reason."[8] In addition to his voluminous work in the field of Christian apologetics and tragedy-dramas based on biblical figures,[9] scholars have typically pointed to the very next line following Grotius's famous passage as proof of his religious conviction:

> The very opposite of this view [that there is no God, or that the affairs of men are of no concern to Him] has been implanted in us partly by reason, partly by unbroken tradition, and confirmed by many proofs as well as by miracles attested by all ages. Hence it follows that we must without exception render obedience to God as our Creator . . . .[10]

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[7] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, *in* 2 CLASSICS OF INTERNATIONAL LAW 1, 13 (James B. Scott ed., Francis W. Kelsey et al. trans., William S. Hein & Co. 1995) (1646).

[8] *See* William George, *Grotius, Theology, and International Law: Overcoming Textbook Bias*, 14 J.L. & RELIGION 605, 605–31 (1999) (providing a useful overview of the various positions and issues without falling into more traditional misreadings of Grotius, and situating Grotius within a larger return of interest in international legal history and religion); *see also* JEROME B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY 66–81 (1998); Kennedy, *supra* note 5, at 79–81.

[9] Grotius's religious works include the tragedies, HUGO GROTIUS, THE ADAMUS EXUL OF GROTIUS (Francis Barham trans., 1839) (1601) and HUGO GROTIUS, CHRIST'S PASSION (George Sandys ed. & trans., 1640) (1608); his commentaries on the Old and New Testament, HUGONIS GROTII, ANNOTATIONES IN VETUS & NOVUM TESTAMENTUM (Samuel Moody ed., 1727) (1650); and his Christian apologetics, Hugo Grotius, *A Defence of the Catholic Faith Concerning the Satisfaction of Christ Against Faustus of Sienna*, *in* 36 BIBLIOTECA SACRA (Edward A. Park et al. eds., Frank H. Foster trans., W.F. Draper 1879) (1617) and HUGO GROTIUS, THE TRUTH OF CHRISTIANITY (Spencer Madan trans., E. Piercy 1797) (1627).

[10] Grotius, *supra* note 7, at 13. In fact, this mode of argument did not originate with Grotius, but was a common technique among earlier Catholic jurists. For instance, in making his case for the theologian as the authoritative final word of the law of nature, Suárez writes,

> [E]ven if God did not exist, or if He did not make use of reason, or if He did not judge of things correctly, nevertheless, if the same dictates of right reason dwelt within man, constantly assuring him, for example, that lying is evil, those dictates would still have the same legal character which they actually possess because they would constitute a law pointing out that evil exists intrinsically in the object.

FRANCISCO SUÁREZ, ON LAW AND ON GOD THE LAWGIVER, *reprinted in* THE CLASSICS OF INTERNATIONAL LAW: SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, S.J., 3, 190 (James Brown Scott ed., Gwladys L. Williams et al. trans., 1944) (1621).

In response, scholars that mark off Grotius as a "great pioneer of modern thinking" maintain that these various appeals to Christianity are not confessions of deep religiosity, but an agnostic strategy to win over Christian populations and their leaders.[11] For legal historians, such as Richard Tuck, Grotius's work falls within the humanist tradition and its emphasis upon the inescapability of the aggressive and self-interested nature of humanity, and therefore, was, unsurprisingly, largely motivated by Grotius's personal commitments to Dutch colonialism (which, in its expansion, was coming into increasingly contact with foreign cultures) and his own family's economic advantage (as Dutch shareholders in the East India Company).[12]

To some extent, at least at first glance, Grotius's minimal Christianity does seem an agnostic effort to find a common settlement between societies with competing jurisdictions, laws, and religious doctrines. In laying out the fundamental tenets of Christianity, Grotius shied away from all sectarian doctrines that might have upset relationships between Dutch Protestants and Spanish and Portuguese Catholics, whereby in place of any talk about the Trinity or the need for redemption, all that remains are a relatively tame set of tenets: there is a single God that actually cares for all humanity and sits unseen in judgment over their behavior; Jesus is the resurrected Son of God; and the faithful will enjoy everlasting life after death, while the wicked will be punished.[13] Moreover, his theorizing on the laws pertaining to warfare did not follow the scholastic tradition of limiting (or even prohibiting) war, but on the contrary, seemed to argue adamantly for rather cynical, almost amoral principles of behavior for both individuals and states: states and individuals aspire to sociability, but are equally prone to violent clashes of self-interest; the possession of natural rights allows for autonomous free will, but also the legitimacy of contracting oneself or community into slavery.[14] Though

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[11] This is a common theme explicitly or implicitly taken up by a great number of authors. *See, e.g.*, ERNST CASSIRER, THE MYTH OF THE STATE 172 (Yale Univ. Press 1969) (1946); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 73–83 (1989); SCHNEEWIND, *supra* note 8, at 65–81; RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 78–108 (1999) [hereinafter TUCK, THE RIGHTS OF WAR].

[12] *See* TUCK, THE RIGHTS OF WAR, *supra* note 11, at 78–108. Others have also adopted more cynical readings of Grotius, arguing that his reasoning was not founded on any ideological, intellectual, or ethical basis, but more directly, to serve his own material and political interests. *See, e.g.*, Georg Schwarzenberger, *The Grotius Factor in International Law and International Relations: A Functional Approach*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 301, 301–12 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1990).

[13] For a useful, but concise overview of Grotius's religious tenets, see SCHNEEWIND, *supra* note 8, at 65–81.

[14] *Id.* at 80–81.

Christian sovereigns are to refrain from barbarity in their military hostilities with one another, in a move foreshadowing later French colonial justifications, they have both the divine and natural sanction to invade and conquer foreign territory by whatever means necessary under the pretext of the "benefit of human society."[15] Thus, Grotius's willingness to discover natural law in the practices of sovereigns, the subjectivization of just-cause rationale in warfare, as well as his prolific use of ancient classical authorities to arrive at conflicting opinions, suggest on some level that his ultimate decision to locate normative authority in a universal, divinely willed framework was less an agreement with prior scholastic theologians and jurists, than the afterthought of a humanist to make his theories palpable to a Christian-colored political order.[16]

Upon closer inspection, however, to claim Grotius as some "avant-garde of secular jurisprudence" is to suppress the overall tenor of his writings and personal beliefs, as well as to miss the strong thematic linkages between his "secular" work and the "profoundly Christian" traditions of the Protestant humanists and late medieval Catholic jurists.[17] First, the minimal Christianity he expounds in both his political polemic concerning warfare, *De Jure Belli ac Pacis*, and his Christian apologetics, *The Truth of the Christian Religion*, is not simply an agnostic strategy to woo Christian states, but very much in keeping with his own personal religious convictions as a Remonstrant and a pupil in Leiden under Arminius. Grotius was both a diplomat and theologian by professional calling,[18] politically repressed along with other Remonstrant members by Calvinist forces in the Netherlands,[19] and condemned to life imprisonment (though his wife engineered his daring escape by smuggling him out of prison in a suitcase).[20] Accordingly, Grotius's avoidance of points of

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[15] *See id.* at 71–72, 80–81; RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 58–81 (1977) [hereinafter TUCK, NATURAL RIGHTS]; TUCK, THE RIGHTS OF WAR, *supra* note 11, at 102–04.

[16] The humanist, or "oratorical," tradition "drew most extensively on the literary and rhetorical writings of the ancient world," and, in a skeptical register, commonly employed the rhetorical technique of "leaving the reader rather unclear about where the author stood." TUCK, THE RIGHTS OF WAR, *supra* note 11, at 16–17; *see also* TUCK, NATURAL RIGHTS, *supra* note 15, at 58–81.

[17] *See* WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 195 (Michael Byers trans., 2005); *see also* Kennedy, *supra* note 5, at 79.

[18] *See* Hedley Bull, *The Importance of Grotius in the Study of International Relations*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 65, 67–70 (Hedley Bull, Benedict Kinsbury & Adam Roberts eds., 1990).

[19] Janis, *supra* note 1, at 218.

[20] *Hugo Grotius Escape from Prison*, HISTORYOFLAW.INFO, http://www.historyoflaw.info/hugo-grotius-escape-from-prison.html (last visited Mar. 7, 2011).

doctrine was not conceived as a neutral position, but firmly understood to be a religious polemic in favor of a broad understanding of Christendom.[21]

Second, Grotius's rather "thin" conception of human sociability—whereby human nature wars between the desire for rational order amongst each other and conflicting self-interests[22]—was not some nascent twentieth century *realpolitik* that he applied evenly across the global spectrum: it was aimed particularly at accentuating the difference between Christian and non-Christian societies in accordance with the Protestant and Catholic humanist traditions from the late medieval and Reformation or Renaissance eras.[23] In the Catholic tradition, the propaganda campaign for the anti-Turkish Crusades carried out by Pope Leo X (1513–21) produced a robust corpus of humanist jurisprudence that condemned warfare between Christian powers while justifying unrestrained warfare upon non-Christian societies.[24] Humanist jurists, by the early sixteenth century, viewed inter-Christian warfare as potentially just for both Catholic and Protestant camps, falling into an almost Darwinian explanation of Providence's design.[25] The humanist jurist, François Connan, for instance, echoed his master, Andrea Alciato, in saying that "you can investigate and speculate all you like, but you will find no other reason . . . [than that] by a tacit law of nature the weaker give way to the more powerful; from which single principle all the laws of war derive."[26] In other words, Grotius's distinction between just and formally legal wars was not by any means a "significant leap" from a unified conception of faith to a subjective agnosticism,[27] but actually a popular technique among Christian

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[21] *See, e.g.*, Janis, *supra* note 1, at 121–26; CHRISTOPH A. STUMPF, THE GROTIAN THEOLOGY OF INTERNATIONAL LAW: HUGO GROTIUS AND THE MORAL FOUNDATIONS OF INTERNATIONAL RELATIONS 241–43 (2006) (stating that Grotius is indebted to the Christian theological and legal traditions to a great extent).

[22] SCHNEEWIND, *supra* note 8, at 71–72.

[23] *See* TUCK, THE RIGHTS OF WAR, *supra* note 11, at 16–17.

[24] *See id.* at 29–31. For instance, Erasmus is remembered as a passionate advocate for peace, but in fact espoused a militant antipathy to non-Christians. "France alone remains not infected with heretics, with Bohemian schismatics, with Jews, with half-Jewish marranos, and untouched by the contagion of Turkish neighbours." *Id.* at 30 (quoting Erasmus). In relation to a war against the Turks, Erasmus adopts a Machiavellian tone:

> [I]f war . . . is not wholly avoidable, that kind would be a lesser evil than the present unholy conflicts and clashes between Christians. If mutual love does not bind them together, a common enemy will surely unite them after a fashion, and there will be a sort of a common purpose, even if true harmony is lacking.

Id.

[25] *See id.* at 34–36.

[26] *Id.* at 33 (quoting FRANÇOIS CONNAN, COMMENTARI IURIS CIVILIS (1538)).

[27] *See* KOSKENNIEMI, *supra* note 11, at 81–82.

jurists and theologians to unify the populations and leaders around an external enemy, thereby preserving the balance of power within Christendom itself and guarding against any revolutionary uprising within its own territories.[28] Legitimate warfare to dismantle the status quo was bracketed outside of the domestic realm of Europe, whereas internal conflict could be characterized as illegitimate violence that demanded immediate police action to preserve what was in fact some mythical homogenous stability (though keeping open the possibility of exceptions, such as the Dutch towards the Spanish).[29]

It is within his passages concerning the justifications and conditions of warfare, especially in relation to foreign non-European territories, that Grotius is perhaps most often misread as announcing the dawn of the modern secular regime of international law. In a characteristic excerpt that touches on some of the more popular themes said to point towards a secular understanding of politics and law, Grotius writes:

> Kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever. For liberty to serve the interests of human society through punishments, which originally, as we have said, rested with individuals, now after the organization of states and courts of law is in the hands of the highest authorities . . . . [W]e follow the opinion of Innocent, and others who say that war may be waged upon those who sin against nature. The contrary view is held by Victoria, Vázquez, Azor, Molina, and others, who in justification of war seem to demand that he who undertakes it should have suffered injury either in his person or his state, or that he should have jurisdiction over him who is attacked. For they claim that the power of punishing

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[28] *See supra* notes 24–25 and accompanying text.

[29] *See, e.g.*, MARTIN WIGHT, FOUR SEMINAL THINKERS IN INTERNATIONAL THEORY: MACHIAVELLI, GROTIUS, KANT, AND MAZZINI 29–62 (2005) (covering a number of seminal themes in Grotius's work and describing Grotius's conception of an inner and outer conception of political identity: the outer circle that which embraces all humanity under natural law and an inner circle of the corpus Christianorum bound by laws of Christ, and at least in part defined in their unity against Turkish populations). Though not typically brought together, Grotius's understanding and strategy of political identity seems to bear a close relationship to Carl Schmitt, another figure who has become a trendy academic figure of study over the past two decades. *See, e.g.*, CARL SCHMITT, THE CONCEPT OF THE POLITICAL (George Schwab trans., 2007); CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM (G.L. Ulmen ed. & trans., 2003) [hereinafter THE NOMOS].

> is the proper effect of civil jurisdiction, while we hold that it also is derived from the law of nature.[30]

The passage carries a distinctly modern feel à la Clausewitz: warfare is not simply a necessary evil that comes with humanity's sinful nature as would be the case with Hobbes, rather it is the very continuation of law by other means.[31] War is litigation, or at the very least, wrapped up in juristic exercises—what Kennedy has discussed in the modern context of the American military as "lawfare."[32] Moreover, the rejection of the neo-scholastic tradition suggests both a prima facie rejection of faith in the hierarchies and dogma of medieval Christendom, and at least a hesitant step away from any overarching normative natural order towards a positivist regime of subjective reciprocal rights held by competing sovereign entities.[33] To be sure, the "law of nature" is still referenced, but it is now coterminous with the "law of nations," and in the place of ecclesiastic authorities imposing the wishes of the divine, sovereignty now seems to take an anthropological turn whereby it is left to secular rulers to mete out material punishments on behalf of the "benefit of human society."

This, however, does not seem to actually be the case: the turn to subjectivity and the emphasis on state sovereignty had nothing to do with any atheistic or agnostic turn in intellectual disposition, but in fact orthodoxies of the Protestant Reformation initiated by Luther and his jurist comrades. Concerning subjectivity and the distancing from ecclesiastic authority, Luther argued against the Church as a mediator between the sinner and God, and instead presented the laity itself as the living Church, and each believer their own priest.[34] On the one hand, this meant that each individual, as their own "lord," was granted "the splendid privilege" of "inestimable power and

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[30] *See* Grotius, *supra* note 7, at 504–05.

[31] *See generally* CARL VON CLAUSEWITZ, ON WAR 90–99 (Michael Eliot Howard & Peter Pare eds. & trans., 1984) (describing war, the decision by force of arms, as the supreme law).

[32] DAVID KENNEDY, OF WAR AND LAW 12 (2006); *see also* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1 (2004).

[33] *See* Knud Haakonssen, *Hugo Grotius and the History of Political Thought*, 13 POL. THEORY 239, 240 (1985) ("Grotius' most important contribution to modern theory was his theory of rights . . . . Instead of being something that an action or state of affairs or a category of these *is* when it is in accordance with law . . . ius is seen by Grotius as something that a person *has*. . . . The concept becomes 'subjectivized,' centered on the person."). *See generally* TUCK, NATURAL RIGHTS, *supra* note 15, at 58–81.

[34] JOHN WITTE, LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION 95–97 (2002).

liberty."[35] Drawing here upon the tradition set by thirteenth and fourteenth century Catholic theologian reformers,[36] Luther anticipates Grotius (if not Kierkegaard), to celebrate the subjective Christian experience of "the inner man" who nurtures faith away from the sinful crowd.[37] In this sense, the Lutheran movement (which would be carried further in Calvinism) swept away the Church as the locus and vehicle of the sacred with its emphasis on the necessity of salvation through a wholehearted personal adhesion. On the other hand, however, the priestly calling brought not only freedom, but also the responsibility to imitate the example of Christ in everyday life, a duty of sociability, and positive reciprocal care.[38] Luther reminds us that "Christ has made it possible for us, provided we believe in him, to be not only his brethren, co-heirs, and fellow-kings, but also his fellow-priests . . . . A man does not live for himself alone, he lives only for others," and not only for the living, but also to owe fidelity—an almost Aristotelian sociability so famous in Grotius's own legacy—to all the Christian believers who had already died, the "saints in heaven."[39] Thus, while the Church itself had lost is central mediating role,

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[35] *See id.* at 95; *see also* HAROLD BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION (2003).

[36] At least as early as Norman Anonymous and John de Salisbury, various more critical theological traditions within Catholicism (and in early Protestantism with the writings of authors like Johann Oldendorp who would provide detailed lists of instances where the citizen's conscience might require disobedience of civil authorities) emphasized the role of the citizen in both political and religious life. *See generally* A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT: FROM IRENAEUS TO GROTIUS (Oliver O'Donovan & Joan Lockwood O'Donovan eds., 1999) [hereinafter A SOURCEBOOK]; *see also* HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 1–45 (1983). In the dominant historical and legal literature, the rise of the individual is conveniently located somewhere in the fifteenth or sixteenth century, helping to mark the transition into the modern era of some emancipated existence (whether that is articulated on the formal horizontal equality of sovereign states or the subjectivity of personal experience that undermines any objective normative order). A SOURCEBOOK, *supra*, at 389–547. When scholars talk about the pre-modern era, the concepts of the individual and community are largely non-existent, either suppressed beneath an imperial-religious logic or simply not yet even within the imaginative framework to be grasped in the first place. *See generally id.* However, what one in fact witnesses in the pre-modern period is not only an awareness of both individual and social components of political life, but a militancy that feels shockingly radical to standard liberal democratic notions of civil society, at least since the aftermath of the French and American Revolutions. *See generally id.* While individuals were to submit to the authority of their leaders, even when they strongly disagreed, they also had the divine obligation to excommunicate their leadership, body, or soul, under a variety of conditions. *See generally id.* Emphasizing seventeenth century notions of social contract (e.g., Locke, organic political theory) or placing absolute sovereign authority in the nation state (e.g., Bodin, Hobbes) potentially robs the vitality and agency given to people in older, more radical traditions of individualism and social consciousness.

[37] WITTE, *supra* note 34, at 95.

[38] *Id.* at 95–97.

[39] *See id.* at 95–96 (quoting Luther); *see also* PAUL ALTHAUS, THE THEOLOGY OF MARTIN LUTHER (1966). In some respects, this seems to anticipate later jurists in the nineteenth century who claimed their work as part of an organic heritage of the dead, the living, and future generations.

salvation continued to be at least implicitly premised on connections to a wider order, only the sacramental life was now brought into the daily vocations and relationships between the citizenry and its government so that our understanding of "the good" would only be discoverable within human life.

By denying the distinction between the sacred and the profane, the anthropological turn that came into focus more fully with Grotius, therefore, does not mark a turning away from Christian thought, but rather its interpenetration into the routine activities of this life. Instrumental rationality takes on fresh importance as the very act of coming to God, as well as the marker of actively belonging to a shared political community.[40] As Kennedy observes, Grotius's willingness to "find natural law in the practices of sovereigns" is not so much any "relocation of normative authority from divine to sovereign will" but that "natural law accords with and is binding as a matter of divine law" whereby the sovereign may be the source or vehicle, but by no means the origin of the law of nations.[41] Writing during what was in many ways the tail end of the Protestant Reformation, the turn to secular authorities in Grotius's text again displays a characteristically Lutheran tenet: that the specific practices and rules of the territorialized secular administrations were in fact albeit imperfect the manifestation, or "mask," of God's will.[42] Breaking from the scholastic tradition that human reason could prove the divine sanctity

[40] This all looks increasingly familiar to our own contemporary period: sober, disciplined production and an attitude of civility that makes possible a life of commerce and acquisition now replace the aristocratic celebration of undisciplined ease and the warrior ethos of seeking personal glory. For studies that circle around this theme in relation to capitalism and religion, see generally PHILIP GOODCHILD, CAPITALISM AND RELIGION: THE PRICE OF PIETY 247–48 (2002) ("Where piety became invisible through the mechanisms of ideology, liberty and right became self-certifying values that shaped human relations for the market, and thus for the advent of capitalism."); BOYD HILTON, THE AGE OF ATONEMENT: THE INFLUENCE OF EVANGELICALISM ON SOCIAL AND ECONOMIC THOUGHT, 1785–1865, at 36–70 (1991) (discussing evangelical economics); STUARD PIGGIN, MAKING EVANGELICAL MISSIONARIES 245 (1985) (arguing that missionaries played a significant role in the Enlightenment confidence in human reason and the ethical value of efficiency and usefulness); R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 277–87 (1926) (tracing the rise of capitalism back to the medieval era); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 211–47 (1989); MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 13–31 (Talcott Parsons trans., 1930); WILLIAM WRIGHT, CAPITALISM, THE STATE, AND THE LUTHERAN REFORMATION 246 (1988) (naming Lutheranism as the main factor behind the protection of the common man in the name of the common good).

[41] *See* Kennedy, *supra* note 5, at 79.

[42] *See* BERMAN, *supra* note 35, at 157. For Luther, God is "hidden" in the earthly kingdom and only appears to humanity through the "masks" of human reason and will, the rule of law and its political officers, and in the conscientious work of believers. *Id.* The civil law, therefore, not only expresses the natural limitations and needs of humanity, but also serves, in the words of St. Paul, as "our schoolmaster to bring us unto Christ," teaching and coercing humanity both to civil and spiritual morality. *See* WITTE, *supra* note 34, at 92–175 (discussing these ideas in the teachings of Luther, Melanchthon, Eisermann, and Oldendrop) (emphasis omitted).

of moral propositions, Luther's colleague, the eminent Philip Melanchthon argued that God has implanted certain "elements of knowledge," whereby humanity could use reason to discern the general principles of God's will, but only imperfectly.[43] For Melanchthon, the state had the duty "of transforming the general principles of natural law into detailed rules of positive law" that could meet the "practical considerations of social utility and the common good," what he called nothing other than "rational positive law."[44] In other words, "rational positive law" straddled the line between Earth and heaven: on the one hand, it was the divine will of God manifesting through the deliberate labor of the faithful; on the other hand, carried out under the limitations of humanity's sinful nature, it was a never-ending, always incomplete quest for perfection, which could only seek the eternal through its preoccupation with the "political, economic, and social needs in given times and places."[45] Thus, for the Protestant lineage of jurists, including Grotius, the violation of the fundamental laws of nature or of nations is therefore not an end in itself, but rather an extension of some violation against divine foundation of existence.

II. THE RISE OF POLITICAL LIBERALISM

In the second stream of argument, Grotius earns the title "father of international law" for advocating what is said to be a liberal universalism that embraced diverse religious and political forms (often claimed nowadays as a central tenet of modern international law), sometimes called the "Grotian tradition."[46] In this vision, the losers are the medieval res publica Christiana, symbolized by the Holy Roman Empire and the Catholic Church, as its "objective hierarchy of normative meaning" gives way to a pristine European order of nation-states premised on "sovereign equality, religious agnosticism

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[43] WITTE, *supra* note 34, at 123–40.

[44] *Id.* at 129–30. Melanchthon was perhaps the leading jurist of the Reformation, drafting the chief declaration of Lutheran theology, the Augsburg Confession and its Apology, and a co-author of the Scmalkaldic Articles, along with writing dozens of instructional books and biblical commentaries. For a discussion of Melanchthon's legal theory, see BERMAN, *supra* note 35, at 77–87; WITTE, *supra* note 34, at 121–40.

[45] BERMAN, *supra* note 35, at 82. Reut Paz's study of early twentieth century and interwar Jewish-German jurists provides an interesting discussion of the idea of international law as a "ladder" between humanity and God, drawing persuasively upon a mix of Jewish religious thought, philosophy, and socio-historical archival materials. *See* Reut Paz, A Gateway Between a Distant God and a Cruel World: The Contribution of 20th Century Jewish German Speaking Scholars Erich Kaufmann, Hans Kelsen, Hersch Lauterpacht and Hans J. Morgenthau to the Professionalisation of International Law and International Relations (2008) (unpublished Ph.D. thesis, Bar-Ilan University) (on file with author).

[46] *See* Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 24–25 (1946).

and balance of powers."[47] In a classic description of this claim in relation to Grotius' political liberalism, Lauterpacht writes in the immediate aftermath of the Second World War:

> [Let us] explain the significance . . . of the Grotian tradition in the history of the law of nations. He secularized 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 civilized life. . . .
> . . . .
> . . . The place which the law of nature occupies as part of the Grotian tradition is distinguished not only by the fact of its recognition of a source of law different from and, in proper cases, superior to the will of sovereign states. . . . [But it is] largely based on and deduced from the nature of man as a being intrinsically moved by a desire for social life, endowed with an ample measure of goodness, altruism, and morality, and capable of acting on general principles of learning from experience. . . . [And it is for] peaceful and organized life according to the measure of his intelligence.[48]

Lauterpacht sees the Grotian spirit of international law, which he must have considered as particularly relevant to an European landscape torn asunder by nationalist passion and violent superstitions, to function as a restraining influence on political aggression, as well as the source and articulation of morality ("endowed with . . . goodness, altruism and morality") and knowledge

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[47] *See* KOSKENNIEMI, *supra* note 11, at 71–157 (encoding a series of linear movements, from the ancient to the modern, from belief to rationality, from objectivity to subjectivity, from hierarchical to democratic or plural models of authority, and so on). For an emphasis on a similar set of founding positions, see GREWE, *supra* note 17, at 20–29, 143, 170, 291 (noting the importance of the balance of power, formal equality, and religious tolerance in de-centering the authority of the Pope and Emperor); THE NOMOS, *supra* note 29, at 140–54 (focusing on the "detheologization of public life" in response to "creedal civil wars" through a horizontal organization of formally equal territorial European states intent to maintain a balance of power).

[48] Lauterpacht, *supra* note 46, at 24. Resurrecting the Grotian tradition of Hersch Lauterpacht, Martti Koskenniemi has characterized it as follows:

> It relies on the interlocutor's willingness to take for granted the intrinsic rationality of a morality of sweet reasonableness, the non-metaphysical doctrine of the golden middle. . . . It is a morality of attitude—of seriousness. . . . It is a morality of tolerance and of personal and professional virtue. It is a morality of scales, controlled by the attempt to balance right with duty and freedom with reason. It is a morality of control and self-control, for which the greatest desire is the end of desire.

Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 EUR. J. INT'L REL. 215, 261 (1997); *see also* Renée Jeffery, *Hersch Lauterpacht, the Realist Challenge and the 'Grotian Tradition' in 20th-Century International Relations*, 12 EUR. J. INT'L REL. 223, 223–50 (2006).

("learning from experience").[49] Here, Lauterpacht adopts the traditional narrative that Grotius "secularized" the law of nations, which in turn, provided the groundwork for claiming international law as a detached process of peaceful resolution. In light of the discussion so far, one might be suspicious about Lauterpacht's claim that international law emerged in the waning twilight of religion as a neutral, deliberative process devoid of religious or political prejudices. However, other scholars have specifically appealed to the religious, or at least spiritual, character of the Grotian tradition to claim international law as a tolerant, universalizing project in otherwise strikingly similar terms to Lauterpacht's image. Writing only a few years after Lauterpacht, the British jurist and legal historian Arthur Nussbaum emphasizes the close link between the spiritual and liberal characters of Grotius's work:

> A cognate trait of great importance was Grotius' tolerance. . . . Grotius, a pious Protestant writing at the time of the most savage of religious wars, refrained from any word which might have offended Catholic feeling. . . . [This expressed] his desire and hope for the reunion of the Christian churches. . . .
> . . . .
> . . . [It also] opened a new path by the doctrine of what he called the *temperamenta* of warfare. . . . [It] urged moderation for reasons of humanity, religion, and farsighted policy . . . .
> . . . .
> . . . From [his writing] emerges the picture of a man absorbed in his ideals, of a devout seeker after truth and right, and of a passionate and unswerving advocate of humaneness and conciliation—a picture borne out by his life. The spiritual light shining through the fabric of his work explains the success of his undertaking. . . .
> . . . .
> . . . His work has remained a living force. . . . The essence of his thought has passed into the conscience of the civilized world. His name has become a symbol of justice in international relations.[50]

Nussbaum's claim is more radical than what Lauterpacht proposed, though it equally results in support for the idea that international law expounds a universalizing faith that can tolerate religious and political diversity. The argument is not the traditional claim made by international lawyers that the discipline became secular over time, and thereby was able to engage with religious passions in a detached, more enlightened way. Rather, in Nussbaum's strain of argument, international law is part of a living Christian lineage, but it

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[49] Lauterpacht, *supra* note 46, at 24.
[50] *See* NUSSBAUM, CONCISE HISTORY OF THE LAW OF NATIONS, *supra* note 6, at 105–12.

is now this very religiosity itself which is seen as one of the key elements in international law's ability to embrace a more universalist vision of emancipation and brotherhood. In more recent years, the American legal historian Mark Janis has eloquently argued for this version of the Grotian tradition:

> It was the imprisonment and exile of this religious and political liberal that both provided the time to write and inspired the theme of *De Jure Belli ac Pacis*. . . .
> . . . .
> . . . Trained and famed as a theologian as well as a jurist, Grotius unashamedly brought the Bible to the law of nations. It is important to note that Grotius brought religion to the discipline not to *exclude* other religious groups (be they Calvinists, Catholics, Jews or Moslems), but to show that his religion, a liberal and universal faith, proved that the law of nations was meant to *include* all peoples.
> . . . [Grotius believed in a] liberal Arminian universalism . . . [at] a time of religious wars among fiercely conservative faiths . . . . His was a more forgiving faith, but a faith nonetheless, that could tolerate religious diversity. Grotius employed this liberal religion as a critical source for proof of legal principles which could tolerate both religious and political diversity among the nations.[51]

At first glance, the secular and religious version of the Grotian tradition of international law as a tolerant, civilizing force upon global governance seems to be affirmed in selective passages from *De Jure Belli Pacis*. Within the more secularist version of the tradition, Grotius seems to occasionally sweep away the primacy of the entire Christian normative order in favor of a formally equal, yet divergent, array of sovereign authorities:

> Just as, in fact, there are many ways of living, one being better than another, and out of so many ways of living each is free to select that which he prefers, so also a people can select the form of government it wishes; and the extent of its legal right in the matter is not to be measured by the superior excellence of this or that form of government, in regard to which different men hold different views, but by its free choice.[52]

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[51] *See* Janis, *supra* note 1, at 121–25.

[52] HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 104 (Francis W. Kelsey trans., Clarendon Press 1925) (1625).

Likewise, this same sort of liberalism also seems to crop up in more religious readings of the Grotian tradition, especially in his polemics in favor of the legitimacy of agreements between Christian and heathen states:

> [D]o we perhaps believe that we have nothing in common with persons who have not accepted the Christian faith? Such a belief would be very far removed from the pious doctrine of Augustine, who declares (in his interpretation of the precept of Our Lord whereby we are bidden to love our neighbours) that the term '*neighbours*' obviously includes *every human being*. . . . Accordingly, not only is it universally admitted that the protection of infidels from injury (even from injury by Christians) is never unjust, but it is furthermore maintained, by authorities who have examined this particular point [including Vitoria], that alliances and treaties with infidels may in many cases be justly contracted for the purpose of defending one's own rights, too. Such a course of action was adopted (so we are told) by Abraham, Isaac, David, Solomon, and the Maccabees.[53]

It is tempting to read these passages (as so many do) as the initial soundings of liberal political thought, sowing the first kernels of what have become the familiar ethics of disengaged, subjective rationality and formal equality of sovereign nation-states so important nowadays in the daily posture of international law. This temptation contains some validity, for Grotius was in some regards original in reconciling the nominalist tradition of William of Occam and Duns Scotus (arguing that the normative order originates in the will rather than some natural order) with the Thomist tradition espoused by late medieval scholastics (that the law of nature was absolutely perfect and did not allow for even divine derogation).[54] In Grotius's solution, the normative order still originates in the willed actions of the sovereign, but the will itself is now constrained to a procedural conception of reason and consent. However, we should be careful not to read this anachronistically through some modern liberal democratic conviction. On the one hand, Grotius's passage advocating the freedom of society to choose its form of government was conditioned upon the understanding that society was premised on "rational order," which was almost exclusively reserved to the practice and customs of Christian states (e.g., Dutch federation of states, the French state).[55] Thus, for instance, if a

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[53] Hugo Grotius, *De Iure Praedae Commentarius*, *in* I CLASSICS OF INTERNATIONAL LAW 1, 135 (James B. Scott ed., Gwladys L. Williams et al. trans., Williams S. Hein & Co. 1995) (1604).

[54] *See* TUCK, THE RIGHTS OF WAR, *supra* note 11, at 78–108. *See generally* A SOURCEBOOK, *supra* note 36.

[55] *See generally* TUCK, THE RIGHTS OF WAR, *supra* note 11.

foreign territory did not structure land distribution around recognizable forms of industry and private property, Grotius argued the legal, if not moral, right of a conquering power to seize and use that land:

> [O]ur natural needs are satisfied with only a few things, which may be easily had without great labour or cost. As for what God has granted us in addition, we are commanded not to throw it into the sea (as some Philosophers foolishly asserted), nor to leave it unproductive . . . nor to waste it, but to use it to meet the needs . . . of other men, either by giving it away, or by lending it to those who ask; as is appropriate for those who believe themselves to be not owners . . . of these things, but representatives or stewards . . . of God the Father.[56]

On the other hand, the argument that Christian states could enter into alliances and even protect infidels from violations against the laws of nature and nations was not a novel gesture of benevolent universalism, but firmly rooted within the Catholic humanist tradition (in direct contrast to the Thomist, Aristotelian, and Lutheran argument for smaller communities[57]) that came to prominence with the papacy of Leo X.[58] As Tuck has unearthed, at the Colonial Conference of 1613 in London, an English diplomat sardonically noted in the margins of a pamphlet prepared by Grotius containing this very same argument, "we think it very honest to defend oppressed people, against their wills."[59] Indeed, for Grotius, not only could Christian nations conquer foreign lands for their own use, but also enslave them for their own good. '"[Aristotle is correct] when he says that certain persons are by nature 'slaves,'" Grotius argues, '"[N]ot because God did not create man as a free being, but because there are some individuals whose character is such that it is expedient for them to be governed by another's sovereign will rather than by their own.'"[60] While Grotius contemplated that these liberties were reserved primarily in relation to European sovereign powers over non-Europeans, and

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[56] HUGO GROTIUS, THE TRUTH OF THE CHRISTIAN RELIGION 43, 119 (John Clarke trans., C. & R. Baldwin 1805) (1627).

> If there by any waste or barren Land within our Dominions, that also is to be given to strangers, at their Request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a Property, only so far as concerns Jurisdiction, which always continues the Right of the ancient People.

See Grotius, *supra* note 7, at II.2.17.

[57] *See generally* TUCK, THE RIGHTS OF WAR, *supra* note 11, at 41.

[58] *Id.* at 28–31.

[59] *Id.* at 94 n.33.

[60] *Id.* at 89 (quoting Grotius).

especially Islamic populations, the rights of domination were not geographically delineated and applied to non-Christians within the domestic borders of a nascent Western Europe.[61]

In *The Truth of the Christian Religion*, Grotius presents a detailed series of arguments specifically condemning the religious and political systems of "Heathenism," Judaism, and Islam.[62] When Grotius turns to the "Heathen" religions, for instance, he justifies the superiority of Christianity on the basis of its rationality, virtue, and civility—to deny Christianity in favor of Heathenism, therefore, is to choose crude barbarism over a "delightful" and refined civility, wickedness over goodness, and ignorance over reason.[63] In similar measure, the Jewish and Islamic populations are seen as dissonant, if not outright dangerous, elements within the emerging sovereign order of nation-states that must be routinized, if not eradicated.[64]

The Jews, in his view, were "a people of so obstinate a disposition," and their laws, archaic and absurd, to have "taken so deep root in the Minds of all the Hebrews, as never to be plucked out."[65] Observing that

> they have been driven out of their Country, [that] they have continued Vagabonds and despised, no Prophet has come to them, no Signs of their future Return; their Teachers, as if they were inspired with a Spirit of Giddiness, have sunk into base Fables, and ridiculous Opinions, with which the Books of the *Talmud* abound . . . .[66]

Grotius argues that the reason the Jews are

> not heard [by God] . . . we must of Necessity conclude one of these Two Things, that either that Covenant made by Moses is entirely dissolved, or that the whole Body of the Jews are guilty of some grievous Sin, which has continued for so many Ages: And what that is, let them tell us themselves; or if they cannot say what, let them believe us, that That Sin is their despising the Messiah, who came before these Evils began to befall them.[67]

In other words, the systematic persecution of Jews carried throughout the history of the respublica Christiania—whether under the guise of the Roman

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61 *Id.* at 89–94 (discussing Grotius's perspective on treaties with non-Christians).
62 GROTIUS, *supra* note 56, at 178–289.
63 *See id.* at 179–206 (discussing Heathenism).
64 *See id.* at 207–89 (discussing Judaism and Islam).
65 *Id.* at 23–24.
66 *Id.* at 243.
67 *Id.* at 244.

Catholic Church, the Emperor, Protestant princes, or the emerging state entities—did not reflect its own moral failing, but was due to the internal chemistry of both the Jewish psychology and institutional or cultural heritage, which bore the stain of God's curse.

Grotius professed a similar disdain for Islam, "the Mahometan Religion."[68] To Grotius, Islam "was bred in Arms, breathes nothing else; and is propagated by such means only."[69] Grotius believed Islam had many times unjustly taken up arms

> against a People who no ways disturbed them, nor were taken Notice of any Injury; so that they could have no pretence for their Arms, but Religion, which is the most irreligious Thing that can be, for there is no Worship of God, but such as proceeds from a willing Mind.[70]

Here, one could juxtapose these comments to Grotius's early justifications for Christian nations to conquer and subjugate foreign people for violating laws of Nature or Nations.[71] On the one hand, Grotius might have cynically been maintaining a rather crude double standard whereby regular Christian warfare was nevertheless an unrelated aberration to its core tenets and only mobilized when absolutely necessary to maintain what was a by-and-large peaceful communal existence. On the other hand, the turn to "naturalizing" Christian doctrine as "secular" may also have allowed him to differentiate between "religious" injury (which was not an acceptable pretext) and injury against the laws of Nature and Nations. Whatever the case, for Grotius, "Mahomet" himself was not only "a long time a robber, and always Effeminate,"[72] who only attracted "Men void of Humanity and Piety,"[73] and orchestrated a false religion, "which was plainly calculated for Bloodshed, delights much in Ceremonies; and would be believed, without allowing liberty to inquire into it."[74] Just as Grotius's disposition towards the Jewish populations intimates the violent logic that would manifest itself in mutated form in Hitler's death camps, many of the prejudices towards Islam in Grotius's work seem to bear a resemblance to the rhetoric surrounding the ongoing "War on Terror," and more generally, the struggle for liberal democratic governments throughout

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68 *Id.* at 111.
69 *Id.*
70 *Id.* at 277–78.
71 TUCK, THE RIGHTS OF WAR, *supra* note 11, at 159–60.
72 GROTIUS, *supra* note 56, at 274.
73 *Id.* at 276.
74 *Id.* at 270.

Islamic countries: the idea that Islamic forms of government possess an almost innately violent character, the juxtaposition between liberal democratic models and intolerant totalitarian regimes, or alternatively secularism versus rigid dogmatisms, and so on.[75] In this sense, perhaps writers like Lauterpacht and Nussbaum are right when they assert that the Grotian tradition lives on at the spiritual core of international law, but in a more perverse manner than either would care to openly contemplate.[76]

III. THE POLITICS OF RESTATEMENT AND DENIAL

The 1999 inauguration of the Grotius Lecture Series by the American Society of International Law opened with a speech by the Vice President of the International Court of Justice, Judge Christopher Weeramantry, reflecting on the purpose of the lecture series and its namesake.[77] In turning to recap the current atmosphere of the Grotian tradition and assessing its limitations and possibilities, it is worthwhile to reflect a moment upon a longer passage from this event:

> The inaugural Grotius lecture . . . is an occasion for deep reflection on the fundamentals of our discipline. It also is a moment to attempt to recapture the spirit of inspiration that moved this great pioneer of our discipline to struggle out of the limitations of the thought-frame of his times and carve out new pathways for international relations in the unchartered waters lying ahead.
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> . . . .
>
> Grotius rose to the occasion—a towering intellect with a passionate vision of an ordered relationship among nations—a

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[75] TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 1–8, 113–19 (2003). In contemporary global governance, this theme is addressed by authors across a wide spectrum of academic disciplines, from international relations scholars (e.g., Elizabeth Hurd), to social anthropologists (e.g., Talal Asad), and philosophers (e.g., Alain Badiou). *See, e.g.*, ELIZABETH HURD, THE POLITICS OF SECULARISM IN INTERNATIONAL RELATIONS (2007); ALAIN BADIOU, THE CENTURY 165–78 (Alberto Toscano trans., English ed. 2007) (2005). Institutions within American foreign policy have also started to recognize this as an imminent strategic concern that goes by the coinage, "God Gap." *See* David Waters, *The 'God Gap' Impedes U.S. Foreign Policy, Task Force Says*, WASH. POST (Feb. 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/23/AR2010022305103.html.

[76] *See* Lauterpacht, *supra* note 48; *see also* NUSSBAUM, CONCISE HISTORY OF THE LAW OF NATIONS, *supra* note 6, at 466–67.

[77] *See* Christopher Weeramantry, *The Grotius Lecture Series: Opening Tribute to Hugo Grotius*, *in* 14 AM. U. INT'L L. REV. 1515, 1516 (1999). Both Weeramantry and Berman situate their conversation of international law in the tradition of Third World Approaches to International Law ("TWAIL") scholars. Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 77 n.2 (2003).

> relationship based not on the dogma of religion or the sword of conquest, but on human reason and experience.
>
> . . . .
>
> For Grotius' contribution, all succeeding generations are in his debt. The new world order of European states that Grotius envisaged became a reality . . . . The nation-state system took over the world . . . .
>
> It was an eminently successful system for those nation states, but it was dangerous. Some would misread Grotius' system as prescribing a lighted area of law and order for those within the fold, and an area of outer darkness for those without.
>
> . . . .
>
> That is now a past chapter. We are left with the aftermath of empire and task of cleaning up its problems. . . .
>
> . . . .
>
> . . . Like Grotius, we are seeking the friendly association of states and the peaceful resolution of disputes; we are also searching for principles of stability amidst the chaos of competing state interests. . . . [L]ike Grotius, we are experiencing a sudden expansion of knowledge and power never seen before.[78]

In his response to Berman, Weeramantry goes on to say:

> Colonialism was a dark chapter in global history and it has fortunately ended. After the long twilight struggle of dying empires, we must prepare ourselves to sail beyond the sunset of that world order of justice, peace, and reconciliation. It is for us, international lawyers, to rise to this task.[79]

The text above is a brilliant synthesis of traditional and contemporary feelings to explain the almost fetishistic hold of Grotius on the imagination of international lawyers. In Judge Weeramantry's depiction, Grotius stands as a shining example of what international lawyers are at their best—drawing upon human reason, intelligence, and experience to civilize the "dogma of religion" and the "sword of conquest" through a "friendly association" of nation-states. This figure embodies the "sweet reasonableness" that Koskenniemi ascribed to Lauterpacht's depiction of Grotius—the Victorian political reformer, armed with knowledge and compassion, searching out a "golden middle" between the

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[78] Weeramantry, *supra* note 77, at 1516–20.

[79] *See* Christopher Weeramantry, *The Grotius Lecture Series: A Response to Berman: In the Wake of Empire*, *in* 14 AM. U. INT'L L. REV. 1515, 1569 (1999).

vagaries of apology and utopia.[80] At the same time, however, the traditional emphasis on curbing "natural" anarchy through the self-enlightened cooperation and regulated intercourse of rules, norms, and institutions of sovereign nation-states is moderated by the shame and horrors of European imperialism, the "dark chapter in global history."[81] The importance of Grotius,

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[80] *See* Koskenniemi, *supra* note 48, at 215. Koskenniemi's resuscitation of a Victorian reading of the Grotian tradition seems to self-consciously situate itself as the heir to the eclectic British jurist, Thomas Baty. *Compare id.*, *with* THOMAS BATY, INTERNATIONAL LAW IN TWILIGHT 9–15 (1954).

> We are slipping into the same state of anarchic practice as that which in an earlier century aroused the indignation of Grotius.
>
> The task of any modern prophet of International Law who should seek to repeat for our age the achievement of Grotius is immeasurably harder than his. Grotius had two irrecusable authorities to which to appeal . . . The modern Grotius can find no such aid. . . . There is no vision. The world lies in twilight.
>
> International law . . . rests on the world's common convictions . . . .
>
> If that twilight is not to deepen into dusk and darkness some unifying principle must be found. . . . Shall we be wrong in saying that Sweetness, Beauty and Honour make as wide an appeal to the common mind as anything else today?

BATY, *supra*, at 13–15. Baty cites for the reader interested in following this theme to the work of his alter-ego, Irene Clyde, who wrote extensively on Victorian manners (e.g., the unseemliness of not only nudity or scant dress, but even sex of any persuasion) and the importance of a feminine ideal for personal and political governance. *See generally* IRENE CLYDE, EVE'S SOUR APPLES (1934).

[81] Weeramantry, *supra* note 77, at 1569. TWAIL scholars, as well as their counterparts in the field of international relations, have followed up on the postcolonial literary tradition to bring the issue of cultural antagonism and ongoing forms of colonialism and imperialism to the forefront of international legal theory. *See, e.g.*, Anghie & Chimni, *supra* note 77, at 77; MATTHEW CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES (2008); EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS 60–96 (2002); THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION (Antony Anghie et al. eds., 2003); David Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 2 CHINESE J. INT'L L. 29 (2003); Peter Fitzpatrick & Eve Darian Smith, *Laws of the PostColonial: An Insistent Introduction*, *in* LAWS OF THE POSTCOLONIAL 1 (Peter Fitzpatrick & Eve Darian Smith eds., 1999); James T. Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 HARV. INT'L L.J. 263 (2000); Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INT'L COMMUNITY L. REV. 355–62 (2008); Makau Mutua, *What is TWAIL?*, AM. SOC'Y INT'L L. PROC. 31 (2000); RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION (2008). At the same time, however, the genre is plagued by ambivalence towards the nature of its critique and the way forward—in particular, whether the issue is included or excluded from the current global order, or instead, some more fundamental structural critique. Here, post-development studies have for the most part remained neglected in the literature, though post-development itself has failed to offer an alternative proposal. *See, e.g.*, THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER (Wolfgang Sachs ed., 1999) (criticizing itself often for not offering a programmatic or systemic alternative vision of global order). In relation to TWAIL, these tendencies are perhaps in part due to an over-reliance on European versus non-European antagonisms rather than looking at how the idea of Europe itself has historically always covered over deep "internal" hegemonic rivalries and competing ideological visions. *But see* David Harvey, *Revolutionary and Counter Revolutionary Theory in Geography and the Problem of Ghetto Formation*, 4 ANTIPODE 1 (1972).

therefore, is to remind international lawyers that the responsibility of the profession is to balance the contradictory needs of freedom and order, at once promoting political ambitions towards greater sociability (e.g., a fully inclusive global cosmopolitan order) while checking the excesses of political ambition (e.g., cultural or material imperialism). Just as Grotius stood against the tides of religious fundamentalism and violent political ambition, so too must international lawyers today transcend the allure of any form of zealous certainty (whether religious, national, and so on). Grotius comes to international lawyers who are searching for guidance like the voice of God out of the wilderness, giving clarity to past, present, and future and calling upon the profession to restate its (almost messianic) mission in an ever-ascending progression upwards, "into the sunrise of a new world order of justice, peace, and reconciliation."[82] At the end of the day, though not above the messy realities of human frailty and desire, international law is remembered in the dominant account of the Grotian tradition as a universalizing force of renewal and progress.[83]

And yet, in light of the unearthed realities of Grotius's positions, the curiosity remains: why does the literature of international law repeatedly fasten around his figure, continually misreading his efforts and his legacy in a consistent story of professional hope and affirmation? Indeed, if the Grotian tradition advocates international law as a politics of emancipation and restatement, it does so only by maintaining a politics of denial, not only concerning Grotius himself, but more importantly, about the nature and track record of its liberal cosmopolitanism project. To borrow from Lacanian terminology, one might say that the symbolic order that colors one's argumentative patterns and imagination—the secular order and its professed formal agnosticism towards competing hegemonic claims[84]—is itself a response to some underlying trauma, that something which resists symbolization: namely, a non-eclipsed background that not only threatens western rationalities by "heightening contradictions and suppressions involved

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[82] Weeramantry, *supra* note 77, at 1569. *See generally* THOMAS SKOUTERIS, THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE (2010).

[83] *See* Nathaniel Berman, *The Grotius Lecture Series: In the Wake of Empire*, *in* 14 AM. U. INT'L L. REV. 1515, 1521–54 (1999) (juxtaposing a "critical genealogist" voice to the standard progress narrative expounded by the "renewer/restate").

[84] *See* ERNESTO LACLAU, EMANCIPATION(S) (1996); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, 413–509 (2001); Martti Koskenniemi, *Formalism, Fragmentation, Freedom: Kantian Themes in Today's International Law*, 4 NO FOUNDATIONS J. EXTREME LEGAL POSITIVISM 7 (2007).

in their construction,"[85] but more perversely, takes on the role of the Freudian death-instinct, compelling international law into an endlessly repetitive circular movement around a constitutive object that it dares not speak.[86] Here, law functions as a sort of feedback loop that allows society to rationalize and sustain the violence and failures of its past and present, as the necessary limitations of human understanding, while holding on to the belief that its principles are fundamentally sound and coherent, a veritable standard to understand oneself in the world.[87] In such a Lacanian understanding of the rule of law, the Grotian tradition is nothing short of the symbol of the existential anxiety among international lawyers over the complex array of human (and more importantly, Western) limitations, both personal and at large.

What makes this trauma so difficult to disclose? The Author believes that the answer contains both a material and symbolic element. On the one hand, the emergence of international law cannot be discussed as a professional, modern discourse without turning to the nineteenth century experiences of both internal (domestic) and external (foreign) colonialism: at home, the violent suppression of working class needs,[88] the brutality of industry's "satanic mills,"[89] famines and bloody intercontinental warfare,[90] and abroad, the

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[85] PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 13 (1992). For Fitzpatrick, a founding figure in the British Critical Legal Studies movement, the effort to bring out these sublimated traumas are political acts of "internal decolonization" against the "white mythology" of mainstream international law. *Id.* at 13, 41. There is, however, both a contemporary and historical challenge to this aspiration. *See* Peter Danchin, *The Emergence and Structure of Religious Freedom in International Law Reconsidered*, XXIII J. L. RELIGION 455, 459–60 (2007) (arguing persuasively that liberalism is founded on illiberal historical core of genocide and expulsion in the creation of sovereign nation-states); *see also* Anne Orford, *Ritual, Mediation and the International Laws of the South*, 16 GRIFFITH L. REV. 353 (2007) (pointing out more or less often in her work generally how the violence often decried in poor, or non-Western countries, is often the very sort of violence that European nation-states found instrumental in their formations).

[86] *See* JUDITH BUTLER ET AL., CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT (2000). *See generally* REX BUTLER, ZIZEK: LIVE THEORY 25–27, 95–100 (2005); SIGMUND FREUD, BEYOND THE PLEASURE PRINCIPLE (1950) (discussing the "death instinct"); JACQUES LACAN, BOOK III: THE PSYCHOSES (Jacques-Alain Miller ed., 1993) (introducing the idea of the "forced choice"); SLAVOJ ZIZEK, ON BELIEF 103–05 (2001).

[87] For a reading of this process in international legal theory in what he calls the 'Feuerbach effect,' see Akbar Rasulov, Universality, Lecture at the Institute for the Study of Political Economy and Law Seminar Series at the International University College of Turin (Mar. 4, 2011) (transcript on file with author).

[88] *See, e.g.*, E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1963); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES (1980).

[89] *See* William Blake, *Milton, A Poem*, *in* 5 THE ILLUMINATED BOOKS OF WILLIAM BLAKE 1 (Robert Essick & Joseph Viscomi eds., 1998).

[90] *See, e.g.*, THEODORE ALLEN, I THE INVENTION OF THE WHITE RACE (1994); ERIC HOBSBAWM, THE AGE OF REVOLUTION: EUROPE 1789–1848 (1962). In contrast to these texts, the dominant trend in historical literature—both legal and otherwise—is to stress the relatively peaceful, at least "stable" character of the early to middle nineteenth century, which contributes to a pacified version about the coming together of the Western

imperial conquest of foreign land through superior warfare technology and resources,[91] the sanctimonious genocide of defeated populations,[92] and colonialists and missionaries racked with disease in pursuit of fantasies.[93] For international legal theorists and historians like Berman and Anghie, the same international law that one typically holds out as the protector of cultural respect and to check political aggression was itself forged in the fires of colonial conquest,[94] far too savage and absolute to allow for any wishful reconciliatory redemption.[95] Here, this nightmarish awakening is not only that we recognize the horrors committed by and upon our fathers and grandfathers, nor that its legacy lingers on despite our best efforts of structural adjustment and ethical denunciation—the trauma that we are almost compelled to disavow is that this past is not simply to be shunned, but also exists as our most intimate, secret dream:

> Colonialism is never the other, never the past, it is always with us . . . because it has made the world we live in, both in the ex-metropoles and the ex-colonies: our culture, our economy, our very languages are imbued with the colonial past; *with us* because trauma (of destruction or of guilt) never really leaves an individual or a culture; and finally, *with us*, because colonialism is not only the *shame* of the West—its violent, shadow side—but rather, it also expressed some of Western culture's highest ideal—that even today

European system—a sort of "mythic" Europe that distances any critiques of endemic, or systemic violence at the core of the European state-order. Björn Hettne, *Development and Security: Origins and Future*, 41 SECURITY DIALOGUE 30, 32 (2010).

91 *See, e.g.*, S. JAMES ANAYA, INDIGENOUS PEOPLES OF INTERNATIONAL LAW 9–38 (2000); EDWARD SPICER, CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533–1960 (1962).

92 *See, e.g.*, ADAM HOCHCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1998).

93 *See, e.g.*, MICHAEL OREN, POWER FAITH AND FANTASY: AMERICA IN THE MIDDLE EAST 1776 TO THE PRESENT 122–28, 200–09, 228–31 (2007).

94 ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 2–3 (2005) ("[S]overeignty . . . emerged out of the colonial encounter. . . . [C]olonialism was central to the constitution of international law in that many of the basic doctrines of international law . . . were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation. . . . [T]hese origins create a set of structures that continuously repeat themselves . . . ."); *see also* Berman, *supra* note 83, at 1521–54.

95 Drawing upon Edouard Glissant's writings about Caribbean history, Berman argues for a "fierce, even brutal honesty, refusing all redemptive consolations. . . . [He] rejects the heroic [foundational] myths [in favor of a] naked self-examination. Can international law, written by history's victors, muster the courage to look frankly, painfully, at the horrors of its own past?" Berman, *supra* note 83, at 1554.

> we cherish . . . . This is the real challenge . . . . [T]he horror . . . and the dream.[96]

The violence here carries an overt materialist content, its scandalous political ramifications (e.g., structurally sustained gross inequality, cultural imperialism or genocide, policing actions, and warfare) the very stuff that everyone from neo-colonial critics and human rights activists to global policy makers and bureaucrats seek to (often very self-consciously) struggle against on one level or another.[97] Yet, what is also touched upon is a more insidious form of violence, a symbolic violence, which is both more elusive, and which actually enlists and assigns one's own desires by telling what can and cannot be said and accomplished.[98] In other words, the rules and historical manifestations of authority, behavior, and beliefs that one lives by may very well be experienced as the taken for granted, axiomatic necessity of objective reality, but they are in fact culturally arbitrary phenomena in that they have no privileged connection to some natural or transcendent and universal truth.[99] These circumscribed moments are thereby transmitted through both historical baggage (diachronically) and everyday discourses (synchronically) as an almost unconscious background logic of understanding, compelling one to act and speak not so much unwillingly (for it is exactly our inability to separate

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[96] *See* Nathaniel Berman, The Alchemy of Empire, or of Power and Primitivism: Inaugural Lecture for the Centre for the study of Colonialism, Empire and International Law at the School of Oriental and African Studies (Feb. 1, 2008) (transcribed recording of the lecture on file with Author; any errors are solely the fault of the Author).

[97] *See* David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUR. HUM. RTS. L. REV. 463, 463–97 (2001).

[98] Symbolic violence is particularly apt in the context of law, which may be itself in some respects the concrete objectification of our anxieties—what the German philosopher Ernst Cassirer called, a "metamorphosis of fear." CASSIRER, *supra* note 11, at 47. Unlike Spencer's law of nervous discharge where we enjoy release from a sudden explosion of physical reaction, this metamorphosis into law may actual defer, and thereby intensify, our anxieties. Thus, the Goethe-like tendency to retreat into law to establish order—the "tendency to turn into an image . . . everything that delight[s] or trouble[s]" us—does not rectify our conceptions to the external world but actually incarnates, and heightens through repetition, our instincts of fear. *Id.* at 46–48.

[99] The term itself, symbolic violence, was coined by Pierre Bourdieu, the late French sociologist and theorist, to denote how impositions of systems of symbolism and meaning (e.g., culture) upon groups and classes would be accepted as legitimate. PIERRE BOURDIEU, HOMO ACADEMICUS 27 (Peter Collier trans., 1990) (1984). Bourdieu was particularly interested in the role of "pedagogic action" in the French university system, which he believed functioned to perpetuate the advantages of privileged class relationships through inculcating students into processes of self-limitation and self-censorship. *See id.*; *see also* PIERRE BOURDIEU & LOIC J.D. WACQUANT, AN INVITATION TO REFLECTION SOCIOLOGY 62–259 (1992); RICHARD JENKINS, KEY SOCIOLOGISTS: PIERRE BOURDIEU (1994); BOURDIEU: A CRITICAL READER (Richard Shusterman ed., 1999).

our knowledge and desires from these conditions) as unwittingly.[100] What makes it so difficult to locate these moments is that they appear immediately "naturalized" through stylized acts of repetition that are reciprocated, and ultimately lead to the appearance of an essentially ontological core.[101] In short, one's understanding of what one ought to do and the parameters one works within are aesthetically determined: less a matter of what actually exists, than how one performs and experiences the various forms, images, tropes, perceptions, and sensibilities that one identifies with international law.[102]

In this sense, the anxiety that repeatedly draws international lawyers to Grotius is an underlying feeling of being caught in a catch-22 of fears. On the one hand, international lawyers labor under the "anxiety of influence," that their vision and projects cannot live up to the creative victories of our ancestors, that global governance has become far too complex and uncertain to imagine any truly new world order.[103] On the other hand, even if such a possibility existed, the lessons of the past are not completely lost in the

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[100] Diachronic refers to the historically constituted, or developed, nature of meaning and interpretation. Synchronic denotes meaning produced by a system at any given point in time. *See* TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 96–97 (2d ed. 1996). For many authors, these two approaches go hand in hand. *See, e.g.*, THE BAKHTIN READER: SELECTED WRITINGS OF BAKHTIN, MEDVEDEV, VOLOSHINOV 5 (Pam Morris ed., 1994) (1986). For a legal discussion of the synchronic play of structuralists, and how it may be engaged in legal analysis, see David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209, 248–89 (1986) (providing an extensive list of relevant materials for further research).

[101] This idea is indebted to the notion of the American philosopher and cultural and feminist theorist Butler's idea of "performativity." *See* JUDITH BUTLER, GENDER TROUBLE (1990). In her 1993 book, *Bodies That Matter*, Butler links the idea of performativity to the idea of "iterability" in the work of French literary theorist and philosopher, Derrida. JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 245 (1993).

> Performativity cannot be understood outside of a process of iterability, a regularized and constrained repetition of norms . . . . [T]his repetition . . . constitutes the temporal condition for the subject. . . . This iterability implies that "performance" is not a singular "act" . . . but a ritualized production, a ritual reiterated under and through constraint, under and through the force of prohibition and taboo, with the threat of ostracism and even death controlling and compelling the shape of the production, but not . . . determining it fully in advance.

Id. at 95; *see also* Jacques Derrida, *Signature, Event, Context*, *in* LIMITED INC. 1 (Jeffrey Mehlman & Samuel Weber trans., 1988) (1977).

[102] *See* Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1049–54 (2002). Schlag takes care to distance himself from an understanding of aesthetics as "the appreciation of art and beauty" to offer four "aesthetic" models which account for the various ways American lawyers perceive and arrive at outcomes in law, which he believes acts as a formal enterprise whereby "ethical dreams and political ambitions . . . do their work." *Id.* at 1049.

[103] *See generally* HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (1973); *see also* HAROLD BLOOM, KABALLAH AND CRITICISM (1975).

subconscious of the discipline, that any political order, whether it expresses itself as totalitarian or liberal, is dependent on some original (and maintained) condition of violent, exclusionary force. Tolerance, in this respect, is not so much a virtue or goal, as it is the condition of a particular situation of comfort or authority, the rationalization of how violence will be organized and directed once a system disclaims its propensity to violence. In response to these anxieties, international lawyers have sought Grotius to either "obscure the historically exclusionary origins of the Western liberal state" by emphasizing his magnanimous advocacy of liberal tolerance and formal equality, or alternatively, decried his theory as self-serving justifications for empire,[104] thereby eliciting a subtle polemic for an acceptance of the status quo one or two degrees to the left, some cautious politics of piecemeal reform and mutual distrust.

CONCLUSION: A POLITICS OF TRUTH[105]

And yet, in the wake of what would otherwise look like false celebration or grim resignation, the words of Judge Weeramantry still carry a portion of hope. To remember Grotius is, for Weeramantry, a "moment to attempt to recapture the spirit of inspiration . . . to struggle out of the limitations of the thought-frame of [one's] times and carve out new pathways . . . in the uncharted waters lying ahead."[106] Out of this come two suggestions for seizing upon Weeramantry's appeal and answering the Grotian tradition in a new light. First, rather than shy away from the partisan nature of Grotius's convictions, we

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[104] HAROLD BLOOM, *supra* note 103.

[105] This might be juxtaposed with the various calls of "radical democracy," *see* Laclau, *supra* note 84, at 105, or their legal equivalent, the "culture of formalism," *see* Koskenniemi, *supra* note 84, at 502–09. At its most appealing, the call for a "culture of formalism" challenges the international legal community to rise above the "politics of the possible" to embrace a higher standard, though like its American humanitarian rule of law counterpart, carries the tendency to recognize itself as a restraining, or gentle, civilizing force outside the auspices of power, and more specifically, war. *Id.* Instead, what the author is searching for here is something more akin to a "politics of truth," which seems to occasionally manifest both within and outside of legal theory—in nineteenth century European political philosophy (Giuseppi Mazzini, *see* WIGHT, *supra* note 29), in the nineteenth century and twentieth century American pragmatic "can-do" ethos (as drawn out by authors within international law, particularly Mark Janis, *see* MARK WESTON JANIS, AMERICA AND THE LAW OF NATIONS 1776–1939 (2010), and David Kennedy, *see* KENNEDY, *supra* note 32), in the liberation struggles in Latin America (Gustavo Gutierrez Merino, *see Gustavo Gutiérrez*, LIBERATION THEOLOGY, liberationtheology.org/people-organizations/Gustavo-gutierrez (last visited Apr. 2, 2010)) and anti-colonial struggles of the twentieth century (emphasized in legal work particularly by TWAIL authors, *see* Anghie & Chimni, *supra* note 77), and in more recent years, within the philosophical writings of authors such as Alain Badiou and Alberto Toscano, BADIOU, *supra* note 75.

[106] *See* Weeramantry, *supra* note 77, at 1515–20.

might instead accept them as the very conditions of any emancipatory politics.[107] No victory, no good, came to any group of humans without what was most often passionate and protracted struggle, usually with countless and unsung casualties. That there will be losers and excluded parties are not an unfortunate by-product of the political world, but the very purpose of struggle: to fight for some condition that will change the distribution and well-being of particular individuals and communities always comes as theft and sacrifice to others. To open up patents on necessary drugs to poor countries, for instance, will mean the loss of a particular form of property and profit for shareholders invested in the pharmaceutical industry. Let us say, so be it. As progressive international lawyers committed to a better world, let us leave the comforts of the condemnation of warfare and venture forward into some battle, whatever that might be.[108]

Second, contemporary international lawyers sympathize with Grotius's eclectic use of sources (nowadays under the rubric of inter-disciplinarity), but too often "appear both ashamed of their inability to propound doctrine in the imperious tone of traditional texts" and "proud of having avoided the [methodological] difficulties plaguing each traditional scheme of authority."[109] While international law should by no means lose sight of the lessons and (partial) victories against oppression (whether that was expressed as child labor, homophobia, racism, sexism, and so on), too often the condition of accepting any principle only when methodologically defensible leads to a retreat into some politics not simply of humility, but deferral.[110] In contrast, for

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[107] *See generally* KENNEDY, *supra* note 32 (drawing out an ethical appeal for a partisan courage to face the "dark sides" of progressive struggle as the very basis of personal and political freedom); *see also* ALAIN BADIOU, SAINT PAUL: THE FOUNDATION OF UNIVERSALISM (Ray Brassier trans., English ed. 2003) (1997); Alberto Toscano, *Fanaticism: A Brief History of the Concept*, EUROZINE (July 12, 2006), http://www.eurozine.com/articles/2006-12-07-toscano-en.html.

[108] *See generally* Toscano, *supra* note 107.

[109] *See* Kennedy, *supra* note 5, at 5–7.

[110] This politics of deferral seems to me less constructed on a sentiment of humility but resignation, and which tacitly accepts the "false necessity" about the nature and outcomes of global governance. *See* 1 ROBERTO UNGER, POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (2004); *see also* QUENTIN MEILLASSOUX, AFTER FINITUDE: AN ESSAY ON THE NECESSITY OF CONTINGENCY (2008). Arguing against Kantian subjectivity, Meillassoux argues provocatively for us to accept arbitrariness as the sole and necessary absolute of existence—what he terms, a "radical contingency." MEILLASSOUX, *supra*, at 60–61.

> We are no longer upholding a variant of the principle of sufficient reason . . . but rather the absolute truth of a principle of unreason. There is no reason for anything to be or to remain the way it is; everything must, without reason, be able not to be and/or be able to be other than it is.

Grotius, authoritative diversity was neither virtue nor vice, but simply a fact of life. To put this in a more contemporary register, any principle or truth is ultimately unanswerable according to any empirical or rational basis, but simply "evident" to its adherents. Instead of remaining caught in the spurious infinity of negation that haunts the post-foundational landscape of politics and law, the memory of Grotius and his eclectic boldness directs international lawyers to proclaim a fidelity to a truth without apology.[111] The Grotian tradition calls on international law to shake off the Victorian pieties that shackle its emancipatory potential.

Id. For an experiment to bring Meillassoux's argument into legal human rights theory, see BILL BOWRING, THE DEGRADATION OF THE INTERNATIONAL LEGAL ORDER? THE REHABILITATION OF LAW AND THE POSSIBILITY OF POLITICS 99–110 (2008). *But see* Susan Marks, *False Contingency*, 62 CURRENT LEGAL PROBS. 1 (2009).

111 *See generally* BADIOU, *supra* note 107; ALAIN BADIOU, THEORIE DU SUJET (1981).