Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius's Early Works on Natural Law

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Modern Rights and Ancient Republics

The Dutch humanist Hugo Grotius (1583–1645) is widely acknowledged to have made important contributions to an influential doctrine of individual natural rights. In this article I argue that Grotius developed his rights doctrine primarily out of normative Roman sources, that is to say Roman law and ethics. If this Roman tradition has been as central to Grotius's influential writing on natural rights as I claim, why has it not received more scholarly attention? The reasons lie in the view that while rights are constitutive of modern liberty, they were unknown in classical antiquity.

The classic expression of this view of rights as an essentially modern phenomenon can be found in Benjamin Constant's famous 1819 lecture *De la liberté des anciens comparée à celle des modernes,* where Constant, drawing on Condorcet, developed a rights-based notion of "modern" liberty by contrasting it with the "liberty of the ancients." According to Constant,

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the "ancients, as Condorcet says, had no notion of individual rights. Men were, so to speak, merely machines, whose gears and cog-wheels were regulated by the law."[1] Modern liberty, on the other hand, in Constant's view consists of an array of individual rights.[2] Constant credits commerce as the crucial force for the development of this rights-based, "modern" conception of liberty, which not only "inspires in men a vivid love of individual independence"[3] and "emancipates" the individual, but also helps to make individuals "stronger than the political powers."[4]

This tenacious view of an "ancient" version of liberty, lacking any notion of subjective rights and therefore lacking what Isaiah Berlin has called "negative" liberty,[5] seems to be informed by an interest in the constitutional structures of the societies of classical antiquity, and, as far as democracy and the democratic elements of Greek antiquity are concerned, nourished by the bias against democracy expressed by most of classical political philosophy. It is a line of thought that can be traced back to Hobbes's scornful remarks about the liberty of the "Athenians, and the Romans" in *Leviathan* as well as to the contrast drawn by Rousseau in his *Contrat social* between the modern and the ancient state.[6]

How has this historical picture developed in the first place? The responsibility seems to lie in too selective a focus in terms of the traditions that came to serve as resources for early modern proto-liberal thought. Broadly speaking, there are two traditions that deserve attention in this regard: The first is looking at the early Roman republic and its institutions, as it appears in the historical writings of Livy and Dionysius of Halicarnassus, in the biographies of Plutarch, and in Polybius's constitutional analysis. This is

1. Benjamin Constant, "The Liberty of the Ancients Compared with That of the Moderns," in *The Political Writings,* trans. and ed. B. Fontana (Cambridge: Cambridge University Press, 1988), 312.

2. Ibid., 310f. Leslie Green has pointed out to me that Constant could be interpreted as claiming only that there were no individual rights among the ancients that *amounted to our basic liberties;* in my interpretation of Constant, however, he is resting his case on the claim that there were no individual rights among the ancients *tout court.*

3. Ibid., 315.

4. Ibid., 325. For this tradition of thought, see W. Nippel, "Antike und moderne Freiheit," in *Ferne und Nähe der Antike,* ed. W. Jens and B. Seidensticker (Berlin: de Gruyter, 2003), 49–68. Nippel shows a line of argument ranging from Constant over Fustel de Coulanges, Jacob Burckhardt, and Lord Acton to Max Weber, and influencing twentieth-century ancient historians such as Moses Finley and Paul Veyne.

5. Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

6. Hobbes, *Leviathan,* ed. R. Tuck, rev. student ed. (Cambridge: Cambridge University Press, 1996), chap. 21, 149f.; Rousseau, *The Social Contract and Other Later Political Writings,* ed. V. Gourevitch (Cambridge: Cambridge University Press, 1997), 114f.

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the so-called republican tradition[7] and can be found in Machiavelli and then again in seventeenth-century English and eighteenth-century French and American political thought, and it was this tradition that provided the foundation for Hobbes's, Rousseau's, and Benjamin Constant's claims about the nature of ancient liberty.[8]

But there is a second tradition that has proved at least as influential, looking not to the mythical Roman republic of Livy's first ten books (covering the years 509 to 292 B.C.), but to texts stemming from the last century of the Roman republic and later. More importantly, the texts used in this second tradition are not historical narratives, nor are they concerned with analyses of various constitutional or institutional arrangements. Rather, they are of a *normative* nature, comprising some of Cicero's ethical works and, most importantly, texts from the body of private Roman law contained in Justinian's *Digest.* Further, the exponents of what I have called the second tradition were not strictly concerned with political theory; instead they put forth ethical theories about the normative conditions obtaining in a state of nature, in other words theories of natural law. In developing these theories, the exponents of the natural law tradition referred back to resources providing a rights-based account of rules obtaining both within and without the Roman polity. The state of nature, as conceived by Hugo Grotius and his followers, became a domain governed by remedies contained in the Roman praetor's edict and later integrated in Justinian's *Digest;* these remedies,

7. For an extension of the classical republican tradition into the early national period, see the classic J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975).

8. Constant's view is probably untenable with regard to "the ancients" as a whole even if one were willing to grant the narrow, restricted focus on institutional history. The view seems tailored to the Greek concept of freedom and would most probably not withstand scrutiny in terms of Roman institutional history; the Romans considered their constitutional safeguards, such as the right to appeal a magistrate's order (*provocatio*), as "bulwarks to guard freedom." Livy 3, 45, 8; see also Cicero *De re publica* 2, 55. In the Greek city-states, "the concept of freedom gained political importance [in the context] of the community's defense against foreign rule and tyranny" and was thus understood collectively. In Rome, by contrast, *libertas* had a "primarily negative orientation" and was "almost without exception—for aristocrats and commoners alike—protection against (excessive) power, force, ambition, and arbitrariness." In Rome, the freedom concept was focused "on the needs of individual citizens," and "its function was markedly negative and defensive" and was "linked primarily with individual rights that eventually were fixed by law." It is of course this last aspect that provides the link to the tradition that is the subject of this article. Kurt A. Raaflaub, *The Discovery of Freedom in Ancient Greece,* trans. R. Franciscono (Chicago: University of Chicago Press, 2004), 267; see also Chaim Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate* (Cambridge: Cambridge University Press), esp. 24–30. Also, it bears mentioning that the Romans did not have the legal concept of expropriation; even for public projects, the government had to buy (without any means of legal coercion) property regularly like a private actor.

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however, were stripped of their original jurisdictional meaning and turned into substantive rights.[9]

In this article, I examine the use of these normative Roman works by the natural law tradition, or rather the use of those works by one pivotal exponent of that tradition, Hugo Grotius.[10] Grotius is exceptionally well suited for such an examination because not only was he the first of the natural lawyers to develop a fully fledged account of subjective natural rights,[11] but he also proved to be highly influential in subsequent moral, political, and legal thought.[12] The natural law tradition that he shaped later

9. Reminiscent of the way Edward Coke's *First Institute* was used in the American colonies before the Revolution and in the early Republic: "From the late seventeenth century until the early nineteenth, Americans learned property law from Coke's treatise without regard to the court system in which those rules arose, which magnified the conceptual division between remedy and right, jurisdiction and jurisprudence, the Westminster courts and the common law." Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review* 21 (2003): 439–82, at 480.

10. For an account of Grotius's Dutch context and the relation in the early seventeenth century between Dutch Roman legal scholarship and the rise of a new commercial morality in the United Provinces, see James Whitman, "The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence," *Yale Law Journal* 105 (1996): 1841–89. For the intellectual climate of the humanist so-called "niederländische Bewegung," see Gerhard Oestreich, *Strukturprobleme der frühen Neuzeit. Ausgewählte Aufsätze,* ed. B. Oestreich (Berlin: Dunker & Humblot, 1980), 301ff.

11. See P. Haggenmacher, "Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture," in *Hugo Grotius and International Relations,* ed. H. Bull, B. Kingsbury, A. Roberts (Oxford: Oxford University Press, 1990), 133–76, at 161. For a recent article that downplays the importance of subjective natural rights in Grotius's works, see P. Zagorin, "Hobbes without Grotius," *History of Political Thought* 21 (2000): 16–40, esp. 33ff.

12. See Knud Haakonssen, "Hugo Grotius and the History of Political Thought," *Political Theory* 13 (1985): 239–65; Haakonssen, *Natural Law and Moral Philosophy. From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996), 30; Haakonssen, "The Moral Conservatism of Natural Rights," in *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought,* ed. I. Hunter and D. Saunders (New York: Palgrave Macmillan, 2002), 27f., sketching a tradition ranging from Grotius to Barbeyrac and Burlamaqui up to the Founding Fathers; for a bibliography containing all editions of Grotius's works up to 1950, see J. Ter Meulen and P. J. J. Diermanse, *Bibliographie des écrits imprimés de Hugo Grotius* (The Haag: M. Nijhoff, 1950). For Grotius's influence on the political thought of the English Whigs, see Michael P. Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994), 106–15, 188 (on the influence on John Locke's *Questions Concerning the Law of Nations*). For Grotius's status as the second most important legal authority after Coke in pre-revolutionary America, see A. E. D. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville: University of Virginia Press, 1968), 118f. For Grotius's impact on international law, see P. Haggenmacher, "On Assessing the Grotian Heritage," in *International Law and the Grotian Heritage* (The Hague: The Instituut, 1985), 150–60. For the influence on the early German enlightenment, see T. J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 2000).

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endowed political theorists of the republican mold with a moral account of a realm outside of or previous to the political, viz. the state of nature, thus providing political theory with a yardstick for a moral evaluation of the extent of political power. Historically, this combination of the natural law tradition, growing out of the reception of the normative Roman texts mentioned above, with the republican "institutional" tradition led to constitutionalism and the entrenchment of some of the Roman remedies as constitutional rights.

Hugo Grotius's doctrine of subjective natural rights was supposed to bolster the claims of the expanding commercial empire of the United Provinces. The Dutch humanist made a crucial contribution to the development of a modern, rights-based natural law advocating the freedom of trade,[13] clearly driven by a desire to promote what Constant thought to be the force behind "modern liberty," namely commerce. Yet Grotius developed his conception of natural rights out of materials stemming from a time that had allegedly "no notion of individual rights" and when "[m]en were, so to speak, merely machines, whose gears and cog-wheels were regulated by the law."[14]

Grotius made use of Roman law and Roman ethics in order to submit a normative case, on behalf of the Dutch East India Company, for a rights-based just imperial war in the East Indies. His conception of a law of nature was conceived in order to apply a theory of compensatory justice to the high seas of Southeast Asia, envisaged as a natural state lacking political authority.[15] Yet while both Grotius's immediate political context—his

13. Grotius's contribution to the development of a doctrine of natural rights is well known and has received a lot of scholarly attention; see P. Haggenmacher, "Droits subjectifs et système juridique chez Grotius," in *Politique, droit et théologie chez Bodin, Grotius et Hobbes,* ed. Luc Foisneau (Paris: Kimé, 1997), 73–130, esp. 114, n. 1; Brian Tierney, *The Idea of Natural Rights* (Scholars Press for Emory University, 1997), 316–42; Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 58–81; Tuck, *Philosophy and Government, 1572–1651* (Cambridge: Cambridge University Press, 1993), 137–76; Tuck, *The Rights of War and Peace* (Oxford: Oxford University Press, 1999), 78–108; James Tully, *A Discourse on Property. John Locke and his Adversaries* (Cambridge: Cambridge University Press, 1980), 68ff., 80ff., 90, 114, 168; M. Villey, "Les origines de la notion de droit subjectif," in Villey, *Leçons d'histoire de la philosophie du droit,* 2nd ed. (Paris: Dalloz, 1962), 221–50.

14. Constant, "Liberty of the Ancients," 312.

15. Which is why only a small part of Aristotle's theory of justice, namely compensatory justice, is imposed on a *polis*-less natural state that is far more susceptible to the normative sources of Roman origin, which place little emphasis on distribution. For a more general account of Grotius's dependency on a Roman tradition in developing his conception of a state of nature, with special attention to his use of classical rhetoric and his interpretation of the Roman just war tradition, see B. Straumann, "'Ancient Caesarian Lawyers' in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius's *De iure praedae,*" *Political Theory* 34.3 (2006): 328–50.

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"experience of international relations"[16]—and the medieval just war tradition[17] certainly deserve ample scholarly attention and constitute important influences on Grotius's natural law tenets,[18] it is a *Roman tradition* of individual legal remedies that lays claim to a foundational role with regard to Grotius's conception of subjective natural rights.

This view goes against that put forward by Michel Villey and Brian Tierney, who have argued, respectively, that modern rights doctrines were the result of a deformation of Christian doctrines brought about by William of Ockham and the Franciscan Order,[19] or that the origin of rights doctrines lies in the rights language of the canonists,[20] thereby relegating the rather obvious fact that Grotius "in his usual fashion" quoted widely "from Cicero and Seneca"[21] to a mere humanist whim. Villey attempted to show that the development of subjective rights doctrines constituted an aberration from a pure Thomist natural law, acknowledging Grotius as one of the main protagonists in the development of the modern, post-Ockham doctrine of rights, a doctrine the Thomist Villey himself deemed detrimental. He argued vehemently against a subjective Roman notion of right—an argument that has influenced Isaiah Berlin's "Two Concepts of Liberty"—and charged the early modern jurists with misrepresenting Roman law on this point.[22] The medievalist Brian Tierney, while critical of Villey with regard to the sharp fault line drawn between Thomist natural law and Ockham's notion of subjective rights and locating the origin of subjective rights in the canonist jurisprudence of the twelfth century, has adopted Villey's stance on the Roman sources and their use by early modern lawyers such as Grotius.[23]

16. C. G. Roelofsen, "Some Remarks on the 'Sources' of the Grotian System of International Law," *Netherlands International Law Review* 30 (1983): 73–79, at 79.

17. See the authoritative work by P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses universitaires de France, 1983).

18. For the political context, see P. Borschberg, "Hugo Grotius, East India Trade and the King of Johor," *Journal of Southeast Asian Studies* 30 (1999): 225–48; Borschberg, "The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602–ca. 1616)," *Journal of Southeast Asian Studies* 33 (2002): 31–62; M. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615* (Leiden: Brill, 2006).

19. M. Villey, "La genèse du droit subjectif chez Guillaume d'Occam," *Archives de philosophie de droit* 9 (1964): 97–127.

20. Tierney, *Idea,* 43–77.

21. Ibid., 330.

22. See M. Villey, "L'idée du droit subjectif et les systèmes juridiques romains," *Revue historique de droit français et étranger* 4.24 (1946): 201–27; Villey, "Les origines." For a good summary of Villey's views and the debate surrounding the origins of individual rights, see Tierney, *Idea,* 13–42.

23. See Tierney, *Idea,* passim and especially 93–130.

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In what follows I will lay out some of the hitherto neglected evidence for an appreciation of the Roman law influence on Grotius's concept of rights, which I insist is both taken from Roman remedies and quite different from much of the medieval tradition. I do not deny that the canon lawyers had an important concept of rights—I argue, however, that Grotius did not draw his concept of rights from them. And while several of Grotius's immediate predecessors, especially Alberico Gentili, Vázquez de Menchaca, and Francisco Suárez,[24] had an account of subjective natural rights and certainly had an impact on Grotius, particularly on his decision to remove the Roman law remedies from their origins and frame his doctrine as an account of *natural* rights, the fine-grained legalistic elaboration of a system of subjective rights by the Dutch humanist is a novel and momentous contribution to the earlier writing on natural law. As Haggenmacher has shown, Grotius is indeed indebted to the medieval just war tradition, but he was original in adding a detailed account of rights modeled after Roman remedies. The present article thus diminishes the importance of Thomism and canon law for the development of modern rights doctrines and stresses the influence of Roman law remedies and Ciceronian political theory.[25] This is not to say, however, that these traditions had no impact whatsoever on Grotius's work—they certainly provided part of the reason why Grotius removed the Roman remedies from their jurisdictional origins and couched them in a language of natural law. Thus, Thomism and canon law can be said to have contributed some necessary, though by no means sufficient, elements. It is just to say that with regard to Grotius's elaborate system of subjective rights, the Roman traditions emphasized in this article deserve primary attention.

Apart from the fact that Grotius as a humanist lawyer was steeped in Roman law,[26] there are four substantive reasons for his use of these nor-

24. For Gentili, see P. Haggenmacher, "Grotius and Gentili," 133–76; for Vázquez, see Annabel S. Brett, *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), 165–204; for Suárez, see Tuck, *Natural Rights,* 54ff.

25. In his later natural law work, when the argument was not directed against Spain anymore, Grotius turned at times very explicitly against the school of Salamanca (see, e.g., *De iure belli ac pacis* 2, 20, 40, 4), while he sometimes adduced the Spanish neo-Thomists in his earlier works for prudential reasons; substantively, however, he drew from very different sources even in his early work. See B. Straumann, *Hugo Grotius und die Antike. Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht* (Baden-Baden: Nomos, 2007), 17–84, 193f.

26. Henry Sumner Maine noted that early on: "The system of Grotius is implicated with Roman law at its very foundation, and this connection rendered inevitable—what the legal training of the writer would perhaps have entailed without it—the free employment in every paragraph of technical phraseology, and of modes of reasoning, defining, and illustrating, which must sometimes conceal the sense, and almost always the force and cogency, of the

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mative Roman traditions: First, Grotius's aim was to put forward a *secular,* denominationally neutral natural law that had to be based on secular, non-Christian sources—Grotius explicitly states in the dedication to *Mare liberum* that his natural law work "does not depend upon an interpretation of Holy Writ in which many people find many things they cannot understand."[27] This ties in with, and lends additional support to, those parts of the research literature that have affirmed the essentially secular nature of Grotius's natural law doctrine and might help move the debate about Grotius's secularity away from the famous *etiamsi daremus* passage in the *De iure belli ac pacis libri tres*.[28]

Second, Roman law had already developed a doctrine of the freedom of the high seas, based on the idea of the sea as having remained in a natural state; third, the parallels between Roman imperialism and the Dutch expansion in the East Indies made Roman political and legal theory particularly attractive for Grotius, as I have argued elsewhere.[29] Finally, Roman law provided a fair amount of commerce driven remedies in contract law, which were part of the so-called law of peoples (*ius gentium*), a body of law initially created to accommodate foreigners (*peregrini*), especially merchants,

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argument from the reader who is unfamiliar with the sources whence they have been derived." H. S. Maine, *Ancient Law* (1866; New Brunswick: Transaction Publishers, 2002), 351. See also H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green, and Co., 1927), 14.

27. Hugo Grotius, *Mare liberum, The Freedom of the Seas,* trans. R. van Deman Magoffin, ed. J. B. Scott (New York: Oxford University Press, 1916), 5: "Sed quod hic proponimus nihil cum istis commune habet, [. . .] non ex divini codicis pendet explicatione, cuius multa multi non capiunt [. . .]." For Grotius's reasons to draw on secular sources for his natural law system, see B. Straumann, *Hugo Grotius und die Antike,* 11f., 121f.; for an excellent discussion of the secular character of Grotius's natural law and especially the famous *etiamsi daremus* passage, see Haakonssen, "Hugo Grotius and the History," 247ff., with literature. It lies beyond the scope of this article to decide whether Grotius in his use of a Stoic concept of nature could be described as a precursor to Deism.

28. For an excellent discussion of that debate with a balanced, well-reasoned judgment in favor of Grotius's secularity, see Haakonssen, "Hugo Grotius and the History," 247ff.; see also Haakonssen, *Natural Law and Moral Philosophy,* 29; J. B. Schneewind, *The Invention of Autonomy. A History of Modern Moral Philosophy* (Cambridge: Cambridge University Press, 1998), 67ff.; L. Besselink, "The Impious Hypothesis Revisited," *Grotiana New Series* 9 (1988): 3–63; J. Zajadlo, "Die Bedeutung der Hypothese *etiamsi daremus,*" *Archiv für Rechts- und Sozialphilosophie* 74 (1988): 83–92; A. P. D'Entrèves, *Natural Law. An Introduction to Legal Philosophy* (London: Hutchinson, 1967), 50ff.; James St. Leger, *The "etiamsi daremus" of Hugo Grotius; A Study in the Origins of International Law* (Rome: Pontifico Ateneo "Angelicum," 1962); A.-H. Chroust, "Hugo Grotius and the Scholastic Natural Law Tradition," *New Scholasticism* 17 (1943): 101ff. Grotius's secularity is affirmed above all by D'Entrèves and Haakonssen.

29. Straumann, "'Ancient Caesarian Lawyers,'" 338ff.; Straumann, *Hugo Grotius und die Antike,* 24, 41–46, 96–103, 138f. For Grotius's relation to the Dutch East India Company, see Ittersum, *Profit and Principle.*

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and give them standing in Roman courts. This body of rules—albeit clearly positive Roman law founded upon the praetor's edict, and flowing from the jurisdictional authority of the praetor (*ius praetorium*)—was thought to obtain even beyond Roman jurisdiction and contained remedies granted by the praetor as a matter of equity because they were taken to be furthering rightful claims.[30] Constant was thus not wrong in identifying a causal relationship between commerce and the development of individual rights—the remedies contained in the *ius gentium,* which in turn had a distinct impact on Cicero's ethics, were indeed largely commerce driven.

If Constant's view that the concept of individual rights is the defining criterion for the idea of "modern liberty" is correct, then the Roman lawyers and Cicero satisfy that criterion. While it is true that the Romans did not use one term, such as *ius,* to express the concept of rights, this is hardly evidence for their lacking the concept.[31] Indeed, an exaggerated infatuation

30. The legal foundation of these remedies, however, was deemed to consist, in a positivist manner, entirely in the authority (*iurisdictio*) of the praetor. For the *ius gentium,* see the authoritative work by M. Kaser, *Ius gentium* (Cologne: Böhlau, 1993), especially 4–7, 165; see also G. Grosso, "Riflessioni su 'ius civile,' 'ius gentium,' 'ius honorarium' nella dialettica fra tecnicismo-tradizionalismo giuridico e adeguazione allo sviluppo economico e sociale in Roma," 451, and especially 442: "[S]i può dunque dire che la trasformazione e crescita sociale di Roma trova nel *ius gentium,* in particolare nei negozi sanzionali *ex fide bona,* la diretta traduzione in schemi giuridici." See also Cicero's account of equitable remedies in the praetor's edict, Cicero *De officiis* 1, 32. For a recent expression of the opposing view that *ius gentium* was nothing more than a loose term used by the Roman lawyers to embrace all the legal provisions commonly observed by all humankind, see C. Ando, "Religion and *ius publicum,*" in *Religion and Law in Classical and Christian Rome,* ed. Ando and J. Rüpke (Stuttgart: Steiner, 2006), 126–45, at 134ff.

31. As we have seen, Michel Villey, looking at the way the term "*ius*" was used, argued against a subjective Roman notion of right; see Villey, "Les origines." But see, for a Greek origin of rights, F. D. Miller, *Nature, Justice, and Rights in Aristotle's Politics* (Oxford: Clarendon Press, 1995); P. Mitsis, "The Stoic Origin of Natural Rights," in *Topics in Stoic Philosophy,* ed. K. Ierodiakonou (Oxford: Clarendon Press, 1999), 153–77. The question of whether the Greek Stoics possessed a concept of rights remains open and need not concern us here. For an overview, see J. Miller, "Stoics, Grotius and Spinoza on Moral Deliberation," in *Hellenistic and Early Modern Philosophy,* ed. Miller and B. Inwood (Cambridge: Cambridge University Press, 2003), 117–20. See also T. Kammasch, S. Schwarz, "Menschenrechte," in *Der Neue Pauly. Enzyklopädie der Antike,* ed. H. Cancik and M. Landfester (Stuttgart: Metzler, 2001), 15.1:383–91, who deny an ancient origin of subjective natural rights. Arguing convincingly for a subjective use even of the term *ius* in Roman law is C. Donahue, "Ius in the Subjective Sense," in *A Ennio Cortese,* ed. D. Maffei (Rome: Il Cigno, 2001), 1:506–35; see also M. Kaser, "Zum 'Ius'-Begriff der Römer," in *Essays in Honor of Ben Beinart* (=*Acta Juridica* 1977), 2:63–81. G. Pugliese, "'Res corporales,' 'res incorporales' e il problema del diritto soggetivo," in *Studi in onore di Vincenzo Arangio-Ruiz* (Naples, 1954), 3:223–60 argued early on for a Roman concept of subjective rights; see also, in a similar vein, M. Zuckert, "'Bringing Philosophy Down from the Heavens': Natural Right in the Roman Law," *The Review of Politics* 51.1 (1989): 70–85; A. Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978), 100.

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with the term "*ius*" ("right") has held scholarship hostage for some time, exerting a stifling influence. Almost without exception,[32] Grotius used his sources sensibly and sensitively and developed his own work with very close reference to the Roman texts, which justifies the claim that the various terms used in these sources to describe claims and legal remedies were justifiably rendered as "rights" by Grotius.

Of the four natural rights that may give rise to a just cause of war—the right to self-defense, to property, to collect debt, and to punish—the right to private property and the right to collect debt are given most attention in this article,[33] because these two rights are most intricately tied to what has been acknowledged by liberals such as Constant as a driving force behind the modern concept of rights, that is to say commerce and free trade.[34] The right to punish on the other hand, interesting in its own right, lies beyond the scope of this article.[35] Suffice it to say that Grotius's right to punish is a secondary right of sorts, derivative of the primary rights of self-defense, property, and collection of debt, and designed to prevent these rights from being invaded.

The article proceeds in four sections. The first gives an account of how Grotius, in his early natural law works, developed a conception of subjective natural rights by reference to Roman law remedies. The second provides a brief discussion of Grotius's right to self-defense and its Ciceronian foundation. Sections three and four deal with the right to private property and the right to enforce contractual claims.

I. Roman Remedies as Natural Rights

The concept of a state of nature constitutes the foundation of Hugo Grotius's law of nature as well as of his law of nations, both resting on a

32. Significantly, the most important example of gross misinterpretation is Grotius's deliberate false attribution of a subjective use of *ius gentium* (as "right of nations" instead of "law of nations") to the Roman jurists; see below.

33. For Grotius's right to property, see R. Brandt, *Eigentumstheorien von Grotius bis Kant* (Stuttgart: Frommann-Holzboog, 1974); S. Buckle, *Natural Law and the Theory of Property. Grotius to Hume* (Oxford: Clarendon Press, 1991). For contractual rights, see M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (Cologne: Böhlau, 1959).

34. See Constant, "Liberty of the Ancients," 325: "The effects of commerce extend even further: not only does it emancipate individuals, but [. . .] it places authority itself in a position of dependence."

35. See B. Straumann, "The Right to Punish as a Just Cause of War in Hugo Grotius's Natural Law," *Studies in the History of Ethics* 2 (2006): 1–20, http://www.historyofethics.org/022006/022006Straumann.shtml (27 February 2008).

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doctrine of the just causes of war.[36] The legitimate *causae belli* consist in Grotius's account in a violation of rights inhering naturally in every inhabitant of the natural state,[37] rights that in turn correspond to the natural rights pertaining to the individual in the state of nature according to natural law, and to a certain degree even to individuals in lawfully constituted commonwealths. Grotius's early treatise *De iure praedae commentarius* (1604–1606)[38] and its offshoot *Mare liberum*[39] already contained an inchoate version of such subjective natural rights, and a still more elaborate natural rights doctrine can be found in Grotius's early *Theses LVI*[40] and in the *Defensio capitis quinti maris liberi,*[41] a defense of the fifth chapter

36. Grotius tries to render the cause of war as an Aristotelian *causa materialis.* This terminology, however, does not carry any substantive weight and in *De iure belli ac pacis* is abandoned entirely; for Grotius's use of the Aristotelian doctrine of causes in *De iure praedae,* see Haggenmacher, *Grotius et la doctrine,* 63ff.

37. Grotius's doctrine of the just war is also reflected in the early *Commentarius in theses XI,* where only public wars are being discussed, however, and where Grotius does not posit a natural right to punish; see P. Borschberg, *Hugo Grotius "Commentarius in theses XI". An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt* (Bern: Lang, 1994), 237ff., 263.

38. The following edition has been used: Hugo Grotius, *De iure praedae commentarius. A Collotype Reproduction of the Original Manuscript of 1604,* ed. J. B. Scott, The Classics of International Law 22, vol. 2 (Oxford: Clarendon Press, 1950); when *De iure praedae* (henceforth abbreviated as *IPC*) is cited in English, this translation will be used: Hugo Grotius, *De iure praedae commentarius. Commentary on the Law of Prize and Booty,* trans. G. L. Williams, with W. H. Zeydel, ed. J. B. Scott, The Classics of International Law 22, vol. 1 (Oxford: Clarendon Press, 1950). Some of the translations have on occasion been modified.

39. The twelfth chapter of *IPC,* published anonymously in 1609; the following edition has been used, containing both the text and a translation: Hugo Grotius, *Mare liberum. The Freedom of the Seas,* trans. R. van Deman Magoffin, ed. J. B. Scott (New York: Oxford University Press, American Branch, 1916), henceforth abbreviated as *ML.* In the following, when *IPC* or *ML* are cited in English, the translation of *IPC* will be used; the translation in *ML* will be used for passages not contained in *IPC.* Some of the translations have on occasion been modified. For a historical interpretation of *ML,* see P. Borschberg, "Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting *Mare Liberum* (1609)," *IILJ Working Paper* 2005/14, History and Theory of International Law Series (www.iilj.org), http://www.iilj.org/publications/2005–14Borschberg . . . asp (27 February 2008).

40. The manuscript is at Leiden University Library: *Theses sive quaestiones LVI,* BPL 922 I, fols. 287–92 (henceforth abbreviated as *TQ*). Citations refer to folio and thesis number, translations are my own. I would like to thank Professor Peter Borschberg for discussing the *TQ* with me and for generously sharing various drafts of his paper "Grotius, the Social Contract and Political Resistance: A Study of the Unpublished *Theses LVI,*" *IILJ Working Paper* 2006/7, History and Theory of International Law Series (www.iilj.org), http://www.iilj.org/publications/2006–7Borschberg.asp (27 February 2008).

41. Hugo Grotius, "Defensio capitis quinti Maris Liberi oppugnati a Guilielmo Welwodo," in S. Muller, *Mare Clausum: Bijdrage tot de Geschiedenis der Rivaliteit van Engeland en Nederland in de Zeventiende Eeuw* (Amsterdam: F. Muller, 1872), 331–61 (henceforth abbreviated as *DCQ*). Translations from *DCQ* are taken from Hugo Grotius, *The Free Sea,*

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of *Mare liberum,* written around 1615 and directed against the Scottish jurist William Welwod's attack on *Mare liberum*.

Grotius developed his conception of subjective rights against the backdrop of the system of Roman private law remedies. In a passage aimed to show that the justification of war, private or public, hinges on the justness of the war's cause, Grotius compares the possible material causes of war with the legal remedies provided by the Roman law of the *Digest.* Having enumerated the four genera of just causes of war, Grotius goes on to identify them with the different kinds of Roman legal actions:

> [I]n both kinds of warfare, [public and private,] one must consider the causes involved. Of these there are four kinds, as we have pointed out: for the authorities who hold that there are three just causes of war (defence, recovery, and punishment, according to their classification), fail to mention the not uncommon cause that arises whenever obligations are not duly discharged. Indeed, *in so far as we are concerned with subject-matter, which is the same in warfare and in judicial trials, we may say that there should be precisely as many kinds of execution* [*exsecutiones*] *as there are kinds of legal action* [*actiones*] [emphasis added]. To be sure, legal judgements are rarely rendered in consequence of causes of the first class, since the necessity for defending oneself does not admit of such delay; but interdicts against attack [*interdicta de non offendendo*] properly fall under this head. The actions relating to property [*actiones in rem*] which we call recovery claims [*vindicationes*], arise from the second kind of cause, as do also injunctions obtained in behalf of possession [*interdicta possessionis gratia*]. The third and fourth classes give rise to personal actions, namely, claims to restitution [*condictiones*], founded upon contract [*ex contractu*] or upon injury [*ex maleficio*].[42]

Grotius maintained that according to Roman law the prohibition of navigation and trade imposed by the Portuguese constitutes an injury.[43] If the

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translated by Richard Hakluyt with William Welwod's critique and Grotius' reply, ed. D. Armitage (Indianapolis: Liberty Fund, 2004), 77–130.

42. *IPC* 7, foll. 30a'f.: "Spectandae igitur in utroque causae, quas esse quatuor diximus. Nam qui tres statuunt iustas bellorum causas, defensionem, recuperationem et punitionem, ut loquuntur, illam non infrequenter omittunt, quae locum habet, quoties quae convenerint non praestantur. Totidem enim esse debent exsecutionum, quot sunt actionum genera, quod ad materiam attinet, quae in bello et iudiciis eadem est. Et ex primo quidem genere raro iudicia redduntur, quia moram istam se tuendi necessitas non permittit. Attamen interdicta de non offendendo huc pertinent. Secundo ex genere sunt in rem actiones, quas vindicationes dicimus: interdicta etiam possessionis gratia comparata. Ex tertio et quarto actiones personales, condictiones scilicet ex contractu et ex maleficio." Punishment constitutes a cause of war, because guilt (*culpa*) itself creates an obligation; see *IPC* 12, fol. 119. This doctrine of punishment as a natural cause of war gave rise to Grotius's famous theory, anticipating Locke's "very strange doctrine," that the private individual in the state of nature has a right to punish; *IPC* 8, foll. 40f. See B. Straumann, "Right to Punish"; R. Tuck, *Rights of War,* 82.

43. *IPC* 12, fol. 119 (=*ML* 13, p. 74), adducing Ulpian *Digest* 43, 8, 2, 9; 47, 10, 13, 7.

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matter in question between the Portuguese and the Dutch were taken into court, there could be, according to Grotius, "no doubt what opinion ought to be anticipated from a just judge." But if such a judgment cannot be obtained, "it should with justice be demanded in a war."[44] The crucial point was that, as Pomponius in the *Digest* had decided, "the man who seized [*usurpere*] a thing common to all [*res communis*] to the prejudice of every one else must be forcibly prevented [*manu prohibendus*] from so doing."[45] The sea according to Roman law was, along with air and flowing water, precisely such a thing common to all.[46] That follows also from an interdict granted by Labeo, cited by Grotius, which is designed to prevent anything from being done in the sea by which shipping could be obstructed.[47] Most importantly, the violation in question does not have to concern just corporeal things, such as an attack on property—rights can be violated as well: "The defence [*rerum defensio*] or recovery of possessions [*rerum recuperatio*], and the exaction of a debt [*debitum*] or of penalties due, all constitute just causes of war [*iustae bellorum causae*]. Under the head of 'possessions' [*res*], even rights [*iura*] should be included."[48]

The use of common goods (*res communes*) such as the high seas is exactly such a right that can be defended in a just war. Grotius, true to his Roman law sources, treats the right to use the sea as a quasi-possession under Roman law,[49] in that he treats it as an interest that is, although strictly speaking not capable of being possessed—since *usus* in Roman law is as an incorporeal interest not capable of *possessio,* just of *quasi possessio*[50]—still enjoying the protection of the remedy designed to protect possession. According to Grotius, a prohibitory interdict, which usually prohibits the use of force against the last rightful possessor, can enforce the right to the use of the high seas. In *De iure praedae,* however, this turns into a *right* of the last rightful

44. *ML* 13, p. 75: "Quod autem in iudicio obtineretur, id ubi iudicium haberi non potest, iusto bello vindicatur."

45. *ML* 13, p. 75: "Et quod proprius est nostro argumento, Pomponius eum qui rem omnibus communem cum incommodo ceterorum usurpet, MANU PROHIBENDUM respondit." The adduced passage (Pomponius *Digest* 41, 1, 50) reads: "Quamvis quod in litore publico vel in mari exstruxerimus, nostrum fiat, tamen decretum praetoris adhibendum est, ut id facere liceat: immo etiam manu prohibendus est, si cum incommodo ceterorum id faciat: nam civilem eum actionem de faciendo nullam habere non dubito." The conclusion by J. Ziskind, "International Law and Ancient Sources: Grotius and Selden," *The Review of Politics* 35 (1973): 545 that the use of force was not mentioned by Pomponius, is baffling.

46. Marcellinus *Digest* 1, 8, 2, 1: "Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris."

47. *IPC* 12, fol. 119 (=*ML* 13, p. 74); the citation is from Ulpian *Digest* 43, 12, 1, 17.

48. *IPC* 12, fol. 116' (a passage omitted from *ML*).

49. *IPC* 12, fol. 116' (omitted from *ML*): "Si quis igitur ius tale quasi possideat [. . .]."

50. The terminology is probably post-classical; see W. W. Buckland, *A Text-Book of Roman Law,* 2nd ed. (Cambridge: Cambridge University Press, 1932), 196f.

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possessor, i.e., the Dutch, to assert their claim to the use of the high seas by force, given the absence of courts: "For in all cases to which prohibitory interdicts are properly applicable in court procedure, armed prohibition is proper outside the courts."[51]

The above illustrates a most important way in which Grotius used private Roman law, viz., how he framed the procedural remedies provided by that law in a language of subjective natural rights. In the *Defensio* of chapter five of *Mare liberum,* Grotius elucidates his notion of right in a subjective sense, a notion already applied in the subtitle of *Mare liberum:* "The Right [*ius*] Which Belongs to the Dutch to Take Part in the East Indies Trade."[52] Grotius, who in *De iure praedae* had used the term "right" (*ius*) in an equivocal way to denote both objective law and subjective rights, ten years later explicitly introduced the notion of a subjective right in his defense of the fifth chapter of *Mare liberum,* directed against William Welwod's attack.[53] In the *Defensio,* Grotius moved to impute to the Roman lawyers the notion of exactly such a claim-right:[54] "Now add the fact that the sea is not only said by the jurists to be common by the law of nations, but without any addition it is said to be of the right [*ius*] of nations. In these passages 'right' [*ius*] can not mean a norm of justice [*norma aliqua iusti*], but a moral faculty over a thing [*facultas moralis in re*], as when we say 'this thing is of my right [*ius*], that is, I have ownership [*dominium*] over it or use or something similar.'"[55]

In *De iure praedae,* Grotius used the term iridescently both in its subjective and its objective sense, but in the *Defensio,* Grotius unambiguously attributed a subjective sense to the notion of right, asserting that *iuris gentium esse* had in fact assumed a subjective sense already in the *Digest.*[56]

51. *IPC* 12, fol. 116' (omitted from *ML*): "Nam quoties in iudiciis interdicta competunt prohibitoria, toties extra iudicia prohibitio competit armata."

52. *Mare liberum, sive de iure quod Batavis competit ad Indicana commercia.*

53. For an excellent discussion of the gradual development of the notion of subjective rights in Grotius's work, see Haggenmacher, "Droits subjectifs."

54. For the notion of a claim-right, see W. Hohfeld, *Fundamental Legal Conceptions, as Applied in Judicial Reasoning, and Other Legal Essays,* ed. W. W. Cook (New Haven: Yale University Press, 1919), 36.

55. Grotius, *Free Sea,* 107; *DCQ,* 348: "Adde iam quod Mare non tantum dicitur a Iurisconsultis esse commune gentium iure, sed sine ulla adiectione dicitur esse Iuris gentium, quibus in locis ius non potest significare normam aliquam iusti, sed facultatem moralem in re: ut cum dicimus haec res est iuris mei id est habeo in ea dominium aut usum aut simile aliquid." The notion of *ius* as a *facultas* had already been developed by Jean Gerson in the early fifteenth century; see R. Tuck, *Natural Rights,* 25f; but see B. Tierney, "Tuck on Rights. Some Medieval Problems," *History of Political Thought* 6 (1983), 429–41; Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997), 207–35.

56. Grotius probably alludes to *Digest* 1, 8, 4, where it is said that nobody could be denied access to the seashore, provided he keeps clear of houses and buildings, because these are not, as opposed to the sea, subject to the *ius gentium* ("quia non sunt iuris gentium sicut et mare"). Cf. *Instititiones* 2, 1, 1.

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He suggested that the genitive *iuris gentium esse* uses the term *ius* in a subjective sense, as in *iuris mei esse,* in order to be able to present the sea as a subjective "*right* of nations." Such a subjective interpretation of the formulation *mare iuris gentium esse,* as it appears in the *Digest,* is certainly untenable—the only thing the Roman jurists meant by that phrase was that the sea was governed by the rules of the *ius gentium.* It is not clear that Grotius himself, when composing *De iure praedae,* understood the phrase *mare iuris gentium* in a subjective sense.[57] Not later than with the *Defensio,* however, this version was convenient for Grotius both because it supported his subjective use of *ius* in other passages and because it fitted his rendering of the various *actiones* and *interdicta* as rights.

This is one of the very few examples where Grotius, seemingly deliberately, abuses his Roman source material and falsely attributes to the Roman jurists a subjective use of *ius gentium* as "right of nations" instead of "law of nations." The general thrust of the argument, however, namely that the term "right" (*ius*) could be used consistently to cover the technical Roman law terms for the various remedies, expresses an important insight into the nature of these remedies, especially given the equitable character of those stemming from *ius gentium.*[58] As Alan Gewirth[59] and more recently Charles Donahue have pointed out: "A legal system like the Roman that conceives of rights and duties in terms of what one can bring an action for, must have the concept of subjective right, even if it never uses the term."[60] The rendering of the various remedies, the *actiones* and *interdicta,* as *iura,* and especially the view that doing a wrong consists in a breach of a subjective right, might have been inspired by the French predecessors of Grotius, the humanists of the *mos Gallicus,* particularly by Donellus,[61] but it could already be found in the texts of Roman law codified by Justinian.[62]

57. Grotius refers in *DCQ* back to the following passage in *IPC* 12, fol. 100' (=*ML* 5, p. 22): "De mari autem prima sit consideratio, quod cum passim in iure aut nullius, aut commune, aut publicum iuris gentium dicatur." In the manuscript, the words *iuris gentium* look as if they had originally read *iure gentium,* "according to the law of nations," and were changed only later to the genitive.

58. Where the praetor would grant a remedy based on equity (*aequitas*), even when there was no remedy available in his edict.

59. See Gewirth, *Reason,* 100.

60. Donahue, "Ius," 530. Most Roman law textbooks cannot do without the notion of right; see, e.g., Buckland, *Roman Law,* passim.

61. For Donellus and his subjective conception of *ius,* see H. Coing, "Zur Geschichte des Begriffs subjektives Recht," in Coing, *Gesammelte Aufsätze* (Frankfurt am Main: V. Klostermann, 1982), 1:251–54; Haggenmacher, *Grotius et la doctrine,* 178–80; Haggenmacher, "Droits subjectifs," 113.

62. See, e.g., the way Celsus characterizes the term *actio* as a right (*ius*) in the context of actions *in personam* in *Digest* 44, 7, 51: "Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi." ("An action is nothing else but the right to recover by judicial process

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In the early, hitherto unpublished manuscript *Theses LVI,* a very important source for the development of Grotius's thought on rights in a state of nature, Grotius already used the term *ius* in an obviously subjective and individuated sense.[63] In the second thesis, Grotius gives the following description of the rights that belong naturally to man: "A human being naturally [*naturaliter*] has a right [*ius*] to his actions [*actiones*] and his possessions [*res*], a right both to retain them and to alienate them: regarding life and body, only to retain them. This right, flowing from the law of God [*ius Dei*], is restricted by the law of God, by the law of nature [*per legem naturalem*], and by the Bible and the revelation."[64]

Subjective natural rights on this account are rights that one can "have," different from the objective norms of law,[65] norms that may restrict the subjective rights bestowed on human beings in the state of nature.[66] The rights vested in the subjects of the law of nature according to the *Theses LVI* are of a universal character, insofar as they pertain to everyone *naturaliter.* Moreover, they are rights that can be described as claims *in rem* in the Roman law sense, insofar as they oblige everyone to respect these rights. The natural, universal subjective rights in the *Theses LVI* constitute a quasi-sovereign territory of the individual subject of law in the state of nature and are an absolute barrier to the claims of all the other subjects of natural law: "Human beings do not have a natural right [*ius non habet naturaliter*] to

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that which is owing to one.") For further examples, see the appendix in Donahue, "Ius," 531ff. (which does not contain, however, the passage by Celsus just cited).

63. The dating of the manuscript remains tentative; Professor Peter Borschberg holds that based on an analysis of the paper's watermarks, the manuscript appears to have been written in the first decade of the seventeenth century, presumably between 1602 and 1605. Based on an analysis of the concepts used, however, I would date the work rather around the *DCQ* (1615), both because of the clear-cut subjective use of *ius* and because of a marginal note denying a natural right to punish (see below, n. 78), which would be more in line with later works such as *Defensio fidei catholicae de satisfactione Christi* and *De imperio summarum potestatum circa sacra,* both written between 1614 and 1617.

64. *TQ,* fol. 287 recto, thesis 2: "Homo naturaliter ius habet in actiones et res suas tum retinendi tum abdicandi: vita autem et corpus retinendi tantum. Hoc tamen ius a iure Dei dimanans ab eodem restringitur, per legem naturalem et per verbum tum extrinsecum tum intrinsecum, id est Scripturam et Revelationem." It is obvious that Grotius in this work is still indebted to certain Thomist patterns of thought, more so than in his later *De iure belli ac pacis;* for an account of the development of Grotius's natural law works, see Straumann, *Hugo Grotius und die Antike.*

65. See Haggenmacher, "Droits subjectifs," 81f., who assumes that Grotius only later came to differentiate strictly between subjective and objective *ius.*

66. In a similar way as natural liberty in the *Institutes* may be restricted by law (*ius*); Florentinus *Institutiones* 1, 3, 1: "Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur." *Pace* Quentin Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998), 19, the Romans jurists obviously thought of freedom as a natural power.

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the life, body, actions and possessions of another man, insofar as the other's life, body, actions or possessions are ordinary means to the self-interested [*ad bonum suum*] pursuit of the right [*ius*] to life, body, actions, and possessions [*res*] that everybody has [*quod quisque habet*]. Consequently, human beings do not have a [natural] right to punishment."[67]

The idea of a *numerus clausus* of rights that one can have, as put forward in *De iure praedae* as well as in *De iure belli ac pacis,* can also be seen in the *Theses LVI.* The rights here are comparable to the rights enumerated in *De iure praedae;* the right to one's own actions points to the freedom of contract, which constitutes the premise of the right to enforce contractual claims. The right to one's own things foreshadows the right to private property, as well as to contractual claims arising out of contracts of sale, while the right to one's life and body corresponds to the right to self-defense. It is remarkable that, as opposed to both *De iure praedae* and *De iure belli ac pacis,* the right to one's own life and body is not alienable.

In concluding the general discussion of *ius* as subjective right, I submit that subjective rights claims clearly do not hinge on the language of rights and the *ius* terminology, but must be conceived as already inherent in the remedies granted under the law of the *Digest.* The intellectual history of natural rights must consequently be seen as an extension of the remedies granted by Roman procedure—Grotius casting subjective *iura* in actions and injunctions granted by the Roman lawyers of the *Digest.* Grotius's originality lies in the fact that he identified an already existing tradition of natural rights with Roman law remedies, internalizing these remedies by making them a subjective moral quality of each individual, or each individual group of people.

II. Self-Defense

Both in this and in the next section, the ethical works of Marcus Tullius Cicero (106–43 B.C.), *De finibus* (*On Ends*) and especially *De officiis* (*On Duties*), play a vital role. It is important to note that Cicero's hugely influential[68] ethical treatises, albeit containing and reflecting upon the doc-

67. *TQ,* fol. 287 recto, thesis 6: "Homo autem ius non habet <naturaliter> in <vitam corpus> actiones et res alterius hominis, insiquatenus illae <vita corpus> actiones aut res alterius sunt media ordinata ad consequendum <ad bonum suum> ius quod quisque habet in vitam, corpus, actiones et res suas. <Ergo non habet ius puniendi>[.]" The bracketed words are marginal notes inserted by Grotius.

68. On the influence of *De officiis,* see the brief sketch with literature in A. R. Dyck, *A Commentary on Cicero, De Officiis* (Ann Arbor: University of Michigan Press, 1996), 39–49.

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trines of the most important Hellenistic philosophical schools, are, first and foremost, an expression of Roman practical morality, with a particular emphasis on political morality and the virtue of justice. While the theory of justice advanced in *De officiis* reflects many Greek, mainly Stoic, ideas, philological scholarship has moved increasingly away from treating Cicero as just another source for Stoic thought, acknowledging the important function of Roman law and jurisprudence in Cicero's theory of justice.[69] Not only did Cicero frequently borrow legal cases in order to illustrate moral and political issues,[70] but, more importantly, the substantive rules of Roman property and contract law entered his theory of justice.[71] The quasi-legal, Roman character of Cicero's moral philosophy has to be kept in mind as we proceed to examining the way Grotius elaborated his rights doctrine by making use of Roman sources.

Grotius's right to self-defense emanates from his first so-called law (*lex*), as formulated in the "Prolegomena" to *De iure praedae:* "It shall be permissible to defend [one's own] life and to shun that which threatens to prove injurious."[72] In the marginal note, Grotius referred to passages out of Cicero's works *De officiis* and *De finibus* as the sources of that first law, which indeed constitutes a paraphrase of the adduced Ciceronian passages wherein the natural appetite for self-preservation is portrayed, in a Stoic tradition, as common to all living creatures.[73] What Cicero had described as natural and therefore desirable in a Stoic sense,[74] Grotius formulated as a permissive norm of the law of nature. Moreover, Grotius in the marginal note to his "first law" also referred to Cicero's forensic speech *Pro Milone,* where Cicero himself, writing in 52 B.C., a time ridden with lawlessness and bound for civil war, had rendered self-preservation as a legal principle.[75]

69. See ibid., 29–36.

70. See, e.g., Cicero *De officiis* 3, 50–68; 2, 78–80.

71. See Cicero *De officiis* 2, 78–80, where the injustice of re-distribution is evoked; see below.

72. *IPC* 2, fol. 6: "VITAM TUERI ET DECLINARE NOCITURA LICEAT."

73. Cicero *De officiis* 1, 11: "Principio generi animantium omni est a natura tributum, ut se, vitam corpusque tueatur, declinet ea, quae nocitura videantur, omniaque, quae sint ad vivendum necessaria anquirat et paret, ut pastum, ut latibula, ut alia generis eiusdem." Cicero *De finibus* 4, 16: "Omnis natura vult esse conservatrix sui, ut et salva sit et in genere conservetur suo." Cicero *De finibus* 5, 24: "Omne animal se ipsum diligit, ac simul ortum est id agit ut se conservet, quod hic ei primus ad omnem vitam tuendam appetitus a natura datur, se ut conservet atque ita sit affectum ut optime secundum naturam affectum esse possit."

74. For the Stoic background (*oikeiosis*) of Cicero *De officiis* 1, 11, see Dyck, *Commentary,* 86ff. For Grotius's use of the Stoic concept, see B. Straumann, "*Appetitus societatis* and *oikeiosis:* Hugo Grotius' Ciceronian Argument for Natural Law and Just War," *Grotiana New Series* 24/25 (2003/2004): 41–66.

75. Cicero *Pro Milone* 10.

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Self-help was lawful in the absence of judicial authority and in a context of diminishing sovereign power, Cicero held, under a "law which is a law not written, but created by nature."[76]

In the seventh chapter of *De iure praedae,* Grotius, setting forth the right to self-defense, drew again on Cicero's *Pro Milone.* Every just war according to Grotius has its origin in one of four just causes of war, self-defense (*sui defensio*) being the first of these just causes. Grotius then justifies self-defense with an argument out of *Pro Milone,* according to which "the act of homicide is not only just but even necessary, when it represents the repulsion of violence by means of violence."[77] The right to self-defense according to Grotius inheres naturally not only in commonwealths, but also in individuals: "The examples afforded by all living creatures show that force privately exercised for the defence and safeguarding of one's own body is justly employed."[78] Grotius supports this contention with various Roman law passages, the following passage from Florentinus out of the *Digest* among them: "[It belongs to the law of nations] to repel violent injuries. You see, it emerges from this law that whatever a person does for his bodily security he can be held to have done rightfully; and since nature has established among us a relationship of sorts, it follows that it is a grave wrong for one human being to encompass the life of another."[79]

Defense against an unlawful attack constitutes, according to the law of the *Digest,* a justification for an encroachment on somebody else's rights. Grotius adduces a further passage from the *Digest* that excepts the bearing of weapons "for the purpose of protecting one's own safety" from the general prohibition under the *lex Julia* on *vis publica* to collect or carry weapons.[80] Clearly, Grotius's just cause of self-defense is modeled on the notion of self-defense as emerging from the *Digest* and some of Cicero's works, with the background of Cicero's speech *Pro Milone*—the civil warlike circumstances of the fading Roman republic with its crumbling institutions—providing

76. Ibid.; cited in *IPC* 1, fol. 4'.

77. *IPC* 7, fol. 29': "Bellum igitur omne quatuor causarum ex aliqua oriri necesse est. Prima est sui defensio, ex lege prima. Nam ut Cicero inquit, illud est non modo iustum, sed etiam necessarium, cum vi vis illata defenditur." The citation is from Cicero *Pro Milone* 9.

78. *IPC* 7, fol. 30a: "Ad defensionem tutelamque corporis sui privata vis iusta est omnium animantium exemplo."

79. Florentinus *Digest* 1, 1, 3: "ut vim atque iniuriam propulsemus: nam iure hoc evenit, ut quod quisque ob tutelam corporis sui fecerit, iure fecisse existimetur, et cum inter nos cognationem quandam natura constituit, consequens est hominem homini insidiari nefas esse." Here nature is taken to give rise to the Stoic concept of *oikeiosis;* see Straumann, "*Appetitus societatis.*"

80. *Digest* 48, 6, 11, 2: "Qui telum tutandae salutis suae causa gerunt, non videntur hominis occidendi causa portare."

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the paradigm for Grotius's concept of a natural state, characterized by the absence of judicial organs and the norms of a natural law.

III. Private Property

The second of Grotius's so-called "laws" presented in the "Prolegomena" to *De iure praedae* reads: "It shall be permissible to acquire for oneself, and to retain, those things which are useful for life."[81] Citing from Cicero's *De officiis,* Grotius goes on to write: "The latter precept, indeed, we shall interpret with Cicero as an admission that each individual may, without violating the precepts of nature, prefer to see acquired for himself rather than for another, that which is important for the conduct of life."[82]

Grotius explains that among the ancient schools of philosophy there had been unity in this regard, supporting this contention with a reference to Cicero's portrayal of the various ethical doctrines in *De finibus.*[83]

In *Mare liberum* (chapter twelve of *De iure praedae*), Grotius discusses the origin of the *institution* of private property by paraphrasing Cicero's explanation of the *acquisition* of private property in *De officiis,* an explanation that is based on the Roman law concept of long occupancy (*vetus occupatio*).[84] In the "Prolegomena," Grotius writes that use of certain things requires the acquisition (*apprehensio*) and possession (*possessio*) of these things, and hence the institution of private property (*dominium*) had originated.[85] In the marginal note, Grotius refers to a passage by the late second century A.D. jurist Paulus out of book 41 of the *Digest,* where the origin of private property is traced back to "natural possession," i.e., the acquisition of possession of an unowned thing *ab initio.*[86] Grotius's account does not take property to be an original institution of natural law,

81. *IPC* 2, fol. 6: "ADIUNGERE SIBI QUAE AD VIVENDUM SUNT UTILIA EAQUE RETINERE LICEAT."

82. *IPC* 2, fol. 6: "quod quidem cum Tullio ita interpretabimur: concessum sibi quisque ut malit, quod ad vitae usum pertinet, quam alteri acquiri id fieri non repugnante natura." Grotius is citing from Cicero *De officiis* 3, 22, where we read: "Nam sibi ut quisque malit, quod ad usum vitae pertineat, quam alteri adquirere, concessum est non repugnante natura [. . .]." In *De iure belli ac pacis,* Grotius cited the whole paragraph from *De officiis.* For the Stoic background of this concept of nature and the similarity to a passage in Seneca, see Dyck, *Commentary,* 524, 527.

83. *IPC* 2, fol. 6: "Hac enim de re et Stoicis et Epicureis et Peripateticis convenit, ne Academici quidem videntur dubitasse."

84. *IPC* 12, fol. 101' (=*ML* 5, p. 25), adducing Cicero *De officiis* 1, 21.

85. *IPC* 2, fol. 6f.

86. *Digest* 41, 2, 1, 1: "Dominiumque rerum ex naturali possessione coepisse Nerva filius ait eiusque rei vestigium remanere in his, quae terra mari caeloque capiuntur: nam haec protinus eorum fiunt, qui primi possessionem eorum adprehenderint."

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but, once constituted, private property is protected by the natural legal rules—there are, on Grotius's view, principles of natural justice governing property holdings. Property, then, is not constituted by government.[87] This is very similar to Cicero's account in *De officiis*—where he is most probably expressing tenets of late republican property law[88]—although it seems that both Paulus in book 41 of the *Digest* and Cicero in fact presuppose the notion of private property as an institution, rather than explaining its origin, and explain merely the *acquisition* of private property.

Grotius holds that the institution of private property is not the result of a sudden decision, but was brought about by slow change that started under the guidance of nature (*monstrans natura*).[89] There are certain things, Grotius writes, that are consumed by use, a fact making it impossible to distinguish between use and property.[90] Grotius predicates this view on a passage of the *Digest,* which deals with usufruct (*ususfructus*) of money and other consumables.[91] With regard to these things, the usufructuary under Roman property law becomes the full owner. The thing belongs to the usufructuary in an exclusive way, belonging to nobody else at the same time—the concept of private property as the most comprehensive right somebody can have in a thing is therewith formulated. This concept was then, according to Grotius, extended to clothes and gradually to immovable things.[92] As the institution of private property had thus been "invented"

87. A view very similar to John Locke's in his *Second Treatise of Government;* see J. Locke, *Two Treatises of Government,* ed. P. Laslett (Cambridge: Cambridge University Press, 1967), *Second Treatise,* sects. 3, 124, 134, 136. See also J. Waldron, "Locke, Tully, and the Regulation of Property," *Political Studies* 32 (1984): 98.

88. See Cicero *De officiis* 1, 21. For the property law of the late republican period, see A. Watson, *The Law of Property in the Later Roman Republic* (Oxford: Clarendon Press, 1968), 71f. For the status of private property in Cicero's political thought, see N. Wood, *Cicero's Social and Political Thought* (Berkeley: University of California Press, 1988), 111–15.

89. For the conception of private property in *Mare liberum,* see the survey in Tully, *A Discourse,* 68–70.

90. *IPC* 12, fol. 101 (=*ML* 5, p. 24): "Ad eam vero quae nunc est dominiorum distinctionem non impetu quodam sed paulatim ventum videtur initium eius monstrante natura. Cum enim res sint nonnullae quarum usus in abusu consistit, aut quia conversae in substantiam utentis nullum postea usum admittunt, aut quia utendo fiunt ad usum deteriores, in rebus prioris generis, ut cibo et potu, proprietas statim quaedam ab usu non seiuncta emicuit."

91. *Digest* 7, 5: "De usu fructu earum rerum, quae usu consumuntur vel minuuntur." This corresponds to the argument used by Pope John XXII against the Franciscans in the fourteenth century; Grotius in the marginal note refers both to John XXII and to Thomas Aquinas. See Tierney, *Idea,* 330f., who ascribes Grotius's reasoning solely to the canonistic tradition, ignoring that John XXII himself had argued using Roman law principles.

92. *IPC* 12, fol. 101 (=*ML* 5, p. 24): "Hoc enim est proprium esse, ita esse cuiusquam ut et alterius esse non possit: quod deinde ad res posterioris generis, vestes puta et res mobiles alias aut se moventes ratione quadam productum est. Quod cum esset, ne res quidem immobiles omnes, agri puta indivisae manere potuerunt [. . .]."

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(*reperta proprietas*), the law codifying that institution was stipulated in order to "imitate nature."[93] Private property, then, is on Grotius's account an institution of the state of nature, perfectly possible apart from civil society and government. Although not existing by nature, the institution of private property nevertheless came into being in a natural way. Grotius adduces the famous theater analogy, which originally stems arguably from Chrysippus,[94] citing it from Seneca's *De beneficiis:* "The equestrian rows of seats belong to *all* [*omnes*] the Roman knights; yet the place that I have *occupied* [*occupavi*] in those rows becomes my *own* [*proprius*]."[95]

In the *Defensio capitis quinti,* his defense of chapter five of *Mare liberum* against William Welwod, Grotius describes the emergence of private property in a concise passage dedicated to the interpretation of Cicero's statement in *De officiis* that "no property is private by nature."[96] Grotius argues that Welwod had wrongly ridiculed this statement by Cicero. According to Grotius, Cicero's statement should not be read to mean that nature contradicts private property, rather that nature in itself did not make anything private property:[97]

> Therefore, in order that this thing become the property of that man, some deed [*factum*] of the man should intervene [*intercedere*], and therefore nature itself does not do this by itself. Hence it is evident that community [*communitas*] is prior to property [*proprietas*]. For property does not occur except through occupation [*occupatio*], and before occupation, there must precede the right

93. *IPC* 12, fol. 101' (=*ML* 5, p. 25): "Repertae proprietati lex posita est quae naturam imitaretur."

94. See Cicero *De finibus* 3, 67, where the following statement is imputed to Chrysippus: "Sed quemadmodum, theatrum cum commune sit, recte tamen dici potest eius esse eum locum quem quisque occuparit, sic in urbe mundove communi non adversatur ius quo minus suum quidque cuiusque sit." See A. A. Long, "Stoic Philosophers on Persons, Property-Ownership and Community," in *Aristotle and After,* ed. R. Sorabji (London: Institute of Classical Studies, 1997), 24f., who takes Cicero at his word, ascribing this moral justification of private property not very plausibly already to the Greek Stoa from Chrysippus. See thereto the criticism in P. Mitsis, "The Stoic Origin," 171f.

95. *IPC* 12, fol. 101' (=*ML* 5, p. 25): "Equestria OMNIUM equitum Romanorum sunt: in illis tamen locus meus fit PROPRIUS, quem OCCUPAVI." The citation is from Seneca *De beneficiis* 7, 12, 3.

96. Cicero *De officiis* 1, 21: "privata nulla natura." Translations of *De officiis* are taken from Cicero, *On Duties,* ed. M. T. Griffin and E. M. Atkins (Cambridge: Cambridge University Press, 1991); some of the translations have been modified.

97. *DCQ*, 336: "Inter quae Ciceronis illud irrideri maxime miror, nihil esse privatum natura, cum sit apertissimae veritatis. Non enim hoc vult Cicero, repugnare naturam proprietati et quasi vetare ne quid omnino proprium fiat, sed naturam per se non efficere ut quicquam sit proprium [. . .]." Grotius's interpretation of Cicero is in line with the standard one; see M. Wacht, "Privateigentum bei Cicero und Ambrosius," *Jahrbuch für Antike und Christentum* 25 (1982): 35–38.

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> of occupation [*ius occupandi*]. Now this right [*ius*] is not competent to this man or that man, but to all men equally, and is rightly expressed under the term "natural community" [*communitas naturalis*]. And hence it happens that what has not yet been occupied by any people or by a man is still common, that is, belongs to no one, and open equally to all. By this argument it is surely proved that nothing belongs [*proprium*] to anyone by nature.[98]

Everyone therefore has at least a potential right to acquisition in the sense of occupation and in this sense a right to private property. Unlike in the *Theses LVI,* private property in the *Defensio* (as already in *De iure praedae*) is not simply presupposed as natural. Rather, its emergence as an institution is explained, and at the same time the emergence of the existing, concrete property regime is explained. The explanation is clearly taken from Roman law, especially book 41 of the *Digest,*[99] and from Cicero,[100] who himself had absorbed the Roman law tenets regarding the natural acquisition of property. The main idea consists in every human being having *ab initio* just a general right to be *eligible* to acquire property by occupation, i.e., a right to the *possibility* of being a property-owner,[101] and not a general right to private property as such. Grotius's right to actual property can be correctly described as a special right,[102] having come into being by virtue of certain contingent transactions, and giving the right-bearer an exclusive, absolute right *in rem* against everyone else, while only his right to be *eligible* to acquire property could be adequately described as a general right *in rem* inhering in every human being *ab initio.*[103]

The process of acquisition itself, or rather the normative principles that apply to that process, are not Grotius's main concern. The *distribution* of property is left largely to coincidence. The origin of concrete claims to property, characterized by no moral restrictions, stands vis-à-vis the

98. *DCQ,* 336: "ergo ut res ista fiat istius hominis, factum aliquod hominis debet intercedere, non ergo hoc facit ipsa per se natura. Unde etiam illud apparet, communitatem priorem esse proprietate. Nam proprietas non contingit nisi occupatione, ante occupationem vero praecedat necesse est ius occupandi; hoc autem ius non huic aut illi, sed universis omnino hominibus ex aequo competit, ideoque communitatis naturalis nomine recte exprimitur. Et hinc evenit, ut quae nondum occupata sunt aut a populo ullo aut ab homine etiamnunc sint communia, hoc est nullius propria omnibus ex aequo exposita: quo argumento certissime evincitur nihil a natura cuiquam esse proprium."

99. See *Digest* 41, 1, 1–41, 9, 2; the passages are taken mainly from Gaius.

100. Cicero *De officiis* 1, 21.

101. See J. Waldron, *The Right to Private Property* (Oxford: Clarendon, 1988), 382f.

102. For a discussion of such special rights *in rem,* see Waldron, *Private Property,* 106–9.

103. In the *TQ,* all the rights described are protected absolutely in that the holders of the rights hold an absolute claim-right against everyone else, entailing a correlative duty of non-interference on the part of everyone else; the subjective rights in *TQ* are all general rights *in rem,* inhering in everyone *ab initio.*

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completed institution of private property, which serves in Cicero as well as in Grotius as the main yardstick for a natural justice of *compensatory* character. Apart from the Roman law requirement that the thing to be acquired as property be *res nullius,* i.e., not yet in anybody else's property,[104] the original acquisition and distribution of property are not subject to any further normative criteria,[105] neither on Cicero's nor on Grotius's account. Once emerged, however, private property serves as the pivotal criterion of natural justice. In speaking about the existing property claims of his time, Cicero says, immediately after the passage cited by Grotius: "If anyone else should seek any of it [i.e., already existing, distributed property] for himself, he will be violating the law of human fellowship."[106] This is a passage Grotius refers to in the marginal note to his fourth so-called law, which should be read as a paraphrase of Cicero: "Let no one seize possession of that which has been taken into the possession of another."[107] It is probable—although he does not say explicitly in *De iure praedae*[108]—that Grotius also has an example by Chrysippus in mind, handed down by Cicero in *De officiis,* which may serve as a normative principle for the process of acquisition by first occupancy: "Among Chrysippus's many neat remarks was the following: 'When a man runs in the stadium he ought to struggle and strive with all his might to be victorious, but he ought not to trip his fellow-competitor or to push him over.'"[109]

104. For the influence of the Roman doctrine of *res nullius* on the international law doctrine of *terra nullius,* see R. Lesaffer, "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription," *The European Journal of International Law* 16 (2005): 25–58, at 45f. Lesaffer's claim that Roman law had not recognized the occupation (*occupatio*) of land as a mode of acquisition is aimed at the Roman law concept of *occupatio* in its strict and original sense; however, real property in Italy could eventually be acquired by occupation in combination with adverse possession (*usucapio*).

105. Although the criteria are meager, it is not justified to speak of "no criterion for deciding whether an entitlement is just," as Julia Annas does; J. Annas, "Cicero on Stoic Moral Philosophy and Private Property," in *Philosophia Togata,* ed. M. Griffin and J. Barnes (Oxford: Clarendon Press, 1989), 170. In Cicero *De officiis* 1, 21, victory in a war is mentioned as a further possibility of acquiring property, without clarifying whether it is required that the war be just, which would obviously constitute a further normative criterion. See the discussion of this passage in Dyck, *Commentary,* 110f. Annas, "Cicero," 170, n. 25 describes conquest as unjust acquisition, without considering conquest in a just war.

106. Cicero *De officiis* 1, 21: "e quo si quis sibi appetet, violabit ius humanae societatis."

107. *IPC* 2, fol. 7: "NE QUIS OCCUPET ALTERI OCCUPATA. Haec lex abstinentiae [. . .]."

108. In *De iure belli ac pacis* Grotius referred to it; see *IBP* 2, 2, 2, 5, note 6.

109. Cicero *De officiis* 3, 42: "Scite Chrysippus, ut multa, 'qui stadium,' inquit, 'currit, eniti et contendere debet quam maxime possit, ut vincat, supplantare eum, quicum certet, aut manu depellere nullo modo debet; sic in vita sibi quemque petere, quod pertineat ad usum, non iniquum est, alteri deripere ius non est.'"

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According to one commentator, this concept has introduced an "economic individualism" into political thought, which had been "alien to the speculations of Plato and Aristotle."[110] The Ciceronian view of the just original acquisition of property is thus seen in a philosophical tradition that leads up to John Locke and, later, Robert Nozick. A very strong protection of property rights as well as correspondingly strong skepticism towards (re-) distributive justice is of course a corollary of this doctrine, as Cicero himself knew:

> Those who wish to present themselves as *populares,* and for that reason attempt agrarian legislation so that landholders are driven from their dwellings, or who think that debtors ought to be excused from the money that they owe, are undermining the very foundations of the political community: [. . .] justice [*aequitas*] utterly vanishes if everyone may not keep that which is his. For [. . .] it is the proper function of a polity [*civitas*] and a city [*urbs*] to ensure for everyone a free [*libera*] and unworried guardianship [*custodia*][111] of his property.[112]

Indeed, in an earlier passage Cicero maintained that men had sought protection in cities "in the hope of safeguarding their property" and that political communities and polities were "constituted especially so that men could hold on to what was theirs,"[113] which led him to express particular concern about property taxes (*tributum*).[114]

Grotius is an important protagonist of that property-centered tradition of a "historical," "entitlement theory of justice."[115] Natural justice with regard

110. N. Wood, *Cicero's Thought,* 114: "Cicero, like John Locke much later, sees no contradiction between the imperative of morality and the demand of self-advancement as long as the latter is accomplished in a reasonable fashion and not at the expense of others, although both have a rather broad interpretation of what this means." Similar is A. A. Long, "Cicero's Politics in *De officiis,*" in *Justice and Generosity,* ed. A. Laks and M. Schofield (Cambridge: Cambridge University Press, 1995), 213–40, at 233. See also Waldron, *Private Property,* 153–55, who describes this account of the state of nature as "negative communism."

111. The term *custodia* is a legal term meaning, interestingly, an obligation to prevent theft. It appears in the *Digest* often as an absolute obligation, imposing strict liability without reference to negligence; see, e.g., *Digest* 4, 9, 1, 8.

112. Cicero *De officiis* 2, 78: "Qui vero se populares volunt ob eamque causam aut agrariam rem temptant, ut possessores pellantur suis sedibus, aut pecunias creditas debitoribus condonandas putant, labefactant fundamenta rei publicae, [. . .] aequitatem, quae tollitur omnis, si habere suum cuique non licet. Id enim est proprium [. . .] civitatis atque urbis, ut sit libera et non sollicita suae rei cuiusque custodia."

113. Cicero *De officiis* 2, 73: "Hanc enim ob causam maxime, ut sua tenerentur, res publicae civitatesque constitutae sunt. Nam, etsi duce natura congregabantur homines, tamen spe custodiae rerum suarum urbium praesidia quaerebant."

114. Cicero *De officiis* 2, 74.

115. As Robert Nozick would have it; see Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 153–60.

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to the original distribution of property both in Cicero and in Grotius is not predicated on the justness of the *result* of the distribution, but exclusively on the *procedure* governing the distribution. Only this procedure must be compatible with natural law in order for the original distribution of property to qualify as legitimate.[116] Grotius does not endeavor to argue morally for his preference of procedural over result-oriented natural justice, which is the obvious conceptual consequence of Grotius's developing a theory of the origin of the *institution* of private property out of the Roman law theory of natural *acquisition* of private property, without even trying to challenge the latter morally. Given the function of *De iure praedae* as a legal apology of the military expansion of the Dutch East India Company in Southeast Asia, this is not surprising—the Roman law doctrine allowed Grotius to refer the rules concerning private property solely to land, without having to abandon the idea of natural acquisition, and to exclude the sea from the things that are subject to the right to acquire by occupation (*ius occupandi*), making the Portuguese claims to the seaway to the East Indies appear as unlawful encroachments on property common to all (*res communis*).[117]

IV. The Right to Enforce Contractual Claims

Trade presupposes both some conception of private property and the idea of a right to alienate property. In reference to the eighteenth book of the *Digest,* which deals with the contract of sale, Grotius explains the origin of trade as the necessary consequence of the abolishment of common property and regards commerce as the natural and universal foundation of contracts.[118] Referring to Aristotle's *Politics,* Grotius writes that freedom of trade is part of natural law and for this reason cannot be abrogated, unless with the "consent of all nations."[119]

116. For criticism of these arguments of procedural justice, see Waldron, *Private Property,* 253–83.

117. See R. Brandt, *Eigentumstheorien,* 37, not paying attention to the historical context of Grotius's doctrine; see also F. Wieacker, *Privatrechtsgeschichte der Neuzeit,* 2nd ed. (Göttingen: Vandenhoeck & Ruprecht, 1967), 292.

118. *IPC* 12, fol. 114 (=*ML* 8, p. 62): "Sed cum statim res mobiles monstrante necessitate quae modo explicata est in ius proprium transissent, inventa est permutatio, qua quod alteri deest ex eo quod alteri superest suppleretur. [. . .] Postquam vero res etiam immobiles in dominos distingui coeperunt, sublata undique communio [. . .] neccessarium fecit commercium [. . .]. Ipsa igitur ratio omnium contractuum universalis, ἡ μεταβλητική a natura est [. . .]." Grotius refers to *Digest* 18, 1, 1 pr.: "Origo emendi vendendique a permutationibus coepit."

119. *IPC* 12, fol. 114' (=*ML* 8, p. 63f.): "Commercandi igitur libertas ex iure est primario gentium, quod naturalem et perpetuam causam habet, ideoque tolli non potest, et si posset

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Contractual relations are in Grotius's view derived from freedom of action, forming the origin of any positive arbitrary law that deviates from the law of nature. In the *Theses LVI,* Grotius renders the freedom of action as "the right to one's own actions" (*ius in actiones suas*), a right alienable by an indication of will (*indicium voluntatis*): "Both natural law [*lex naturalis*] and the Bible relate the restriction that man, by an indication of his will [*indicio voluntatis*], is being obliged [*obligetur*] to his fellow man and insofar gives up his right [*ius*], both with regard to his actions [*actiones*] and his possessions [*res*]."[120]

This means that the *Theses LVI* do not merely state a freedom of action, but they posit a natural right to one's action, implying the recognition of a *power*[121] to do something which is given legal effect under the law of nature. In *De iure praedae,* this power or right to one's actions is being described as analogous to the Roman conception of private property; liberty is to actions what private property is to things—natural liberty consists in the faculty to do what everyone wants to do, Grotius holds in reference to a passage in the *Institutes.*[122] Unlike private property, which in *De iure praedae* is not originally natural, the power or right to one's action is—as in the *Theses LVI*—a natural institution in the strict sense. Both actions and

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non tamen posset nisi omnium gentium consensu [. . .]." Previously, Grotius cites Aristotle *Politics* 1, 1257a15–17. Ironically, during the Anglo-Dutch colonial conference in 1613 in London, Grotius would be attacked by reference to this very sentence of his own. For the arguments of the English delegation, referring to *ML* 8, p. 63f., see G. N. Clark and W. J. M. Eysinga, *The Colonial Conferences between England and the Netherlands in 1613 and 1615,* vol. 1, Bibliotheca Visseriana 15 (Leiden: E. J. Brill, 1940), Ann. 38, p. 115f.: "Nec enim latere vos arbitramur quid in hanc sententiam scripserit assertor Maris liberi: 'Commercandi (inquit) libertas, quae ex iure est primario gentium et quae naturalem et perpetuam causam habet, tolli non potest et, si posset, non tamen nisi omnium gentium consensu.'" See also ibid., Ann. 39, p. 120; for the colonial conference in general see G. N. Clark, *The Colonial Conferences between England and the Netherlands in 1613 and 1615,* vol. 2, Bibliotheca Visseriana 17 (Leiden: E. J. Brill, 1951), 59–81.

120. *TQ,* fol. 287 recto, thesis 3: "Lex naturalis simul et Scriptura hanc restrictionem tradunt, ut Homo indicio voluntatis <alteri> facto obligetur, et eatenus amittat ius cum in actiones tum in res suas."

121. Best described in Hohfeldian terms as a power to alter existing legal arrangements; see Hohfeld, *Legal Conceptions;* for a useful summary, see J. Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice Hall, 1973), chapter 4; see for a discussion of such a power in the context of free trade Waldron, *Private Property,* 296.

122. *IPC* 2, fol. 10: "Quid enim est aliud naturalis illa libertas, quam id quod cuique libitum est faciendi facultas? Et quod libertas in actionibus idem est dominium in rebus." Grotius refers to Florentinus *Institutiones* 1, 3, 1: "Et libertas quidem est [. . .] naturalis facultas eius quod cuique facere libet [. . .]." The passage had already been used by Fernando Vázquez de Menchaca for the identification of *dominium* with *naturalis libertas* in his *Controversiae illustres* (1, 17, 4–5). See Tuck, *Natural Rights,* 51; Haggenmacher, "Droits subjectifs," 92.

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private property, however, can be alienated according to *De iure praedae,* which extends the commerce friendly aspect of the right to private property to one's own actions, and, in *De iure belli ac pacis* at the latest, to one's own person and body.[123]

Breaches of contract constitute, like violations of property rights, just causes of war. Grotius derives this formally from his sixth so-called law that "Good deeds must be recompensed."[124] Substantively, however, Grotius derives this just cause of war from the necessary condition for just war under the Roman fetial law (*ius fetiale*) that redress be demanded (*rerum repetitio*). Grotius attaches importance to the statement that breach of contract gives rise to an independent just cause of war, substantiating his claim by reference to the fetial formula handed down by Livy:

> A third cause [of just war]—one that a great many authorities neglect to mention—turns upon debts arising from a contract or from some similar source. To be sure, I presume that this third group of causes has been passed over in silence by some persons for the reason that what is owed us is also said to be our property. Nevertheless, it has seemed more satisfactory to mention this group specifically, as the only means of interpreting that well-known formula of fetial law: "And these things, which ought to have been given, done or paid, they have not given, paid or done."[125]

The addition of breach of contract to the traditional causes of war constitutes a clear deviation from the medieval tradition of just war jurisprudence, which had not acknowledged the violation of a contractual obligation as a just cause of war. Grotius's novel system of the law of war is best seen in light of the private law terminology of the law of the *Digest,* and of the parallel between individuals and polities, private and public war that goes along with that terminology.[126] The use of force for the collection of debt

123. In the *Theses LVI,* alienation is restricted to *res* and *actiones,* while later Grotius extends freedom of contract congruously to body and life.

124. *IPC* 2, fol. 8: "BENEFACTA REPENSANDA."

125. *IPC* 7, fol. 29': "Tertia, quae a plerisque omissa est, ob debitum ex contractu, aut simili ratione. Sed idcirco praeteritum hoc puto a nonnullis quia et quod nobis debetur nostrum dicitur. Sed tamen exprimi satius fuit cum et Iuris illa Fecialis formula non alio spectet: Quas res nec dederunt, nec solverunt, nec fecerunt, quas dari, fieri, solvi oportuit." The rendering of the fetial formula is taken from Livy 1, 32, 5.

126. See Haggenmacher, *Grotius et la doctrine,* 178–80, who intimates with regard to the distinction between absolute rights *in rem* and personal rights at the influence exerted by Donellus and his *Commentarii de iure civili* (1589). See also Haggenmacher, "Droits subjectifs," 113; Coing, "Zur Geschichte," 251–54. Grotius in 1618 had in his library a copy of Donellus's commentary on the title *De pactis et transactionibus* of the *Codex Justinianus;* see P. C. Molhuysen, "De bibliotheek van Hugo de Groot in 1618," *Mededeelingen der Nederlandsche Akademie van Wetenschappen,* Afdeeling Letterkunde, Nieuwe Reeks 6, 3 (1943), Nr. 246.

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is in Grotius's view just under the law of nature,[127] a stance characteristically substantiated by reference to the law of the *Digest.*[128] Grotius makes it clear that the right to wage war corresponds to a claim against a person under a contract in Roman law, or rather to the relevant remedy, the *actio in personam.* If according to Roman law there lies an *actio in personam* for the enforcement of a contractual claim, then in the state of nature everyone can under the law of nature legitimately enforce his contractual claims by the use of force. The institution of contract is for Grotius an institution of natural law, emanating from the natural liberty of action human beings in the natural state enjoy.[129]

These causes of war, corresponding to the *actiones in personam* under a contract in Roman law, are the same causes that Grotius in the "Prolegomena" had identified with the voluntary (*hekousia*) legal transactions described by Aristotle in the *Nicomachean Ethics* under the heading of compensatory justice.[130] The conception of contract, however, is understood in a wide sense and extended beyond the *numerus clausus* of Roman law types of contract, to include, as in *De iure belli ac pacis,* promises (*pacta nuda*). In support of his conception, Grotius hints at those passages in the *Digest* and in Cicero's *De officiis* which emphasize the element of mutual consent and give less weight to form.[131]

127. *IPC* 7, fol. 30a: "[. . .] privata vis iusta est omnium animantium exemplo [. . .] ad consequendum id quod nobis debetur."

128. *Digest* 42, 8, 10, 16: "Si debitorem meum et complurium creditorum consecutus essem fugientem secum ferentem pecuniam et abstulissem ei id quod mihi debebatur, placet Iuliani sententia dicentis multum interesse, antequam in possessionem bonorum eius creditores mittantur, hoc factum sit an postea: si ante, cessare in factum actionem, si postea, huic locum fore." Grotius does not cater to the differentiation made here in terms of the moment of the bankruptcy proceedings, which in absence of a judge is not relevant.

129. See Haggenmacher, "Droits subjectifs," 92; see also Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen,* who, however, refers almost exclusively to *De iure belli ac pacis.*

130. *IPC* 2, fol. 8, referring to Aristotle *Nichomachean Ethics* 5, 1131a1ff. See the discussion of Grotius's use of Aristotle's theory in Haakonssen, "Hugo Grotius and the History," 239–65, at 254ff. Haakonssen errs, however, in thinking that Grotius's compensatory justice is to be identified with Aristotle's particular justice, which would include distributive justice; Grotius in fact identifies his compensatory justice only with Aristotle's justice *en tois sunallagmasi.* See also *IBP* 1, 1, 8, 1.

131. Grotius cites—as later in *IBP*—Cicero *De officiis* 1, 23 on *fides* and *Digest* 2, 14, 1 on *pacta.* This is evidence against the view, held by Nörr, that Grotius's *fides* is a notion pertaining specifically to the law of nations and is not derived from the *bona fides* of Roman private law; see D. Nörr, *Die Fides im römischen Völkerrecht* (Heidelberg: C. F. Müller, 1991), 45f. For *fides* in Grotius's *Parallelon rerumpublicarum,* see W. Fikentscher, *De fide et perfidia. Der Treuegedanke in den "Staatsparallelen" des Hugo Grotius aus heutiger Sicht* (Munich: Verlag der Bayerischen Akademie der Wissenschaften, 1979). For the de-

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This conception corresponds to the account in the *Theses LVI;* Grotius compares the relations among the inhabitants of the natural state with the relations between a physician and a patient, where the physician only has consultative power (*consilii potestas*), not entitling him to hold any claims against the patient.[132] It is only through the means of consent, i.e., contract, that rights can be forfeited. Thus no one has any natural right of coercion (*ius exsecutionis*). Such a right can be created only through voluntary transactions that may give rise to rights in another subject.[133] These transactions are clearly modeled upon the Roman consensual contracts (*obligationes consensu contractae*) as described by Gaius,[134] where an agreement, entirely free of form, is enough to produce enforceable contracts.

Conclusion

By drawing on the normative Roman tradition described in this article, Grotius was able to formulate, independently from Christian sources, a secular doctrine of natural rights. The fact that this rights doctrine acknowledged both private entities—individuals and trading corporations—and states as subjects, was to have a decisive impact on subsequent political and constitutional thought. While Grotius had devised a legal theory of war, his view of the law of war did not presuppose public authority for a war to be lawful; indeed, the whole argument of *Mare liberum* aimed precisely at showing that the war waged by the Dutch East India Company and its predecessors against Spain in the East Indies was lawful even if one were not to concede a delegation of public authority to that trading company—a plausible view given the precarious nature of Dutch independence in the early seventeenth century. This however had a double-edged implication for sovereignty: not only were states endowed with certain rights, but so were individuals and private entities, and although Grotius's Roman rights

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velopment of the doctrine of *pactum nudum* in seventeenth-century Roman-Dutch law, see R. Zimmermann, "Roman-Dutch Jurisprudence and Its Contribution to European Private Law," *Tulane Law Review* 66 (1991–92): 1685–1721.

132. *TQ,* fol. 287 recto, thesis 7: "Quatenus autem eadem illa sunt media ordinata ad bonum cuique suum, eatenus homo alter in ea ius non habet; atque ita sapiens et medicus consilii habent potestatem non imperii: quod iure executionis demonstratur." The example can be attributed to Plato's *Gorgias (*456b*),* where Gorgias illustrates the alleged necessity of rhetoric with the example of the physician who has to coax the patient into taking his medicine.

133. *TQ,* fol. 287 recto, thesis 8: "Quod ita ver(um) est nisi consensus accesserit: cuius virtute alter ius habet ad eliciendi media ad bonum alterius."

134. Gaius *Institutiones* 3, 135f.

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doctrine was conceived for the high seas, which had remained in a state of nature, the doctrine, while strengthening the external sovereignty of states, left domestic sovereignty in a more ambiguous condition, with space for certain rights to be claimed against public authorities.[135]

There are thus considerable ramifications of Grotius's use of and dependency on a Roman tradition in developing his doctrine, since it seems to suggest that some of the crucial features of modern liberalism such as deontological individual rights were in fact derived explicitly, and with good reason, from a Roman tradition. The lessons to be drawn from such an account of Grotius's doctrine of rights, then, are both of a conceptual and an historical nature. Conceptual in that this account of Grotius's doctrine of rights suggests that anything deserving the label "negative liberty" is difficult to conceive of without a notion of subjective rights, and historical in that it may direct the ongoing search for the origins of modern rights-based moral, political, and legal thought towards the normative texts of Roman law and Roman ethics.

135. An implication which was to become more prominent in *De iure belli ac pacis;* see Straumann, *Hugo Grotius und die Antike,* 162–95, esp. 174ff. and 191ff.

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