HUGO GROTIUS AND THE HISTORY OF POLITICAL THOUGHT

by

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In proposing to address the topic of Hugo Grotius and the history of political thought, I am not primarily intending to calculate his originality by establishing what he brought into the world of ideas that was new. It would take more than one essay to refute the applicability to Grotius of the old Terentian word that "Nothing is said now that has not been said before". It is Grotius and the *subsequent* history of political thought I am concerned with Of course the consideration of a thinker's influence may be of great relevance to the question of his originality by organizing or concentrating the search for the latter; but at least in the present context it is not my claim that the areas of thought where I see Grotius's influence were also the areas in which he was particularly original.

Grotius' influence was, of course, vast and varied, and a history of social and political thought in the seventeenth and eighteenth centuries might well be written which took as its *leitmotiv* the role of the modern school of natural law which he, despite all scholarly qualifications about his originality, must still be said to have founded (if for no other reasons than because he was thought to have done so). The intellectual arrogance of trying to sketch this here would, though, be in direct proportion with the magnitude of the task, and such an attempt would merely prevent me from adding anything at all, however modest, to what others have already said about the history of modern natural law theory. In looking at Grotius's influence, I will, in other words, have to be highly selective - both as to period, place and problem.

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For our present purposes, we may divide Grotius's influence into three problem areas which are, however, neither mutally exclusive nor jointly exhaustive of the field. Firstly, there is the question of the nature of rights and their relationship to natural law. Secondly, there is the question of the basis for, including the ground of obligation to, natural law. And thirdly, there is the question of the scope and composition of natural law. To each of these topics I will devote a section.

II

The pioneering studies of the first question concerning the nature of rights and their relationship to natural law are by Axel Hägerström and, particularly, Karl Olivecrona, and these have recently been supplemented by Richard Tuck's study of the political-theoretical implications which Grotius drew from his theory of rights.[1] In this section I will primarily present and build upon the results of these scholars.

Grotius's most important contribution to modern thought was his theory of rights, for although this had precursors, it was in his formulation that it gained currency - though this has been obscured to modern scholarship until recently. The central point is that Grotius in extension of, and undoubtedly inspired by, various scholastic thinkers, particularly the Spanish neo-Thomists, transformed the concept of *ius* as it is found in Roman law and in Aquinas. Instead of being something which an action or state of affairs, or a category of these, *are* when they are in accordance with law (*in casu*, natural law), *ius* is by Grotius seen as something which a person *has*. The concept becomes 'subjectivized", centred on the person: it is a *power* which the person has, and it is as such also called a moral *quality* of the person.[2]

This twisting of the concept of *ius* is one of the cornerstones of modern individualism in political theory, for when *ius* is no longer an objective condition appointed by law, but something which individuals have, then the idea of human life as the exercise of competing individual rights is close to hand. And the extreme version of this was, of course,

soon to be developed by Hobbes in his theory of the state of nature But the thing that made Hobbes an outrage was the suggestion that the *proper* pursuit of our rights leads to anarchy, and that the task of law consequently is to restrict our rights. By contrast, Grotius and the mainstream of political theory saw conflict as a result of the *improper* pursuit of individual rights, and whether this arose out of malice or ignorance or both, the task of law was to make the proper exercise of rights effective for all by preventing the imporper interference by some. Or, in other words, in contrast to Hobbes, Grotius operated with the idea that nature had made possible an ideal order in the moral world, and that the function of law was to maintain, rather than create, it. It was, however, a minimal order, as can be seen when we look closer at the content of *ius*. *Ius*, considered as a power, is a power over other people, *viz.* the power to keep them off that which is "one's own", one's *suum*. The realm of one's own is originally settled by nature as one's life, liberty, body, and everything in nature which is immediately required for one's maintenance; and it is subsequently extended conventionally into *dominium*, or property in things, and contractual relationships.[3] This is the background of Grotius's second way of characterizing *ius*, *viz.* as that which is not unjust, meaning by this such actions as do not infringe upon the *suum* and *dominium* of others.[4] (As has been pointed out, this leaves a conceptual gap between the two definitions of rights (as moral powers and as non-injurious actions)[5], and I would suggest that this does not find a reasonably satisfactory closure until Adam Smith takes up the problem with his spectator theory, according to which rights as moral powers are functions of the interaction of the individual with others, when they as spectators judge that a person's actions are rightful *because* they are non-injurious.)[6]

Whether it is set within the Hobbesian threat of natural disorder or within the Grotian promise of an ideal natural order, the idea that humanity from the hand of nature is engaged in an open-ended, un-coordinated bargaining process about the maintenance of their several rights, leads to the question of how a *common* life - morality and society - is possible. And the history of political thought in the seventeenth and eighteenth centuries is overwhelmingly the history of answers to this question and

its derivatives, ranging from the various combinations of natural law and contract to the eventual dissolution of the problem in the great "historical" schools of the later Enlightenment, *viz.* the Scottish moral philosophers - especially Hume and Smith - and the German jurists of the universities of Halle and Göttingen. At the centre of Grotius's own solution to this problem of the possibility of society amongst individuals conceived as the owners of rights, was an ingenious combination of his new idea of natural rights with a somewhat more traditional - and superficial - theory of natural law. When Grotius in the Prolegomena to the *De iure belli ac pacis* defines natural law in terms of man's *socialitas*, his social nature, this may at first sight remind one of Aristotle and St. Thomas: Man is sociable because he is created to live in accordance with the law of nature to that effect. But this is explained and applied in a most un-Aristotelian manner, for the *socialitas* to which we are bound by the law of nature is for Grotius simply the respecting of each other's rights, subjectively conceived, so that the minimal order mentioned above, i.e., a minimum of social life, is possible. And this brings him to a position where he could have dispensed entirely with natural law - as Olivecrona has suggested[7] - for all that it does is to tell us that we should be what we are, *viz.* wielders of moral powers called rights, the content or scope of which is not settled by natural law, but by our situation in the world. And again I think that the most satisfactory completion of this Grotian beginning is to be found in the jurisprudence of Adam Smith, which of necessity is entirely rights-based (the impartial spectator does not legislate, but judges about proper spheres of action).

The tenuous position of natural law within Grotius's theory will be further underlined by our subsequent discussion of the changing concept of the common good, but before that some additional elements in Grotius's thought should be outlined. Grotius's picture of the natural, pre-civil relationships of men is completed with the idea of a natural right to punish those who transgress upon the rights of others, and by the theory of the contractual basis of property. The former suggestion, that man has a natural right to punish, has a somewhat problematic position in Grotius's theory because it cannot be conceived as a moral power in the same way as our other rights, but must be understood as a

kind of second order right, and this is never adequately explained by Grotius.[8] The idea was, however, to become enormously important in the eighteenth century and especially in Scottish moral thought, reaching its peak in Adam Smith's elaborate socio-psychological theory of natural resentment at injury as the unitary basis for *all* rights - yet another case of Smithian solutions to Grotian problems.[9]

As to property, Grotius started from the idea of an original or natural common use-right in all things, but this situation is entirely changed when the natural *suum*, as mentioned, is conventionally extended through agreements to recognize a certain realm of things as private property. Such agreements can either take the form of explicit divisions and allocations or a tacit recognition of *de facto* seizures of things.[10] By operating with this broad concept of the contractual basis for private property, it is clear how Grotius's legacy in this respect was a dual one. On the one hand, he can be seen - as he usually is - as the ancestor of the modern absolutist theory of private property as something created or instituted through positive contract - the sort of theory Hobbes eventually reached and Pufendorf refined On the other hand, the suggestion of tacit recognition as the basis of private property by eliminating the idea of deliberate institution of course weakens the concept of contractual agreement so much that it comes very close to Locke's and other later liberal thinkers' theory of private property as a spontaenous, natural off-spring of human activity - a theory which was again taken up by a number of Scottish moral philosophers in the eighteenth century and not only issued with a new empirical psychological basis, but also turned systematically into a *history* of the origins of the various forms of private property.[11]

But while Grotius's subjective rights theory thus in a way furnished Locke with some of the basis for his theory of property, Grotius would have rejected the radical consequences which Locke drew from it. It is true that they both operated with the idea that the law of nature tells us to live socially with others in the exercise of our natural rights, and that this puts some limitation on the acquisition and use of private property But for Grotius the natural law concept of "living socially" meant no more than living without injuring the rights

of others and private property was not limited by any other obligations than those entered into voluntarily through contract (obligations beyond these would have to be imposed by divine or human positive law). The extent of Locke's natural law concept of "living socially" and consequently the extent of the obligations carried under natural law by the owners of private property are debatable matters - James Tully has recently argued with much force that these concepts range much wider than we had hitherto understood.[12] But what is not under dispute is that, for Locke, private property is subject to the famous "spoliation condition" which cannot legitimately be over-riden by positive laws and institutions; and it is only subject to this limitation that the distribution and accumulation of private property may be conventionally changed (e.g. by the introduction of money or the imposition of taxes). Furthermore, Grotius admitted that men in "direct necessity" may take what they need from the private property of others, not because they have any natural right against these others, but because their ancestors could not reasonably be understood to have consented to arrangements which entirely abolish the original use-right in such circumstances. But by contrast Locke simply maintained not only that each person retained a natural right against others to be provided with the necessities of life, but also that the conventional arrangements of private property systems could only be legitimated by the current consent of each person himself.[13]

Finally in this section, we should notice the connection between Grotius's subjective rights theory and his theory of the state. From the hand of nature, or under natural law, or ideally, mankind forms a universal society (one of the many ideas Grotius derived from stoicism), but the prevalence of human ambition and the consequent corruption makes it impossible to fulfil the natural law injunction to live socially in the exercise of our individual rights without the assistance of civil authority. Historically, legitimate authority over groups of people may arise in all manner of ways - through contractual agreements, through conquest in just war, through punishment under the "provisions" of natural law. But the principle of logic behind it is in all cases the voluntary consent by the individual to the exercise of sovereignty over him For sovereignty is conceived in analogy with individual rights as a *facultas moralis*, a moral power over the will of other people,[14]

and since it is not a naturally given, but a conventionally instituted exercise of moral power, it can only be understood on the basis of voluntary consent by those over whom it is exercised.

Grotius is famous, or notorious, for being one of the pioneers of the contractual theory of absolute sovereignty. This is an issue which, because of its complexity, has not been well understood and about which I only tentatively offer the following four points for consideration. Firstly, we should notice the "location" of sovereignty. It is well known how Grotius goes out of his way to deny that sovereignty somehow necessarily resides in the people; it has been less emphasized that he equally denies that the ruler or rulers as such are the bearers of sovereignty. For him sovereignty can only exist in both taken together, i.e. in the politically organized society as a whole. He employs the analogy with vision, of which the eye is the *subjectum proprium*, the particular or special agent, and the body as a whole is the *subjectum commune*, the common or general agent. In the same manner, the ruler is the special agent for the sovereignty of which the state as a whole is the common agent.[15] Or, in other words, sovereignty is not a power which rulers have over subjects, but which they exercise on behalf of the corporate body.

This forms the background to the second point I want to draw attention to, *viz.* the distinction between the form of sovereignty and the form of government with which Grotius operates. Again, part of the story is very well known in the literature, *viz.* that Grotius insists that sovereignty is absolute in the sense that it is entirely indivisible. But at the same time he makes it perfectly plain that, in his view, this is compatible with all manner of governments - democratic, aristocratic, monarchic, and mixed; governments with separation of powers; governments which are feudally or in other ways contractually dependent on other governments; governments which are time-limited, etc. etc.[16] This would only seem to make sense if we accept the distinction between sovereignty and government, and if we further understand that Grotius's notion of sovereignty is purely legalistic. "That power is called sovereign whose acts are not subject to the *ius* of another, for in that case they could be made invalid by the decision of another human will."[17]

It is in effect the state, considered as an independent legal structure, which is sovereign, and when Grotius criticizes the idea of divided sovereignty he is warning against dividing that which cannot, for him, be divided without being destroyed - not necessarily against dividing the governmental agencies which serve as the "special agent" of sovereignty.

The third matter for our attention here is that Grotius, in a manner which we normally associate with eighteenth century thinkers, draws a sharp distinction between individual liberty (*libertas personalis*) and political liberty (*libertas civilis*), i.e. the liberty to participate in government.[18] And he makes this distinction in order to suggest that we can well have the former without the latter, and that individual liberty may find protection under governments which we would normally call absolute. This is never clearly linked with the distinction between sovereignty and government and seems to be left undeveloped, but it does serve to make our fourth point into an acute question. What is it precisely that is given up by individuals in the contract which forms the explicit or implicit basis for a sovereign civil society? Grotius says clearly that it is the right to resist other people if they transgress on our rights,[19] and as is clear from the general formulation of the point and from the logic of the theory, this applies both to resistance to the sovereign and to fellow citizens. Furthermore, from this plus the fact that Grotius thinks that the sovereign may legitimately take anything from the individual and that the latter may only offer passive resistance when ordered to transgress natural (and divine positive) law, it is usually concluded that the individual surrenders all his rights in the basic contract. This does, however, not seem a very satisfactory reading of Grotius, for it makes it hard to see why he talks of individual liberty in civil society as a matter of course, and it makes it particularly difficult to understand how rights considered as moral powers over others can be surrendered in a contract which has as its main rationale their more effective protection.[20] But Grotius's argument does make sense, and interesting sense, if we take it in the following manner. When he says that it is the right of resistance that we give up, I suggest that he means simply the right to punish others. As already mentioned,

this is a second-order right of a different character from the first-order rights, which are our moral powers over others with respect to our *suum* and its extensions. These latter rights, *qua moral* powers, are *ideal* powers which generally depend on the back-up of the right to punish in order for them to be realized or implemented in the empirical human world. Hence it is their *implementation* rather than the rights as such which may be over-ridden in civil society by other considerations so that the sovereign may take what is needed from the individual. Now, it is certainly true that Grotius has a rather rich store of considerations which might over-ride the active protection of individual rights, but as far as the structure of the argument is concerned, there is a significant difference between the reading suggested here and the usual one according to which all rights are surrendered to the sovereign. The latter view would make it impossible to understand how Grotius at once can maintain both that the fundamental aim for civil society is protection of rights, *and* that the sovereign may have other conflicting and yet legitimate aims. That the story told here serves to underline the complexity of a moral world dominated by subjective rights needs no explanation.

To supplement these suggestions, we should also recall the point which Richard Tuck has stressed in this connection.[21] Just as private property rights may legitimately be over-ridden by the original common use-right when men are in the utmost need, so Grotius does admit that men cannot reasonably be understood to have given up all right to resist either fellow citizens or the sovereign when threatened with the most extreme danger - i.e. presumably when the original, natural *suum* is directly endangered (an idea which has a well-known parallel in Hobbes).

In sum, for Grotius, men in civil society retain the full complement of natural rights, considered as ideal moral powers, as well as a minimum of rights of resistance. The sovereign authority to which they surrender their general right to resistance is the legal sovereign, *viz.* civil society as a whole. And the question of the form of the political power required to exercise this sovereignty is an entirely separate one which does not allow of one answer for all times and places.

We may still want to call Grotius an absolutist in the common meaning of the word, but it should be clear by now that there are a number of liberal possibilities in his theory which point forward to later thinkers. Tuck has emphasized the line to Locke; the suggestions given above point at least as much to e.g. Montesquieu, Hume, and Smith.

III

Moving now to the second area of the Grotian legacy which I proposed to discuss, that of the basis for natural law, we encounter a group of ideas which are not only enormously wide-ranging, but whose interpretation is highly controversial. What is clear is that natural law theories during the seventeenth and eighteenth centuries lost more and more of their theological appearance, and as they increasingly became theories of *state*-law, they instead gained in purely juristic technicality.[22] But as soon as we try to pinpoint this development in particular thinkers, we are in difficulties, running a constant danger of "premature secularization"[23] in our interpretation. And this is where the controversies rage. To most of the modern scholars who write outside the Catholic natural law tradition, it seems obvious that the secularization begins decisively already with Grotius himself. On the other hand, to scholars within the Catholic tradition, it seems equally clear that Grotius's alleged secularism amounts to nothing, being little more than a restatement of a position already worked out within the Church by a number of late scholastic thinkers.[24] And to everyone it is clear that all the great post-Grotian natural jurists within Protestantism - Locke, Cumberland, Cudworth, Clarke, Pufendorf, Leibniz, Thomasius, Wolff - as well as the lesser ones - the two Cocceii, Heineccius, the Swiss Protestants (Barbeyrac, Burlemaqui, Vattel), and some of the Scottish thinkers we will look later - that each of these in one way or another work with some sort of Christian foundation. In this situation it may be tempting to close the books with the verdict that the secularization of natural law theory amounts to nothing but a relative neglect of theology in favour of juristic

technicality induced by the decreasing controversiality of the problem as the religious strife calmed down in Europe. But while this is quite true, it is a poor substitute for an explanation, and while I cannot promise to provide a full explanation, I can at least try to open up the problem for some further discussion.

I have - in line with so many before me - talked vaguely of the basis or foundation of natural law. But we need as a first step to clarify this by drawing some distinctions - even if some of these are somewhat anachronistic, arising as they do from post-Kantian ways of thinking, for it is after all the lead-up to these ways that we are studying. Let us then keep separate the following four: Firstly, the question of the ground of *existence* of natural law; secondly, the question of the basis for or source of our *knowledge* of natural law; thirdly, the question of the ground of our *obligation* to natural law; and fourthly, - though I will hardly touch upon this here - the question of our *motivation* to follow natural law.

As to the first question concerning the ground of existence of natural law, there is never any doubt in any of the modern natural lawyers until we come to Hume that God, in creating the world, created the law by which it is natural for man to live. But they held this basic opinion on religious grounds, which ranged from the orthodox Lutheran and Calvinistic to more or less philosophically founded deism And this indicates very well that the question of the ground of *existence* of natural law is not a very interesting one in itself, and that any shift in the foundations of natural law must arise in one or more of the other areas.

The key question is in my opinion that of the *knowledge* of natural law, partly because this makes the question of obligation acute And it is here that the disagreement about Grotius's role exists Like all the subsequent natural law theoreticians, Grotius never held any doubts about God's authorship of nature and thus of man and the law by which he should live. And yet he, in a completely hypothetical manner, made the point that if natural law was inherent in the nature of things, as they *de facto* are, and if our natural understanding of our life is

sufficient to see the obligations which this imposes upon us, then this would still be the case "even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him."[25] This is the famous *etiamsi daremus* passage upon which the picture of Grotius as the great secularizer has often been built, but it has time and again been pointed out that he is really just following in the footsteps of a scholastic tradition which goes back at least to the mid-fourteenth century, and especially that he is doing little more than re-phrasing what his older contemporary in the Spanish neo-Thomist school had said.[26]

But this is no way to settle Grotius's secularism and especially his secularizing effect. We have to take more indirect routes. At the centre of Grotius's idea of natural law is, as already mentioned, the concept of man's social nature. It is inherent in our nature or a law of our nature that to live humanly, we should live socially. Disregarding for the moment the, to us, obvious ambiguity in this concept of "law", we can, of course, see that this is not in itself a new idea in Grotius. Already Aristotle had sought the foundation of law in man's social character. But in Aristotle, it is a *politically organized* society which our nature prescribes for us, whereas in Grotius it is mere human sociability which is prescribed, with the question of the *organization* of the ensuing society being a further one [27] And this may give us a lead to an appreciation of Grotius's differences from the scholastic tradition. For while it is true, as is often pointed out, that Thomistic theory too sees natural law as a sufficient injunction to live socially without further help from divine law proper, and takes human nature alone as a sufficient source of knowledge of natural law, it is nevertheless the case that for Thomists life in accordance with natural law fits into a well organized structure, *viz* the whole moral life of humankind here and hereafter. In other words - and with allusion to what I said earlier about the traditional concept of *ius* - in both the Aristotelian and the Thomistic tradition the right action and the right state of affairs is that which fits into a law-governed whole And for the Thomists this whole includes God, so that by living socially in accordance with natural law, we are in

the end living in society with God. But for Grotius the right action is the one which each person *has* an individual natural right to do, subject to the essential requirements of social life - which, as we know, for him amount to no more than the non-infringement of the similar rights of others. Grotius's concept of the moral world that results from right action thus implies a much lower degree of organization or well-structuredness; subject to mutual compatibility the moral world seems to be an open-ended pursuit of individual rights. It is true that Grotius like Aquinas has the idea that divine positive law as revealed and presented in the Bible supplements natural law. But in Thomistic theory, divine revelation is necessary to augment our *knowledge* of the moral structure of the world as a whole, whereas in Grotius divine positive law (as well as much human positive law) is necessary, not because our natural understanding is insufficient, but because natural law itself is morally insufficient - it only prescribes negative justice, not positive virtues and obligations.[28] From the hand of nature and without the special moral intervention of God, there is thus no moral community between God and man, and we are thus brought close to the idea that man's society with man and man's society with God are two entirely separate questions, not simply for epistemic reasons to do with our knowledge of God, as in the Thomistic tradition, but for reasons to do with the very relationship between God and his creation For the real point here is, of course, that the acceptance of God's authorship explains the fact but nothing about the form of human sociability, and the whole tendency of Grotius's argument is thus in effect to narrow down the former to a question of faith and to expand the latter to a quest for explanatory knowledge. And it is in this light that we can see the secularizing effect of his theory of our knowledge of natural law.

The *etiamsi daremus* passage which I quoted above thus maintains only a superficial common ground with Aquinas. But it leads the way to Grotius's speculations about the *empirical methods* to be used in investigating natural law and its implications - ideas which to a large extent tied in with other contemporary ones and which were to become enormously important in the debates about scientific methods right down to our own time. What Grotius said was, *inter alia*, the following:

> In two ways men are wont to prove that something is according to the law of nature, from that which is antecedent (*prius*) and from that which is consequent (*posterius*). Of the two lines of proof the former is more subtle, the latter more familiar. Proof *a priori* consists in demonstrating the necessary agreement or disagreement of anything with a rational and social nature; proof *a posteriori*, in concluding, if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilization. For an effect that is universal demands a universal cause; and the cause of such an opinion can hardly be anything else than the feeling (*sensum*) which is called the common sense of mankind.[29]

Grotius thus wanted to proceed both with arguments derived from general ahistorical theories of human nature, and with arguments from the historical recordings of "the common sense of mankind". It was, however, the latter he practised most in his text, and this led to the common criticism that instead of using a properly empirical investigation of human nature, he relied on the authority of historians, poets, etc. - a criticism which was formulated with particular force by Pufendorf. So, although he so liberally embraced both methods, Grotius was subsequently generally seen as a protagonist of the so-called "a posteriori" or historical or inductive side in the often fierce contest between this and the "a priori" or theoretical or deductive method. The debate is well known not only from the opposition between classical humanism versus science, or from Vico's discussions of the matter, or from Hobbes's personal development from Thucydides scholarship to deductive science, but also from the discussion in Britain and especially in Scotland about the true nature of the "experimental method" in the moral sciences.[30]

The sheer prominence of Grotius's emphasis on the empirical methods of understanding natural law obviously contributed strongly to the perception of him as a secularizer of natural law. But this becomes even more important when it is combined with the tendency which, as explained earlier, is inherent in his subjective theory of natural rights, *viz* to see the moral world as an ongoing, open-ended

adjustment of individuals' pursuit of their natural rights. For it then lies close to hand to see natural rights as themselves subject to historical development rather than as God-given, i.e. to see them as dependent upon the stage of development of social living as a whole. Thus, although there may be a natural right to property in land, once this has been established, it gives no meaning to talk of such rights in a society which has not yet developed any idea of settled agriculture. And while this is no more than an indication - though a clear one - in Grotius's theory,[31] it was exactly the line of argument taken by the historically minded moral philosophers of the Scottish Englightenment, and especially by Adam Smith who knew Grotius's work well and considered him the greatest of the modern natural jurists.

When we in this way combine what Grotius has to say about the empirical character of our knowledge of natural law with his subjective theory of natural rights, it is possible to see him as a great secularizing influence on modern natural law theory. But when we turn from the question of the *knowledge* of natural law to the closely connected question of its ground of obligation, I am more in doubt about how much can be claimed for him - though not about his influence. Firstly, it should be pointed out that the natural sociability which is the law of nature by no means is a simple emotional force in men; while it has an emotional side, the emphasis is on its *rational* character,[32] and it is of course this which makes it possible to see the law of nature as prescriptive, in modern terms. This does, however, not take us very far, for the rational insight into natural law is so simple that a denial of it would amount to a contradiction. Indeed, it is inherent in the concept of human being that once it applies its rationality to the content of natural law, it will follow this law. The only argumentative strength in this was of course that the law of nature, although created by God with the creation of man, was not simply the expression of God's arbitrary will. Like the laws of logic it had a validity independent of God's will. It is in this that Grotius's rationalism and anti-voluntarism consists - and here again he was very much in accord with the Thomistic tradition. But the question that immediately arises is why that which is rational in this

limited sense should have any obligatory force; and this was exactly the question which Hume raised about the ethical rationalism of such thinkers as Samuel Clarke, who probably developed their ideas from Grotius.[33] Faced with this question Grotius himself fell back, lamely, on God's will after all: about those acts which are due or undue according to natural law it is understood, he says, "that necessarily they are enjoined or forbidden by God."[34]

If, however, we disregard the religious aspect - which Grotius himself, of course, could not do - we can see that the problem is not very serious in his theory. As Thomas Mautner has explained so excellently,[35] the implication of Grotius's argument is that there is a distinction between the validity of the content of natural law and the obligation to keep natural law. And since the rational insight into the former consists in no more than the common ability to exercise our individual rights as this is required by the ordinary circumstances of human life, there is - as Olivecrona has shown and as we mentioned above - really no need for natural law and thus for an obligation to natural law, whether of divine or other origin. But Grotius did retain the idea of a law of nature, and given his idea of legal obligation as imposed by a superior moral power, the obligation to natural law could only be seen to stem from God.

Grotius's failure to see the full implications of his theory is a highly illuminating spectacle when we reflect on the history of political thought. The Thomistic way out of the problem of the obligation to natural law was a theory of a common human good which was the object of natural human reason - a theory which has recently been re-worked with particular ingenuity by John Finnis.[36] But this avenue was closed to Grotius by his adoption of a subjective natural rights theory which watered down the concept of the common good to very little indeed, *viz.* the maintenance of mere compatibility in the pursuit of individual rights claims. Hobbes took up Grotius's problem in a completely different way by first turning man's natural sociability into its opposite and then introducing the laws of nature as heuristic devices to which we had a simple prudential obligation. And Pufendorf twisted this into a fully-fledged voluntarism in stark opposition to

Grotius, by first agreeing with Hobbes that man is naturally egoistic, and that the sociability, which also for him is the law of nature, is the means which reason suggests to curb egoism, but then adding to this that the law of nature is obligatory upon us because it is the will of God. And it was this voluntarism which in one form or another became the dominant form of natural law theory in Germany in the eighteenth century, and which particularly through Samuel Cocceji influenced the legal theory behind the so-called enlightened absolutism.

Finally, in considering some of all these echoes of Grotius's failure to develop a theory of practical reasoning which was in accord with the subjective theory of rights, it should be pointed out that the problem can be pursued into the school of David Hume - i.e first and foremost Adam Smith. For while Hume's theory of the role of reason in human conduct historically speaking constitutes the final dismemberment of the Thomistic idea of practical reasoning which had been initiated by Grotius, it is also with Hume and especially with Smith that we find the beginnings of a new theory of practical reasoning. And as explained elsewhere, this centres on the purely formal rules of practical reasoning which are embodied in the so-called ideal impartial spectator and on the minimal conception of the common good as mere negative justice.[37]

In the first two sections, concerning the nature of natural rights and concerning the foundations of natural law, respectively, I have shown how I, in line with some other recent students of these matters,[38] want to include Scottish eighteenth-century moral thought within the conceptual world of modern natural law theory. And this point is further strengthened when I now embark on the topic of my third section, *viz.* the question of the range and composition of natural law and the question of the relationship between its component parts. These questions really amount to an enquiry into the nature of justice, since justice is commonly conceived as the object of natural law and thus as determining the concept of natural law.

The question, wherein consists justice, is of course as old as

moral thought itself. But for our understanding of natural law theory, the most immediate line of descent is, as so often, from a clever but troublesome Aristotelian distinction which was revitalized - though by no means rediscovered - by the modern natural lawyers. In the *Nicomachean Ethics* Aristotle makes the famous distinction between "universal" and "particular" justice, of which the former "is not part of virtue but virtue entire"; it is the "justice...which answers to the whole of virtue...being the exercise of virtue as a whole... towards one's neighbour".[39] While particular justice partly is concerned with fairness between the state and the individual in the former's distribution of various benefits, and partly "plays a rectifying part in transactions between man and man" - i.e. rectifies injuries or wrongs within what came to be called private law.[40] It was, however, Grotius's handling of this Aristotelian distinction which was to determine the modern debate. Firstly, Grotius translated the distinction into rights-language, saying that the sort of right protected by what Aristotle called particular justice was a perfect right or a "faculty", and these rights were divided into three well-known areas, powers (over oneself, i.e. liberty, and over others in non-political relationships), property rights, and contractual rights; while the "rights" protected by Aristotle's universal justice were imperfect and mere "aptitudes", i.e. such as is "fitting" or "suitable".[41] Furthermore, only the former kind of justice "is entitled to the name of justice properly or strictly so called", for only the rights pertaining to it are, as indicated by the label "perfect", really rights, i.e. the only rights which are of relevance for the existence of society amongst men:

> This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.[42]

From the point of view of justice, nothing but this is due to anyone,[43]

and if more is to be given it must either be done freely out of more positive moral considerations than those of justice, or it must be imposed by divine or human positive laws justified by such considerations. What we see is thus that Grotius's theory of rights sharpens the division between justice and the other virtues, and when he also excludes the latter from natural law, an important step is clearly taken towards a separation of law and morals. It is, however, far too simple to declare, as Alf Ross has done,[44] that Grotius and the modern natural law school secured this separation for jurisprudence. As already indicated, Grotius himself saw important moral roles for both divine and human positive law, but he did not explain the exact relationship of these areas of law to the straightforward laws of justice which implement natural law. And for all subsequent natural law theory this was one of the most troublesome and important problems, as can be seen from the following case studies.

As a first instance, Samuel Pufendorf protested against Grotius's narrowing down of the Aristotelian concept of justice. He admitted that there was a distinction between universal and particular justice and that it referred to the distinction between imperfect and perfect rights. He further agreed that only the latter were subject to rigorous legal enforcement. But he maintained in effect that the distinction was merely heuristic, *viz.* based on what was practically necessary for the maintenance of human society - not on any moral difference between the two kinds of right, for all rights were equally appointed by natural law:

> ...the reason why some things are due to us perfectly and others imperfectly, is because among those who live in a state of mutual natural law there is a diversity in the rules of this law, some of which conduce to the mere existence of society, others to an improved existence. And since it is less necessary that the latter be observed towards another than the former, it is, therefore, reasonable that the former can be exacted more rigorously than the latter... In civil states this distinction arises from their civil laws, which either allow or deny an action, although *in most instances* states have followed in the footsteps of natural law, *except where their own reasons persuaded them to take another course* When, therefore, actions or things are extended to another, which are due him only by an imperfect right, or when

> actions are performed for another which have no relation to business, it is usually said that universal justice is observed... But when acts which concern business relations are performed for another, or acts by which something is transferred to another to which he had a perfect right, that is called particular justice.[45]

The important thing here is that perfect and imperfect rights have an equal moral foundation in natural law, for this implies not only that in some situations the latter carry a moral obligation which overrides the former - e.g. one has an obligation of charity to give of one's property or an obligation of benevolence to give of one's free time to those in need of either - but it also means that it is on occasion morally justified for the state to legally protect imperfect rights, as indicated in the italicised passages. And this is spelled out later:

> ...although, from the point of view of mere natural right, a man is expected only on the basis of an imperfect obligation in so far as it arises from the virtue of humanity, to aid another in the latter's extreme necessity, with property of which he himself has no such present need, yet nothing prevents this imperfect obligation from being strengthened by civil law into a perfect one.[46]

Between the theories of Grotius and Pufendorf there is thus a tension which was enormously influential for the eighteenth century, and this was in Britain accentuated even further by the difference between Richard Cumberland and John Locke, a topic which has recently been explained by James Tully with particular reference to property: "Cumberland completely reverses the roles of expletive [particular or negative] justice and distributive [universal] justice. The government's duty is to distribute property in such a way that the common good can be realized, and then protect it. Private property is seen as the conventional means of individuating man's natural right to his due."[47] On the other hand, Locke is hailed in the eighteenth cnetury as the great protagonist of limiting government to the task of protecting individual rights, with the clear implication that this task is both clearly defined and on a firm moral footing, because the

rights in question have these qualities. And this of course lent further urgency to the dispute between Grotius and Pufendorf about the extent of the concept of rights: were imperfect rights conceptually clear enough and morally well enough founded to be within the orbit of government without endangering the limitation of government?[48]

Part of the problem had been met head-on by the German philosoher Christian Thomasius who explicitly repudiated Pufendorf and returned to Grotius's distinction between perfect and imperfect rights and developed it into a much clearer distinction between law and morality on the basis of a distinction between what can legitimately be enforced and what cannot. To some extent I could therefore base the argument of this section on the development in Germany of the dialogue between the Thomasian line and its numerous critics (Thomasius was in this matter very much a liberal in advance of his time). When I nevertheless prefer to concentrate on Scotland, it is because the distinction between justice and the rest of morality, and hence the separation of law and morals, here was based on a more original and important moral philosophy than that of Thomasius, *viz.* the secularized theory of David Hume and Adam Smith. In Scotland the whole problem in a way strikes much deeper than anywhere else.

Hume and Smith follow very closely in the footsteps of Grotius when they distinguish sharply between on the one hand justice and on the other hand all the other virtues, and when they characterize justice as a mere negative virtue concerned with what not to do, whereas the other virtues are positive guides to action.[49] Smith in particular develops an elaborate theory of this which centres on two ideas, firstly the principle that injury to persons - which is the object of the virtue of justice in the negative sense - is much more universal in meaning than the positive goods which are the objects of the other virtues; and secondly the principle that the avoidance of evil has moral priority over the obtaining of good. The net result is therefore that justice is the most fundamental virtue necessary to ensure the existence of any human society; and because of the properties just mentioned, there will always be a spontaneous tendency to formulate

justice in sharp and clear rules, which will by and by achieve the character of law.

These are, then, what Smith called "laws of justice", and like Hume he saw it as the over-riding duty of civil government (apart from defence) to maintain these laws. And it was exactly because he saw this task as historically a most difficult one that his plea for limited government was a plea for *strong* government. But it is important to realize that Smith clearly saw other tasks for government than simply to maintain the system of justice. There was for him also a requirement for a variety of so-called "laws of police" which should pursue some *positive* good for the society, ranging from public works to public education. However, these positive tasks of government were always secondary to the maintenance of the laws of justice; they were subject to the test of justice, and they were generally conceived as direct or indirect supports for the functioning of the system of strict negative justice.

It seems obvious that these, briefly indicated, developments of Grotius's idea of justice must be considered amongst his most important legacies. And this can perhaps be put into further perspective by glancing at a few of the other eighteenth century Scottish thinkers who were well aware of the preceding European debate about the ideal of justice which should be directive for political power. We find the problem debated at central place by so to speak all the Scottish philosophers - in George Turnbull and his student Thomas Reid, in Francis Hutcheson, Lord Kames, and Adam Ferguson. Let us here just look at Hutcheson and Ferguson.

Hutcheson takes over the rights talk which he had learnt from the modern natural law school, and especially from his predecessor in Glasgow, Gershom Carmichael, who, with his teaching and commentaries on Pufendorf, played a key role in the import of these European ideas into Scotland. But at the same time Hutcheson incarcerates this doctrine in a utilitarian moral theory, defining a right in the following way: "a man hath a *right* to do, possess, or demand any thing, 'when his acting, possessing, or obtaining from another in these

circumstances tends to the good of society, or to the interest of the individual consistently with the rights of others and the general good of society, and obstructing him would have the contrary tendency'."[50] This immediately gives Hutcheson a ground for the traditional distinction between perfect and imperfect rights; those which are so useful to general happiness that human society cannot exist without them are perfect, those of a less degree of utility are imperfect. But he is quite clear in his mind that this is by no means a sharp division:

> ...the boundaries between perfect and imperfect rights are not always easily seen. There is a sort of scale or gradual ascent, though several almost insensible steps, from the lowest and weakest claims of humanity to those of higher and more sacred obligation, till we arrive at some imperfect rights so strong that they can scarce be distinguished from the perfect.[51]

And not only this, but Hutcheson also draws the conclusion with great clarity, that since the moral ground for rights is the natural law about the maximization of happiness, all individual rights, including perfect rights, are defensible by actions of greater general utility than their protection in particular cases and types of cases: "no private right can hold against the general interest of all. For a regard to the most extensive advantage of the whole system ought to control and limit all the rights of individuals or of particular societies."[52] In this connection it should also be remembered that Hutcheson's utilitarianism is part of the providential order of the universe and hence we can be sure that morally right actions will never be in conflict with each other, ultimately at least; thus he emphatically maintains that perfect and imperfect rights, when properly conceived, are never *really* in conflict.[53]

While the law of civil society by no means is restricted to the protection of a system of perfect rights, this is nevertheless also for Hutcheson its main task. But added to this we get in him a very clear concept of positive virtue as a matter of policy, as opposed to law: the strong encouragement to moral and religious education and to thrift as well as political and military exertion, partly by creating suitable

institutions, partly by setting an example, and only in greatest necessity by means of legal enforcement.[54] And this is considered to be a duty for government, which is morally on a par with the enforcement of justice.

Also in Ferguson we find that the primary object of law is that which may justifiably be defended by force, and that this is a system of imperfect, exclusive rights which we exercise in a world which is from the hand of God or nature given to us in negative community.[55] Further, we find that there is a body of public law, the justification of or rationale for which is - much like in Smith - the defence and effectivity of private law.[56] In contrast to this morality - i.e. the exercise of the four cardinal virtues - is outside the compulsion of the law and is only subject to "encouragement", which it finds in the verdicts of the individual's conscience, of religion, and of public repute. And when law and morality are thus distinguished, their "sanctions are supposed to be distinguishable also, under titles of perfect and imperfect obligation."[57] But although this may be commonly "supposed", it is nevertheless dangerously misleading to human morality, for "it ought not to be implied in any words we employ, that a rule, merely because it may be enforced, is in any degree more binding than the consideration of what is in itself an article of wisdom, as constituent of good to mankind."[58]

So, despite all the emphasis on the "necessity" and consequent enforceability of law, in contrast to morality, and notwithstanding the implication that this necessity has a moral ground in the further necessity of society as a means to the realization of human morality, we nevertheless have it stated as a general principle that law has no greater moral obligation than the moral virtues as such. And this principle is quite basic to an understanding of Ferguson. It is true that we do not find in him the sort of clearheaded utilitarian argument which we found in Hutcheson according to which "virtue" on occasions might overrule "mere justice" within the law itself.[59] But we do find him pursuing with even greater vigour than Hutcheson the complementary line of argument, that "virtue" should be a matter of policy Thus the central mission of his first and most influential

work, the *Essay on the History of Civil Society*, was that the legal protection of individual rights to pursue our interests, which it was the glory and fate of modern commercial society to have achieved, was not enough, morally speaking. The very security in this pursuit might well be the bane of civilization unless the "spirit", the moral stature of the individual was attended to.

With Ferguson's fervent attempt to have it both ways, the tension we have been tracing in the concept of justice, or between "negative justice" and positive "virtue", reaches a crescendo. Hutcheson did have some means to resolve the issue in his utilitarianism, but it would have required that he had abandoned the concept of rights (except legal rights in positive law, of course). After him we have to wait for Thomas Reid to find a philosophically coherent answer to the Grotian line taken by Hume and Smith. But what was the moral philosophical question which set Hume and Smith apart from the rest of their Scottish contemporaries? We might approach this question by pointing out that for the former two the freedom of individual pursuit had achieved a morally justified primacy in *political* contexts (though not necessarily in other contexts), which overruled other moral claims, whereas for the latter there was a tension between this "formal" ideal of freedom and the ideal of another sort of freedom, *viz.* freedom from moral delusion and hence the achievement of a particular virtue which was universally objective for mankind. So behind this issue lies the question of the objectivity of morals, and amongst the thinkers dealt with here this was considered as a question of the extent to which morals was subject to historical change: was there a universally valid ideal of the moral virtues as in the Common Sense philosophy, or was such universality confined to some minimal, formal aspects of moral reasoning concerning justice without which human society could not exist, as in Hume and Smith? It is thus the continuation of the debate about Grotius's theory of justice which in Scotland leads directly to the troublesome question of the historicity of morality, law, and civil society - a question which elsewhere tended to arise in the more arid concern with the historicity of the contractual bases for property or political authority. As with the other matters discussed in the present paper, we therefore see

that we have to go beyond continental Europe and beyond the seventeenth and eighteenth centuries if we want a reasonably full picture of Grotius's place in the history of modern social and political thought.

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NOTES

It is my pleasure to acknowledge the criticism and comments of Dr. Thomas Mautner.

1. Axel Hägerström, *Recht, Pflicht, und bindende Kraft des Vertrages nach römischer und naturrechtlicher Anschauung*, ed. Karl Olivecrona, Skrifter utgivna av K. Humanistiska Vetenskapssamfundet it Uppsala, 44:3, Stockholm and Wiesbaden, 1965. - Karl Olivecrona, *Law as Fact*, 2, ed., London, 1971, pp. 7-25, 142-46, and especially 275-96; same, 'Das Meinige nach der Naturrechtslehre', *Archiv für Rechts- und Sozialphilosophie*, vol. LIX, 1973, pp. 197-205; and most importantly, 'Die zwei Schichten im naturrechtlichen Denken', *Archiv für Rechts- und Sozialphilosophie*, vol. LXIII, 1977, pp. 79-103. - Richard Tuck, *Natural Rights Theories. Their Origin and Development*, Cambridge, 1979, pp. 58.81.

2. Hugo Grotius, *De iure belli ac pacis libri tres*, 2 vols., translation [in vol. II] by F.W. Kelsey et al., New York and London, 1964, vol II, Book I, chapter I, section iv. (The book, chapter, section, and paragraph numbering is the same in the Latin and the English texts; in the following I therefore exclude the volume-indication. Except in a couple of cases, which are noted, I have followed Kelsey's awkward translation). - Cf. Marcel Thomann: "Pour Aristote, les Romains de l'époque classique et Saint-Thomas le *jus* est l'égal, la *res justa*, l'*objectum justitiae*, l'*id quod justum est*. Ces autorités ignorent un "droit" qui soit pouvoir, liberté, volonté ou faculté de l'individu. Dans les relations de la cité, il y a des personnes et des choses; et la jurisprudence, dit Ulpian, est la science des choses divines et humaines, et spécialement du *justum* et de l'*injustum*. La justice consiste à accorder à chaque *chose* sa place dans un monde harmonieux, où règne un juste universel, *donné* par la nature." 'Christian Wolff et le droit subjectif', *Archives de philosophie du droit*, vol. 9, 1964, p.154.

3. On the *suum*, see *De iure*, I, I, v. On the original form of *suum* and its conventional extension, *ibid.*, II, II, ii.

4. For Grotius's characterization of *ius* in terms of that which is not *iniustum*, see *De iure*, I, I, iii, 1.

5. See Hägerström, *op.cit.*, pp. 53-54, and Olivecrona, *Law as Fact*, pp. 276-77.

6. See my discussion of Smith's theory in *The Science of a Legislator. The Natural Jurisprudence of David Hume and Adam Smith*, Cambridge, 1981, pp. 99ff. and the references given there.

7. See Olivecrona, 'Die zwei Schichten im naturrechtlichen Denken'

8. *De iure*, I, I, x, 7, and II, I, x, 1. - See Olivecrona, *Law as Fact*, pp. 294-95, and cf. his 'Die zwei Schichten. .', pp. 94-100.

9 For Smith's theory of punishment, see *The Science of a Legislator*, pp. 114-23.

10 *De iure*, II, II, ii, 5.

11 See James Moore, 'Locke and the Scottish Jurists' mimeographed, Conference for the Study of Political Thought, March, 1980, for an excellent discussion of some aspects of this.

12 See James Tully, *A Discourse on Property. Locke and His Adversaries*, Cambridge, 1980.

13. See Tuck's important discussion, *op. cit.*, p. 172.

14. *De iure*, I, III, vi, 1.

15 *De iure*, I, III, vii, 1.

16. *De iure*, I, III, vii-xxiv.

17 *De iure*, I, III, vii, 1 (the translation is here mine).

18. *De iure*, I, III, xii, 1; cf. II, IX, vi.

19 *De iure*, I, IV, ii, 1.

20. For civil society as the protector of individual rights, see e.g., *De iure*, I, I, xiv, 1, and I, II, i, 5-6.

21 Tuck, *op. cit.*, pp. 79-80.

22 I am here indebted to Werner Schneiders, *Naturrecht und Liebesethik. Zur Geschichte der praktischen Philosophie im Hinblick auf Christian Thomasius*, HIldesheim and New York, 1971, pp. 64-65.

23. See Duncan Forbes, *Hume's Philosophical Politics*, Cambridge, 1975, pp. 41ff., and cf. his 'Natural law and the Scottish Enlightenment', in R.H. Campbell and A.S. Skinner, eds., *The Origins and Nature of the Scottish Englightenment*, Edinburgh, 1982, pp. 192-93.

24. A few very different examples: Johann Sauter, *Die philosophischen Grundlagen des Naturrechts. Untersuchungen zur Geschichte der Rechts- und Staatslehre*, Frankfurt, a.M., 1966 (1932), pp. 91ff.; A. -H. Chroust, 'Hugo Grotius and the scholastic natural law tradition', *The New Scholasticism*, vol. XVII, 1943, pp. 101-33; John Finnis, *Natural Law and Natural Rights*, Oxford, 1980, pp. 43-44 and 54. - Cf. also the discussions in M.B. Crowe, *The Changing Profile of the Natural Law*, The Hague, 1977, pp. 223-28, and in A. Nussbaum, *A Concise History of the Law of Nations*, New York, 1954, pp. 296-306.

25 *De iure*, Prolegomena, §§ 11.

26. There is a huge literature on this topic. Some of it is discussed in the works referred to in Note 24 above. The most recent monograph in English on Grotius does not rise above this level; see C.S. Edwards, *Hugo Grotius. The Miracle of Holland. A Study in Political and Legal Thought*, Chicago, 1981, pp. 48ff.

27. Cf. Schneiders, *op. cit.*, pp. 70-71.

28. For this idea - which might be called legal supererogation - see e.g. *De iure*, Prolegomena, §50, I, II, i, 3; I, II, vi; II, V, ix, 2; and III, XIII, iv, 1. Cf. also I, I, xv, 1-2, concerning the relationship between natural law and divine volitional law.

29. *De iure*, I, I, xii, 1; cf. Prolegomena, §§39-40, 46.

30. In Scotland more than in England this issue was forced by the early adoption and constant pressure of Newtonianism, conceived in a completely inductivist fashion. For it was the requirement of a sound inductivist basis for all theories also within the moral sciences which led the Scots eighteenth-century thinkers to see the historical record of mankind as a store-house for scientific generalizations. But the general unanimity about this was clearly superficial and obscured the real issue, *viz.* whether the experimental method consisted in a reductive analysis of the common human experience, or whether it amounted to the formation of inductive generalizations based directly on such experience, or whether the two somehow should be combined - as intended by Grotius. By following the opposing lines on this issue Hume and Smith, on the one hand, and Reid and the Common Sense school, on the other, laid the foundation for many of their other differences. Thus when Dugald Stewart in his *Life of Thomas Reid* tried to put his master on the intellectual map, part of his case was that it was Reid and not Hume - despite the latter's declared intentions on the title page of his *Treatise of Human Nature* - who succeeded in introducing the experimental method into moral subjects. For while Hume had proceeded with speculative hypotheses about human nature, Reid had respected the authority of experience as men had always recorded it, a charge to which it is not hard to imagine the Humean rejoinder. And this methodological uncertainty and disagreement was indeed an important part of the legacy of Enlightenment thought to the nineteenth century, as is shown by Sir James Mackintosh's and Thomas Macaulay's battle with the utilitarian radicals about the proper method to use in the study of politics. In short, with his ideas about the proper methods to use in the study of natural law, Grotius places himself in a tradition of methodological discussion which was to run over centuries and which has clear contemporary echoes.

31. For the extension of *ius naturale* to the conventionally established, such as *dominium*, see *De iure*, I, I, x, 4. For the changeability of the objects of *ius naturale*, *ibid.*, I, I, x, 607 - e.g. "the use of things in common was natural, so long as ownership was not introduced" (translation changed).

32 Cf Schneiders, *op. cit.*, pp. 71-72.

33. See Finnis, *op. cit.*, pp. 36-48, for a stimulating discussion.

34. *De iure*, I, I, x, 2.

35 See Thomas Mautner, 'Divine will in modern natural law theory: a discussion note', *Bulletin of the Australian Society of Legal Philosophy*, No. 26, 1983.

36 See Finnis, *op. cit.*

37 See my *The Science of a Legislator*, and 'What might properly be called natural jurisprudence?' in R.H. Campbell and A.S. Skinner, eds., *The Origins of Nature of the Scottish Enlightenment*, Edinburgh, 1982, pp. 205-225.

38 See the works by Duncan Forbes referred to in Note 23 above, as well as D.N. MacCormick, 'Adam Smith on law', *Valparaiso University Law Review*, vol. 15, 1981, pp. 243-63, and 'Law and enlightenment', in Campbell and Skinner, eds., *op. cit.*, pp. 150-66; Hans Medick, *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft. Die Ursprünge der burgerlichen Sozialtheorie als Geschichtsphilosophie und Sozialwissenschaft bei Samuel Pufendorf, John Locke und Adam Smith*, Göttingen, 1973; James Moore, *op. cit.* For two older (Scottish) studies of relevance, see W.G. Miller, *The Law of Nature and Nations in Scotland*, Edinburgh, 1896; and James Reddie, *Inquiries Elementary and Historical in the Science of Law*, London, 1840.

39. Aristotle, *Nicomachean Ethics*, trans. and introd. by W.D. Ross, London, 1959, $1130^{a}8$ and $1130^{b}18$.

40 *Ibid.*, $1130^{b}31$-$1131^{a}1$. This distinction within "particular justice" was clearly apt to contribute to the (un-Aristotelian) concepts of public and private law.

41 *De iure*, I, I, iv-v and vii-viii.

42. *Ibid.*, Prolegomena, §8. The following quotation from Porphyry is added for support: "Justice consists in the abstaining from what belongs to others, and in doing no harm to those who do no harm."

43. See e.g. *ibid.*, II, XVII, ii.

44. See Alf Ross, *Kritik der sogenannten praktischen Erkenntnis. Zugleich Prolegomena zu einer Kritik der Rechtswissenschaft*, Copenhagen and Leipzig, 1933, pp. 231-45.

45. Samuel von Pufendorf, *De iure naturae et gentium libri octo*, 2 vols., translation [in vol. II] by C.H. and W.A. Oldfather, New York and London, 1964, vol. II, Book I, chapter VII, §§7-8 (my italics).

46 *Ibid.*, II,VI,§5; see in general §§5-8.

47 Tully, *op. cit.*, p 93; see also Tully's general discussion of natural law theory, pp. 80-94.

48. Tully's powerful study (*op. cit.*) has suggested that this kind of interpretation of Locke is entirely misconceived, as Locke did not operate with rights as the moral power to *exclude* others from consideration in our use of a world which was given to each of us equally (negatively in common) - a concept which, for Pufendorf and his followers, seemed to lead to the need for a positive supplement, *viz.* the imperfect "right" to be included after all. By contrast, it is suggested, Locke exploited the Thomistic tradition to construct the idea of rights as an entitlement ordered by divine natural law to be *included* in the moral considerations of others when using the world which was given to us jointly (in positive community) to preserve. And according to Tully, this leads to a, in some respects, much more "radical" political theory than the one we are used to ascribe to Locke. Whether or not this is the correct reading of Locke is, however, not our present concern, for the eighteenth century - and especially the Scottish thinkers dealt with below - seemed on the whole to read Locke in the light of Grotius and Pufendorf, and indeed they in various respects used him to improve on these (see Moore, *op. cit.*).

49. I here gloss over the translateability of rights-language and virtue-language. Concerning Smith, see my *The Science of a Legislator*, pp. 99-100, for brief comment. The short sketch here of Hume and Smith is based on the argument in this book. Its motto could be Hume's dictum about his own endeavours: "This theory concerning the origin of property, and consequently of justice, is, in the main, the same with that hinted at and adopted by Grotius." (Hume, *An Enquiry Concerning the Principles of Morals*, ed. L.A. Selby-Bigge, revised by P.H. Nidditch, Oxford, 1975, p. 307.

50. Francis Hutcheson, *A System of Moral Philosophy*, 2 vols., London, 1745, in *Collected Works of Francis Hutcheson*, facsimile edition prepared by Bernhard Fabian, 7 vols., Hildesheim, 1969, vols. 5-6 [I employ the volume numbers of the original edition, i.e. I and II], vol. 1, 253; and cf. *A Short Introduction to Moral Philosophy*, Glasgow, 1747, in *Collected Works*, vol. 4, 118-20, and *An Inquiry into the Original of our Ideas of Beauty and Virtue*, The Fourth Edition, London, 1738, 277-78. There is now an excellent short sketch of the connections between Hutcheson's moral and political philosophy, T.D. Campbell, 'Francis Hutcheson: "Father" of the Scottish Enlightenment', in R.H. Campbell and A.S. Skinner, eds., *The Origins and Nature of the Scottish Enlightenment*, 167-85.

51. *Introduction*, 122-23; cf. *System*, I, 262-63. Concerning perfect and imperfect rights, see *Introduction*, 141-46; *System*, I, 257-59; *Inquiry*, 278-80. Hutcheson also adopts the category of "external rights", which are simply perfect ("legal") rights which are immoral: *System*, I, 259-60; *Introduction*, 123; *Inquiry*, 281-82.

52. *Introduction*, 120; cf. *System*, I, 273-74.

53. *System*, I, 260; *Introduction*, 123; *Inquiry*, 282.

54. See *Introduction*, chapter 8, and *System*, Book III, chapter 9.

55. Concerning the object and method of law: *An Essay on the History of Civil Society*, Edinburgh, 1767, ed. and introd. by D. Forbes, Edinburgh, 1966, 154-67; *Institutes of Moral Philosophy*, The Second Edition, Edinburgh, 1773, facsimile edition, New York and London, 1978, 172-73; *Principles of Moral and Political Science*, 2 vols., Edinburgh, 1792, facsimile edition, Hildesheim and New York, 1975, II, 179-83 and 315-16. Concerning the system of rights: *Institutes*, 174-202; *Principles*, II, chapter 3. Concerning negative community: *Principles*, II, 192-93.

56 *Principles*, II, 257-92, esp. 270-92 (the most central principles are at 284-88); *Institutes*, 203-08.

57 *Principles*, II, 315-20; cf. *Institutes*, 213-14. One of the cardinal virtues is of course justice, and Ferguson underlines that he has some distinction between law and morality by distinguishing sharply between justice as it is enforced by law and as it is exercised "freely" as a virtue (*Principles, ibid.*). This is also the reason why he feels free to use "justice" and "benevolence" interchangeably in the classical manner, when he discusses the cardinal virtues elsewhere-- but it is certainly a confusing usage (see *Principles*, II, 43-44 and 108-11).

58 *Principles*, II, 316.

59 Although he does say that those in dire need and without the ability of self-help "have a claim not only upon the humanity and compassion of the rich, but upon the justice and good policy of their country also." *Principles*, II, 372; and cf. *Institutes*, 212
