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# 3 Grotius and Pufendorf

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During the seventeenth century, natural law theory became institutionalised as the leading approach to moral philosophy in Protestant Europe.[1] Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–94) were undoubtedly the most influential natural law theorists of the period. Their books went through hundreds of editions and were translated into most European languages. Grotius was widely praised for having been 'the first to have systematised a science that, prior to him, was nothing but confusion ... and impenetrable darkness'.[2] His systematisation of natural law – the science in question – did not consist in deducing moral rules from uncontested definitions and indisputable axioms. His published writings on natural law took no such 'geometric' approach. Rather, in a move mirroring Hans Kelsen's *Reine Rechtslehre*, Grotius purportedly pioneered a 'pure' science of natural law by sharply distinguishing it from divine positive law (i.e. revelation), civil (i.e. Roman) law, and the voluntary law of nations. Grotius, in other words, was said to have turned natural law into ethics proper.[3]

This chapter will reconstruct the structure and philosophical presuppositions of the natural law ethics of Grotius and Pufendorf. Readers interested in the legal and political theories which the two erected upon the back of their natural law doctrines, or in other early modern natural lawyers, are advised to look elsewhere. The natural law theories of Grotius and Pufendorf are often discussed in tandem; indeed, Pufendorf is frequently portrayed as further developing and amending Grotius' basic ideas. The two thinkers indeed strikingly employed the same juridical language in their moral and political philosophy. Moreover, they shared key methodological assumptions, including concerning the importance of divorcing natural law from revealed theology. Both held that natural law is based on human nature and that its precepts require sociality above all: humans ought to perform those acts conducive to a peaceful society and omit those that undermine one. As Pufendorf wrote, natural law 'is so exactly fitted to suit with the Rational and Social Nature of Man, that Human Kind cannot maintain an honest

and a peaceful Fellowship without it'.[4] Notwithstanding these many commonalities, this chapter unearths some fundamental philosophical disagreements between the two thinkers, especially concerning meta-ethics.[5] By highlighting and analysing these disagreements, I hope to give some impression of the richness and diversity of ethical thinking in the early modern natural law tradition. This chapter discusses how Grotius and Pufendorf conceived of the interrelations of natural law with, in turn, theology; human nature; natural morality; and rights and justice.

## NATURAL LAW AND NATURAL THEOLOGY

It has been suggested that Grotius and Pufendorf developed a minimalist natural law theory in response to the confessional strife plaguing Europe. The problem the two purportedly faced would have been akin to that troubling the later John Rawls: how to arrive at a shared moral framework that allows settlement of disputes over rights between opposing parties of different creeds and convictions. Rather than a free-standing overlapping consensus, Grotius and Pufendorf would have opted for a minimalist morality, grounded in values no one could reasonably reject: self-preservation and peace.[6] If this was indeed their project, then it was not wholly successful. Pufendorf himself criticised Grotius for adding to ethics 'so much that deviates from our true religion'.[7] The Lutheran, we will see, took offence at both the contents of Grotius' natural law doctrine and its meta-ethical presuppositions. Despite avowing to 'abolish in natural law all theological controversies, and adapt it to the understanding of the whole of mankind, who disagreed in many different ways over religion',[8] Pufendorf was likewise constantly embroiled in theological disputes.

To be sure, the notion that Grotius and Pufendorf 'secularised' natural law ethics by disentangling it from theology is liable to be misunderstood. While revelation was jettisoned from natural law, natural theology most certainly was not.[9] Theological principles purportedly knowable by natural reason continued to be fundamental to their natural law ethics. Both Grotius and Pufendorf insisted, for a start, that the existence and providence of God is rationally demonstrable.[10] Pufendorf's textbook on natural law (*De Officio*) contained an entire chapter on natural religion and natural law duties owed to God.[11] These duties included both speculative truths concerning the nature and attributes of God as discoverable by reason, and practical

prescriptions concerning the proper ways of worshipping him. Pufendorf controversially confined the domain of natural law theory to 'within the orbit of this life', the immortality of the soul and the existence of otherworldly bliss and punishment being knowable by revelation alone.[12] Leibniz severely chastised Pufendorf for this, insisting that the immortality of the soul and the reality of divine judgement are demonstrable by natural reason.[13] Leibniz's criticisms, it is worth noting, accepted Pufendorf's categorical demarcation of natural law from revealed truth and were thus internal to his project of restricting ethics to what can be known by unaided reason. As the bounds of natural theology were hotly disputed in the period, accusations of impiety continued unabated.

A divine lawgiver was pivotal within Pufendorf's ethics – yet not within those of Grotius. The material content of natural law, both held, can be discovered by reflecting on the human predicament – especially our inclination to self-preservation, quarrelsomeness and mutual dependency. But natural law would have no more force than doctor's orders, Pufendorf insisted, were we to stop there.[14] For the natural dictates of reason to have 'the Force and Authority of Laws, there is a necessity of supposing that there is a God … in as much as all Law supposes a Superior Power'.[15] Grotius had earlier emphasised that law is a matter of strict obligation. 'I say, obliging: for Counsels, and such other Precepts, which, however honest and reasonable they be, lay us under no Obligation, come not under this Notion of Law'.[16] Yet the Dutchman employed a rather different conception of moral obligation, and hence of law, than his Saxon successor. Under the purview of natural law come only those actions which are 'in themselves, or in their own Nature, Obligatory and Unlawful'.[17] This is what differentiates natural law from positive law, whose issuer renders morally optional actions mandatory or forbidden by sheer force of will. Divine commands are hence not required to render natural law obligatory. Grotius' naturalistic conception of moral obligation thus renders 'God in effect … dispensable' to natural law.[18] Hence the significance of the well-known *etiamsi daremus*.

Pufendorf firmly condemned this last 'impious' contention of Grotius, that natural law would have a degree of validity 'even if we grant [*etiamsi daremus*], what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs'.[19] Grotius would have failed to grasp that law essentially involves binding obligations imposed by a superior authority. 'Law

is a decree by which a superior obliges one who is subject to him to conform his actions to the superior's prescript'.[20] Law is not a matter of agreements or useful conventions; for this reason, the voluntary law of nations is an oxymoron.[21] Pufendorf's doctrine that 'law' presupposes a lawgiver has no parallel in Grotius. It is, however, found in Hobbes. The English philosopher had claimed that the dictates of right reason are properly called laws 'in so far as [they] have been legislated by God in the holy scriptures'.[22] Pufendorf strenuously denied that last clause:

> The Laws of Nature would have a full and perfect Power of binding Men, altho' GOD ALMIGHTY had never proposed them in his Reveal'd Word. For Man was under Obligation to obey his Creator, by what means soever he was pleas'd to convey to him, the Knowledge of his Will. Nor was there any absolute necessity of a particular Revelation to make a Rational Creature sensible of his Subjection to the supreme Author and Governour of things.[23]

The existence of natural law and its divine authorship can be proven by natural reason.[24] Natural theology is thus essential, on Pufendorf's account, for natural law formally to be 'law'.

Their foundational disagreement over the meaning of 'law' in turn informs their diverging views on the content of natural law. Grotius' and Pufendorf's natural law doctrines are often equated with the principle of sociality. For Grotius, the laws of nature are those norms consequent to human rational and sociable nature: 'the Law of Nature . . . is the Dictate of a reasonable and sociable Nature, considered as such'.[25] It requires performance only of those intrinsically good actions strictly necessary for the maintenance of orderly society, and omission of those intrinsically evil ones incompatible with it. Grotius' magnum opus, *De Jure Belli ac Pacis* (hereinafter *DJBP*), contains a brief discussion of deviations from the 'true religion' that warrant punishment by humans. It does so without mentioning that such impieties transgress natural law (except perhaps indirectly, by endangering human society – laws would presumably not be kept without fear of a deity).[26] For Pufendorf, by contrast, natural law concerns *all* duties imposed by God and knowable by natural reason. It includes duties to the deity and to oneself; and these spring from other principles than sociality – gratitude and a mixture of religion and sociality, respectively.[27]

Grotius and Pufendorf held conflicting views on the content of natural law even insofar as it concerns what maintains and promotes

human society. For Grotius, the principle of sociality directly determines what is by nature morally good and evil, mandatory and illicit. Pufendorf's theory includes the additional step of finding 'signs' of God's legislative will in the present world, since for him natural law obligations derive from divine commands; these obligations are more than simply indications of what is necessary for upholding orderly society. Assuming that God is benevolent and we are needy and prone to conflict, what actions can we reasonably infer He commands us to perform? Not merely those actions, as we will see, without which human society is undermined.

## NATURAL LAW AND HUMAN NATURE

In his juvenile works, Grotius equated natural law with the divine plan discovered in nature. According to *Mare Liberum*, the wide ocean and shifting winds, rendering the earth 'navigable on every side round about', and the uneven scattering of resources among nations together attest that rights of trade and free passage belong to natural law.[28] Geographical and meteorological facts no longer evince what natural law requires in Grotius' mature works. *DJBP* explicitly grounds natural law in principles of human nature alone.[29]

This raises two questions. The most salient one concerns the underlying anthropology at issue. What views of human nature did Grotius and Pufendorf hold and what consequences did this have for the content of their natural law doctrines? Much has been written on their respective conceptions of human sociability, generally in contradistinction to Hobbes.[30] Less attention is given to the question of how anthropological data can establish moral facts. That humans have such and such a nature does not entail that they ought therefore to act thus-and-so. Moreover, that certain things are naturally good for humans (given our make-up) does not make them morally good.

In the *Prolegomena* to *DJBP*, Grotius has a moral sceptic proclaim: 'Nature prompts all Men, and in general all Animals, to seek their own particular advantage'. Had this been true, then natural law would have been either non-existent or extreme folly 'because it engages us to procure the Good of others, to our own Prejudice'.[31] The sceptical challenge presupposes a traditional conception of moral goodness as somehow including the common good. In response, Grotius accused the sceptic of having a faulty view of human nature. Transcending a narrow, beastly clinging to self-interest, the human being has a 'Desire of Society, that is,

a certain Inclination to live with those of his own Kind . . . peaceably, and in a Community regulated according to the best of his Understanding'.[32] The unique human capacities to follow general rules, required for grasping obligations, and of speech attest to our sociable nature. Natural law is grounded in 'Sociability . . . or this Care of maintaining Society in a Manner conformable to the Light of human Understanding'.[33]

Grotius did not even consider the thought that private advantage can be constitutive of moral goodness (*honestas*). Closely following Cicero's analysis of *oikeiosis* in *De Finibus* III.16–23, Grotius declared that humans by nature love themselves and seek to preserve themselves. Right reason, tracking moral goodness and virtue, is normatively prior to such self-love, albeit ontologically secondary. (Humans are animals first and reasonable creatures second.) 'Right Reason should still be dearer to us than that natural Instinct'.[34] Like the ancient Stoics, Grotius stipulated that right reason manifests what is truly good and evil for the kind of creatures we are – rational and sociable: 'Now such is the Evil of some Actions, compared with a Nature guided by right Reason'.[35]

After Hobbes' scathing attack on the 'superficial view' that 'Man is an animal born fit for Society', Pufendorf could not simply restate Grotius' position.[36] While not entirely unsympathetic to Hobbes' anthropology, Pufendorf firmly dismissed the Englishman's normative conclusions. Humans are indeed naturally inclined to love themselves predominantly, and to put their own advantage first; and natural law, as the law of human nature, takes this fact into account. Yet Hobbes was wrong to deduce the laws of nature 'from the Principle of Self-preservation', if only because a liberty-right cannot conceivably ground moral duties in the same agent.[37] Elaborate qualifications of the various senses of human sociability and the conditions obtaining in real and hypothetical states of nature notwithstanding, Pufendorf endorsed the basic imperative of sociality much like Grotius. Unlike that of Grotius and Hobbes, however, Pufendorf's analysis of human nature was embedded within natural theology – even if his focus was explicitly on fallen man.[38] His objective, in other words, was less to establish directly what is right and good for us, than to search for clues of a divine legislative will.

While Hobbes had argued that the human propensity to cause trouble mandates instituting a civil lawgiver, forcing rabble-rousers to fall in line, Pufendorf regarded the same quarrelsome nature as evidence of the existence of natural laws, explicating the conditions of harmonious living. As weak and dependent creatures, humans rely on society

and mutual aid to flourish. As peaceful society cannot exist without laws constraining pride and greed, a benevolent God must have ordained such laws.[39] The unique human capacities of rational reflection, speech and conscience, given to us by God, would moreover be pointless had we stuck to 'a Lawless, a Brutal and an Unsociable Life'.[40] Pufendorf agreed with Grotius and the Stoics that self-love is the first principle of nature in a developmental sense only: 'Man is by Nature sooner sensible of the Love he bears towards himself, than of that which he bears towards others'.[41] Not self-love but sociability should be the rule of our actions. Sociability is not at odds, however, with self-love properly understood: we need the help of others to thrive and survive, and their support is best procured by constant benevolence.[42]

From such empirical observations and premises of divine direction to and concern about human well-being, Pufendorf deduced the following Fundamental Law of Nature:

> Now that such a Creature may be preserv'd and supported, and may enjoy the Good things attending his Condition of Life, it is necessary that he be *Social*, that is, that he unite himself to those of his own Species, and in such a Manner regulate his Behaviour towards them, as that they may have no fair reason to do him harm, but rather incline to promote his Interests, and to secure his Rights and Concerns. This then will appear a Fundamental Law of Nature, *Every Man ought, as far as in him lies, to promote and preserve a peaceful Sociableness with others, agreeable to the main End and Disposition of [the] Human Race in General*.[43]

The demands of natural law focus on conduct rather than cultivation of character; virtues and vices play a minor role in Grotius' and Pufendorf's ethics.[44] For Grotius, natural law merely requires those actions necessary for upholding orderly society. Pufendorf's law of nature is more extensive and demanding: 'all Actions which necessarily conduce to this mutual Sociableness are commanded by the Law of Nature, and all those on the contrary which tend to its Disturbance or Dissolution, are forbidden'.[45] Besides prohibiting harming anyone in their goods or person, natural law mandates 'the real Practice of mutual Good' inasmuch as we can.[46] Benevolence requires both discrete acts of charity and generally contributing productively to society. Monks, 'who in a lubberly Laziness, consume the Fruits of other Mens honest Labour', contravene this last requirement.[47] Rights of innocent use and free passage, which for Grotius are conventional restrictions on private

property, are correlates of natural law duties in Pufendorf.[48] As the next section reveals, Pufendorf's law of nature is so extensive because he rejects a natural morality, independent of natural law.

## NATURAL LAW AND NATURAL MORALITY

Scholars frequently study early modern natural law ethics through the prism of two rival scholastic positions on moral ontology.[49] Naturalists such as Gregory of Rimini avowed the existence of a measure of moral good and evil independent of God's will. Murder would have been wrong even if God had not issued his *Thou shalt not kill*. Voluntarists like Ockham disliked this view for undermining divine omnipotence. They insisted that natural law consists entirely in divine commands and prohibitions. By the time of Grotius, this straightforward meta-ethical binary had been overturned by Francisco Suárez's momentous interventions. The Spanish Jesuit (1548–1617) developed a self-proclaimed 'middle course' between extreme voluntarism and radical naturalism, based on two philosophical refinements.[50] He distinguished, first, between God as creator and God as lawgiver; and, second, between natural morality and natural law. Crudely put, Suárez combined voluntarism about law with naturalism about morality.[51]

According to Suárez, natural law is truly, not metaphorically, called 'law'. As 'that sort of authority which can impose a binding obligation', natural law presupposes a lawgiver.[52] Binding obligations can be imposed only by a superior. God qua legislator 'decrees that men shall be bound to obey that which right reason dictates'.[53] While the obligation imposed by natural law derives from God's commands and prohibitions, divine legislation does not create moral good and evil. 'On the contrary, it necessarily presupposes the existence of a certain righteousness or turpitude in these actions and attaches to them a special obligation derived from divine law'.[54] Natural law regulates actions that are intrinsically right and wrong, in virtue of their harmony or disaccord with rational nature. For this reason, moral good and evil ultimately derive from God qua creator, who made humans rational creatures.

Grotius followed Suárez in distinguishing the intrinsic moral quality of an action from logically subsequent divine commands and prohibitions:

> NATURAL LAW is the Rule and Dictate of Right Reason, shewing the Moral Deformity or Moral Necessity there is in any Act, according to

> its Suitableness or Unsuitableness to a reasonable Nature, and consequently, that such an Act is either forbid or commanded by GOD, the Author of Nature.[55]

Yet he departed from Suárez by omitting his central point: that God's command is needed to create a 'real prohibition or preceptive obligation … since such an effect cannot be conceived apart from volition'.[56] For the Dutch philosopher, natural law concerns actions that 'are in themselves either Obligatory or Unlawful, and must, consequently, be understood to be either commanded or forbid by God himself'.[57] Like Suárez, Grotius maintained that God cannot *not* command morally necessary actions and prohibit evil ones.[58] But crucially, divine legislation is not needed to render the action obligatory to begin with. Suárez's and Grotius' contrasting explications of the difference between natural and positive law corroborates this reading. Suárez cashed out the distinction in terms of moral value. Positive law renders evil what it forbids, while natural law assumes the depravity of what it proscribes. Grotius, by contrast, explained it in terms of obligation. Positive law renders obligatory what before was morally optional, whereas natural law governs intrinsically obligatory actions.[59] Divine positive law (revealed in scripture) thus deals with actions that are of themselves morally optional and that become mandatory only 'because GOD *wills* it'.[60]

Natural law and natural morality are both conceptually and practically distinct for Grotius. Natural morality captures what is intrinsically morally good or evil; natural law concerns what is intrinsically morally obligatory or forbidden. The two frequently come apart. Grotius was adamant that 'those Things which our Reason declares to be honest, or comparatively good, tho' they are not enjoined us' are beyond natural law.[61] As a voluntarist about law and obligation, Suárez held that spotting the intrinsic moral goodness of an action involves a recognition that God commands us to pursue the same: both indications together make up natural law.[62] The Spanish theologian could therefore not easily admit the thought that some intrinsically morally good or evil actions are first rendered obligatory or unlawful by (divine) positive law. This view is open to Grotius due to his refusal to differentiate natural and positive law in terms of moral value. Positive laws frequently prescribe actions that before were either merely morally commendable or morally blameworthy but not forbidden. (Prescribing the last may be justified as a lesser evil.) Once positive law prohibits some action $\varphi$, it becomes

morally wrong to $\varphi$. Yet the wrong is in that case not an intrinsic one (pertaining to features of the act itself), but rather extrinsic (imposed by law). While natural law and natural morality are co-extensive for Suárez, they are not for Grotius. His naturalistic conception of moral obligation permits a more restrictive conception of natural law, as not capturing the whole of natural morality.

Grotius thereby opened up space for supererogation – morally good actions beyond the call of duty:

> *Honestum*, according to the Nature of the Things upon which it turns, sometimes consists (as I may say) in an indivisible Point; so that the least Deviation from it is a Vice: And sometimes it has a large Extent; so that if one follows it, he does something commendable, and yet, without being guilty of any moral wrong, he may not follow it, or may even act quite otherwise.[63]

Supererogation is pivotal to Grotius' just war theory. *DJBP* teems with examples of morally commendable 'Acts of Humanity' which belligerents are nonetheless not bound to perform 'in Rigour'.[64] Sometimes combatants are bound to perform morally supererogatory conduct by non-moral standards, such as the Gospel or the voluntary law of nations. Christ prescribed more demanding acts of love than natural reason requires. 'The Christian Religion commands, that we should lay down our Lives one for another; but who will pretend to say, that we are obliged to this by the Law of Nature?'[65] Interestingly, Grotius maintained that in certain circumstances, otherwise supererogatory actions can become obligatory as a matter of natural law. 'Circumstances too may sometimes fall out so, that it may not only be laudable, but an Obligation in us to forbear claiming our Right, on account of that Charity which we owe to all Men, even tho' our Enemies; whether this Charity be considered in itself, or as it is what the sacred Rule of the Gospel requires at our Hands'.[66] For Grotius, suitability to a rational and social nature is a criterion for both moral value and moral obligation. But being conducive to human society does not by itself suffice to render an action mandatory: its omission must in addition be a positive moral wrong. Put differently, its omission must be incompatible with human society (whether by its nature or due to present circumstances).

Suárez had combined voluntarism about law with naturalism about morality; Grotius was a naturalist about both morality and obligation; Pufendorf a voluntarist in respect of both.[67] Suárez had argued that natural morality was instituted by God qua creator and natural law by

God qua legislator. Grotius wrote, vaguely, that natural law can 'be justly ascribed to God' because we are rational and sociable by dint of his free creation.[68] According to Pufendorf, natural law exists by 'hypothetical necessity' – the act of freely creating rational beings necessarily involves lawgiving: 'by decreeing to create Man, that is, to create an Animal whose Actions should not be all indifferent, God immediately constituted a Law for his Nature'.[69] The law of nature remains firm and immutable as long as human nature is so.[70]

The German philosopher had little sympathy for Grotius' naturalistic conception of obligation: 'it would remain a most perplexing Doubt what those Acts are which we thus suppose in themselves Unlawful, and by what distinguishing Token they may be clearly known from others'.[71] Not only moral obligations, but also moral good and evil were first introduced by natural law: 'all acts of themselves were indifferent before the announcement of a law'.[72] Indeed, he defined moral goodness (*honestas*) as the voluntary accordance of actions with law.[73] It follows that actions are called 'Naturally Honest or Dishonest' only because natural law 'strictly enjoins' their performance or omission. Natural morality and natural law are thus co-extensive on Pufendorf's account, foreclosing the possibility of supererogation.[74]

Grotius had endorsed the Stoic view that certain actions, discoverable by right reason, are intrinsically right and wrong. Citing the English natural lawyer Richard Cumberland (1631–1718), Pufendorf accused the Dutchman of conflating natural and moral goodness in the second edition of *De Jure Naturae et Gentium*.[75] Natural goodness is a matter of happiness and expediency; moral goodness of conformity to natural law. This legislative conception of moral goodness propelled Pufendorf to insist, contra Suárez, that both natural law and morality presuppose divine lawgiving. That very move forced him to determine the content of natural law further (through the principle of sociality); a law ordering agents to pursue *honestas* and to avoid evil would have been vacuous for him.[76]

These semantic shifts receive justification from Pufendorf's celebrated, albeit hard-to-grasp, idea of moral entities. Moral entities are non-natural properties superimposed upon physical beings, things, and motions by an intelligent power (human or divine) in order to regulate the behaviour of rational agents.[77] The condition of being a person is a moral entity: it generates specific rights, duties and responsibilities. Ditto for being at peace, being elderly, a spouse, a soldier etc. Property is a moral entity superimposed on things. Authority, right and obligation

are moral qualities attached to persons; price and esteem are moral quantities. Moral entities do not exhaust the realm of morality. The law of nature, for instance, is not a moral entity. Rather, it is a means by which God imposes moral entities such as obligations on rational beings. Abstaining from wantonly harming others is naturally good for both human and non-human animals insofar as it conduces to self-preservation. Yet only in humans can such conduct also be morally good, in virtue of conforming to a natural law prohibiting unprovoked harming.[78] While natural goodness is a non-imposed, inherent feature of actions, all moral properties – including moral right and wrong – are superimposed by some intelligent agent. The idea of superimposed moral entities thus underpins Pufendorf's voluntarism about natural law and natural morality.

## NATURAL LAW, RIGHTS AND JUSTICE

Scholarly research in the intellectual history of rights has long dwelled on the question of when a subjective sense of *ius* as moral qualities attached to persons ('rights') first arose, as distinguished from its objective sense as 'what is right'. A related research agenda, inspired by Leo Strauss, explores when 'subjective' natural rights first gained normative primacy over 'objective' natural law, reflecting the moral individualism allegedly distinctive of modernity. The varying ways in which subjective rights have been conceptualised has been given less scrutiny. *Ius*, we will see, is among a range of basic moral notions which Grotius and Pufendorf understood and classified in divergent ways.

What are we talking about when we talk about natural rights? Sometimes the term denotes a basic moral permission, as in Hobbes: '*Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature'.[79] Sometimes commentators use the phrase loosely to refer to those things which individuals own by nature. 'A Man's Life is his own by Nature ... and so is his Body, his Limbs, his Reputation, his Honour, and his Actions'.[80] For Pufendorf, our natural *suum* includes 'our Life, our Bodies, our Members, our Chastity, our Reputation and our Liberty'.[81] Strictly speaking, however, 'right' signifies not the things we own, but a moral power over what we own. Early modern natural lawyers generally conceived of individual rights as moralised personal and property rights. Since humans were assumed to be equals by nature, personal rights over others (presupposing relations of authority and subordination)

were treated as conventional in character. All natural rights were therefore property rights: rights *in* our life, liberty, chastity, reputation etc.

Grotius and Pufendorf contrasted two kinds of individual rights. Perfect rights are enforceable, in court and on the battlefield. Imperfect (i.e. incomplete) rights are unenforceable.[82] They denote that the 'right-holder' is worthy to receive a perfect right: 'an Aptitude or Merit, which doth not contain in it a Right strictly so called, but gives Occasion to it'.[83] Suppose that Hugo has an imperfect right to amnesty. This imperfect right expresses the fact that it is morally fitting to give him reprieve; he deserves it. While Hugo cannot claim amnesty as his due, the world would be morally better for him receiving it. 'Thus then, he who renders to another any thing due by *Imperfect* Right, doth properly *attribute*, give or add to him somewhat which he could not before call *his own*'.[84] Failure to properly respect imperfect rights does not warrant punishment,[85] and damage done thereby does not call for compensation.[86] Since imperfect rights are not actionable, Pufendorf subsumed them under 'passive moral qualities' (allowing us to lawfully suffer, receive or admit something).[87] The distinction between enforceable and non-enforceable rights was crucial to Grotius' just war theory, as it determined which wrongs constitute a *casus belli*.

Grotius recognised three kinds of perfect rights, or 'faculties' (moral powers). *Potestas* includes both rights over ourselves (i.e. liberty) and rights over others. *Dominium* includes all sorts of property titles in things (*ius in rem*), including those that do not involve full ownership, such as tenancies and servitudes. *Creditum* is 'the Faculty of demanding what is due'.[88] 'For he to whom any Thing is due, hath a Right against him from whom it is due'.[89] Pufendorf revamped Grotius' classification by introducing a distinction between moral power (*potestas*) and right (*ius*). *Potestas* (power) covers those moral qualities '*by which a Man is enabled to do a thing lawfully and with moral effect*'.[90] The latter clause is added to signal disagreement with Hobbes, for whom natural right places no moral constraints on others.[91] Personal liberty, property (*dominium*) and authority over others are all types of *potestas*. Notwithstanding its inherent normative effects, the term 'power' does not itself connote that the moral quality in question is obtained and possessed fairly. Rights (*iura*) are just normative bases for *potestas*: they are moral qualities by which we justly obtain or claim moral powers from others. Imperfect rights allow us lawfully to receive property and authority over persons; perfect rights allow us justly to claim the same.[92] Rejecting Grotius' identification of *ius* with subjective moral qualities

generally, Pufendorf narrowed the meaning of 'right' considerably. A significant upshot of his reconceptualisation is that for him, rights always entail corresponding obligations ('a Moral Necessity to perform, or admit, or undergo any thing') in some other party.[93] This holds true for both perfect *and* imperfect rights.

Indeed, Pufendorf's dismissal of supererogation led him to revise the status of that last distinction. Both thinkers maintained that respecting perfect rights is essential for peaceful society, while realising imperfect rights merely contributes to the well-being of society.[94] On Grotius' account, the latter is always morally commendable but not normally required by natural law. Showing mercy to a deserving enemy, for instance, is often supererogatory (namely whenever the maintenance of society is furthered by pardoning, without necessitating this).[95] Imperfect rights therefore do not always correlate to obligations in others. Pufendorf dissented on this point, insisting that sociality does generally oblige agents to realise imperfect rights.[96] Dispensing benefits, gratitude and other duties of kindness and humanity are obligatory by natural law. The obligation in question is an imperfect one, however, meaning that no force or compulsion is permitted against derelict obligees.[97] Natural law does not countenance enforcing imperfect obligations, as this would be 'a Remedy more grievous than the Disease'.[98] Unenforceable obligations are still obligations, however: imperfect obligations are incomplete, not in normative force, but in lacking corresponding perfect rights in others.

Contrary to what is often maintained, natural law requires fulfilment of non-enforceable obligations for both thinkers, albeit to differing degrees. This point is best grasped by considering their views on justice – the moral norm regulating rights and desert. Grotius used his pioneering distinction between perfect and imperfect rights to revise the received Aristotelian classification of justice. On the latter view, commutative justice demands that equality is observed in exchanges, while distributive justice calls for allocating common goods in proportion to prospective recipients' merit. The two norms were deemed to differ with respect both to the kinds of equality (arithmetic vs geometric) and to the social relations they concern (private vs communal).[99] Grotius rejected the traditional account, averring instead that commutative justice governs perfect rights, and distributive justice imperfect ones.[100] Since imperfect rights are not enforceable, neither is distributive justice.

Confusingly, distributive justice is not, for Grotius, the only moral norm ordering respect for imperfect rights. Other-regarding virtues such

as liberality and mercy do so too.[101] For this reason, Pufendorf accused Grotius of conflating distributive justice with universal justice – the whole of other-regarding morality.[102] The classification of justice advocated by the German natural lawyer was more traditional. Both commutative and distributive justice concern perfect rights. Commutative justice calls for numerical equality in private exchanges; distributive justice demands that partners receive a 'just Share' of the profits made in a corporate society.[103] Partners have a perfect, actionable right to a fair share. Imperfect rights lie beyond particular justice: 'When then, we exhibit to another either Actions or Things due to him only by *Imperfect* Right ... [then] we are said to have observ'd *General* or *Universal Justice*'.[104] For Pufendorf, natural law requires observance of duties of humanity that fall under universal justice. This allowed him to claim that to every imperfect right corresponds an imperfect duty; a claim that is false on Grotius' ethics of natural law and supererogation.

The view that Grotius reduced natural law to commutative justice is widespread in the literature. 'Through his distinction between rights and imperfect moral qualities', Stephen Buckle maintains, 'Grotius thus limits the law of nature to the protection of the *suum* of each individual member of society, restraining it from requiring any positive acts of private benevolence'.[105] In fact, Grotius was adamant that 'there are many Duties, not of strict Justice but of Charity, which are not only very commendable ... but which cannot be dispensed with without a Crime'.[106] Not all moral duties are accompanied by perfect rights of others: 'Duties of Charity and Gratitude ... lay ourselves under an Obligation, and at the same Time give no Right to any other over us'.[107] Natural law hence requires more than merely abstaining from injury: '*natural Right*, considered as a *Law*, does not only respect what we call *expletive* [i.e. commutative] Justice, but comprehends the Acts of other Virtues, as of *Temperance*, *Fortitude*, and *Prudence*; so that in certain Circumstances they are not only *honest*, but of an *indispensable Obligation*'.[108] Only violations of perfect rights justify resort to court or arms.[109] Observance of distributive justice, liberality, charity etc. is nonetheless in some circumstances necessary for the maintenance of an orderly society and hence required by natural law – even if such duties remain beyond compulsion.

## CONCLUSION

This chapter has highlighted some interconnected ethical disagreements between Grotius and Pufendorf. The latter rejected his predecessor's

naturalistic conception of morality and moral obligation as impious and conceptually unsound. His own divine command theory rendered natural morality and natural law co-extensive, as moral goodness consists in the voluntary accordance of actions with natural law. By contrast, Grotius practically disentangled natural law from natural morality, thus creating space for supererogation. My analysis has hinted at how the two thinkers strived to incorporate the language of rights and justice within their natural law framework. Theoretical differences with contemporary natural law thinkers not discussed in detail in this chapter – including Hobbes, Locke and Leibniz – are arguably even greater. Notwithstanding their shared belief that morality is rationally demonstrable, seventeenth-century natural law ethicists disagreed deeply about the nature of morality, about what it requires and about the meaning of basic moral terms – providing a wealth of ideas for moral philosophers to ponder today.

## NOTES

* For splendid feedback on an earlier version of this chapter, I would like to thank Aaron Garrett, Heikki Haara and Kari Saastamoinen.

1. For an excellent overview of thinking on natural law and natural rights over the past 2,500 years, see Haakonssen and Seidler 2016.
2. Barbeyrac 2003: 272. Also e.g. Smith 1982 [1759]: VII.4.37.
3. The ensuing analysis of Grotius' ethics draws on Olsthoorn 2018 (outlining his just war theory) and Olsthoorn 2019 (outlining his natural law theory).
4. Pufendorf 1729: I.6.18.
5. I will refrain from offering catchy characterisations of their positions ('Was Grotius a late scholastic or a proto-Hobbist?'), as such shorthand depictions are inevitably imprecise and misleading. For the same reason, I will bracket the much-contested question of what, if anything, was distinctly 'modern' about the Grotian approach to natural law. For two contrasting recent assessments of the innovativeness of Grotius' ethics, see Irwin 2008: 88–99 and Darwall 2012a.
6. Schneewind 1998: 70–73 (Grotius); Schneewind 2010: 170–75 (Pufendorf). Also e.g. Tuck 1987.
7. Pufendorf 2014: 81, also 55–7. Pufendorf also lambasted Grotius for credulously copying ideas 'from the scholastic writers'.
8. Quoted in Saunders 2002: 2180.
9. Schneewind 1987: 134.
10. Grotius 2005: II.20.45–8 and, more generally, Grotius 2012: I.2–12. The arguments the latter text musters in support of the truth of Christianity are not restricted to those demonstrable by unaided reason. Also e.g. Pufendorf 1729: I.6.13.

11. Pufendorf 1991: I.4.
12. Pufendorf 1991: preface, I.4.8. Pufendorf 1729: II.3.19 explains that the immortality of the soul is 'abstracted from', rather than denied by, his natural law doctrine.
13. Leibniz 1972: 66–7.
14. Pufendorf 1991: I.3.10.
15. Pufendorf 1729: II.3.19.
16. Grotius 2005: I.1.9, also II.14.6.1.
17. Grotius 2005: I.1.10.2.
18. Haakonssen 2002: 34.
19. Grotius 2005: prol. 12. Cf. Pufendorf 1729: II.3.19.
20. Pufendorf 1991: I.2.2, also 1729: I.6.4, II.3.6.
21. Pufendorf 1729: II.3.23.
22. Hobbes 1998: 3.33. Cf. Hobbes 2012: 15.41.
23. Pufendorf 1729: II.3.20, also I.6.4.
24. Pufendorf 1729: I.6.13.
25. Grotius 2005: II.20.5.1, also I.2.1.3.
26. Grotius 2005: II.20.45–8.
27. Pufendorf 2002: § 24; Pufendorf 1991: I.3.13, I.4.6.
28. Grotius 2004: 11.
29. Grotius 2005: prol. 12.
30. E.g. Tuck 1987; Hont 2005: 159–84; Palladini 2008; Darwall 2012b: 200–202; Haara 2018.
31. Grotius 2005: prol. 5.
32. Grotius 2005: prol. 6.
33. Grotius 2005: prol. 8.
34. Grotius 2005: I.2.1.2; also II.20.5.1. For helpful discussion, see Saastamoinen 1995: 114–16; Brooke 2012: 37–58; Straumann 2015: 88–119.
35. Grotius 2005: I.1.10.5.
36. Hobbes 1998: 1.2. Cf. Pufendorf 1729: II.2.4.
37. Pufendorf 1729: II.3.16. Hobbes had defined natural law as 'the Dictate of right reason about what should be done or not done for the longest possible preservation of life and limb' (in 1998: 2.1). The incorrect view that Pufendorf, too, derived natural law from the principle of self-preservation is widespread (e.g. Tuck 1987: 105; Hont 2005: 175; Palladini 2008: 30n) and the result of mistaking an empirical principle of human behaviour for a normative one. Saastamoinen 1995: 65–77, 83–94 offers a helpful corrective.
38. Pufendorf 1991: preface.
39. Pufendorf 1729: II.1.8.
40. Pufendorf 1729: II.1.5. On the moral psychology underpinning Pufendorf's natural law ethics, see Haara 2016: 425–38.

41. Pufendorf 1729: II.3.14.
42. Pufendorf 1729: II.3.16.
43. Pufendorf 1729: II.3.15.
44. Schneewind 2010: 181–5.
45. Pufendorf 1729: II.3.15.
46. Pufendorf 1729: III.3.1.
47. Pufendorf 1729: III.3.2.
48. Grotius 2005: II.2.11–7; Pufendorf 1729: III.3.5–10.
49. E.g. Simmonds 2002: 218–20; Haakonssen 2004.
50. Suárez 2015: II.6.5.
51. Insightful analyses of Súarez's ethics are found in Haakonssen 1996: 16–24; Irwin 2008: 1–69; Irwin 2012.
52. Suárez 2015: II.6.6.
53. Suárez 2015: II.6.10.
54. Suárez 2015: II.6.11, also e.g. II.7.1, II.9.4.
55. Grotius 2005: I.1.10.1.
56. Suárez 2015: II.6.13.
57. Grotius 2005: I.1.10.2. This naturalistic conception of moral obligation – actions can be morally obligatory of themselves, independent of human or divine legislative will – is new to *DJBP*. In the earlier *Jurisprudence* (written 1619–20; first published 1631), Grotius still endorsed the Suárezian thesis that any obligation to do what is naturally right is superimposed by God: 'Natural law in man is an intuitive judgement, making known what things from their own nature are honourable or dishonourable, involving an obligation to follow the same imposed by God'. Grotius 1926: I.2.5. Cf. Suárez 2015: II.6.13.
58. Suárez 2015: II.6.20–24.
59. Suárez 2015: II.7.1, 6; Grotius 2005: I.1.10.2.
60. Grotius 2005: I.1.15.
61. Grotius 2005: I.1.10.3.
62. Suárez 2015: II.6.8.
63. Grotius 2005: I.2.1.3. The metaphor recurs in I.2.8.4 and II.1.5.1.
64. Grotius 2005: III.15.1.
65. Grotius 2005: I.2.6.2; also II.1.10.1, II.20.10.
66. Grotius 2005: II.24.2.3; also e.g. II.1.9.1, III.20.50.1.
67. Irwin 2008: 284–307.
68. Grotius 2005: prol. 12.
69. Pufendorf 1729: II.3.4.
70. Pufendorf 1729: II.3.5.
71. Pufendorf 1729: II.3.4.
72. Pufendorf 1729: II.3.4, also I.2.6, II.3.19. Cf. Hobbes 2012: 13.10.

73. Pufendorf 1729: I.7.3.
74. Pufendorf 1729: I.2.6. Protestants generally disliked the idea of supermeritorious actions because Catholic thinkers had invoked it to support the sale of indulgences and masses. For the same reason, Protestants insisted on justification by faith alone. Pufendorf dismissed supererogation on anti-Catholic grounds in 1991: I.5.3.
75. Pufendorf 1729: I.2.6, II.3.4; Cumberland 2005: 5.9. Schneewind 1998: 123–5 argues that Pufendorf, innovatively, makes moral goodness entirely independent of natural goodness.
76. Hence his accusation that Grotius' natural law is circular. Pufendorf 1729: II.3.4. See Irwin 2008: 292.
77. Pufendorf 1729: I.1.3.
78. Pufendorf 1729: I.2.6.
79. Hobbes 2012: 14.1. Also Spinoza 2016: 16.2–3.
80. Grotius 2005: II.17.2.1, also I.2.1.3.
81. Pufendorf 1729: III.1.1, also Pufendorf 1991: I.6.3. Incidentally, for Hobbes nothing is exclusively our own by nature because his right of nature permits agents to seize anything which may prove beneficial for their preservation, even 'one anothers body'. Hobbes 2012: 14.4.
82. Grotius 2005: II.22.16; Pufendorf 1729: I.1.19, I.7.7; Pufendorf 1991: I.9.4.
83. Grotius 2005: II.2.20.2.
84. Pufendorf 1729: I.7.11.
85. Grotius 2005: II.2.20.1.
86. Grotius 2005: II.17.3.1, II.17.9, II.17.13; Pufendorf 1729: III.1.3.
87. Pufendorf 1729: I.1.20.
88. Grotius 2005: I.1.5.
89. Grotius 2005: II.2.20.2.
90. Pufendorf 1729: I.1.19.
91. Pufendorf 1729: III.5.3.
92. Pufendorf 1729: I.1.20, III.5.1, VIII.3.5. On moral powers, see Saastamoinen 2006: 230–31; Darwall 2012b.
93. Pufendorf 1729: I.1.21, III.5.1. Cf. Mautner 1999.
94. Grotius 2005: prol. 8–10; Pufendorf 1729: I.7.7.
95. Grotius 2005: III.11.7; cf. II.10.11, III.14.6.4.
96. Pufendorf 1729: I.1.20, I.7.15, III.3.17.
97. Pufendorf 1729: III.3.9.
98. Pufendorf 1729: I.7.7.
99. Aristotle 2000: 5.2–5; Aquinas, *Summa Theologiae* 2a.2ae.61.1.
100. Grotius 2005: I.1.8, II.20.2.
101. Grotius 2005: I.1.8.1; cf. Pufendorf 1729: I.7.11.

102. Pufendorf 1729: I.7.9, 11. Also Smith 1982 [1759]: VII.2.1.10. Cf. Aristotle 2000: 5.1 (1129a20). Pace Pufendorf, Grotius distinguished distributive justice from universal justice in 1926: I.1.9–10.
103. Pufendorf 1729: I.7.9, also VIII.3.5.
104. Pufendorf 1729: I.7.8.
105. Buckle 1991: 31–2; also e.g. Straumann 2015: 126. Olivecrona 2010 argues that the natural law theories of Grotius and Pufendorf can, paradoxically, do without the idea of natural law. Virtually all the normative content in their ethical thinking could be captured, he claims, by rights, obligations, wronging and justice – ideas which neither presuppose laws nor lawgiving. Olivecrona's argument rests on an untenably narrow conception of natural law, as requiring nothing other than keeping promises and avoiding injury (2010: 209). Cf. Haakonssen 1996: 39–41.
106. Grotius 2005: II.25.3.3, also e.g. II.22.10.1, II.24.2.3, II.25.3.4, III.1.4.2, III.18.4.
107. Grotius 2005: II.11.3, cf. II.14.6.1.
108. Grotius 2005: II.1.9.1, also I.1.9.
109. Grotius 2005: II.1.2.1; Pufendorf 1729: I.7.7.