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## Hugo Grotius' Classical Conception of Justice

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Hugo Grotius is increasingly portrayed as an early modern natural rights theorist. Such readings often reduce his concept of justice to the negation of offences against private property rights, and frame his politics in legal terms. Grotius indeed has a category of “expletive” (or “strict”) justice, understood in terms of universal laws, which provides an individual with the necessary possession or liberty. However, the exercise of this status must then be governed by his under-explored category of “attributive” (or “wider”) justice, which alone, through the exercise of political virtue, can promote positive (and public) goods.

This dual framework is evident in three important aspects of Grotius' thought: political authority, criminal punishment, and Atonement theology. In the first, there is no strict obligation to enter civil society, as the natural laws and rights of expletive justice can already be enforced in extra-political society. However, attributive justice encourages entry into political society, because it allows for public governance in the particular situations where expletive justice, owing to its impersonal universality, must be

silent. Likewise, the right to punish crime is not a claim on a tangible good, but a difficult responsibility. Its exercise thus requires attributive justice, whose personal, forward-looking, action-oriented character will reveal the particular punishment that best promotes the public purposes of punishment: the common good. Grotius' use of a criminal law paradigm (rather than a private law framework) is also evident in his creative understanding of how Christ's death atones for human wrongdoing. Grotius portrays God as moral governor of the universe, rather than judge or economic creditor. God then exercises (political) prudence and love in relaxing his 'expletive' right to condemn humanity, out of considerations of a higher good.

This dual framework of expletive and attributive justice allows Grotius to build on the traditional understanding of commutative and distributive justice, by allowing a place for a law-based (expletive) ethics within a wider (attributive) virtue-based ethics. Thus, he shows how a robust conception of individual rights need not sever the link relating those rights to higher goods both in the political realm and beyond it.

This dissertation by Jeremy Seth Geddert fulfills the dissertation requirement for the doctoral degree in Politics approved by David Walsh, Ph.D., as director, and by Claes Ryn, Ph.D., and Stephen Schneck, Ph.D. as Readers.

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## INTRODUCTION

Hugo Grotius has long been portrayed by North American scholarship as a modern natural rights thinker. Indeed, his position on subjective rights has been taken as the basic orienting principle of his politics. In the legal field, he has variously been portrayed as the father of modern international law, modern natural law, or the modern science of law. Many political theorists of the past generation have described him as a precursor to figures such as Hobbes and Locke, and thus as representing a break with the classical understanding of politics.

This understanding of Grotius' place in the history of political thought reflects a variety of interpretive moves. Foremost among them is an emphasis on rights rather than goods. This tends to produce a largely formal conception of politics that focuses on justice in procedures rather than outcomes. These possessive rights confer on individuals a status that guarantees their immunity from injustice, thus obviating the need for guidance in the action they subsequently perform. This leads to an emphasis on civil society as existing to protect and enlarge private goods, rather than to foster a common public good. Another common theme in these accounts is the conception of politics as an impersonal system in which abstract theory and calculative reason can solve the problems of politics (for example, by channelling enlightened self-interest). This universal science of politics can theoretically be applied to any political community, regardless of its



particular historical situation. Thus, justice fundamentally resides in the safeguards of the system, rather than in the character of a people. Grotius is thus interpreted as rejecting an action-based understanding of politics as a practice requiring (and inspiring) political virtues, such as the classical virtue of prudential judgment.<sup>1</sup>

Indeed, this approach is typically perceived as a necessary break with the traditional political thought of classical Greece, as typified by Aristotle, and, later, his medieval Christian heirs. For them, political justice was not simply reducible to commutative justice, in which the concern is the private realm; the subject matter, external goods; the reasoning, calculative; the approach, procedural; the outcome, universal; and the prescriptions, amenable to systematization. Nor was it an exercise employing *techne* to design constitutions which, as Aristotle says in his *Politics*, would simply “guarantee men’s rights against each other.”<sup>2</sup> Rather, politics also included distributive justice, in which the concern is with the public realm; the subject matter, personal; the reasoning, prudential; the approach, substantive; the outcome, historical-situational; and the prescriptions, reliant on the political virtue of *phronesis* to judge the spirit of the law. Finally, beyond this duality of political (or “partial”) justice existed a greater overarching sense of justice. The natural realm of politics was conceived as an intermediate end, ultimately ordered to a higher philosophical or theological realm.

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<sup>1</sup> See, for instance, Michel Villey, *La Formation de la Pensée Juridique Moderne* (Paris: Montchrestien, 1975); Richard Tuck, *Natural Rights Theories: Their origin and development* (Cambridge: Cambridge University Press, 1979); Tuck, *Philosophy and Government 1572-1651* (Cambridge: Cambridge University Press, 1993); Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (New York: Oxford University Press, 1993); Peter Haggenmacher, “Droits subjectifs et système juridique chez Grotius”, in Luc Foisneau, ed. *Politique, Loi, et Théologie Chez Bodin, Grotius et Hobbes* (Paris: Kime, 1997), and Jerome Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (New York: Cambridge University Press, 1998).

<sup>2</sup> Aristotle, *Politics* 3.9, trans. Ernest Barker (New York: Oxford University Press, 1962), 119 (1280b10).

Richard Tuck is a representative (and influential) figure who situates Grotius as breaking with the classical order to help inaugurate the modern order. Tuck argues that Grotius espouses a theory of secular natural rights built on premises that even a relativist could accept. In this reading, Grotius rejects an Aristotelian conception of the virtues. Tuck also argues that Grotius sees no distinction between theoretical and practical sciences, with systematic mathematical rationality covering the whole of morality. Likewise, his justice consists simply in upholding the rights of others, rather than any principle of overall distribution of goods. Tuck concludes that Grotius leaves “little room for individual judgment or the exercise of *phronesis*.”<sup>3</sup>

A helpful recent study by Brian Tierney has challenged the assumption of Grotius as a revolutionary thinker. However, Tierney accomplishes this by identifying antecedents in the development of subjective rights and situating Grotius as a mere agent of transmission in a new world. Left unchallenged is the assumption that subjective rights are the basic ordering principle of Grotius’ political thought.<sup>4</sup>

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<sup>3</sup> Richard Tuck, “Grotius and Selden,” in *The Cambridge History of Political Thought 1450-1700*, ed. J. H. Burns (New York: Cambridge University Press, 1991), 506-07, 515-19. For a variation on this specific line of thought, see Michel Villey, *La Formation de la Pensée Juridique Moderne* (Paris: Montchrétien, 1975), 619-20, or John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980), 205-08. More recently, Charles Taylor has described Grotius as a “modern social imaginary”, and argues for a “Grotian-Lockean theory” that stands in direct opposition to Aristotle. See Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007), 170.

<sup>4</sup> Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, MI: Eerdmans, 2001), 324-42. There are a few limited exceptions to this picture. For example, Richard Cox’s chapter “Hugo Grotius,” in Leo Strauss and Joseph Cropsey, eds., *History of Political Philosophy* (University of Chicago Press, 1963), 344-53, helpfully points out the distinctiveness of Grotius’ understanding of punishment as natural rather than conventional. In addition, although Knud Haakonssen generally agrees with the rights-based portrayal of Grotius, he has suggested that Grotius’ understanding of (subjective) rights is ultimately derived from prior relations of justice. See Knud Haakonssen, “Review: The Rights of War and Peace,” *Mind* (April 2002), pp. 499-502; Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (New York: Cambridge University Press, 1996), 26-30. However, these are both shorter selections, and there have been few systematic book-length treatments of Grotius’ thought. Onuma Yasuaki, ed., *A Normative Approach to War* (New York: Oxford, 1993) offers one generally careful and thorough study of Grotius, but its treatment overlooks a subtle yet important distinction in Grotius’ own delineation of the categories of justice. Christoph Stumpf has recently offered another systematic

These portrayals are in some ways understandable. Grotius devotes plenty of attention in the well-known *de Jure Belli ac Pacis* (*DJB*), or *Right of War and Peace*, to the defence and recovery of property. Likewise, his *Inleydinge*, or *Jurisprudence of Holland*, is devoted to enumerating different types of possessive rights to which an individual may be legally entitled. And an effort to systematize the principles of international law runs throughout his works.

Yet Grotius scholarship has focused on a relatively narrow section of Grotius' corpus, primarily *DJB*. Even within this massive tome, their interest is typically confined to Grotius' writings on rights, property, consent, and defensive war. A few have recently explored Grotius' early works on international relations, particularly his *de Jure Praedae*, written at the age of twenty-one. However, the literature is particularly dismissive of the political import of Grotius' theological works, despite the fact that this was the exclusive practical and theoretical focus of Grotius' mature years. As a result of this selective and hermeneutically questionable approach to Grotius, few studies have attempted to treat Grotius systematically. There is little exploration of his philosophy of law, his philosophical ethics, his conception of church and state, his understanding of nature and grace, and his foundational conception of justice.<sup>5</sup>

As a result, the literature has largely overlooked the importance of Grotius'

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exposition of Grotius that helps to advance the understanding of justice in Grotius, building on the work of Oliver O'Donovan. See Christoph Stumpf, *The Grotian Theology of International Law* (New York: Walter de Gruyter, 2006).

<sup>5</sup> The notable exception to this trend is the work of Oliver O'Donovan. See Oliver O'Donovan and Joan Lockwood O'Donovan, "Hugo Grotius (1583-1646)", in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, MI: Eerdmans, 1999), 787-92 and Oliver O'Donovan, "The Justice of Assignment and Subjective Rights in Grotius", in Oliver O'Donovan and Joan Lockwood O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (Grand Rapids, MI: Eerdmans, 2004), 167-203.

division of justice into “expletive” and “attributive” categories, a distinction can be found, in one form or another, throughout Grotius' corpus.<sup>6</sup> In so doing, Grotius' conception of justice has been almost entirely reduced to the former of these two categories. This ignores Grotius' attention to a justice in which the subject matter is personal; the reasoning, prudential; the approach, substantive; the outcome, historical-situational; and the prescriptions, reliant on the political virtue of *phronesis* to judge the spirit of the law. This conception of attributive justice also develops the classical theme of distributive justice in several new ways. Grotius builds on his personal conception of politics by emphasizing the good rather than the right. This also illuminates the fact that goodness is higher, and thus never perfectly fulfillable in this world. It also draws out the forward-looking nature of Grotian political thought, in its creative approach to human action. This shows that politics is a dynamic practice rather than a static reality. Perhaps most importantly, Grotius demonstrates that expletive justice is completed in (and ordered toward) attributive justice. Although expletive justice may be “strict” justice, it is not the highest sense of justice.

Because Grotius' explicit references to expletive and attributive (or “strict” and “higher” justice) are somewhat sparing, it is helpful to show how they are implicit in several of Grotius' themes, particularly those generally overlooked by the discipline. This can be seen first in Grotius' approach to authority. His argument in *DJB* that authority

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<sup>6</sup> Indeed, the term “attributive justice” appears only a few times in *DJB*. However, Grotius frequently contrasts expletive (or “strict”) justice, which is required, with a higher (or “wider”) standard, which is “fitting” and is guided by the exercise of the virtues. The structural importance of attributive justice can be seen in one of Grotius' private letters. Here he lays out a diagram of his structure of justice, with natural law divided into that which is mandatory and that which is appropriate. See Hugo Grotius, letter to Willem de Groot, 21 May 1638, in Herbert F. Wright, ed. *Some Less Known Works of Hugo Grotius* (Leiden: Brill, 1928), 210.

arises not only from generation and consent, but also from crime, demonstrates his conception of authority as not simply contractarian but also moral. Furthermore, his treatment of civil society as salutary but not necessary helps to draw out not only the validity of individual choice under expletive justice, but the higher morality of the common good under attributive justice. Of particular interest in regard to expletive and attributive justice is Grotius' treatment of right to rebellion, where he argues that the status of authority is nearly unassailable. At the same time, however, he permits wide latitude for civil disobedience, rendering impotent the ruler's ability to act effectively.

However, this sense of attributive justice is much more visible in his overlooked theo-political work *De Imperio Summarum Potestate Circa Sacra*, or *On the Government of the Supreme Powers Concerning Religious Matters*, in which he provides his most systematic exposition of the foundations of political authority. Here he provides a much clearer defense of his ideas about authority in *DJB*. In addition, he sets out an exposition of the purposes of government. Likewise, he provides a taxonomy of types of rule, and examines the nature of the judgment corresponding to each. This demonstrates the importance of practical virtues over impersonal formulas, showing that order is not propositional but existential. Grotius also outlines the relation between natural and supernatural, and examines the role of politics in pointing toward a higher moral realm. This work also fleshes out Grotius' metaethics, discussing the relation between indicative and imperative components. Furthermore, it begins to examine his conception of positive law and the role it plays in instantiating attributive justice. Together, these elements point toward Grotius' approach to natural Right and natural law.

Grotius' understanding of expletive and attributive justice are even better illustrated in his treatment of punishment. Grotius' conception of punitive war in *DJB* includes perhaps the earliest in-depth treatment of the philosophy of criminal law. Expletive justice may deductively grant political authorities a strict natural right to punish lawbreakers. However, attributive justice – the specifically political component of justice – then governs the actual exercise of law enforcement. Here Grotius emphasizes the importance of prudence and clemency in the ruler, as the ruler deliberates over the particular punishment that will best secure the common good. Moreover, this status does not confer on the punisher a self-interested claim-right to a tangible possession, but instead a difficult duty. Nor does the very crime automatically dictate the redress in mathematically reciprocal fashion. Rather than looking backward to restore a previous state of being, punishment is a course of action that looks forward, creatively imagining new possibilities and working toward a more just future. As a result, such justice is not something that can be completed; rather, it is an orientation point toward which a community moves through time. Thus, while this rights-based conception of justice plays an initial role in punishment, it is insufficient to realize the true purposes of punishment.

Likewise, Grotius' conception of punishment adds a fundamentally public component to his philosophy of law and politics. This implicit theory of public law points to the limitations of reading Grotius as reducing justice to procedural considerations, as in contract law.<sup>7</sup> It also counteracts the notion that Grotius views

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<sup>7</sup> Grotius offers a more explicit theory of public and private law in *A Defence of the Catholick Faith Concerning the Satisfaction of Christ: Against Faustus Socinus* (London: Printed for Thomas Parkhurst and Johnathan Robinson, 1692).

politics as aiming solely at the protection of private property, as in tort law. On the contrary, Grotius' understanding of punishment shows a concern for the internal character of the violator, rather than a mere concern to recoup external damages inflicted on the victim. This illustrates that justice is incomplete without reference to a particular kind of personal character.

This understanding of expiatory and attributive justice culminates in Grotius' almost-entirely-overlooked *De Satisfactione Christi*, or *The Satisfaction of Christ*. This work puts forward a new understanding of the Atonement of Christ that subsequently gained wide currency in Arminian Protestantism. Here Grotius puts forward a creative understanding of Christ's salvific assumption of human punishment, one in which God himself acts prudently for the common good. In doing so, God takes on a 'political' role as governor of the moral universe rather than an 'economic' role as generous creditor to individuals. God's role is not compelled by laws of nature, but demonstrates free will, judgment, and virtue in accepting Christ's death as a substitution for eternal punishment. Eschewing an approach that involves external units of account such as merits, this theory emphasizes the personal and political nature of existence. This can be seen in Grotius' corporate understanding of the effect of the Atonement, putting forward a fundamentally political conception of action. This also demonstrates Grotius' commitment to an overarching sense of natural Right that transcends the strict dictates of law. Likewise, it particularly draws out the forward-looking nature of the Atonement, looking ahead to glorification rather than back to innocence. This also points toward the cultivation of positive virtue rather than the mere negation of infractions. Ultimately, in contrast to the

two predominant theories of his (and our) day, Grotius views the Atonement not simply through expiatory justice but also through attributive justice. This shows that Grotius not only has a place for attributive justice, but an even more robust place than his predecessors in the classical and Christian tradition.

Taken together, Grotius' thought shows a remarkable continuity with at least the spirit (and often, the letter) of classical thought on justice. Indeed, this emphasis on a higher attributive justice builds upon Aristotle's dual classification of political justice in Book V of his *Nicomachean Ethics*.<sup>8</sup> In doing so, Grotius further develops Aristotle's classical understanding of politics as aiming for a common good, one that is manifested in performative action in concrete historical situations. It also requires (and cultivates) *phronesis*, rather than simply being an exercise of *techne* in which impersonal systems are designed merely to "guarantee men's rights against each other."<sup>9</sup> Grotius thus opens an even wider space for *praxis* relative to *poiesis*, further developing Aristotle's commitment to *phronesis*. However, his emphasis on the existential character of attributive justice also draws on Plato's emphasis on the experiential character of Right. Finally, it further develops the Christian emphasis on the personal and Divine Source of Right, and the infinite nature of goodness toward which politics can only point the way.

Thus, while others have effectively identified Grotius' development of subjective rights and law as a contribution to commutative justice, the account of Grotius developed here indicates that his ostensibly impersonal and formal conception of rights is not the final word in his political philosophy. Rather, his conception of law and rights is best

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<sup>8</sup> Aristotle, *Nicomachean Ethics* 5.2-6, trans. Martin Ostwald (Upper Saddle River, NJ: Prentice-Hall, 1999), 115-30.

<sup>9</sup> Aristotle, *Politics*, trans. Ernest Barker (New York: Oxford University Press, 1962), 3.



understood within a specifically political account of his thought. In turn, this political account itself is incomplete without reference to an order that transcends the natural political order.

Few today would advocate sacrificing the protections of subjective rights. Yet this emphasis on protection of private possessions (leaving out the public realm) and on the secular (leaving out any kind of good transcending politics) often leaves rights-based political regimes grasping for reasons by which to persuade their citizens to sacrifice their own self-interest in the name of a higher good. A fuller study of Grotius reveals ways in which a robust conception of subjective rights can be ordered toward the practice of politics and the active striving toward the common good. Far from eliminating public virtue and reducing the public realm to the impersonality of legal systems, Grotius goes beyond the letter of the law, and points toward the role of political judgment in ascertaining the underlying spirit of the law. Instead of offering one-size-fits-all blueprint that can be applied without regard for the particularities of individuals and communities, he emphasizes situational judgment to ascertain the best course of action in particular situations. Rather than seeing justice as looking to the past in redressing violations of procedure, he offers a forward-looking vision that opens up the substantive possibilities of politics. Grotius' vision of justice thus creates a space for the protection of rights without sacrificing the higher goods to which those rights are ultimately ordered.

## CHAPTER 1

### A HISTORY OF JUSTICE

Any study of the history of justice must start from the beginnings. The classical tradition of political philosophy is often said to have originated when Socrates ‘brought down philosophy from the heavens’. For Socrates, ethics is inseparable from the study of nature, which had been the primary focus of the Presocratics. Indeed, although Plato’s *Republic* deals with several branches of what is now called philosophy, its initial point of departure is the ethical question of justice. Socrates’ subsequent use of the polis to illustrate justice in the individual introduces a connection between ethics and politics. By examining the polis in conjunction with the question of ethics or justice, Plato becomes the father of political philosophy.

#### *Plato*

For Plato, justice in the soul and justice in the polis are integrated, but not coequal. The tripartite structure of the polis, including the virtues of each, reflects the ontologically pre-existent tripartite structure and virtues of the soul. Indeed, justice in the polis mirrors justice in the soul only because the former is a reflection of the latter. Political justice is a derivative, second-order reality.

Put another way, justice is not reducible to institutional solutions. It is not simply

about organizing the polis in a particular way. Such organization, in and of itself, is only a means or a procedure. Simply placing the auxiliaries and the producers under the rule of the philosopher-kings does not automatically bring about justice. Rather, this structure simply brings about the condition in which it is possible for the philosophers to transmit the true justice in their own souls (or at least its effects) to the rest of the polis. Indeed, true justice resides in the soul of the philosopher-king. As a result, political order points toward philosophical order, the order of the soul, which transcends the political realm. For Plato, the substantive realm of justice is the overarching sense of justice, which might be called “philosophical justice”.

Having been brought to this point in Books II through IV of the *Republic*, Socrates’ interlocutors naturally then demand that Socrates explain the exact nature of justice. Yet Socrates is characteristically hesitant to provide a concrete answer. As he says, “I won’t be up to it and I’ll disgrace myself and look ridiculous by trying.” However, Socrates does offer a substitute: “I am willing to tell you about what is apparently an offspring of the good and most like it.” Accordingly, in the following books, Socrates provides metaphors: the sun, the divided line, and the cave.<sup>1</sup>

Thus, the Form of the Good, the higher justice by which the philosopher-kings justly rule the polis, is not something which can be put into concrete propositional formulations. The words Glaucon and Adeimantus want to hear cannot be anything more than second-order realities in relation to the justice which resides in the souls of the philosopher-kings. Indeed, when Socrates concludes the main argument of the *Republic*

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<sup>1</sup> Plato, *Republic*, trans. G. M. A. Grube, rev. C. D. C. Reeve (Indianapolis: Hackett, 1993), 180-190 (506d-518b).

– that justice is intrinsically good – he again uses a metaphor, that of the three-headed beast.<sup>2</sup> It may not be accidental that Plato writes in dramatic form, using allegory and metaphor, rather than writing a treatise aiming for ‘scientific’ exactitude.

Indeed, this explains why Plato’s understanding of political justice resides in a classification of people (“who”) rather than ideas (“what”). Plato cannot give a clear definition of the principles by which the polis will be justly governed (which is to say, educated). He can only give a clear definition of *who* will govern the polis. This definition is, of course, a sort of pseudo-definition; it is little use knowing who will govern unless one knows what is true order in the soul.

The personal practice of government is thus particularly important to Plato. Plato’s critique of imitative poetry relies on the premise that poets lack knowledge of the subject of which they draw or speak, and thus deal with the world of appearances rather than realities. Likewise, knowledge of horsemanship can be attributed only to those who know how to use a bridle, not to those who know how to draw or rhapsodize about equestrian equipment. Yet even in the world of horsemanship, one who actually makes a bridle is still one step removed from one who actually uses the bridle in riding horses. The maker can only have correct opinion about horsemanship – to which the bridle is ordered – through associating with the user. Importing this distinction into politics, Plato would presumably see those who participate in politics as superior to those who simply have abstract knowledge of politics. Reality, even if ‘theoretical’, is known in practice, not in depersonalized laws.<sup>3</sup> This reflects Plato’s understanding of justice as existential; it

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<sup>2</sup>Plato, *Republic*, 260-63 (588b-592a).

<sup>3</sup> Plato, *Republic*, 265-72 (595b-602b, esp. 601c-602a).

consists of participation in transcendent reality rather than knowledge of propositional formulas.

These themes can be seen even more clearly in one of Plato's later political dialogues, the *Statesman*. Here Plato sets up a six-fold typology of regimes, which is later repeated in Aristotle's *Politics*. These types are divided according to rule by the one, the few, or the many. Each of these three types is then further sub-divided according to whether the rulers govern according to law, or govern ignorantly and according to their own passions. However, Plato makes it clear that each of these institutional types is limited in its ability to realize justice – even those ruled according to law. For this reason, Plato adds a seventh type of rule, which corresponds to true statesmanship.<sup>4</sup>

This statesmanship is characterized by art of ruling, an art that transcends the rule of law. While the law is rigid and inflexible, the art of ruling may counsel different prescriptions for each unique individual in a particular situation. Just as a good doctor considers each patient individually rather than slavishly adhering to the guidelines of the textbook, the justice of the true statesman is manifested in his wise action in unique situations. Indeed, law is actually one step removed from the art of ruling; it is only an imitation of the true art.<sup>5</sup> The propositions contained in a written constitution or set of laws are akin to a bridle, not to the skill of horsemanship. The wise ruler is a sort of 'living law', because the law dwells within his or her soul. This further testifies to the personal and existential character of justice.

Thus, for Plato, justice in its highest sense concerns the soul. It is inescapably

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<sup>4</sup> Plato, *Statesman*, trans. J. B. Skemp, rev. Martin Ostwald (Indianapolis: Hackett, 1992), 78-84 (300e-303b).

<sup>5</sup> Plato, *Statesman*, 63-78 (292a-300e).

related to virtue. Consequently, true justice is internal to a person; it does not reside in external institutions. It is fundamentally personal and cannot be fully defined in logical propositions any more than an individual person could be defined. As a result, it cannot consist in simply following institutional procedures and rules, blind to the actual outcome. On the contrary, it is substantive, even if the content of that outcome cannot be encapsulated in formulas. This is why Plato's procedural formulations of the tripartite structure of the polis are incomplete, and require a substantive – if nonpropositional – knowledge of philosophy itself. Thus, justice does not simply consist in the institutional arrangement of the tripartite structure of society, as known in abstract formulations claiming universal competence and applicability. It ultimately consists in the order of the soul. Consequently, it is known as that order is made manifest in human actions in time, in the particular situations of history.

### *Aristotle*

Aristotle is not the same thinker as Plato, as the student famously breaks with the teacher in Book II of the *Politics*. Indeed, the distinction between the approaches of Plato and Aristotle is a useful lens through which to view the subsequent history of political thought. Yet for all their differences, Plato and Aristotle agree on a great many fundamental issues, especially in contrast with modern political thought. In many ways, Aristotle's approach is simply one of further developing Plato's thought in a more concrete and scientific fashion. This is particularly apparent in Aristotle's treatment of justice.

Where Plato had only implicitly distinguished between political and philosophical justice, Aristotle makes this distinction clear. Aristotle begins Book V of his *Nicomachean Ethics* by drawing a primary distinction between “complete justice” and “partial justice”. The first appears to correspond to what Plato simply calls “justice”, in the generic sense of the term. It is an overarching sense of justice, one that deals most directly with the internal ordering of the soul, and corresponds to what might be termed “philosophical justice.” Aristotle defines this justice as that which makes people desire to act justly, and that which is manifested when they enact these desires.<sup>6</sup> He adds that it is a characteristic (*hexis*) of the soul, an ability which can only be used for good, not a purely technical or intellectual power (*dynamis*), such as may be possessed by a clever thief.<sup>7</sup> Thus, because it is a virtue, justice is fundamentally personal.

On the contrary, partial justice is what is denoted when the term “justice” is used to indicate the species, of which there are two types. One is termed “rectificatory justice,” or what would later come to be called “commutative justice.” This deals with the relations not among the citizenry as a whole, or between the citizenry and one person, but rather, between one individual and another. This category of justice thus appears to correspond to the private realm. Furthermore, rectificatory justice deals exclusively with external goods; that is, it deals with objects, not subjects. It solely deals with the content of economic transactions. As Aristotle says, “it makes no difference whether a decent man has defrauded a bad man or vice versa....The only difference the law considers is that brought about by the damage.”<sup>8</sup> The character of the subject is irrelevant. This

<sup>6</sup> Aristotle, *Nicomachean Ethics* 5.1, trans. Martin Ostwald (Upper Saddle River, NJ: Prentice Hall, 1999), 111 (1129a7-11).

<sup>7</sup> Ibid., 5.1, 111 (1129a11-14).

<sup>8</sup> Ibid., 5.4, 120-21 (1132a1-4).

simplifies judicial reasoning, as the judge need not consider intangible factors such as internal character.

Rather, in order to bring about rectificatory justice, the judge simply orders that the stolen object be taken from the offender and returned to the victim. The concern is solely with the goods themselves. There are only two shares at hand, and one can easily understand why Aristotle describes rectificatory justice as arithmetic. One might imagine an initial just distribution in which both persons possessed  $(x)$ . The subsequent commission of an injustice thus results in the thief now possessing  $(x + y)$  and the victim  $(x - y)$ . In order to rectify the injustice, the judge simply subtracts  $(y)$  from the stock of possessions of the thief and adds it to those of the victim. It is the arithmetic inverse of the original unjust act.<sup>9</sup> Justice requires no virtue, only the skill of calculation. As a result, the prescriptions are much more amenable to systematization in impersonal formulas: in this case, a universal rule that one must repay exactly as much as they have borrowed or taken. Furthermore, when the verdict is given, there is no question about the extent to which justice has prevailed; it is clear that the original state of justice has been restored.

Although Aristotle does not draw out this point, it seems that rectificatory justice essentially deals with violations of procedure. Granted, it may be true that the success of the rectification depends on the substantive outcome; in the example above, justice depends on both persons coming to possess  $(x)$ . However, the substantive outcome in which both persons possess  $(x)$  is only contingently just; in different situations, other just outcomes are easy to imagine. For instance, suppose the ‘victim’ had voluntarily given

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<sup>9</sup> Ibid., 5.4, 120-22 (1131b25-1132b20).



good ( $y$ ) to the 'thief' as a gift. In such a case, the substantive outcome in which the 'thief' possessed  $(x + y)$  and the 'victim' possessed  $(x - y)$  would in fact be just. Returning to the original case, the cause of injustice in the victim's status of  $(x - y)$  was the unjust procedure by which the thief acquired ( $y$ ). The change in the substantive outcome through the substantive transfer of ( $y$ ) was done in order to rectify the injustice of the procedure. In other words, the inherent justice of the situation cannot be determined by assessing whether the victim's stock of goods is  $(x)$  or  $(x - y)$ . It can only be determined by assessing the rectitude of the procedures by which the 'victim' arrived at his or her current stock of goods. The state (indeed, the private individuals) have no opinion on the inherent justice of possessing  $(x)$ , because there is none. This is why individuals are free to engage in any (licit) procedure to alter their own stock of goods as they so desire.

Aristotle further points out that rectificatory justice involves transactions both voluntary and involuntary. The first corresponds to what is known today as contract law: if a debtor fails to pay back the mutually-agreed sum, the creditor can take the debtor to court to recover the lost amount. The second lines up with tort law: if a person destroys an object lent to him, its owner can sue for damages.

Aristotle terms the other sub-species of partial justice "geometric justice", which is often known by its more recent denotation, "distributive justice". This deals with the distribution of honours, material goods, or any other common goods which may be authoritatively allocated by a political community. Thus, because distributive justice deals with the relations between the citizenry as a whole, it is fundamentally public. It

deals with proportions of distribution, and thus is given out according to the merit or desert of each individual. It is only the political community as a whole, mediated through its governors, who can justly engage in the procedure of awarding these goods. This category allows Aristotle to emphasize the social and interpersonal character of justice.

Furthermore, while external goods are still relevant to distributive justice, the honours in question are intangible, unlike in commutative justice. Thus, once individuals have been given such honours, they are not free to pass them on or sell them to others. They are not commodities, to be bought and sold through commercial procedures.

Moreover, distributive justice calls for a determination of the character of the individuals involved. Its proper exercise requires the necessary wisdom of the *spoudaios* – the man of practical wisdom – to ascertain the internal character of the subject at hand. This is why Aristotle describes distributive justice as geometric: If there are two persons, there must also be two shares, and the size of the shares must each be proportionate to the merit of the person. If one person is twice as deserving as another, that person should receive twice the honours of the other.<sup>10</sup>

Yet this proportionality, it would seem, must be determined on a case-by-case basis. No predetermined, universal rule can specify the just course of action prior to assessing the particulars of the situation. Thus, the decision must be left in the hands of the judge in each particular situation; no single law can suffice. Furthermore, despite Aristotle's use of mathematical terms, it is surely difficult to quantify the desert of a person. Indeed, the judgment needed in such prudential considerations can only be developed through experience. While young men may be excellent mathematicians, they

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<sup>10</sup> Ibid., 5.2, 5.3, 117, 118-20 (1130b30-34, 1131a10-1131b24).

cannot have any genuine practical wisdom.<sup>11</sup>

The determination of the distribution of such social goods is also substantive, or outcome-based. If one person possesses a quality desired by the state (such as virtue), then the distribution of social goods needs to reflect that state of being. To use the language of rectificatory justice, if a person inherently possesses a virtue to which the requisite social good (according to the standard of distributive justice) is (x), it would then be an injustice for that person to possess social good (x – y). Thus, a determination at any one time that the person's outcome is (x) is not a mere clue to the justice of the procedures by which the individual has gained (x), procedures which have no inherent justice-value in themselves. Rather, in this case, the outcome of (x) *does* have an inherent justice-value; it is the very substance of (political) justice.

Yet, as in Plato, this two-fold conception of particular justice does not entirely stand on its own; it still points toward a higher conception of justice. The presence of distributive and rectificatory justice only ensures that a state will more effectively achieve its desired goal. However, this goal may or may not be the best possible end; indeed, it may even be a bad end. For instance, a polis may adhere to its own principles of distributive justice, but these might simply make it effective in promoting its ultimately unjust end. Likewise, its adherence to commutative justice might be nothing more than “honour among thieves”. Thus, in one sense, Aristotle's political justice is only formal, much like that of Plato.

Indeed, Aristotle makes it clear that a polis oriented around simple preservation of life might be a state of animals (reminiscent of Glaucon's evaluation of the Republic's

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<sup>11</sup> Ibid., 6.8, 160 (1142a11-20).

unphilosophical city as one fit for pigs). The purpose of the state is not simply “to provide an alliance for mutual defence against injury, or to ease exchange and promote economic intercourse.” Rather, the good state exists to ensure a “particular quality of character” among its members, aiming for justice in the highest sense. Absent this aim, the political association descends into a mere alliance, unworthy of the name of “polis”. Likewise, law simply becomes a guarantee of each person’s rights against one another, an offer of collateral to guarantee payment of a debt. It merely has the outward appearance of just external behaviour, rather than being a rule of life meant to inculcate virtue in the souls of people.<sup>12</sup>

This is why the good citizen may be distinct from the good man. The good citizen acts according to the end of his political order, but the good man has a philosophical knowledge of the highest good for man. Only in the best state will the good citizen act toward an end which is also that of the good man.<sup>13</sup> Particular justice allows a well-run state, but this is only a means to an end. The citizens will achieve true justice only if the state itself is oriented toward higher justice. The aims of an alliance – preventing injustice and fostering economic exchange – may be conditions of the polis, but they do not constitute a polis.<sup>14</sup> Rather, the political order must be oriented toward its own self-transcendence in philosophical order.

Unlike Plato, however, Aristotle argues that distributive justice, at the very least, has a fundamentally interpersonal character. It is not something that is simply discerned in the soul of the solitary philosopher and subsequently imparted to others. Rather, it is

<sup>12</sup> Aristotle, *Politics* 3.9, trans. Ernest Barker (New York: Oxford University Press, 1958), 118-19 (1280a30-1280b14). The lesser understanding of law is taken from the phrase of the Sophist Lycophron.

<sup>13</sup> *Ibid.*, 3.4, 106 (1276b16-1277a25).

<sup>14</sup> *Ibid.*, 3.9, 120 (1280b30-35).

discerned and developed in political life. Plato had left the impression that justice requires one to transcend politics. At best, political existence is incidental to the just soul; Socrates' death suggests that, in some cases, political life may indeed be actively harmful to philosophy. Aristotle, by contrast, seems to suggest that justice in the polis is more than simply derivative of overarching justice. Rather, it may be a two-way street. There may be something unique to political justice which is necessary for philosophical justice. Indeed, Aristotle notes in the *Ethics* that the human desire for sociality would lead people to a common life even if it was not needed for self-preservation. The desire for the good reveals the fundamentally political character of man. Although politics may help to provide comfortable self-preservation, its ultimate *raison d'être* goes far beyond such prosaic provision.<sup>15</sup>

Aristotle also introduces another important concept in his discussion of justice: that of equity (*epieikeia*). Equity is a difficult concept, because, as Aristotle states, some identify it with (political) justice, but others identify it as 'better than the just'. This testifies to the place of equity in overarching justice, because it acts as a corrective of what is legally just. Such correction is necessary because the laws of a political order must necessarily be absolute and universal within that realm. However, due to their inflexibility, individual laws cannot be adequate to the infinite possibilities of human action. In such cases, the best the law can do is simply to take into account what will be the best course of action in the majority of cases. However, in a minority of cases, the truly just course of action will be different from – or even contrary to – the prescribed law. In such situations, equity is necessary. Equity imagines what the good ruler would

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<sup>15</sup> Ibid., 111 (1278b19-23).

have decreed as a law if this were the only situation for which the law was designed.<sup>16</sup> Thus, inasmuch as the term “justice” refers to the keeping of the law, it is subordinate to equity.<sup>17</sup> Here we can see how Aristotle builds upon Plato’s intuition about the limits of the law. In these cases, true justice rests upon the decree of the wise ruler – a decree what follows from his settled virtuous character – rather than resting upon propositional and absolute laws. Plato’s true statesman seems to be Aristotle’s man of equity.

In his *Rhetoric*, Aristotle further emphasizes the limits of law in capturing the essence of justice. He begins by acknowledging that there are two types of law: written (positive) and unwritten (natural). He then further bifurcates the realm of the unwritten. One half includes conduct springing from exceptional goodness, presumably going far beyond what is required by the law, and is greatly honoured. Examples include gratitude and readiness to help friends. Thus, he appears to draw a distinction between justice and beneficence. Aristotle is not entirely clear whether this beneficence includes the honours bestowed by the state in carrying out distributive justice, or whether it simply refers to virtues acted upon by private individuals. Indeed, he does little to further develop this concept. However, this area appears to point to a distinction between political justice and philosophical order, with the latter transcending the realm of law altogether.<sup>18</sup>

The other half of the unwritten law is the place of equity. This refers to those moral areas regarding which, it seems, the ruler justifiably attempts to legislate, but is unable to fully do so. As a result, some actions which should be the subject of law are

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<sup>16</sup> For this reasons, Aristotle acknowledges that there are some things about which law should not be enacted; rather, a special decree should be enacted.

<sup>17</sup> Aristotle, *Ethics* 5.10, 142 (1137a31-1138a3), *Politics* 3.9 (1280b36-1281a3).

<sup>18</sup> Aristotle, *Rhetoric* 1.13, trans. W. Rhys Roberts, in *The Complete Works of Aristotle*, ed. Jonathan Barnes (Princeton, NJ: Princeton University Press, 1985), 2188 (1374a18-25).

not actually covered by the written law. This may occur contingently, for instance, when the legislator fails to notice that he or she has left a gap in the law. However, it may also result from the fact that no finite law can ever be adequate to the infinite number of potential cases in which its guidance is needed. This seems to indicate that the role of equity will always be necessary, no matter how wise the legislator, because in such cases the incompleteness inheres in the nature of the law itself, rather than in the failings of the ruler. Thus, the legislator consciously makes a rule which will cover only a majority of cases, with the understanding that flexibility will be needed in interpretation. Thus, equity must consider the intention of the legislator – the desired result – rather than the precise formulation of the actual law. Furthermore, the person of equity must consider the character of the subjects involved, not simply the outward manifestations in the world. And who has the proper authority to exercise equity? A judge must consider only the letter of the law, and thus cannot enter the higher realm of unwritten law. Thus, equity is the province of the arbitrator. Indeed, the inherent restriction of the judge to positive law is precisely why arbitration was invented.<sup>19</sup>

Aristotle also introduces post-Platonic distinctions into his understanding of virtue. For Plato, ethics, metaphysics, and aesthetics are all unified. Participation in the unchanging transcendent reality allows for knowledge of the good, the true, and the beautiful. Aristotle, the great scientist, separates these areas into intellectual and moral virtue, while still acknowledging that good action requires both.<sup>20</sup>

Intellectual virtue is further sub-divided into a number of categories including

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<sup>19</sup> Ibid., 1.13, 2188-89 (1374a25-1374b23).

<sup>20</sup> Aristotle, *Ethics*, 6.1, 148, (1139a29-30).

pure science (*episteme*), art or applied science (*techne*), and practical wisdom or prudence (*phronesis*). *Episteme* refers to things which cannot be otherwise, that is, the immutable laws according to which universe operates. *Techne* refers to production, in which a person acts on an object to create a finished product, and is often described as “making”. It involves visualizing a particular form in the mind, and reifying this form in the physical world. The process of making has a final and static end outside the exercise of *techne* itself, and the excellence of the art depends on the worthiness of this product.<sup>21</sup>

Contrary to both *episteme* and *techne*, *phronesis* refers to action in the human world, among subjects, and is often described as “doing”. It involves deliberation, which is the consideration of how to “act rationally in matters good and bad for man.” *Phronesis* does not have an end outside itself, as does *techne*; rather, the temporal process which it begins is itself the end of action.<sup>22</sup>

In his discussion of *phronesis*, Aristotle writes that it is a virtue unique to rulers. Hence, he explicitly links *phronesis*, or doing, to the practice of politics. In so doing, he draws attention to the character of politics as an interpersonal reality. Because it is something that one does, politics is fundamentally concerned with subjects. This stands in contrast to the one who acts on inanimate nature, to make something out of (or into) an object. This seems to develop Plato’s idea of the Good as existential and participatory. Indeed, Aristotle even borrows from Plato’s own example to make his point, comparing the practitioners of politics to flute-players rather than flute-makers. While a flute-maker is concerned with a finished product external to himself, a flute-player is concerned with

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<sup>21</sup> Ibid., 6.4-5, 151-53 (1140a1-1140b30).

<sup>22</sup> Ibid., 6.4-5, 151-53 (1140a1-1140b30).



the practice of music, which has no end.<sup>23</sup> Politics is a dynamic, living reality, rather than a problem to be rendered static and solved with finality.

It is true that Aristotle's *Politics* (and Plato's *Laws*) seem to envisage a more realistic system of concrete political structures and laws. However, these systems can never perfectly reflect order in the souls of the well-ordered rulers, as that order is made manifest in time. Much like a series of snapshots of a runner in motion, the discrete 'time-slices' represented by changes in law do not accurately capture the nonpropositional essence of the good society as it exists in time.<sup>24</sup> Absolute laws enshrining permanent propositional truths about good politics fail to represent the true order of reality.

#### *St. Thomas Aquinas*

St. Thomas Aquinas stands at a crossroads. As a theologian at the University of Paris he is committed to an understanding of the supernatural, as it is known through revelation. Yet the rediscovery of the naturalistic philosophy of Aristotle creates a challenge for the Christian world: How can the seemingly indisputable insights of this naturalistic thinker be harmonized with a revealed Christian understanding of reality?

Aquinas spends the first half of his *Summa Theologiae* examining reality through a theological lens. This is not accidental. For Aquinas, the ultimate end of human existence rests in the beatific vision of a God who is outside the cosmos. Aquinas implicitly assumes the Christian theology of history, which posits that the end of history

<sup>23</sup> Aristotle, *Politics* 3.4, trans. Ernest Barker (New York: Oxford University Press, 1958), 106 (1277b24-30). See also editor's note.

<sup>24</sup> Eric Voegelin, *The Nature of the Law and Related Legal Writings*, *Collected Works* Vol. 27 (Baton Rouge, LA: Louisiana State University Press, 1991), 16-17, 33-35.

comes only in sacred history. It is true that the natural realm, including that of politics, has a sort of provisional completeness on its own. However, there remains a tension, because anything complete in the natural realm still does not fully account for the supernatural end of human existence. As a result, even the completeness of the political realm points toward the theological realm. This principle runs throughout Aquinas' understanding of politics and justice. For Aquinas, the justice of the political order is not the entirety of moral existence. Thus, in addition to incorporating Aristotle's naturalistic insights, Aquinas must deal with Plato's implicit question of what value the natural political realm can have on its own, a question which is only magnified in light of the Christian understanding of the supernatural end of humanity. Thus Aquinas follows in the tradition of Plato and Aristotle (particularly the former) in seeing the political life as ultimately ordered toward an extra-political realm.

Aquinas seeks to incorporate Plato's idea of the supernatural, as reshaped by the Christian understanding of a Creator-God, within Aristotle's approach to the systematic categorization of knowledge. As a result, Aquinas builds on Plato's approach of fusing reason and the transcendent, as well as Aristotle's naturalistic approach. He does so by delineating precisely what can be known through revelation, and what can be known only through 'secular' reason. This results in an epistemology in which reason and revelation are both valid ways of knowing. Of course, Aquinas' entire project seeks to show where and how these two overlap, demonstrating the harmony between 'secular' reason and (Christian) revelation.

In regard to reason, Aquinas argues that knowledge of the laws of nature can be

derived both deductively and inductively. Principles typically understood as absolute or universal are known deductively. Aquinas gives the example that murder must be prohibited and murderers punished, examples one imagines to be true independent of time and context. The binding force of this rule comes from the natural law. However, the appropriate punishment to be given to any particular murderer can only be determined inductively, as it is manifested in the punitive actions undertaken in particular situations. Thus, the particular punishment is considered as “natural law” inasmuch as it is an application of the general natural law. Yet the binding force of such laws comes from human law, not natural law.<sup>25</sup> Thus, Aquinas accords a place for prudential reasoning. However, he tries to include even inductive knowledge under the category of “law”, which seems to indicate his preference for absolute principles.

Aquinas’ Christian understanding of history as linear, supplanting the cyclical Greek understanding of history, also allows him to develop the idea of historical progress through tradition. Thus, history can supplement reason and revelation as a source of law.<sup>26</sup> For example, customs which have developed through time-tested practice can, over time, acquire the status of law. This allows for the development of tradition as a guide to knowledge, adding a potential third component to his epistemology.

The idea that truth can be manifested in practice, and subsequently formalized in positive human laws, creates an interesting tension in relation to natural law (whether derived from reason or revelation). In moral philosophy, positive laws are typically seen as being grounded in natural law, merely adding a practical sanction to the imperative

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<sup>25</sup> Thomas Aquinas, *Summa Theologiae* I-II 95.2, in Thomas Aquinas, *On Law, Morality, and Politics*, 2<sup>nd</sup> ed., ed. William P Baumgarth and Richard J. Regan (Indianapolis: Hackett, 2002), 53-55.

<sup>26</sup> *Ibid.*, 97.3, 72-74.

force already existing in the natural law. Positive laws can also be problematic, however, because there is no guarantee that they will reflect natural law; in some cases, they may be contrary to true justice. Thus, it seems that some positive laws, potentially contrary or at least indifferent to natural law, may reveal truths not already known through natural reason. While Aquinas would presumably consider those positive laws contrary to natural law to be morally invalid, he seems to open the door to the idea of positive law as morally revelatory in the absence of explicit grounding on an already-known natural law. Thus, such positive laws must have some ontological status as laws, not only descriptively, but also morally.

This idea of tradition seems to further develop the idea of politics as a possible moral end in itself. As mentioned above, it is true that Aquinas sees the natural political realm as pointing toward transcendent realities (as Plato did exclusively and Aristotle also did). However, Aquinas also seems to reflect Aristotle's idea that politics may have independent value on its own. Indeed, Aristotle had accorded the term "justice" (in at least some form) even to those positive laws which reflect the state's imperfect conception of distributive justice. Thus, he appears to have accorded some value even to ordering principles that are less than perfectly just. In one case, Aquinas asserts that a positive human law can be considered as a law even when it is only oriented toward the political good, not toward the Divine good. This is not necessarily an endorsement of an unnatural positive law; the true political good may lead toward the divine good. As Aquinas states elsewhere, "every part is related to a whole as something imperfect to something perfect."<sup>27</sup> These laws may reflect (and instantiate) the natural law principle of

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<sup>27</sup> Ibid., 90.2, 13.

order, even if these laws imperfectly reflect the content of the pre-existing natural laws they purport to follow.

Elsewhere, however, Aquinas even seems to grant a status to positive laws independent of any natural-justice-revealing capacities. That is, otherwise amoral positive laws may have some value simply for their role in bringing co-ordinative order to the political realm. For instance, Aquinas also brings up the example of rulers who make laws oriented only toward their own self-interest, and thus presumably contrary to natural law. He acknowledges that such human positive laws still make subjects good relative to the political order. He even uses the example of thieves who regulate their own affairs according to laws. As a result, even though such be a perversion of law, it still “partakes of the nature of law,” and thus appears to differ from an absolutely good law only in degree, not in kind.<sup>28</sup> It is possible that Aquinas sees basic political order as a good of such high moral value that even some acts contrary to natural law may be permissible in order to secure it. This seems to be a large step in the direction of legal positivism: the idea of defining a law in a descriptive sense in addition to (or rather than) a teleological sense.<sup>29</sup>

This possibility, of course, is no different from Aristotle’s idea that distributive justice may not actually be just when it is ordered toward a less just distributive principle such as those based on free birth or property rather than virtue. Aristotle created some ambiguity by giving the appellation of “justice” to something that was imperfectly representative of overarching justice. However, the issue becomes more difficult when

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<sup>28</sup> Ibid., 92.1, 28.

<sup>29</sup> Admittedly, Aquinas’ position is not entirely clear; elsewhere, he argues that a human law diverging from natural law is not a law at all (see 95.2)

one considers the possibility that this imperfect distributive ‘justice’ is actually unjust (and presumably different from true justice in kind, not simply in degree). This is particularly problematic in light of the infinite perfection of the Christian God and the concept of sin. If humankind has an eternal destiny in which unjust souls will be punished, the importance of correct moral behaviour is surely increased.

One possible reconciliation – albeit one Aquinas does not appear to suggest – is that there might be varying levels of law. Those which offend against fundamental principles of natural law might not be considered law. On the contrary, those which offend against general principles of fairness or impose disproportionate burdens on some subjects could be considered as law.

Whatever the case may be, the concept of law is certainly crucial for Aquinas. His *Summa Theologiae* deals with law before it deals with justice, and his highest sense of justice is termed “legal justice”. This tendency to conceptualize rightness as law – perhaps even moreso than as virtue – reflects Aquinas’ Roman heritage. In the Greek world, there was little use of law or tradition of jurisprudence in the Roman or modern sense. Good political order flowed from virtue in the souls of the citizenry rather than from institutional sources. However, the transition from the Greek world to the Latin brought about an increased focus on the external effects of a virtue rather than virtue itself. In Rome, one saw an increased focus on politics and institutions rather than on the soul. One of these institutions was the tradition of legal cases. When one encountered a particular case, one needed only the technical ability to identify similar cases in the past. This guidance of external codes and cases in law could act as a substitute for virtue,

allowing a just verdict even if the judge lacked practical wisdom. Thus the realm could be administered in a way that produced the external results of virtue, without possessing its internal characteristics.

Aquinas does, however, recognize the limits of the law in his discussion of equity. Law has binding force only, he says, insofar as it is ordered to the common good. Lawmakers cannot envision all particular future cases toward which any new law is ordered. As a result, a generally beneficial law is nonetheless often detrimental to the commonweal in exceptional cases. For example, a law decreeing that the gates of a besieged city should remain closed would be detrimental in a case where defenders of the city are being put to flight by the enemy. In such a case, the letter of the law is in conflict with the intention of the legislator – that being the safety of his or her subjects – and thus should not be obeyed. There is a spirit of the law which goes beyond the letter of the law. As he says, “one cannot adequately express in words the things suitable for an intended end.”<sup>30</sup> Aquinas is hesitant to take away from the inviolability of natural law, and clarifies that the first-order principles of natural law do not admit of dispensation. Yet he recognizes the limits to the correspondence of finite laws to the potential infinitude of possible situations. Only prudential interpretation can bridge this gap. As he says, rulers must be wise and consider the reasons for granting dispensations. Likewise, they must be faithful in issuing dispensations only according to the common good.<sup>31</sup>

Aquinas is nonetheless careful to say that only a superior can make such interpretations, and subsequently to issue dispensations from laws. However, if an urgent

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<sup>30</sup> Ibid., 96.6, 69.

<sup>31</sup> Ibid., 97.4, 74-75.

situation arises and there is insufficient time to consult a superior, such necessity allows subjects to act contrary to the written law. As Aquinas says, “necessity includes an implicit dispensation, since necessity is not subject to the law.”<sup>32</sup>

The Roman approach to justice resulted in a proliferation of terms for justice or Right; where Greek had *dike*, Latin includes both *jus* (with its substantive, *justum*) and *justitiae* in all its forms. Aquinas begins with an examination of *jus*, a word notoriously subject to controversy and mistranslation. Indeed, it can be translated both as a possessive right, or as a more general “Right” in the singular sense: two categories which may differ markedly. Aquinas defines *jus* as the object or goal of justice (*justitiae*).<sup>33</sup> Thus, *jus* is a depersonalized condition which obtains as a result of the exercise of justice. Because it is a static reality, it can be more easily defined and is more amenable to systematization. According to Aquinas (and many Roman thinkers before him), the content of *jus* consists of rendering to others what accords with or is commensurate to a particular standard. Aquinas continues his dual emphasis on law as both natural and positive by stating that this standard may be inherent in nature, or it may be a standard that has been agreed upon by a community.<sup>34</sup>

Turning then to justice, Aquinas follows the ancients in understanding justice as personal, defining it as “the constant and perpetual will to render to others what is due them.” This is similar to Aristotle’s definition, but incorporates the Roman emphasis on externals in *jus* by further specifying that the content of justice is to render to each their due.<sup>35</sup> With his Christian conception of the will, Aquinas also affirms that the ‘agent’

<sup>32</sup> Ibid., 96.6, 69.

<sup>33</sup> Ibid., II-II, 57.1, 98.

<sup>34</sup> Ibid., 57.2, 100-01.

<sup>35</sup> Ibid., 58.1, 105-06. Aquinas also substitutes the term “will” for “habit” in order to reaffirm that justice is



employing justice is not the cognitive power of reason or intellect but the will. This emphasizes the connection between justice and practical virtue. If one knows the just course of action, and fails to do it, it is a failure of justice; merely knowing what is just does not make one just.<sup>36</sup> Thus, as with Plato and Aristotle, justice is not purely an intellectual virtue. However, Aquinas does not ignore the intellect; unlike the sense appetites, the will can be guided by reason.

Thus, with his conception of justice as a virtue, Aquinas echoes Plato and Aristotle's conception of the primacy of virtue over institutional approaches to politics. Aquinas also echoes Aristotle's emphasis on the inescapably political character of justice, as it must necessarily involve others. However, unlike Aristotle, he does not also use the term "justice" to refer to the internal ordering of one's own soul (which, for Plato, was arguably the only task of justice). At most, this internal ordering can only "metaphorically" be considered as part of justice, inasmuch as the parts of one's soul (reason, will, and sense appetites or emotions) can be considered plural.<sup>37</sup> For Aquinas, the control of one's internal emotions is accomplished by virtues other than justice, such as moderation and courage.

Aquinas' narrowing of the term "justice" to the political sense creates subsequent terminological confusion, because this justice as such for Aquinas appears to correspond to what Aristotle had called only "particular justice." To further confuse the issue, within

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an act rather than a potency. He later draws this distinction more sharply, stating that virtue directs potencies or powers, rendering them subjects of virtue. However, because the will must be perpetual and the act therefore repeated and regular, it is unclear exactly what Aquinas intends in reframing justice as an act, considering that the perpetuity of the will presumably must follow from a settled character, virtue, and habit. Indeed, in the following paragraph (Reply Obj. 2), Aquinas acknowledges that it is a habit.

<sup>36</sup> Ibid., 58.4, 110-11.

<sup>37</sup> Ibid., 58.2, 108.

this category of political justice – entitled “particular justice” by Aristotle but simply “justice” by Aquinas – Aquinas draws two further subdivisions: general justice and particular justice. (Thus, Aquinas’ “particular justice” is actually a sub-species of what Aristotle had called “particular justice”.)

For Aquinas, general justice is also called “legal justice” – another indication of the primacy of the concept of law in Aquinas. It concerns itself with the common good. Thus, when an individual acts for the sake the entire community, this is the jurisdiction of legal justice. Aquinas draws a subtle distinction regarding the term “general”. Justice is not general by predication, in the way that horses and cows can both generally be called animals. If justice were general by predication, then all virtues would indeed be part of justice, as they are for Aristotle. Rather, justice is general in regard to causation. This is analogous to how the sun causes both plants and animals to grow, but the sun is of a different nature than plants and animals. Thus the sun is general to plants and animals by causation, but not by predication. Legal justice is considered general when it acts as an overall orienting virtue, because it directs the acts of other pre-existing virtues, which are distinct from justice, to the common good.<sup>38</sup> This parallels the place of charity as an overall orienting virtue or general virtue, in that it orients the acts of all virtues toward the divine good. Later, Aquinas describes this as a cardinal virtue.<sup>39</sup>

This general justice is distinguished from Aquinas’ particular justice. Particular justice concerns the good of individuals rather than the good of the community. Indeed, the very distinction between particular and general justice depends on the terminus.<sup>40</sup>

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<sup>38</sup> Ibid., 58.5-6, 110-14.

<sup>39</sup> Ibid., 58.8, 116-17 ; 58.11, 121.

<sup>40</sup> Ibid., 61.1, 124.

Aquinas' particular justice retains Aristotle's bifurcation of arithmetic and geometric justice, but Aquinas renames the categories to "commutative" and "distributive" justice. While Aquinas thus de-emphasizes the mathematical nature of these types of justice, he does not dispute their nature as external goods (or, rather, the virtue involved in the giving of goods.) This may reflect the concept of *jus* as being the object of the virtue of justice.

Indeed, Aquinas' commutative particular justice is economic, private, and transactional, being concerned with mutual exchanges between two individuals.<sup>41</sup> For example, when two individuals make a contract, they are bound by commutative justice to fulfill their pledges to each other. Aquinas seems quite interested in this category of justice, devoting fifteen different questions of his *Summa* to offenses against it. Distributive particular justice, on the other hand, concerns the interaction of the community with an individual. Thus, when the community has a stock of private goods to distribute, distributive justice directs their distribution.<sup>42</sup> (It is noteworthy that Aristotle does not consider this to be a matter of the common good.) Aquinas seems less interested in this category, devoting only one question (II-II, Qu. 63) to the vice associated with offenses against distributive justice, namely that of partiality or favouritism.

It is interesting to note that both kinds of particular justice involve a private individual as the recipient of the goods in question. Furthermore, both seem to emphasize the external nature of the goods, leading one to consider their possible

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid., 58.5, 112; 58.7, 115-16; 61.1, 123-24.

possessive character. This can be seen in Aquinas' qualitative distinction between individual goods (the subject of particular justice) and common goods (the subject of general justice). The common good does not differ from the individual good only by quantity. Thus, it is presumably not the simple aggregation of individual goods. Rather, it is qualitatively different as parts are different from the whole. The political community is not simply one gigantic household. Yet in the pluralization of even common goods, it would appear that these goods are still tangible, external goods, which is to say, they are possessions. Thus, even in general justice there seems to be a relation between politics and individual possessions. Justice does not simply deal with others, but also with the goods of others. As Aquinas says, it corresponds both to "external actions and things regarding a special objective aspect."<sup>43</sup> Thus, it is worthy of note that Aquinas here uses 'objective' not to denote a metaphysical reality, but to denote the fact that justice deals with objects in addition to (and in some cases, instead of) subjects.

This can also be seen in Aquinas' understanding of punishment.<sup>44</sup> Aquinas acknowledges that law includes the practice of punishment, which again seems to demonstrate at least some effort to link law to a more personal and situational practice. However, he does not devote a great deal of attention to the concept of punishment. Indeed, inasmuch as Aquinas' political justice is still only concerned with external goods, it would seem that any punitive measures would concern only rightful recovery of those goods. Strictly speaking, such an activity is not actually punishment, but rather restitution of goods. It does not deal with the person as such, but only with possessions.

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<sup>43</sup> Ibid., 58.8, 116-17; see also 58.2, 107-08; 58.5, 112.

<sup>44</sup> Ibid., I-II, 92.2, 28-29.

Like Plato and Aristotle, Aquinas has a clear sense that ethics or natural Right goes beyond political justice. Politics is ordered to a higher reality. His confinement of the term “justice” to the natural realm of politics helps to emphasize this. Furthermore, Aquinas also make some efforts to frame (political) justice within a virtue-based framework. His concept of history and tradition also allows a role for the positive laws of political practice in ascertaining moral truth, helping to open up the value of politics. This is reflected in the fact that even imperfect positive laws may have some value, justifying their designation as genuine “law”.

However, Aquinas also incorporates the Roman concept of *jus*, and defines it as the object of justice. Thus, he opens the door to a systematized institutional science of politics, as *jus* corresponds to visible states of being or external conditions. This is further seen in the fact that justice in politics corresponds to individual goods, rather than to a more ineffable common good. This seems to nudge open the door toward a politics focused more on the individual. Aquinas' comparatively greater focus on commutative justice (rather than distributive justice) further affirms this emphasis. Finally, while Aquinas does not deny the importance of virtue, he seems to prefer to approach ethics and politics from a natural law perspective. This appears to be only a subtle departure from the classical natural Right position. However, in subsequent centuries, this distinction would lead to significant implications for practical virtue, the personal nature of politics, and even the ability of the political realm to point toward a supra-political reality.

*Natural Law and Natural Right(s)*

Several themes are implicit in this discussion of the classical tradition of justice. As a result, some conceptual categories merit further clarification. One particularly subtle but important distinction is between natural Right, natural law, and natural rights.

Natural Right (as distinguished from natural rights) is consistent with a virtue-based moral philosophy, as is implicit in Plato and somewhat more explicit in Aristotle. As Schneewind puts it, this means that “no antecedently statable set of rules or laws can substitute for the moral knowledge the virtuous agent possesses.”<sup>45</sup> At the very least, it cannot be put into a semantic framework, least of all one that is universally valid. Rather, Right is manifested in actions of persons, springing forth from its dwelling-place in the Being or the soul of the virtuous person. Thus, Right by nature is inherently personal.

Natural Right is also thus somewhat ineffable. As a result, it is difficult to communicate to those in whose souls it does not already dwell. For this reason, there is often an effort to formulate these ineffable, personal characteristics in propositions of law which hold true for all and are thus still rooted in the structure of reality. These natural laws may still be oriented toward a more ineffable, teleological conception of natural Right. However, they testify to the purported knowability of natural Right through propositions of reason that are absolute. Thus, even if individuals are unable to intuitively foster natural Right in their souls, perhaps through participation in the transcendent reality, they may be able to learn natural Right through rational propositions, which are more easily passed from one person to another. This may, in turn, guide them toward incorporating natural Right into their being.

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<sup>45</sup> J. B. Schneewind, *The Invention of Autonomy* (New York: Cambridge University Press, 1998), 76.

Indeed, the greater and more detailed the formulations of natural law, the more it begins to act as a substitute for natural Right. As it addresses more and more situations that the person may encounter, the role of situational judgment and intuitive wisdom become less necessary. One need not ascertain the good course of action in a particular situation when the absolute natural law is a clear guide, even before one learns the specifics of the situation. One is not left to one's own devices; one does not have to discern the good in each situation. In fact, one does not even need another, wiser person present to help discern the good. Rather, the law makes clear the just course of action, simplifying the situation. All that remains is implementation.

However, the propositionality of natural law is a double-edged sword. The absoluteness that laws must inherently claim may result in prescriptions that are deaf to situations. No matter the mitigating circumstances, the law cannot be modified on its own terms. Only predetermined exceptions that are explicitly stated in the law can abrogate its sanction.

Moreover, the concept of law may create an escape hatch for the basic teleological orienting reality to which the law originally pointed. One may forget that laws are a second-order reality aimed at instantiating something beyond themselves. To use Platonic terms, correct opinion may come to be seen as actual knowledge of the good. Following the law may become an end in itself. This leads to an exclusive focus on the letter of the law rather than being constantly reminded of the spirit of the law. Furthermore, this focus on law may diminish or eliminate the place of equity. Laws may come to be seen as the final word.

This is particularly problematic in light of the inherently infinite possibilities of action in any particular situation. Because lawmakers can never fully envision all situations to come, it will not always be clear what kind of action would be necessary in order to abide by the original animating spirit which led to the creation of the law. This may result in well-intentioned confusion and invincible transgression. However, it might also lead one to perform the minimum possible action that will qualify as “legal”. This is a particular temptation in cases where the legal process is especially cumbersome, and the associated opportunity costs of pursuing redress must be offset by a high potential payoff.

For example, a contract may stipulate that one party must provide a particular quantity of goods. However, it is often difficult to regulate the quality of those goods. In a society with little trust, one can expect the party to provide goods of poor quality, barely sufficient to prevent a lawsuit. Yet such would be a fully legal action, characteristic of a “law-abiding” society. To be sure, this situation would be preferable to a society in which the party provides no goods. However, it would clearly be inferior to one in which the party provides adequate or superior goods, reflective of a good working relationship between the two parties.

This example testifies to the inability of laws to effectively regulate anything beyond clear and obvious external actions. Thus, law further tends to orient moral discourse around external manifestations such as visible actions, rather than the underlying personal habits or virtues from which those manifestations spring. This is another way in which law can contribute to a focus on second-order realities rather than primary realities.



This is particularly problematic inasmuch as law has a negative function. Law is not typically expected to actively assist in realizing a good society itself. Indeed, some things cannot be commanded, because they must be given freely rather than compelled by law. A law commanding every person to trust one another when entering a contract would be superficial, with little bearing on whether the parties actually came to trust each other. Inasmuch as such trust is compelled under threat of sanction, it is unlikely to be believed by the other party.

Rather, law is expected to prevent major obstacles to the realization of a good society. For example, laws can – and often do – proscribe the fraudulent acts which weaken social trust. Yet the mere absence of negative characteristics, such as fraud, does not automatically indicate the existence of substantively positive ones, such as a widespread sense of trust. Thus, although the use of laws or rules in ethical discourse need not necessarily reduce political action to a negative function and separate it from its orienting teleology, they tend to do so in practice. The initiative is left to the individual.

Furthermore, law can be positive as well as natural. Although positive and natural law derive their binding nature from different sources, they function in the same manner. Indeed, a precept of natural law may also become a statute of positive law. In such a situation, the content of each is identical. Because the binding nature of natural law (at least in the moral realm) is usually less immediate than the sanctions of positive law, one may be inclined to forget that the positive law actually reflects a pre-existing natural law. Thus, the concept of law contains within itself the danger that law may lose its naturalistic character, eliminating the possibility of natural justice or right by nature.

The English language itself creates difficulties in understanding this distinction. Most languages have separate terms for natural and positive law: in Latin, *jus* and *lex*; in French, *droit* and *loi*; in German, *recht* and *gesetz*. Unfortunately, the term “law” is often used to refer to both concepts in English. As will be evident below, this creates problems in understanding Grotius from the beginning. As most observers begin with *de Jure Belli*, their first impression of Grotius comes from the mistranslated title “The Law of War and Peace”. This leads them to assume that Grotius is operating from a purely positivistic conception of law, rather than the overarching framework of Right in which Grotius dwelt.

The advent of subjective rights takes the concept of law one step further. Subjective rights build on the concept of law by conceptualizing the situation from the perspective of the one who benefits.<sup>46</sup> Thus, rights have a tendency to orient moral discourse around the individual, de-emphasizing the multiplicity of agents (and thus the social reality) involved in ethics.

As a result, subjective rights tend to postulate a sphere of freedom in which the agent can act autonomously, free from constraints. This does not necessarily mean that the individual is radically free to create individual morality, separate from the structure of moral reality. Indeed, by opening a sphere of freedom, one might argue that freely willed goodness – surely the highest kind of goodness – may flow forth. However, this is also a double-edged sword, because in leaving the individual with a sphere of sovereignty may tend toward the impression that such sovereignty is, indeed, radical and absolute. One may feel emboldened to act without moral constraint. This is only reinforced by the fact

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<sup>46</sup> John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980), 205.

the aforementioned de-emphasis on interpersonal context.

Subjective rights also tend to de-emphasize the willed action and to focus instead on the position of inanimate signifiers or commodities that result from the action. As a result, rights are two steps removed from the virtue or character that precedes the action. While laws create duties not to commit the worst of negative actions, rights create claims that one not be subjected to the worst of negative actions.

The claim on behalf of the individual potentially being acted upon is particularly central to the idea of rights. Granted, the imperative of acting according to natural Right may indeed have the consequence that one not be (mis)treated in a particular way. For instance, if one's life is being threatened by another's practice of hunting people for sport, there is a high chance that natural Right is not being instantiated. However, the physical violation of one's body is a second- (if not third-) order consequence of this breach of Natural Right. Natural Right is the first-order reality, requiring people to live in harmony with each other (to use one of many possible – and necessarily imperfect – formulations). The natural law creating in one the duty not to unnecessarily harm others is a second-order reality from which the other's claim to his own body subsequently follows. Thus, while killing people for sport would be incompatible with natural Right, it would be wrong because such an action runs contrary to the positive vision of human flourishing, rather than because it infringes upon a particular claim-right. The conceptualization of natural rights (in the sense of claim-rights which may be multiplied) as the foundation of justice has the effect of turning a third-order reality into the cornerstone.

This has the effect of further depersonalizing the character of good (or non-

negative) action by focusing not only on the external actions (as does law) but on the effects of those external actions on impersonal possessions. The concept of property is central. Thus, political discourse becomes oriented around things, rather than around action. This further emphasizes the idea of mastery and possession, the relevant condition of (inanimate) property, as opposed to interpersonal interaction, which can never proceed on terms of mastery.

Moreover, one may take a defensive posture toward others in protection of one's own rights, focusing the terms of discourse on the unjust actions of others. Where law may turn the positive sense of willed action into a negative sense of avoidance, it still contains the idea of a personal duty to refrain from committing evil against others. The concept of rights removes the element of will as a primary consideration altogether. Rather than ordering that others not commit a particular act, which requires a limitation of their own wills, rights simply stipulate that one's possessions must not be subjected to a particular set of external consequences. Thus, the concept of rights can tend to make each person forget his or her duties toward others, and instead to focus only on what each can get for himself.

By removing the element of will and focusing on the status of property, a basis in rights renders it much easier to identify breaches of justice. Consequently, justice becomes much more amenable to systematization (as suggested by the term "the justice system"). There exist purely objective criteria to measure compliance or lack thereof: namely, the condition of external, measurable objects. Because these inert objects are lifeless and frozen, their essences do not change, conferring on them a status. This static

condition makes them naturally amenable to systematization.

Subjective rights should not be mistaken for a return to the concept of “Right” or “right by nature” which can be found, for example, in Plato’s notion of the Good, in Aristotle’s understanding of equity, and in the medieval understanding of a personal God. Indeed, the grammatical use of an article, definite or indefinite, to indicate “a right to X” or “the right to X” is a clue to the fundamentally possessive nature of rights. Likewise, the grammatical possibility of pluralization testifies to the quantitative (and thus ontologically monistic) nature of rights. Unfortunately, the English language is again limited, as this subtle distinction is easily overlooked owing to the coincidence of the term “right” for both. This will be seen throughout the study of Grotius. For example, Tuck’s chosen title for his edition of *DJB*, “The Rights of War and Peace”, further compounds the error of the common mistranslation as “The Law of War and Peace”. A more accurate title might use the word “Right” or “justice”, perhaps adding the modifier “natural”.

### *Grotius' Context and Reception*

Hugo Grotius was born in 1583 in Delft, in the United Provinces of Holland and Zeeland. Young Hugo gained an early reputation as a child prodigy, entering the university of Leiden at age eleven and mastering his education in the classics of Greece and Rome. At the age of fifteen, he was taken to visit the inquisitive King of France, who pronounced the boy “the miracle of Holland.” The following year he would be called to the bar, and two years later, in 1601, he was chosen by the government as the official

historiographer of Holland over a distinguished professor of letters. Grotius' career soon became intertwined with that of Johann van Oldenbarnevelt, a leading politician, and in 1613, at the age of twenty-eight, he became pensionary (mayor) of Rotterdam. By this time he had begun publishing in earnest in literature, history, theology, and politics, as well as wading boldly into the political and religious controversies of the day. Having earned the wrath of the orthodox Calvinist party (along with Oldenbarnevelt), he was imprisoned for life in 1619, where he continued to write. Two years later, after a daring escape from prison, he found refuge in Paris, where he would spend most of the rest of his life. Here he was granted a royal pension by the King of France, and in 1634 became a diplomat for Sweden, working for the cause of peace and religious unity during the tumult of the Thirty Years' War. He continued to write until his death in 1645, producing more works of jurisprudence, legal commentary, poetry, tragedy, philology, Biblical commentary, theology, and political thought, including his magisterial *de Jure Belli ac Pacis*.

Grotius' impact during his day was considerable. It is said that Gustavus Adolphus of Sweden charged into battle with a copy of *DJB* ready at hand. Grotius' death did not mitigate his impact. Shortly thereafter, the University of Heidelberg established a Chair for the study of Grotius' teachings on natural law and the law of nations.<sup>47</sup> Its first holder was no less than Samuel von Pufendorf, who would become the pre-eminent international jurist of the mid-to-late seventeenth century. Grotius' authority was of such stature that Pufendorf would claim to be following in his footsteps, to the

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<sup>47</sup> Martine Julia Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595-1615)* (Boston: Brill, 2006), xxvii.

extent of being his intellectual “son”. However, Pufendorf's ideas were not entirely consistent with those of Grotius. In the process, he began to subtly recast the Grotian legacy.<sup>48</sup>

Indeed, the reaction against the Christian Aristotelian context described above certainly loomed large already during Grotius' day. The humanistic impact of the Renaissance had begun to work its course throughout Europe, including its rediscovery of other elements of antiquity. Grotius himself was brought up in a Renaissance education, with its emphasis on the languages and history of ancient Greece and Rome. Grotius' late renaissance context also saw the beginnings of change in science and letters. The heliocentric theories of Copernicus had shaken Europe, and the discoveries of Newton were not far off. Francis Bacon published his *New Atlantis* in 1612, and Descartes' *Discourse on Method* appeared in 1637. Thus, the teleological focus of scholasticism was no longer unchallenged, with an increasing emphasis on the man rather than God and the individual rather than whole.

Enlightenment writers of the seventeenth and eighteenth century would certainly view Grotius as part of this trend. Jean Barbeyrac describes Grotius as having “broken the ice” after the long winter of medieval ethics.<sup>49</sup> This reflected his portrayal of Grotius as putting forward a natural law not based on medieval principles. Rather, Grotius was seen as having employed a proper method that allowed for systematization. Likewise, Barbeyrac saw Grotius as having separated natural law from its theological (and possibly even its metaphysical) entanglements. For this reason, Grotius is one of few classic just

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<sup>48</sup> Renée Jeffery, *Hugo Grotius in International Thought* (New York: Palgrave Macmillan, 2006), 57-58.

<sup>49</sup> Jean Barbeyrac, *An Historical and Critical Account of the Science of Morality*, prefaced to his edition of Samuel von Pufendorf, *The Law of Nature and Nations* (London, 1749).

war thinkers to escape the implicit anathematization of enlightenment thinkers.<sup>50</sup>

Barbeyrac would publish an idiosyncratic French edition of *DJB* in 1724, which Onuma describes as “strongly colored by his own bold interpretations.”<sup>51</sup> This edition would become influential, being read by most of the French *philosophes*.<sup>52</sup> Rousseau would frequently use Grotius as a foil, describing him as “a child, and what is worse, a dishonest child.” A contemporary of Rousseau, Emer de Vattel, would emphasize Grotius' position on positive law, thus opening the door for the portrayal of Grotius as the “father of the modern science of law.”<sup>53</sup> Barbeyrac's influence carries on today, with the most recent English translation (that of Richard Tuck) being translated from Barbeyrac's French edition.

Ironically, despite the academic assumption of Grotius' secularity, his most published text in succeeding centuries would be his apologetic work *de Veritate Religionis Christianae*, or *On the Truth of the Christian Religion*. This would serve as the cornerstone of his popular reputation. This was not his only theological contribution. In fact, his *de Satisfactione Christi*, or *The Satisfaction of Christ*, would put forward a new conception of Christ's Atonement. This 'governmental theory' would come to gain wide currency within Arminian Protestantism, especially the Methodist church.

Grotius' influence in America would extend beyond the theological realm, and would represent Grotius' last spark of influence in the nineteenth century. Foundational figures such as Benjamin Franklin, John Adams, Alexander Hamilton, and Thomas

Jefferson all read and recommended the works of Grotius. Their interests tended to be

<sup>50</sup> Robert Hubert Willem Regout, *La Doctrine de la Guerre Juste* (Paris: A. Pedone, 1934), 274.

<sup>51</sup> Onuma Yasuaki, *A Normative Approach to War* (New York: Oxford University Press, 1993), vi.

<sup>52</sup> Van Ittersum, xxviii.

<sup>53</sup> Jeffery, 70-74.



practical, employing his texts to deal with issues as various as dispute resolution, interpretation of treaties, rights of passage, and even Greek philology. However, Grotius would be influential on later academics such as James Kent, author of “the first great American law treatise,” the *Commentaries on American Law* (1826-30). Kent correctly perceived that Grotius did not separate law from morality, and that his conception of Christian charity was integral to his understanding of international relations. This reading was later echoed by Henry Wheaton in his 1836 *Elements of International Law*.<sup>54</sup>

During the seventeenth and eighteenth centuries, Grotius' works were almost continuously in print. *DJB* would see nearly fifty editions in Latin alone; *De Veritate* would see a hundred in ten languages. The nineteenth century, however, brought a decline in Grotius' perceived stature. Publication of his works would grind to a near-standstill. In the intellectual sphere, the exclusive emphasis on positive law rather than natural justice would render Grotius less relevant. This led to a strong conception of state sovereignty that tended to occlude any transcendent moral standard. In the practical realm of international relations, the aftermath of the Napoleonic campaigns saw a general rejection of moral restraints as a path to peace, focusing instead on the balance of power.

Only with the Hague Convention of 1899 and the establishment of the first Permanent Court of Arbitration did thinkers return to Grotius for inspiration. The outbreak of World War I saw the creation of a “Grotius Society”, and Grotius' name was often invoked by those associated with the League of Nations and the agenda of Woodrow Wilson. This nascent renaissance was given a boost with the three-hundredth anniversary of *DJB* in 1925, and the increased focus on international law following the

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<sup>54</sup> Jeffery, 77-82.

First World War. Grotius would often be claimed as the father of modern international law.<sup>55</sup>

However, just as the eighteenth century saw an overemphasis on the secularity of Grotius, so would the early twentieth overemphasize his pacific tendencies, as well as the concept of law over politics. Cornelius Van Vollenhoven, the first academic figure to delve deeply into Grotius' work in a century, would see Grotius as advocating a worldwide rule of law. This theme was further taken up by Hersch Lauterpacht's now-(in)famous 1946 article entitled “The Grotian Tradition in International Law”. Lauterpacht believed that the problems of international relations could be solved by law, and read in(to) Grotius “the subjection of the totality of international relations to the rule of law.”<sup>56</sup> Furthermore, this academic rediscovery of Grotius was largely a rediscovery of *DJB*.

As the twentieth century wore on, the narrative of Grotius as a secularizer would reappear alongside the focus on international law. Thus, the enlightenment reading of Grotius as the father of a distinctively modern natural law reappeared in full force.<sup>57</sup> Many saw Grotius as a harbinger of modernity, rejecting the teleological Aristotelian conception of virtues and the common good. Toward the end of the twentieth century, scholars began to examine Grotius in a somewhat more comprehensive manner. This included attention to Grotius' moral theories, and brought about a reading of Grotius as ushering in a rule-based ethics. This also saw increased study of Grotius' conception of

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<sup>55</sup> Jeffery, 86-88.

<sup>56</sup> Jeffery, 92-96, 105-09.

<sup>57</sup> Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, MI: Eerdmans, 1997), 317-19; Richard Tuck, “Introduction”, in Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck, from the Edition by Jean Barbeyrac (Indianapolis: Liberty Fund, 2005); Christian Gellinek, *Hugo Grotius* (Boston: Twayne, 1983), 118-120.

political theory, and framed Grotius as advocating political systems based on individual subjective property rights.

*Michel Villey*

The most prominent late-twentieth-century advocate of this reading was Michel Villey – an agenda-setting figure in the history of rights. In *La Formation de la Pensée Juridique Moderne*, he sketches an outline of the history of Right by nature from its beginnings in Ancient Greece through to the juridical positivism of Thomas Hobbes. He sees in the modern notion of natural rights a significant – and detrimental – departure from the classic tradition of natural justice. As a result, he takes issue with those who identify Grotius as a founder of natural right. This is not because Grotius was an insignificant or secondary figure; indeed, Villey himself identifies Grotius as a crucial figure in this modernization. Rather, due to the inherent flaws in the modern notion of rights, Grotius’ participation in this development qualifies him as a deformer of natural Right.<sup>58</sup>

Several key points form the core of Villey’s reading. The first is Grotius’ supposed secularization of natural Right. This is not a new charge, as many observers (including those who sing his praises for it) have identified Grotius as releasing natural justice from theology. Here Villey is a good enough scholar not to rely on the *etiamsi daremus*, the (in)famous phrase on which so many twentieth-century thinkers have hung the secularization hypothesis. In the *Prolegomena* to *DJB*, Grotius states, “what we have been saying would have a degree of validity even if we should concede that which cannot

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<sup>58</sup> Michel Villey, *La Formation de la Pensée Juridique Moderne*, 4<sup>th</sup> ed. (Paris: Montchretien, 1975), 611.

be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.”<sup>59</sup> Villey correctly acknowledges the parentage of that formulation over two centuries earlier in Gregory of Rimini and Gabriel Biel, and extends its lineage even through such theological intermediaries as Suarez.<sup>60</sup>

Instead, Villey sees evidence of secularization in Grotius’ use of “man and his reason” as a foundation for natural Right. He particularly seems to emphasize the “reason” part of that formulation, indicating a basic departure from the ethical naturalism of Aristotle. Aristotle’s metaphysics is oriented around the idea of an end, or *telos*, for each thing that possesses a distinct nature. This serves as the foundation for ethics; an action is good if it leads a thing toward its particular *telos*, or unique fulfillment. Thus, natural Right can be ascertained from an examination of the ‘facts’ of nature. In contrast, Villey sees Grotius as abandoning this metaphysical foundation and transforming natural Right into a primarily moral doctrine.<sup>61</sup> Indeed, Villey goes so far as to charge Grotius with instituting a radical separation between fact and Right. Such a charge sees Grotius as a precursor to David Hume’s famous fact-value distinction. Villey even suggests that, in this way, Grotius may be a precursor to Kant, whose frame of reference was strongly shaped by Hume.<sup>62</sup>

A further – and related – charge is that Grotius looks to mathematics for his methodology. According to Villey, this is closely connected with Grotius’ rejection of the Aristotelian conception of virtue as a golden mean. This leads Villey to argue that

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<sup>59</sup> Hugo Grotius, *De Jure Belli ac Pacis (The Law of War and Peace)*, trans. Francis W. Kelsey, intro. James Brown Scott. Carnegie Classics of International Law, No. 3, Vol. 2. (New York: Bobbs-Merrill, 1925), Prol. 11, 13.

<sup>60</sup> Villey, 612.

<sup>61</sup> *Ibid.*, 611-15.

<sup>62</sup> *Ibid.*, 621.

Grotius transforms a virtue-based natural Right into a system of natural rights. As mentioned above, along with instituting the universality of rules, this eliminates practical wisdom (indeed, virtue in general), as well as equity and the spirit of the law.<sup>63</sup>

Moreover, this allows the systematization of political knowledge into a positive science. This is accomplished by his unity of justice and law. Villey would not be the first to make such a claim, as can be seen in the title of Hamilton Vreeland's 1917 biography *Hugo Grotius: Founder of the Modern Science of International Law*. Politics is transformed from a practice guided by virtue into a problem to be solved by employing legal science.

This approach to Grotius' epistemological and metaphysical foundations (or lack thereof) shapes Villey's reading of Grotius' texts, particularly his direct statements on the nature of justice. The Aristotelian tradition had posited a tripartite conception of justice, including a bifurcation of political justice into commutative and distributive justice (to use the commonly-accepted Thomistic terminology). Justice was understood as teleological, with political justice existing in relation to a higher sense of philosophical or theological justice. Villey notes Grotius' acknowledgement of this higher sense, or what Villey calls "objective Right", in Grotius' initial definition of justice as "that which is just". However, Villey believes that Grotius fails to substantively incorporate this category into his thought. Rather, he sees Grotius' next category of justice, which Villey terms "subjective Right", as subsuming and replacing the first entirely, rather than supplementing and enriching it. Thus, Grotius is left with no conception of justice in the overarching sense, as something which grounds the contingent and formal realities of

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<sup>63</sup> Ibid., 621-23.

political institutions. Furthermore, because this “subjective Right” category overwhelms “objective Right”, Grotius must be rejecting a natural Right perspective entirely, in favour of a subjective rights position.<sup>64</sup>

Moreover, this category of subjective Right, in focusing on “Right properly said”, supposedly has no room for Aristotle’s concept of distributive justice. There is no conception of a good society beyond adherence to the formulations of the rules outlined. Thus, lacking both an overarching sense of Right and a concept of distributive justice, Grotius reduces Aristotle’s tripartite structure of justice to a single component: commutative justice (or, as Grotius calls it, “expletive justice”). Thus, justice is no longer concerned with outcomes, but only with the procedures or rules by which one arrives at an outcome.

Indeed, according to Villey, Grotius’ conception of this “subjective right” can be reduced to three rules: to refrain from the possessions of others, to restore those possessions we have taken, and to keep our promises.<sup>65</sup> Essentially, justice is reduced to the protection of property – a theme to which Villey returns again and again in his account of Grotius. Thus, there is no obligation of the rich to provide for the poor; as long as they have abided by these formal rules (such as honesty in transactions), hoarding their wealth is perfectly just. All of this is evidence of Grotius as apologist for imperial Holland as it pillaged the poor peoples of the earth.<sup>66</sup>

According to Villey, these undeniably unjust outcomes must of necessity follow from Grotius’ rationalist method. However, Villey believes Grotius was adroit enough to

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<sup>64</sup> Ibid., 627.

<sup>65</sup> Ibid., 620-21.

<sup>66</sup> Ibid., 630-32.

recognize in advance the unpopularity of the severe outcomes to which his pure reason had to lead. As a result, when Grotius comes to deal with actual questions of the practice of war, he arrives at more reasonable-sounding prescriptions by surreptitiously citing examples of historical (or contemporary) consent. All the while, the reader is left concluding that these examples further support the conclusions to which his pure rationalist methodology leads them.

According to Villey, this allows Grotius to be an apologist for the status quo. He is a European bourgeois, concerned primarily not with norms but with ensuring the social order and peace that will secure individual possessions.<sup>67</sup> Villey ultimately sees Grotius as a product of his time, compromising his intellectual integrity in order to promote the self-interested desires of author and country.

Ultimately, according to Villey, Grotius' system of rights has four fundamentally new aspects. Its goal is protect private property. Its form is universal rules, rather than contextually-dependent guidelines of prudence. Its structure is systematic. And its content is contrary to the idea of the common good.<sup>68</sup>

There are several limitations to Villey's reading. A crucial problem, one which is not unique to Villey, is a monistic understanding of Grotius' epistemology. Having identified a rationalist element which seems new, Villey assumes that rationalism must explain the whole of Grotius. Although this may be a fruitful heuristic approach, it ignores the possibility that rationalism may coexist with other ways of knowing. The same is true of his reading of Grotius as a mathematizer, and the same assumption seems

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<sup>67</sup> Ibid., 620.

<sup>68</sup> Ibid., 619.

to pervade his secularization hypothesis. In this way, Villey succumbs to the common temptation to seize upon what appears most innovative in a thinker and to promptly pronounce it the ordering principle of his thought.

Thus, having established the fact that Grotius seeks universal principles from reason, the study of history and empirical observation of the world no longer have anything to contribute. Indeed, if Grotius' historical methodology were genuine, it would serve as evidence that – contrary to Villey's reading – Grotius does, in fact, understand Right as emerging out of facts. Thus Villey must read the immense historical component of Grotius' work as subterfuge. Villey assumes that there is a duplicity at the heart of Grotius' argument. As a rhetorician, Grotius is providing an esoteric reading for the discerning reader. However, a hermeneutic of suspicion may not be the best way to discern the mind of Grotius. This is particularly problematic in light of the fact that others, including philosopher of history Giambattista Vico, have seen Grotius as being original precisely because of his emphasis on history.<sup>69</sup>

Villey's rush to view Grotius' supposedly radical statements as the core of his political philosophy may be the result of his hermeneutic approach to Grotius' works. In Villey's defense, he does avoid the most egregious errors of many observers, who are unaware of any relevant works beyond *DJB*. However, Villey's foray into other works is hardly intrepid; he examines only three works of Grotius. He begins with the *De Jure Praedae* and gives passing mention to *de Imperio* before proceeding to *DJB*, from which he draws most of his treatment of Grotius.

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<sup>69</sup> A. C. 't Hart, "Hugo de Groot and Giambattista Vico", in John Dunn and Ian Harris, eds. *Grotius*, Vol. 2. (Lyme, NH: Edward Elgar Publishing, Inc., 1997), 186-222.



Furthermore, even his reading of *DJB* is quite selective. He describes Book II of *DJB* as reframing war in terms of property rights and their proper prosecution, according to his property-based understanding of Grotian justice. Yet he stops reading after Chapter 17 of Book II, ignoring the remaining eight chapters of that book and the entirety of Book III. Villey's reduction of Grotius' understanding of justice to his three property-protecting elements of expletive justice would indeed be a fairer reading of Grotius if Grotius had stopped writing after Chapter 17. By ignoring the rest of the work, however, Villey misses out on Grotius' entire treatment of how the right-holder ought to exercise those rights. He also ignores the components of when (and in what way) one should give up one's rights, and of how one may be obligated to act on behalf of others. He is also unable to see the stricter code of conduct Grotius outlines for the Christian, the moderation which should be exercised in war, and the importance of maintaining good faith even with enemies. These omissions are not insignificant.

Likewise, Villey also misses out almost entirely on Grotius' theological works. There is little curiosity to explore what these works might have to offer. Having concluded that Grotius rejects natural Right, he presumably sees little reason to probe Grotius' theology.

This hermeneutic helps to explain much of Villey's reading, including his dismissal of (practical) virtue, of attributive justice, and of history in Grotius. It also contributes to his rush to pronounce the most original elements, such as possessive rights, as the core of Grotian thought. This narrow reading prevents Villey from seeing the context in which Grotius makes these statements, and the wider reality within which

some of these elements (particularly the emphasis on rights) must exist. Villey identifies the existence of subjective rights in Grotius, but lacks a nuanced understanding of their place.

*Richard Tuck*

Probably the most notable and extensive commentator on Grotius' political thought today is Richard Tuck. In addition to chapters on Grotius in three books, he is the editor of the 2005 edition of *DJB*, the first new English edition since 1964. Tuck's excellent historical scholarship is widely acknowledged even by his critics.<sup>70</sup> His work is seasoned with interesting contextual information about Grotius' life. Beyond this, he even undertakes primary source analysis, comparing discrepancies in manuscripts. For instance, Tuck draws out the differences between the first edition of *DJB* in 1625, which remains untranslated into English to this day, and the second edition in 1631, which has become the standard.<sup>71</sup>

Tuck is somewhat more adventurous in his reading of Grotius' corpus. He has a salutary willingness to look beyond *DJB*, the one and only work most observers associate with Grotius. In particular, Tuck has brought an increased focus on Grotius' first major political work, the *DJP* of 1605. Yet, far from simply bringing this work to light, Tuck takes the audacious step of placing *DJP* at the centre of Grotian political thought,

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<sup>70</sup> Oliver O'Donovan, "The Justice of Assignment and Subjective Rights in Grotius", in Oliver O'Donovan and Joan Lockwood O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (Grand Rapids, MI: Eerdmans, 2004), 171.

<sup>71</sup> Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press, 1999), 98-99.

describing it as “the most impressive and remarkable of all of Grotius’ writings”.<sup>72</sup> Over the years, Tuck’s treatments of Grotius have consistently devoted a sizable and primary place to *DJP*. His most recent work asserts that “most of the substantive theory of *DJB* was in fact an expansion of the arguments of *DJP*.”<sup>73</sup> Tuck is so enamoured of this early work that nearly half of his introduction to the 2005 edition of *DJB* is devoted to an analysis of *DJP*, in which he attempts to show the dependence of many significant concepts in the later work on the earlier.<sup>74</sup>

This hermeneutic is crucial to Tuck’s reading of Grotius as a whole, and leads to an emphasis on particular themes. One is Tuck’s persistent conviction that Grotius intends to undermine the Aristotelian worldview. Although he shares this conviction with Villey, Tuck’s wider reading of Grotius adds weight to the claim. In *DJB*, he reads Grotius as “attacking the Aristotelian theories of the virtues and of justice,” making explicit the implicit attack on Aristotle in *DJP*. For instance, he points to Grotius’ suggestion that virtue is not always a mean. Tuck takes this to imply that Grotius rejects a virtue ethics in favour of a law-based ethics, and that the work is a historical watershed in this regard. He writes, “after the *De Jure Belli*, it was impossible for anyone who wished to think about politics in a modern way – that is, in terms of natural rights and the laws of nature – to pretend that they were still Aristotelians.” The work represents a “final and public break” with the Aristotelian inheritance.<sup>75</sup>

This perceived rejection of Aristotelian metaethics is consistent with Tuck’s

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<sup>72</sup> Richard Tuck, *Natural Rights Theories: Their origin and development* (New York: Cambridge University Press, 1979), 59.

<sup>73</sup> Tuck, *Rights of War and Peace*, 95.

<sup>74</sup> See Tuck, “Introduction”.

<sup>75</sup> Richard Tuck, “Grotius and Selden,” in J. H. Burns, ed., *The Cambridge History of Political Thought 1450-1700* (New York: Cambridge University Press, 1991), 518-20.

understanding of justice in Grotius. Tuck argues that for Grotius, “the essential feature of justice was respect for one another’s rights, not any distributive principle,” which implies a rejection of distributive justice.<sup>76</sup> Effectively, Aristotle’s tripartite sense of justice has been reduced to a monistic sense in which the only relevant consideration is subjective rights. In addition, it indicates a more subtle rejection of teleology in justice as a whole, moving toward a formalistic or procedural conception of justice. Tuck adds that Grotius’ later *Inleydinge* was the “first reconstruction of an actual legal system in terms of rights rather than laws.”<sup>77</sup>

Tuck also reads *DJB* as following what he sees as the mathematical epistemology of *DJP*. For instance, Tuck reads Grotius’ rejection of the distinction between theoretical and practical sciences as the reduction of the latter to the former. This emphasis on theoretical reason opens the door to “a definite and *a priori* science of ethics.” Such a science is also minimalistic. The number of truths that can be known as part of natural law, as theoretical reason, are limited in comparison with earlier natural law thinkers. Correspondingly, this emphasis on theoretical reason closes the door to “individual judgment or the exercise of *phronesis*.”<sup>78</sup> This eliminates any place for practical virtue, without which Aristotle believed that politics could not function.

Furthermore, Tuck argues that *DJP* sees self-interest as the primary human drive, to the extent of reducing altruism to self-interest. Individuals are thus justified in pursuing their own self-interested desires to the full, provided that they do not harm others. However, they are also justified in declining to help others. Again, here can be

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<sup>76</sup> Ibid., 518.

<sup>77</sup> Tuck, *Natural Rights Theories*, 66.

<sup>78</sup> Tuck, “Grotius and Selden,” 518.

seen an understanding of rights that is self-existent, divorced from dependence upon any prior understanding of justice. Tuck later puts it more clearly: “Social life is the peaceable exercise by each member of his rights”.<sup>79</sup> This is an example of Tuck’s formalistic understanding of Grotius: it does not matter how one exercises one’s rights. One is perhaps reminded of Jeremy Bentham’s maxim about the equal value of poetry and push-pin.<sup>80</sup>

As seen in Villey’s works, this reading is not entirely new. However, Tuck attempts to strengthen this reading by identifying these themes even more strongly in *DJP*, a task to which he applies his considerable scholarly abilities. His next move is to read *DJB* with these themes firmly in mind, identifying similarities whenever possible.

However, it is difficult to deny that there are significant theoretical differences between Grotius’ nascent approach in the *DJP* of 1605 and his mature work in later decades. In some areas, Tuck seems to overlook these discrepancies. For instance, he asserts that Grotius’ treatment of punishment in *DJB* is fundamentally unchanged from that enumerated in *DJP*, and one assumes that *DJB* is thus an outworking of what is already present in the early work. This is a curious generalization; while Grotius says little about punishment in the *DJP*, his treatment in *DJB* is described by a noted observer as nothing less than “the first modern theory of criminal jurisprudence.”<sup>81</sup> Yet Tuck sees little fundamental change.<sup>82</sup>

In other cases, Tuck recognizes a change, but chooses to downplay it. For

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<sup>79</sup> Richard Tuck, *Philosophy and Government, 1572-1651* (New York: Cambridge University Press, 1993), 197.

<sup>80</sup> Jeremy Bentham, *The Rationale of Reward* (London: R. Heward, 1830), 206-07.

<sup>81</sup> J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), 238.

<sup>82</sup> Tuck, *Philosophy and Government*, 199.

instance, while *DJP* may show a voluntarist conception of law, Grotius' *de Imperio* and *de Christi Satisfactione* in the following decade demonstrate a painstaking effort to maintain the delicate traditional Christian balance between voluntarism and naturalism. Grotius repeatedly (indeed, almost tediously) maintains that we know morality through nature, *and* that God has commanded it. As will be discussed later, this methodology is in fact an organizing principle of *DJB*.<sup>83</sup> Tuck is too good a scholar to ignore all of the revisions that Grotius makes in later works to the embryonic theories of *DJP*. However, he downplays these changes. This fundamental alteration of Grotius' philosophy of law is not sufficient for Tuck to alter his thesis of *DJP* as paradigmatic.

Tuck's most common approach to these discrepancies relies on his own extensive historical research. He often uses this information to explain the revisions after *DJP* as a self-interested cover for Grotius' own political agendas. This allows Tuck to retain the ideas in *DJP* as the core of Grotian political thought, while providing a somewhat esoteric reading of the later works. For instance, Tuck notes that the second edition of *DJB* was published during a narrow time window during which Grotius hoped to return to Holland. Thus, he interprets the changes in the 1631 edition of *DJB* as a calculated attempt to appeal to the more "Aristotelian, Calvinist" culture of Holland.<sup>84</sup> While this interpretation is not fundamentally different from that of Villey, Tuck's historical research

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<sup>83</sup> It is ironic that Tuck should charge Grotius with being entirely voluntaristic. Those who read Grotius' *etiamsi daremus* as defining his thought must, of necessity, argue the exact opposite: that he is purely naturalistic, with no God to command anything. Grotius' critics all seem to argue that he is an extremist on this point, but they cannot seem to get their stories straight.

<sup>84</sup> Tuck, *Rights of War and Peace*, 99. On first glance, this might appear a plausible and original hypothesis. Yet to describe any culture as simultaneously Aristotelian *and* Calvinist is rather curious. Indeed, it was Grotius' very Aristotelian-Thomist leanings which rendered him unable to embrace the orthodox Calvinism favoured by the Counter-Remonstrants, nearly costing him his life. To conflate these two systems of thought is to overlook a distinction which, in Grotius' eyes, would have been sharp as an executioner's sword.

lends more plausibility to his reading.

Ultimately, however, if this methodology were to be useful in explaining away Grotius' true self-interested motives, the most obvious candidate would be *DJP* itself. The work was written to justify Dutch action in a particular political event: the 1603 seizure of a Portuguese trading vessel by Dutch privateers. Indeed, only a solitary chapter of *DJP* dealing most directly with the issue was even published. At that time, Grotius was still quite young and not fully established in his career, and was actively seeking to rise up in Dutch politics. Subsequent events would demonstrate that this work certainly did not hinder Grotius' ascent. By 1613, he was named pensionary of Rotterdam, becoming the chief legal officer of the second-largest Dutch city.

In contrast, after his 1618 arrest and imprisonment, followed by his daring escape from prison and exile in France, Grotius must have known that his prospects of returning to public life in the Netherlands were rather dim. Surely his abortive 1632 attempt to return would have made clear the futility of using theoretical works such as *DJB* for personal purposes. Thus, if one is inclined to read Grotius through a politically self-interested lens, it seems most plausible to apply this reading to his earlier works, as the passage of time seems to reduce rather than to increase its predictive power.

Indeed, in his suggestion that *DJP* – written at the tender age of twenty-one – is paradigmatic of Grotian political thought, Tuck has taken upon himself a challenge of considerable magnitude. This can be seen not least from Grotius' own attitude toward *DJP*. During his final years, Grotius worked frantically to ensure the publication of his vast oeuvre, from history to literature to theology to law to international relations. No

work, it seemed, was too insignificant for the world to read, with one solitary notable exception: *DJP*.<sup>85</sup> Indeed, with the exception of the chapter published as *Mare Liberum* in 1609, the entire manuscript lay hidden until 1868. If this work truly contained the essence of Grotius' thought, one supposes that Grotius would have keenly desired it to see the light of day. Any fears over the implications of its supposed radicality could have been averted by instructing his executors to publish it posthumously, along with the many other works they published after Grotius' death. Yet he declined to do so. Indeed, already in 1606 Grotius questioned the value of its possible publication. In particular, his private correspondence reveals his awareness of its limited nature as a treatment of a specific issue. This points toward a desire to return to the issue as a component of a truly comprehensive treatise, one which – unlike *DJP* – would begin with the true philosophical foundations of his thought.<sup>86</sup>

Another characteristic of Tuck's analysis, also not original, is the belief that Grotius' political works stand on their own. Unlike many earlier readers, however, this belief does not result from simple ignorance of Grotius' theology and theo-political works. Indeed, Tuck devotes some time to an analysis of these works, and even seeks to integrate them into a unified understanding of Grotius.

Unfortunately, Tuck achieves this unity by assuming the complete dependence of Grotius' theology on his political thought (as understood through the lens of *DJP*). On this reading, Grotius' theology is a mere extension of his political thought, and simply explores the implications of this understanding of politics in the theological realm. Thus,

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<sup>85</sup> Gellinek, 100; For an exhaustive primary bibliography, see J. ter. Meulen and P. J. J. Diermanse, *Bibliographie des écrits imprimés de H. Grotius* (The Hague, 1950).

<sup>86</sup> R. W. Lee, *Hugo Grotius* (Oxford: Oxford University Press, 1930), 9-10.



while Tuck is able to provide some detail about these theological works, he sees little political import in them. They are not works of independent theoretical interest. Rather, they simply illustrate the theological ramifications of the political theory that Tuck has already drawn from Grotius' non-theological works.

Like Villey, Tuck seems to gravitate toward what seems most radical in Grotius without considering the possibility that it is only a small part of Grotius' thought. Tuck's identification of secular and rationalistic elements in Grotius leads him to dismiss the possibility that revelation could be a further source of knowledge for Grotius. Furthermore, Tuck seems to deny the possibility that Grotius' natural theology could be a source of insight, because of its categorization as "theology". Indeed, Tuck even ignores the possibility that elements in Grotius' natural theology could influence his political thought.

Indeed, this approach is also evident in Tuck's assumption that Grotius' natural law minimalism must reduce the richness of his moral thought, which relies on the premise that his ethics is purely based on theoretical reason. This ignores the possibility that Grotius may be reducing the law-based element of his moral thought in order to leave more room for the virtue-based component. The same can be said of his approach to self-interest. Grotius' very mention of the idea leads Tuck to assume that it is the basis for his political thought. He fails to see Grotius' belief that self-interest is compatible with a focus on the common good.

Returning to theology, Tuck's either-or approach also blinds him to the fact (which will become apparent in a study of Grotius' theology) that Grotius himself does

not draw a strict line separating the secular and the sacred when it comes to matters of practice. While Grotius may separate natural law and divine positive law as a methodological tool, he still sees them as unified in God. As a result, the distinction between the two may not hold up as well as Tuck perceives.

This approach also leads Tuck to downplay theological elements even in works as central (and supposedly secular) as *DJB*. For instance, as mentioned above, Grotius takes a voluntaristic approach in *DJP* to meta-ethics and law: moral law exists because God has commanded it (and thus not because it is inherent in the nature of reality). However, Grotius argues that the *content* of all moral law is nonetheless known through natural reason alone. However, Tuck acknowledges that in *DJB*, Grotius eliminates the discrepancy between existence of law and knowledge of law. In this later work, he argues that some law exists in the order of things (and is thus knowable through natural reason), and other law arises from God's command (and is known only through revelation). Thus, in *DJB*, knowledge of the latter is now dependent on revelation, as only God can reveal its substantive content.<sup>87</sup> This opens the door for theology to be relevant to Grotius' understanding of political affairs. However, Tuck's reduction of Grotius' theology to his secular reason quickly closes that door.

Tuck's inability to draw anything of independent theoretical value from Grotius' theology seems to limit his ability to adequately theorize Grotius. For instance, he correctly notes that in the later edition of *DJB*, Grotius especially emphasizes the place of God as a giver of law. Although a discussion of Grotius' epistemology, philosophy of law, and theology will reveal this to be highly consistent with his thought, Tuck can only

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<sup>87</sup> Tuck, "Introduction".

conclude that this inclusion “[sets] in train a long-standing puzzle for the interpretation of Grotius’s ideas.”<sup>88</sup> By focusing on the most apparently innovative ideas in Grotius (such as his secular or rationalistic elements), Tuck fails to see their possible coexistence with older, more traditional approaches. Thus, these theological inclusions are a mystery to Tuck.

Even on Tuck’s own historical terms, there are difficulties with this approach. One of the chief difficulties with seeing Grotius’ theology as purely derivative is that Grotius’ interest in theology does not follow his political works in a temporal sense; if anything, the reverse seems true. As a boy of 12, Grotius converted his own mother from Roman Catholicism to Reformed Christianity.<sup>89</sup> Grotius’ first published work, accomplished at the age of 18 and predating even the *DJP*, was a literary work on the Exile of Adam. (Indeed, there exists a small body of scholarship exploring the impact of this work on *Paradise Lost*, whose noted author was a personal acquaintance of Grotius.)<sup>90</sup> Grotius followed this effort with another literary piece on the passion of Christ in 1608, and three years later wrote his first explicitly theological work.

Nor did Grotius’ interest in theology wane over time; on the contrary, it only seemed to grow. Between the composition of *Meletius* in 1611 and his escape from prison ten years later, Grotius worked not only on his *Inleydinge* (*Jurisprudence of*

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<sup>88</sup> Tuck, *Rights of War and Peace*, 101.

<sup>89</sup> Hamilton Vreeland, *Hugo Grotius: The Father of the Modern Science of International Law* (New York: Oxford University Press, 1917), 13-14.

<sup>90</sup> See, for instance, Christian Gellinek, *Hugo Grotius* (Boston: Twayne, 1983), 120; Elizabeth Sue Oldman, *Milton, Grotius, and the Law of War*, Doctoral Dissertation, New York University, 2003; Tiemen De Vries, *Holland's Influence on English Language and Literature* (Chicago: W. B. Conkey, 1916), 288-94; Carey Herbert Conley, *Milton's indebtedness to his contemporaries in 'Paradise Lost'*, Master's Thesis, University of Chicago, 1910. For the personal connection to Milton, see R. W. Lee, *Hugo Grotius* (Oxford: Oxford University Press, 1930), 41.

*Holland*) and *DJB*, but also four other theological works of significant heft. Indeed, after 1631, Grotius published little other than his massive commentary on the Bible. Furthermore, during the last decade of Grotius' career, he devoted significant practical energies toward the cause of Christian unity.

Yet despite these interests, Tuck assumes that Grotius' theology was purely derivative of his political thought, and that these years of attention did not produce new insights. His theology simply works out the implications of *DJB* (which, according to Tuck, itself reflects *DJP*). Thus, he sees in Grotius' theology the supposedly minimalist character of his ethics and politics. Because of the way that these ideas played out in theology, Grotius became "progressively more radical in his thinking" in his old age. The later theological works are those of a man "conscious of [his] novelty."<sup>91</sup>

Tuck's understanding of justice in Grotius is also limited by his monistic and theologically insufficient approach. Tuck does indeed identify Grotius' distinction between expletive (commutative) and attributive (distributive) justice, and in his more recent works he does attempt to treat the distinction in at least a cursory sense. However, he is unable to recognize any substantive role for attributive justice, given that he sees nothing beyond rights in Grotius' justice. Thus, he effectively reduces justice to expletive justice and its focus on possessions. As he states, Grotius was quite "willing to explain relationships in terms of the transfer of *dominium*, and to treat liberty as a piece of property."<sup>92</sup> Tuck correctly reads Grotius to say that only expletive justice is part of natural right in a strict sense. However, absent an understanding of Grotius' theology,

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<sup>91</sup> Richard Tuck, "Grotius and Selden," in J. H. Burns, ed., *The Cambridge History of Political Thought 1450-1700* (New York: Cambridge University Press, 1991), 521-22.

<sup>92</sup> Tuck, *Natural Rights Theories*, 60.

particularly in *de Imperio* and *de Satisfactione*, Tuck can only assume that attributive justice must therefore be lower than natural right.<sup>93</sup> He does not recognize the possibility that attributive justice could correspond to the transcendent, elevating it to a position above purely natural right, and corresponding to a more overarching sense of rightness. Nor is Tuck able to see any emphasis on practical virtue in attributive justice, which could point toward an ethics based not simply on law but also on virtue. This could, in turn, show that Grotius' natural law minimalism is not equivalent to a moral (or even political) minimalism.

This assumption of the derivative position of theology also limits the significance of what appear to be interesting discoveries in Tuck's reading. For instance, Tuck acknowledges Grotius' statement in the early *Meletius* that "on the basis of this religious principle it is not enough just to abstain from harm."<sup>94</sup> Yet Tuck fails to pick up on the importance of this development of a component of ethics that transcends the prohibition of the most obvious violations of property rights. This may stem from a belief that the positive, virtue-based component is purely theological, and thus cannot be instructive for politics. However, such a position would eliminate the supposed unity that Tuck seems to assume in Grotius' thought, even if it had no implications for politics. Only by taking the theology seriously can these discrepancies be harmonized, an approach that runs contrary to Tuck's methodology.

Tuck's historical scholarship on the circumstances and political pressures of Grotius' life is typical of the Cambridge school approach, and Tuck does it very well.

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<sup>93</sup> Tuck, *Rights of War and Peace*, 98.

<sup>94</sup> Richard Tuck, *Philosophy and Government, 1572-1651* (New York: Cambridge University Press, 1993), 186.

However, this historical focus seems to impose a particular synthesis that fails to account for significant elements of Grotius' thought. Tuck sees the *de Jure Praedae* – a work written for explicitly political reasons at the ripe old age of twenty-one – at the center of Grotius' thought. Any further perceived developments are reducible to the historical events of Grotius' life, filtered through the lens of Grotius' own political and personal self-interest. This interpretation, which sees Grotius as modifying his earlier thought for self-interested political considerations, prevents Tuck from recognizing the subtlety and maturity of Grotius' later thought.

These omissions are further compounded by Tuck's focus on the most radical-sounding elements of Grotius' thought, and his inability to see the coexistence of multiple approaches to epistemology and philosophy of law that are central to Grotius. Even more seriously, Tuck almost completely overlooks Grotius' theology, implicitly assuming that it reveals no additional theoretical insight. Because of these interpretive commitments, Tuck is unable to integrate some of his genuine discoveries and insights into a coherent framework, and must downplay them. Ultimately, these discoveries do not alter Tuck's belief that Grotius' understanding of politics is reducible to possessions, and his political philosophy is exclusively focused on the protection of those possessive rights. He thus reads Grotius as breaking with the classical tripartite conception of justice in favour of a monistic, systematic, secular, and individualistic understanding of justice in politics.

*Brian Tierney*

Both Villey and Tuck suggest that Grotius is a revolutionary. They agree that he

inaugurates a rights-based (and thus modern) approach, thereby undermining the classical and Christian order. A more nuanced view, however, has recently been put forth in a 1997 work by Brian Tierney. In *The Idea of Natural Rights*, he sketches the history of subjective rights. Rather than locating their origin in the modern era, however, Tierney identifies a multitude of medieval sources of natural rights, stretching much further back than the reader might have expected. From Ockham and the Franciscans, through Gerson and the conciliar movement, to the Spanish neo-Scholastics Vitoria and Suarez, Tierney identifies a variety of texts in which an embryonic conception of individual rights can be found.<sup>95</sup> He concludes his work with Grotius, which gives an indication of where he situates Grotius in the development of subjective rights. This is a stark contrast to the works of Tuck, Haakonssen, Schneewind and Buckle on the history of rights, all of which effectively begin their investigations with Grotius.<sup>96</sup> Indeed, far from situating Grotius as a radical who boldly brings the world into a new self-understanding, Tierney sees him as taking an existing tradition and transmitting it to a new world. Grotius' chief accomplishment is to frame the medieval (and largely Catholic) subjective rights tradition in a language intelligible to the modern (and largely Protestant) world.

Tierney thus takes issue with both treatments of Grotius. His work repeatedly rejects Villey's description and evaluation of the development of individual rights, prior to and including Grotius. Likewise, he also questions Tuck's reading of Grotius as a

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<sup>95</sup> Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, MI: Eerdmans, 2001). Throughout this history, Tierney repeatedly points to the Canon law tradition, which leads one to consider the possible connections between the concept of subjective rights and the practice of law rather than politics.

<sup>96</sup> See Tuck, *passim*, Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (New York: Cambridge University Press, 1996), Jerome Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (New York: Cambridge University Press, 1998), and Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (New York: Oxford University Press, 1993).

decisive modernizer and as propounding a new science of morality.<sup>97</sup> Tierney methodically takes each of the arguments for Grotius' radicality and coolly provides some perspective on their supposed novelty.

For instance, Tierney argues that the natural law minimalism so emphasized by Tuck is not new to Grotius. Indeed, he argues that medieval natural law thinkers had always been hesitant to propound a multitude of specific injunctions. This did not cause anyone to question the commitment of those earlier thinkers to the Christian Aristotelian tradition. Just as importantly, Grotius' references to individual self-interest are not meaningfully different from such references found in his medieval predecessors.<sup>98</sup>

The reason for this is the fact that earlier thinkers did not posit a deep divide between individual rights and the common good. As Tierney says, Grotius' work is characterized by the medieval approach: one which could "hold together, in coherent structures of thought, ideas that later thinkers would sometimes treat as polar opposites."<sup>99</sup> This is an example of how Tierney's project to show the pre-Grotian patrimony of these ideas further allows him to recognize the subtlety of Grotius' thought in the co-existence of novel and traditional elements.

This approach also makes it easier for Tierney to recognize and deal with the coexistence of secular reason and theology in Grotius. He is again untroubled by this state of affairs because he recognizes its heritage in scholastic thought. The fact that a thinker as paradigmatic as Aquinas uses both revelation and 'secular' reason in parallel, demonstrates that the use of 'secular' reason alone is insufficient grounds for the charge

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<sup>97</sup> Tierney, *The Idea of Natural Rights*, 319.

<sup>98</sup> *Ibid.*, 319-23.

<sup>99</sup> *Ibid.*, 319-23, 334-35.



of ‘radical modernizer’. Likewise, Tierney shows that the influence of the Stoics on Grotius (according to Villey, another sign of Grotius’ deviance) was no more decisive than was their influence on medieval thought in general, particularly its jurisprudence. A Christian view need not be entirely exclusive of other sources.<sup>100</sup>

Tierney’s willingness to see a plurality of approaches in Grotius allows him to take a nuanced reading of Grotius’ moral philosophy. The *etiamsi daremus* has sometimes been taken to show that Grotius takes a purely naturalist or rationalist metaethics. Yet others, particularly those who are wont to argue the centrality of *DJP*, point to the supposed voluntarism of his initial formulations there. Tierney avoids these two extremes by identifying Grotius’ emphasis on the truth of both, and identifies similar formulations in more supposedly orthodox thinkers, such as Suarez.

Tierney also takes seriously Grotius’ simultaneous epistemological employment of history and reason. He does not simply reduce the historical method to a self-interested cover for Grotius’ true beliefs. However, Tierney is first and foremost a historian: he offers only brief textual evidence and passing theoretical study of Grotius’ epistemology.<sup>101</sup>

Tierney also makes brief but insightful observations that merit further inquiry on the subject of consent and sovereignty. One such passing remark addresses Grotius’ understanding of sovereignty, where Tierney correctly identifies a distinction between what he calls “the underlying sovereign of the whole” and the exercise of that sovereignty by the ruler. Tierney does identify one critical implication of this distinction.

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<sup>100</sup> Ibid., 319-23.

<sup>101</sup> Ibid., 327.

Sovereignty is absolute only by reference to *position*: to be sovereign means to be answerable to no other temporal power. This does not, however, confer an absolute sovereignty of *action*. Sovereigns are limited by natural law, as well as divine law and *jus gentium*. Thus, subjects are free – indeed, obligated – to disobey unjust laws, severely restricting the legislative sovereignty of the ruler. Tierney takes this observation to show that Grotius’ supposed social contract theory is undertaken within a natural law framework rather than a purely positivistic one.<sup>102</sup>

However, to put this observation more precisely, this points toward a distinction between the *status* of possessing sovereignty, and the particular *actions* in which that status is manifested. This is indicative of an even more significant underlying distinction between a status, which exists in ideals outside time, and an action, which draws upon personal virtues in particular situations in time. However, Tierney is not primarily concerned with pursuing the deeper significance of these distinctions. Chapter 3 will undertake such a study, both by showing the consistency of this approach throughout Grotius’ corpus, and by showing its broader philosophical implications regarding idealism, history, and existential virtue.

This is one of several areas in which Tierney begins to overcome the limitations of much of the scholarship, but does not flesh out the implications to the full. Another example is in Tierney’s hermeneutic. In showing how Grotius embraced various pairs of opposites, Tierney occasionally identifies shifts of emphasis from one of Grotius’ works to another. He does this primarily to show that Grotius held many ideas together in tension. Indeed, Tierney is more concerned to show the simultaneous coexistence of

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<sup>102</sup> Ibid., 336.

these ideas than any sort of gradual progression from one to another. In doing so, he seems to implicitly question Tuck's thesis of Grotius' early works as paradigmatic. However, he does this by suggesting a sort of implied egalitarianism between Grotius' works, taking *DJP* off its pedestal but refusing to place any other work on it, or even to suggest a substantive interpretive principle by which to comparatively evaluate Grotius' various works. However, it seems just as plausible to suggest that a deeper study might uncover a trajectory in Grotius' thought.

This (tentatively) insightful approach is also visible in Tierney's greater willingness to take seriously some of Grotius' theological works. Unlike Tuck, who relegates Grotius' theology to a derivative position in his thought, Tierney acknowledges (at least in brief) some of the contributions of *de Imperio* to Grotian political thought. In particular, he identifies the contributions of Grotius' treatment of permissive natural law.

Tierney's willingness to recognize – if perhaps not to explain – a coexisting plurality of approaches unfortunately does not extend very far in his treatment of justice in Grotius. As with Tuck and Villey, when glossing over Grotius' understanding of subjective Right, Tierney writes that “Grotius was mainly interested in *ius* as *facultas*”, ignoring the other species, that of *aptitudo*. In particular, he does not question the interpretive assumption that if a faculty is right in a “strict sense”, then an aptitude must be a lesser – rather than a higher – form of justice rather than a higher form.<sup>103</sup>

As a result, while Tierney has done some work to clear the way for a new reading, one which might show where and how Grotius builds on the classical understanding of justice, Tierney does not fully recognize the opportunity he has created. He does identify

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<sup>103</sup> Ibid., 325-26.

the idea of the common good, and the possibility of an overarching conception of justice. However, he does not explore the idea that virtue, particularly the historical-situational virtue of prudence, may play a central role in political life. He also does not explore the possibility that Grotius was interested in outcomes, rather than mere content-independent procedures. In doing so, he fails to emphasize the possibility of politics as a personal practice, one that is not simply reducible to the protection of subjective rights, particularly those of private property.

This dismissive approach to attributive justice in general also prevents Tierney from understanding permissive natural law in a more nuanced way, one that incorporates a virtue-based understanding.<sup>104</sup> As a result, he effectively interprets the absence of strict moral prohibitions as rendering all remaining possibilities equally morally acceptable. This may follow from the fact that his hermeneutic does not include a study of the rest of Grotius' theological works, including the crucial *de Satisfactione*.

Thus, Tierney provides an interesting historical analysis of Grotius' place in the subjective rights tradition. He also shows some promise of transcending the pitfalls of much of the existing Grotius scholarship. What Tierney leaves largely unexamined, however, is the assumption that subjective rights are the basic ordering principle of Grotius' political thought. Tierney offers a new perspective on Grotius' historical importance by re-examining the context leading up to Grotius and re-situating Grotius in relation to this background. However, Tierney's distinctiveness in relation to Villey and Tuck ultimately has more to do with how he perceives the background than how he reads Grotius. Tierney does make some observations – primarily about the coexistence of

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<sup>104</sup> Ibid., 328-29.

multiple approaches – that offer some hope of overcoming the limitations of Villey and Tuck. However, on his central interpretation of justice in Grotius, Tierney does not differ substantially from the figures he criticizes. Nor does he fully move beyond the hermeneutic limitations in much of the North American scholarship.

*Oliver O'Donovan*

This general lack of attention to Grotius' oeuvre as a whole cannot be attributed to European scholarship. A handful of scholars have recently shown renewed interest and detailed study of Grotius' theology on its own terms. Grotius' *Meletius*, a work outlining the commonalities between the various branches of Christianity, was published in 1988 after its rediscovery by Guillaume Posthumus Meyjes.<sup>105</sup> The past ten years have also seen the release of critical editions of *Ordinum Pietas*, edited by Edwin Rabbie, and *de Imperio*, edited by Harm-Jan Van Dam.<sup>106</sup> The Van Dam edition, in particular, manifests painstaking attention to detail, as it carefully compares manuscripts, examines the reception of the work, and adds an entire volume of commentary. The same series also includes an edition of secondary commentary in honour of Meyjes.<sup>107</sup>

Unfortunately, however, the only attempt to situate this wealth of historical data within any organizing framework has been largely historical. Scholarship has focused

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<sup>105</sup> Hugo Grotius, *Meletius*, critical edition with introduction, translation and commentary by Guillaume H. M. Posthumus Meyjes (New York: Brill, 1988).

<sup>106</sup> Hugo Grotius, *Ordinum Hollandiae ac Westfrisiae pietas (The Piety of the States of Holland and Westfriesland)*, critical edition with English translation and commentary by Edwin Rabbie (New York : Brill, 1995); Hugo Grotius, *De Imperio Summarum Potestatum Circa Sacra (On the Power of Sovereigns Concerning Religious Affairs)*, critical edition with introduction, translation and commentary Harm-Jan Van Dam (Boston: Brill, 2001).

<sup>107</sup> Henk J. M. Nellen and Edwin Rabbie, eds., *Hugo Grotius – Theologian: Essays in Honour of G. H. M. Posthumus Meyjes* (New York: Brill, 1994).

primarily attempting to identify the influences of contemporary writers, earlier figures, or of ancient schools of thought. Other articles have focused on issues of narrow topical interest, or examined Grotius' historical reception in various places.<sup>108</sup>

Hence, there has been little attempt to situate Grotius' theology within an overarching theoretical framework. Indeed, most of these commentators are skeptical about the very possibility. For instance, while Van Dam understandably laments the widespread ignorance of Grotius' theology, he does not believe that such an understanding would help to illuminate the essence of Grotius' thought. Taking Villey and Tuck's interpretation to the extreme, he argues that Grotius is a rhetorician at heart, lacking any "complete, consistent philosophical system."<sup>109</sup> Consequently, there has been little attempt to relate Grotius' theological writings to his understanding of the interplay between reason, history, and revelation, his relative emphases on law and virtue, his philosophy of law, or on his categories of justice and their limits. This lack of attention to theoretical synthesis even hinders some recent translations, leading to the confusion or conflation of separate terms that identify distinct theoretical categories.<sup>110</sup>

There is one significant exception to this general survey. In 1999, Oliver O'Donovan co-edited a reader in Christian political thought entitled (notably) *From Irenaeus to Grotius*, in which he argues that Grotius "is the last great figure in whose thought a unity of theology, law, philology, and history is effective."<sup>111</sup> Furthermore, he

<sup>108</sup> See Nellen, as well as J. P. Heering, *Hugo Grotius as Apologist for the Christian Religion* (Boston: Brill, 2004).

<sup>109</sup> Harm-Jan Van Dam, "Introduction", in Hugo Grotius, *De Imperio Summarum Potestatum Circa Sacra* (*On the Power of Sovereigns Concerning Religious Affairs*), critical edition with introduction, translation and commentary Harm-Jan Van Dam (Boston: Brill, 2001), 5-6.

<sup>110</sup> Oliver O'Donovan, "Review: *De Imperio Summarum Potestatum Circa Sacra*" *Theological Studies*, Sept. 2003 (64:3), 629-30.

<sup>111</sup> Oliver O'Donovan and Joan Lockwood O'Donovan, "Hugo Grotius (1583-1646)", in *From Irenaeus to*

asserts that “to understand Grotius as a legal and political theorist implies understanding him also as a lay theologian.”<sup>112</sup> Thus, O’Donovan does not read Grotius solely through *DJB*, as did most earlier readers, nor does he accord disproportionate interpretive weight to *DJP*. Neither does he regard the theological works as merely derivative. Rather, O’Donovan sees Grotius’ theological works as coequal texts in the effort to discern the underlying unity in Grotius’ thought, an understanding that each part plays a role in enriching. In particular, O’Donovan points to the importance of *de Satisfactione*. This is a work regarding which the secondary scholarship has been almost completely silent in recent decades even on theological terms, to say nothing of its political relevance.

O’Donovan’s effort to take Grotius’ Christianity seriously may contribute to his sensitive treatment of Grotius’ understanding of justice. In reading *DJB*, he draws careful attention to the distinction between expiatory and attributive justice in Grotius in a way that no previous source does, and identifies it as one of Grotius’ “most valuable theoretical contributions”.<sup>113</sup> He identifies the place of a rightness in Grotius that transcends a particular subjective right, and points to the fact that expiatory justice is insufficient to account for all of Grotius’ restraints on war in *DJB*. He also points toward the particularly situational nature of attributive justice. O’Donovan also hints at Grotius’ emphasis on the impossibility of ever fully achieving justice, which points toward perfection only in the supernatural realm.

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*Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, MI: Eerdmans, 1999), 787. This observation is corroborated in a sort of way by James Turner Johnson, arguably the leading just war scholar today. He considers Grotius to be the last thinker to take just war theory seriously, at least until Paul Ramsey and John Courtney Murray revived the tradition in the 1960s. See James Turner Johnson, “Grotius’ Use of History and Charity in the modern Transformation of the Just War Idea”, in John Dunn and Ian Harris, eds. *Grotius*, Vol. 2. (Lyme, NH: Edward Elgar Publishing, Inc., 1997), 241-54.

<sup>112</sup> O’Donovan and O’Donovan, 788.

<sup>113</sup> O’Donovan and O’Donovan, 790.

This exposition of attributive justice counteracts the prevailing exclusive focus on possessive rights in Grotius, against the outlined trend in the discipline to see Grotius as a possessive individualist. Indeed, in his 2004 treatment of Grotius, O'Donovan concludes his chapter by arguing that Grotius is notable for having actually lifted justice "out of the marketplace of private claims".<sup>114</sup> This supplements Tierney's more nuanced perspective on Grotius' understanding of human sociality. Where Tierney has suggested that Grotius' emphasis on individual rights is not exclusive of a focus on human sociality, O'Donovan actually identifies a positive substantive grounding for human sociality in the fundamentally social and situational nature of attributive justice.

In this reading of justice in Grotius, O'Donovan argues that Grotius is fundamentally working within Aristotle and Aquinas' structure of justice while simultaneously developing it. O'Donovan sees Grotius as conserving and even recapturing the emphasis of the theo-political tradition of moral and practical virtues against those late-medieval thinkers who were inclined to accord the protection of individual rights an inordinate place in justice. If there is a modern revolution, it does not follow from Grotius' emphasis on subjective rights. Rather, it follows from a latent risk in the subjective rights tradition, one that (as chronicled by Tierney) long preceded Grotius: namely, that the place of individual possessive rights would overstep its bounds and usurp the entirety of natural Right.<sup>115</sup> Indeed, O'Donovan seems to imply that Grotius helped to firmly situate these individual rights within a wider context of practical and moral virtue, preventing them from usurping the core of justice. Furthermore, while

<sup>114</sup> Oliver O'Donovan, "The Justice of Assignment and Subjective Rights in Grotius", in Oliver O'Donovan and Joan Lockwood O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (Grand Rapids, MI: Eerdmans, 2004), 202-03.

<sup>115</sup> O'Donovan, "The Justice of Assignment", 202-03.



O'Donovan does not fully draw out the metaethical implications, his analysis implicitly questions the reading of Grotius as rejecting virtue ethics in favour of a purely rule-based ethical theory.

O'Donovan also corrects the secularist reading of Tuck and Willey, not simply by using Tierney's general assertion that opposites can be held in tension, but by specifically pointing out that Grotius' ostensibly 'naturalist' approach includes the duty of obedience to God. Natural justice does not consist solely in refraining from the possessions of others. One might respond by arguing that the observation of those rights is the full duty of obedience to God, but Grotius makes it very clear that obedience to God includes worship of God, which seems to go beyond respecting the rights of others.<sup>116</sup> O'Donovan thus points toward the weakness of the strict separation between theological and secular approaches, and the fact that the two are inseparably commingled in Grotius. This is a line of inquiry that merits more attention, as does the significant place that Grotius accords to revelation proper, even in *DJB*. Indeed, O'Donovan does not probe the conceptual relation between natural and special revelation in Grotius, a matter of some importance in understanding Grotius' structure of justice.

### *Methodology*

This study follows up on many themes from O'Donovan's approach. It proceeds on the assumption that much of O'Donovan's critique of previous approaches is substantially correct, and seeks to build upon his reading of Grotius. Hermeneutically, it

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<sup>116</sup> Oliver O'Donovan and Joan Lockwood O'Donovan, "Introduction", in Oliver O'Donovan and Joan Lockwood O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (Grand Rapids, MI: Eerdmans, 2004), 14-15.

shares O'Donovan's guiding principle that Grotius' works – including those of theology – should be understood as a whole. Rather than assuming the paradigmatic status of Grotius' early *DJP* or his best-known *DJB*, this study will assume that Grotius' emphasis on theology both early and (especially) late in his life is reflective of his entire thought.

Hence, this study will further examine *de Satisfactione*, as well as showing where (and why) it differs from the dominant Atonement theories of Grotius' day. Likewise, the approach followed here leads to an exploration of Grotius' *de Aequitate, Indulgentia et Facilitate*, an untranslated work that even O'Donovan does not reference.<sup>117</sup> In this short treatise, Grotius provides an uncharacteristically clear exposition of the topic of equity, as well as two other related but distinct concepts. Furthermore, while *de Imperio* is mentioned by Tierney and O'Donovan (and occasionally by others), there is little exploration beyond the most immediate practical matter of the work (namely, its treatment of church and state). In this engagement with the full scope of the work, this study will draw out the many theoretical contributions of *de Imperio* to Grotius' understanding of politics, authority, law, and virtue. Together, these works will inform the readings of each other, and also of *DJB*, better integrating its attention to theology, virtue, and punitive war.

This study also aims to build thematically upon O'Donovan's work in several ways. The first is to more clearly draw out Grotius' tripartite epistemology: that is, his use of reason, history, and revelation. While O'Donovan is certainly aware that Grotius not simply a rationalist, he does not explore the extent to which this approach pervades

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<sup>117</sup> Hugo Grotius, *De Aequitate, Indulgentia & Facilitate (Traité de l'équité, de l'indulgence, et de la facilité)*, trans. de Courtin, 1703.

*DJB* (and is implicit in his other works). This project aims to show how fundamental this epistemology is to Grotius. This will provide a counterweight to the readings of Villey and Tuck, showing precisely where and how their monistic readings of the place of ‘secular’ reason in Grotius are, if not entirely inaccurate, then at least incomplete. This also seeks to draw out the importance of history and prudential judgment in Grotius, countering the reading of Grotius’ reason as purely calculative. In going beyond pure reason and showing the place of knowledge and virtue as existential, it will question Grotius’ reputation as having reduced the practice of politics to political (or legal) science.

More fundamentally, however, this investigation will further explore Grotius’ distinction between expletive and attributive justice. While O’Donovan helpfully points out this distinction, he does not provides a comprehensive treatment of its presence throughout Grotius’ corpus. Indeed, O’Donovan acknowledges that the decisive study of Grotius’ understanding of *jus* has yet to be written.<sup>118</sup> This study will further trace this concept in the works mentioned above, as well as in *DJB* and in Grotius’ personal correspondence. Furthermore, it will also explore how these two types of justice relate to each other, showing how expletive justice is ordered to attributive justice.

In its exploration, this study will identify several distinct characteristics that distinguish expletive justice from attributive justice. This will enable a discussion of how these two categories line up with the classical and medieval tradition of commutative and distributive justice. It will also show how these categories build upon the structure Grotius inherited, as well as suggesting some reasons why Grotius occasionally shifts his

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<sup>118</sup> O’Donovan, “The Justice of Assignment”, 195.

emphasis.

This exploration will allow for a deeper understanding of Grotius' conception of theory and practice, intellectual and practical virtue, *poiesis* and *praxis*. Building on the observations of O'Donovan (and Tierney), it will draw out the distinction between the status of a right and its subsequent exercise. This will point toward politics as not simply a science, but an interpersonal human reality. Likewise, the study will explore Grotius' conception of civil and criminal law. This will further help to show how Grotius' conception of a right is not necessarily possessive or formal, but outward-focused and teleological, reinforcing O'Donovan's suggestion that Grotius is not best understood as reducing politics to the protection of possessions. Likewise, the discussion of *de Aequitate* will reveal Grotius' understanding of the underlying spirit that gives life to the written law. It will also explore the relation of equity to practical virtue, justice, and grace. This will not only illuminate attributive justice, but will also begin to point toward Grotius' understanding of the relation between the natural and the supernatural. This exploration of justice in Grotius will also allow for a better understanding of Grotius' metaethics, exploring the balance he maintains between naturalism and voluntarism. This, in turn, will shed light on his philosophy of law, and his understanding of both the value and the limits of law.

Through this examination, this study will also show how any 'minimalism' in regard to Grotius' natural law is only a superficial retreat. Indeed, any ground conceded by Grotius' natural law is more than made up for by his concept of natural Right, or virtue. This actually provides a richer conception of Right than would a complicated and

detailed system of propositional natural laws. An investigation of the ground Grotius opens up for virtue, in the territory of attributive justice, shows how the law retreats in areas where practical virtue is more suited to take its place. This will build on O'Donovan's suggestion that Grotius' un-doctrinal approach is not an anti-doctrinal approach.<sup>119</sup>

This deeper investigation into Grotius' conception of justice is crucial to understanding his place in the development of subjective rights, and his relation to classical and Christian thought. It indicates that Tuck and others are indeed correct to read in Grotius a conception of possessive rights. However, it indicates that there is much more to Grotius than simply this. Even possessive rights must be interpreted and exercised within the framework of that which goes beyond it. Thus, this study of Grotius' understanding of natural rights will show how he recaptures the spirit of equity in Aristotle and existential virtue in Plato, pointing the way toward the classical spirit of natural Right.

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<sup>119</sup> Ibid., 173.

## CHAPTER 2

### CONCEPTIONS OF JUSTICE

Grotius' concept of justice cannot be studied in isolation. Rather, it is part of a more overarching framework of natural Right. As a true man of the Renaissance, Grotius was a comprehensive thinker, seeking to deal with reality as a whole. (Indeed, for this reason, it is difficult for any study of Grotius to establish a single foundation and proceed sequentially; each of his areas of interest are mutually interdependent.) For instance, Grotius' concept of natural Right is somewhat dependent on his philosophical anthropology, which deals with the nature of man. It is also illuminated by his epistemology, which lays out the sources of knowledge. This, in turn, points to his meta-ethics, in which he speaks of the balance between naturalism and voluntarism. While recognizing the ultimate circularity of such a holistic approach, this chapter will begin by examining these basic concepts before it proceeds to a more targeted examination of justice in Grotius.

#### *Defense of Natural Right*

From its title, *de Jure Belli ac Pacis* purports to be a work of jurisprudence. However, Grotius begins the work with the assertion that, amid much existing commentary on Roman law, little study has been undertaken of the relations between

states. Thus, unlike other jurists, he aims not simply to comment on the tradition of positive laws within one particular tradition. Rather, he seeks the fundamental principles of natural Right.<sup>1</sup>

However, as Plato recognized, before one can examine the concept of natural Right, its very existence must first be defended. Why ought one act justly? Is it not simply a cover for self-interest, as Carneades and Thrasymachus had argued? Grotius acknowledges these skeptical objections, and addresses these issues very early in his *Prolegomena* to *DJB*.<sup>2</sup>

Here he offers both intrinsic and extrinsic justifications for natural Right. These follow from his understanding of human nature. On one level, humans share a self-interested nature with animals. However, the person also transcends animal existence, as seen in the desire for peaceable social life. This life is governed by the specifically human capacity for speech and discursive reason. Human nature is also manifested in the capacity to act in accordance with general principles, in order to determine what is fitting in particular cases. This same argument can also be found in the earliest pages of Grotius' *Inleydinge*, or *Jurisprudence of Holland*.<sup>3</sup> Our social nature would lead us into society even if we did not lack anything. Natural Right is therefore grounded in human nature. It is a dictate of right reason, one that indicates the conformity of an act to rational nature.<sup>4</sup> Thus, Grotius' ethics is related to his metaphysics.

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<sup>1</sup> Hugo Grotius, *De Jure Belli ac Pacis (DJB) (Law of War and Peace)* Prol.1, Prol.31, trans. Francis W. Kelsey, intro. James Brown Scott, Carnegie Classics of International Law, No. 3, Vol. 2 (New York: Bobbs-Merrill, 1925), 9, 21.

<sup>2</sup> Ibid., Prol. 5, 10.

<sup>3</sup> Ibid., Prol. 5-7, 10-12; Hugo Grotius, *The Jurisprudence of Holland* 1.2.6, ed. R.W. Lee (Oxford: Oxford University Press, 1926), 5-7.

<sup>4</sup> Grotius, *DJB* 1.1.10.1,5, 38-40.

However, this social nature is reinforced by expediency. The Author of nature also made us weak, needing the help of others to live properly. In other words, we punish ourselves if we do not act according to the principles of reason that correspond to human nature. This provides an additional incentive to live according to justice.<sup>5</sup> Even if we are not motivated by truth, we may be motivated by fear; God has implanted intrinsic and extrinsic motivations in us. Appropriately, these principles are not simply indicated in creation. They are also commanded by God.<sup>6</sup>

Thus, Grotius is evidently not troubled by the mutual co-existence of self-interest and higher motives. In fact, he mentions the fact that animals themselves act in some ways that are consistent with natural Right, such as in the rearing of offspring. This does not mean, however, that inferences from animal nature have any necessary connection with natural Right. Where animals do so out of instinct, people are able to consciously comprehend the general principles by which they act in such ways. This can be seen in the fact that natural Right is known by reference to the human world (as can be seen in other non-animal practices, such as the worship of God), and any participation in it by animals is simply derivative and incidental.<sup>7</sup>

This idea of two natures, one higher than the other, is reinforced in Grotius' treatment of friendship. Grotius does not deny that individual needs or self-interest may lead to friendship. However, friendship cannot be reduced to what he calls first (animal) nature, or need alone. Rather, friendship is also something to which we are spontaneously drawn by distinctively human nature. From this (second) nature is known

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<sup>5</sup> Ibid., Prol.16, 15.

<sup>6</sup> Ibid., 1.1.20.1-2, 38-39.

<sup>7</sup> Ibid., 1.1.11.1-2, 41-42; Grotius, *Jurisprudence of Holland* 1.2.6, 5-7.



something higher than self-interest. Consideration of others suggests – and sometimes commands – individuals to put the interests of others above oneself.<sup>8</sup>

Thus, references to expediency in Grotius' works need not lead one to the conclusion that he reduces political existence to the self-interested desire to avoid pain and punishment. Expediency may reinforce the higher human inclination toward acting justly, but one should not thereby conclude that natural Right is justified only by recourse to it. Natural Right does not simply follow self-interest. Rather, because of the goodness of the Author of nature, the opposite is true: self-interest follows natural Right. Extrinsic factors do not preclude the existence of intrinsic ones. Grotius has no reason to be scandalized by their mutual co-existence.

### *Dual Metaethics*

This dual justification for the existence of natural Right carries on into Grotius' metaethics. The metaethical debate between naturalism and voluntarism is a persistent one in the history of thought. Does God command things because they are good, or are things good because God commands them? Grotius deals with the tension between naturalism and voluntarism in orthodox Christian fashion: he implicitly denies the either-or nature of the philosophical question, affirming that both are true in the mystery of a God who is both infinitely omnipotent and infinitely good. Throughout his work, Grotius will fastidiously repeat (indeed, almost to the point of tedium) that things that are binding through reason are also commanded by God.<sup>9</sup> In an ontological sense, natural Right

<sup>8</sup> Grotius, *DJB* 2.1.9.3, 177.

<sup>9</sup> See, for instance, Hugo Grotius, *Defensio fidei Catholicae de satisfactione Christi adversus Faustum Socinum* (*A Defence of the Catholick Faith Concerning the Satisfaction of Christ: Against Faustus Socinus*) (SC) 3 (London: Printed for Thomas Parkhurst and Johnathan Robinson, 1692) 79-80; SC 4, 112;

exists in the universe that God has created. Thus, it proceeds both from nature and from God's creative will.

Epistemologically, however, Grotius asserts in *DJB* that natural Right is known through natural reason. Thus, it can be known by those who know nothing of God's special revelation. However, the fact that it can be known even by those impious enough to challenge the existence of God does not change the fact that God exists. Nor does it change the fact that their knowledge of natural Right is still dependent upon the prior existence (and will) of God. Whether acknowledged or not, natural reason is in fact natural revelation. Furthermore, the content of natural Right is given subsequent weight through God's imperative will; he forbids things contrary to nature and enjoins those which naturally have a quality of moral necessity.<sup>10</sup> This law of nature is unchangeable, even by God. Just as God cannot make two times two equal anything but four, he cannot cause an intrinsic evil to be good. Just as the being of things, from their creation, is unchanging, so is their nature as good or evil. Indeed, God allows himself to be judged by such a standard, as is shown in several examples from scripture.<sup>11</sup>

### *Tripartite Epistemology*

Returning to the opening sentiments of *DJB*, Grotius immediately suggests three sources of this knowledge of natural Right. It can be "known from nature, or established by divine laws, or brought in through custom and tacit agreement." Thus can be seen Grotius' tripartite epistemology of reason, revelation, and history. It is fitting that he

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SC 5, 114; Grotius, *DJB* 1.1.10.1, 38-39; Grotius, *Jurisprudence of Holland* 1.2.5, 5.

<sup>10</sup> Grotius, *DJB* 1.1.10.1, 38-39; Grotius, *Jurisprudence of Holland* 1.2.5, 5.

<sup>11</sup> Grotius, *DJB* 1.1.10.5, 40.

reveals this tripartite epistemology in his first paragraph, as it permeates the entirety of his work.<sup>12</sup>

This tripartite epistemology is immediately featured in Grotius' defense of right by nature. He offers rational reasons for the intrinsic character of natural Right, citing Plato's famous argument in the *Republic*. Next, he cites history, with injustice being condemned by the "common agreement of good men". Finally, and most importantly of all, he states that God is a friend of the just soul, as can be seen in the punishments he gives both in this life and (especially) in the hereafter.<sup>13</sup>

Grotius' tripartite epistemology is next seen in the infamously misquoted passage through which alone so many dilettantes have read (and judged) Grotius. After having briefly established the existence and content of natural Right, Grotius states that it would have "a degree of validity" even in a most impious hypothetical: should there be "no God, or the affairs of men [be] of no concern to Him."<sup>14</sup> However, when read through Grotius' tripartite epistemology, this *etiamsi daremus*, or "impious hypothesis", is rather less controversial. If there were no divine law, either through God's nonexistence (atheism) or indifference (deism), humanity would still have two other sources of natural Right: rational deduction, and the collected wisdom of history. These sources would provide at least some degree of validity to the existence and content of natural Right. In actual fact, when combined with miraculous divine revelation, Grotius declares that there is ample testament to the existence of God.<sup>15</sup>

Another way to place Grotius' statement in context is to approach God's existence

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<sup>12</sup> Ibid., Prol.1, 9.

<sup>13</sup> Ibid., Prol.20, 16-17.

<sup>14</sup> Ibid., Prol.11, 13.

<sup>15</sup> Ibid.

by imagining the absence of natural (rather than supernatural) epistemological sources. In this complete absence of reason and history, humanity could still know God through direct revelation. Returning then to the actual world, in which natural aptitudes vary and many people actually do lack such abilities to understand reason and history, one would expect no less from a benevolent God. Indeed, this is one of Aquinas' very reasons explaining why God would directly reveal truths that can also be known through reason. The fact that some people come to know truths of God through his benevolent revelation in no way invalidates others' simultaneous knowledge of God through reason and history. Thus, there is no reason why the knowledge of the truths of God through reason should be taken as invalidating the knowledge of God's existence through revelation.

It should be noted that Grotius sees this separation as a methodological and epistemological principle, rather than an ontological one. Almost immediately, he credits God as the source of natural law, having created humans with the particular nature from which *jus naturale* proceeds.<sup>16</sup> Grotius is very conscious, however, that he is dealing with a pluralistic world in which Christianity is not universally accepted. By separating theological and natural moral guidelines, he is able to speak to those who do not share his religious commitments. This provides a hope of peace in the midst of religiously-motivated conflict. (As will be seen later, however, Grotius' natural reason includes some elements of natural religion. Thus, despite the fact that many point to the *etiamsi daremus* as evidence of Grotius' secularism, the opposite is actually true: Grotius has a robust place for religion even as part of purely *natural* Right.)

Few observers have picked up on the importance of this simultaneous emphasis

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<sup>16</sup> Ibid., Prol.12, 14.

on multiple sources of law. Although it may be simpler to posit a monistic epistemology, such an approach would consign integral parts of Grotius' thought to irrelevance (or, at best, redundancy). Others have implicitly argued that each part can be taken on its own, whether pure reason or history, and go on to ignore the other parts of Grotius' thought, not least the theological component. This study seeks to follow Grotius' emphasis on simultaneous sources of law, and to point to the overarching reality to which they each testify.<sup>17</sup>

### *Divine Positive Right*

A monistic approach to Grotius' epistemology also obscures Grotius' plurality of types of Right. As mentioned above, the revelatory source of knowledge is a source of Right. This occurs when God issues positive laws: specific divine commands that could not be known through natural reason. Indeed, volitional divine law does not enjoin or forbid things whose rightness or wrongness is inherent in nature. Rather, by forbidding things, God makes them illicit, and by commanding makes them obligatory.<sup>18</sup> Inscrutable

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<sup>17</sup> Many observers have seized upon the rationalistic elements of Grotius' thought as proof that he rejects any alternate sources of knowledge. Such readings have tended to focus on Grotius' *Prolegomena to DJB*, picking and choosing citations favourable to their interpretation. They are particularly apt to cite one particular statement in which Grotius indeed claims to be abstracting himself from knowledge of particulars, as do mathematicians. For example, see Richard Tuck, "Grotius and Selden," in J. H. Burns, ed., *The Cambridge History of Political Thought 1450-1700* (New York: Cambridge University Press, 1991), 518. The wider context in which this Grotius makes this comment, however, is not a discussion of the sources of knowledge, but a defense of his impartiality. In this statement, Grotius is simply asserting that he is not writing this work for immediately political purposes, or to show that any particular party of his time is on the right or wrong side of justice. On the contrary, he intends it to be a faithful exposition of the true justice of war and peace, one that transcends his own partisan desires and interests (Grotius, *DJB* Prol.58, 29-30). This attitude is further confirmed in his general discounting of poets and orators (Grotius, *DJB* Prol.47, 26). Despite his own love of rhetoric and letters, he seems implicitly concerned to ensure that his discussion of Right is not influenced by mere pleasant-sounding arguments. This shows his fervent hope, derived from his desire for peace, that the impartiality of his work will allow to serve as an agreed-upon standard for all parties in war.

<sup>18</sup> Grotius, *DJB* 1.1.10.2, 39.

though they may be, however, their divine origin testifies to their reliability. Elsewhere, Grotius clarifies that divine commands supplement that which God already approves or disapproves of as being in harmony with the rational and social nature he implanted in man. Thus, these commands do not necessarily follow from that nature. Rather, God intervenes with his free divine will to order or to prevent many other things, as he sees fit.<sup>19</sup> Thus, while God has created nature (and is subsequently bound by it), he voluntaristically reveals additional truths that better illuminate the fullness of goodness.

This emphasis on divine action in time opens up history as a source of ethical knowledge. Such knowledge does not require a person to discern normative truisms from observation of nature. Rather, it requires an awareness of sacred history. As long as these revelations are recorded and passed down, one will be able to know truths about Right without having expertise in reason.

Divine commands may be given to the entire world. According to Grotius, there are three such universal revelations: immediately after creation, after the Flood, and the highest of all, through Christ. However, as with human positive laws that are valid within the boundaries of one particular nation, God's commands may be issued to a specific people. This assertion is an early testament to the unity of Grotius' philosophy of law in both the secular and sacred realms. Grotius understands this to have been the case for much of the Old Testament, where God made a covenant with only the people of Israel. As a result, these commands – which went beyond simply restating the natural dictates of reason – could only be binding on the Hebrews to whom he had revealed

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<sup>19</sup> Hugo Grotius, letter to Willem de Groot, 21 May 1638, in Herbert F. Wright, *Some Less Known Works of Hugo Grotius* (Leiden: Brill, 1928), 208-10.

them. Grotius devotes an entire section to providing evidence for this claim, from God's command of "Hear, O Israel," to the rules for non-Jewish proselytes in Israel, to St. Paul's description of righteousness in the New Testament Book of Hebrews.<sup>20</sup> For this reason, Grotius asserts that many of the rules in the Old Testament do not, in fact, set forth the law of nature. Rather, they proceed from the free will of God, and are binding only on the particular nation to which he has given these commands.

Of course, in many cases, the New Testament revelation confirms the special revelation to the Hebrews. However, in many other cases, it enjoins moral precepts that are even higher. Again, this revelation outlines what is demanded of Christians – a more exacting standard than that of natural revelation. While natural Right sets out the minimum standard by which injustice (and its consequent punishment) may be avoided, Divine law points the way toward a higher level of nobility and perfection.<sup>21</sup>

### *Natural Right*

The character of supernatural or Divine Right is different from that of natural Right. Knowledge of Divine Right simply consists in codifying and interpreting God's divine commands. On the other hand, the structure of natural Right is comparatively complex. As it can be categorized in a complex taxonomy, a deeper examination is necessary to understand it.

Grotius begins all of his works with an exposition of this structure of natural Right. However, his clearest exposition actually comes from one of his private letters.

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<sup>20</sup> Grotius, *DJB* 1.1.15-16, 45-48.

<sup>21</sup> *Ibid.*, Prol.48-50, 26-27.

Grotius was truly a man of letters. His prolific personal correspondence, a full seventeen volumes in all, is a testament both to his love of language and his tireless energy. In one of these, a 1615 letter to his brother (and publisher) Willem, he lays out very clearly the structure of justice that is implicit in his public works. *Jus naturale*, he says, has an eight-fold structure. This structure may be organized as follows:

Divine Positive Right	Natural Right					
	Human Positive Right	Natural Right Proper				
		Fitting (Attributive (or 'Wider') Justice)	Mandatory (Expletive (or 'Strict') Justice)			
				Concessive	Preceptive	
					Changeable	Immutable
					Known by will in history (sacred or secular)	
Known either by reason or by will in history (secular)						

### *Natural Right – Human Positive Right*

Grotius' first division within natural Right is between what might be called human positive Right and natural Right proper. As seen above, Divine Right is made effective through the direct command of God, and is subsequently known through the transmission of these commands through history. Human positive right functions in a similar way. It is also made effective through direct command and known through historical



transmission. However, it arises from ordinances of human command rather than divine command. Just as God's commands may be binding on an individual, a particular people, or the entire world, the same is true of human positive laws. These may be promises between individuals, in which case they are not even termed "laws". Alternatively, regulations may be made at the sub-municipal level, as in the just rule of a father or master. They may also be made at the level of the community, as in formal statutes enacted by the ruler. In the realm of international relations, bilateral or universal agreements would fall under this category.

These obligations do not pre-exist the will of the one on whom they are binding, as if they were grounded in the nature of things. Rather, they arise from the spheres of action in which natural (and Divine) Right are silent, thus creating a freedom to promise. As a result, they become obligatory by the will of the one who makes the promise. Once this promise has been made, it partakes of natural Right by incurring a natural obligation to fulfill the promise and to abide by the agreement. It is as if natural Right is silent in a particular realm, but can be brought into that realm in order to guarantee the promise.

On the individual level, one might think of contracts regarding which one is not obliged to enter, but become obligatory to fulfill once entered into. On a higher level, these promises include the positive statutes of the state, which one has already promised to obey in the original authorization of lawmakers to create such governing statutes. (It goes without saying that these promises cannot be contrary to indicative natural Right proper.)

In order to know what promises are binding on a person or community, one needs

to know the history of all of these positive, contingent agreements that have been made. Because these obligations do not pre-exist the person, but arise from will, they are not generally considered to be part of natural Right proper.

*Natural Right Proper – History*

There is one exception. Through the passage of time, individuals and peoples may increasingly acknowledge the rightness of a particular promise. As Grotius will later argue in *DJB*, these are chiefly seen in the unbroken customs and tacit agreements characteristic of relations between nations.<sup>22</sup> Once the universality of this directive has been widely acknowledged throughout time and place, the particular obligation becomes part of natural Right. The universal acknowledgement of this truth, at least by those nations “more advanced in civilization,” provides “every probability” of its accuracy. The dissent of a few people(s), having become savage and lacking sound mind, does not call this judgment into question. Honey does not cease to be sweet because a sick man is unable to perceive its sweetness.<sup>23</sup> Thus, although the binding force of these agreements was, at one point, derived from will, the now-accepted universality of their principle renders the content of the obligation as existing independently of will. At that point, this obligation becomes binding on individuals in a pre-existing sense, and they cannot choose to do otherwise. It limits their possible exercise of will in making future promises (and thus in effecting new obligations).

Thus, this universal assent testifies to a truth about the nature of things, even

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<sup>22</sup> Ibid., 1.1.14, 44.

<sup>23</sup> Ibid., 1.1.12.2, 43-44.

though it is not indicative in character. This component of natural right cannot simply be discovered from an individual examination of nature. Rather, as historical knowledge, it must be passed down to by others. This allows a place for secular history, as well as sociality, in the knowledge of natural Right.

As Grotius later comments, the purpose of history is twofold: it supplies judgments and illustrations. The convergence of judgments on particular matters through the passage of time may reveal a truth on the same level as the rational knowledge of nature according to principles of reason. Illustrations from history, particularly those from Greece and Rome, further confirm those judgments.<sup>24</sup> Thus, like Divine positive Right and human positive Right, natural Right proper may be known through history.

Indeed, when Grotius criticizes the weakness and unsystematic approach of previous writers on international *jus*, he suggests that their chief weakness was an ignorance of history. The few who did venture into such territory, such as Ayala and Gentili, are still chided for choosing only a few examples, or examples permeated with self-interest rather than examples whose precedents are universally acknowledged by subsequent generations. Likewise, he later credits Bodin and Hotman for introducing history into the study of *jus*.<sup>25</sup>

#### *Natural Right Proper – Reason*

However, in addition to Divine positive Right and natural Right known through history, natural Right may also be known through reason. Rather than being taken on

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<sup>24</sup> Ibid., Prol.46, 26.

<sup>25</sup> Ibid., Prol.38. 22-23; Prol.55, 29.

historical authority, natural Right may also be directly accessible to the individual. This source of Right inheres in nature, being grounded in the pre-existing order of things. The study of nature reveals truths about the structure of reality.

*Further Divisions of Natural Right Proper*

Thus, Grotius' first subdivision of natural Right corresponds to the difference between positive Right and natural Right proper. This latter category may be known by history or by reason, but Grotius further sub-divides it along a different axis. This results in two categories of natural right proper: that which is mandatory and that which is appropriate or fitting. This category will become central to Grotius' subsequent works, as it mirrors his categories of expletive and attributive justice. The former is the realm of those laws which are truly and properly called laws, and are thus obligatory. This is where God has ordered or forbidden something through nature. As a result, Grotius writes that their immutability among men comes from the fact that they have been commanded by a superior. However, these commands are still perceived through natural faculties of reason, rather than being revealed through specific divine commands. The latter category of "that which is appropriate" is also natural. However, it does not flow of necessity from nature, but rather has a certain "harmony with nature." Hence, this realm is described as "becoming", rather than strictly obligatory.

In regard to strict or mandatory justice, Grotius then makes a third division. He identifies separate categories of mandatory justice which he calls preceptive and concessive components. Preceptive Right places an obligation on individuals by

demanding that they act in a particular way. These either command or forbid, and they take away the person's freedom of action. On the other hand, concessive Right obtains in where commands and prohibitions are silent. This provides a sphere of liberty to act according to one's own free will. It is not a strict use of the term *jus*.

The final division concerns preceptive Right. Some areas of preceptive Right are immutable. Others are changeable due to the change in circumstances. For instance, by paying a debt, one may nullify the effect of a law demanding payment of the debt. As a result, the law is changed, owing to the circumstances.<sup>26</sup>

#### *Justice in de Jure Belli ac Pacis*

In *de Jure Belli*, Grotius continues this approach of explaining structures of natural Right proper, or justice. His distinct categories can already be seen in the earliest parts of the *Prolegomena*. Having given a brief justification for the existence of natural Right, Grotius lays out its content. He begins by discussing *jus naturale* in its proper or strict sense, which seems to fit into mandatory natural Right. This *jus naturale* may command or forbid certain actions, a mode that appears to fit into the “preceptive” category. In such cases, there is no discretion or freedom of action. For example, if there are only two options available, and one is prohibited, then the other must be commanded. In other cases, however, things may be in accordance with *jus naturale* not strictly but ‘by reduction’ (to use a scholastic term). In these situations, there may be a variety of options, with only one prohibited. Thus, all others would be in accordance with natural

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<sup>26</sup> Hugo Grotius, letter to Willem de Groot, 18 May 1615, in Herbert F. Wright, *Some Less Known Works of Hugo Grotius* (Leiden: Brill, 1928), 209-210.

law; a wide range of options can be said to be natural. This seems to fit into his “concessive” category. This corresponds with Grotius’ first definition of *jus* as that which is free from injustice.<sup>27</sup>

Grotius further illuminates this sense of nature as negative when he adds another category of actions: those things that reason discerns to be honourable, or “better than their opposites”.<sup>28</sup> He goes on to talk about another “more extended meaning” of *jus*. This appears to correspond to fitting (rather than mandatory) natural Right. Grotius mentions that this wider sense of *jus* follows not simply from man’s desire for social life, but especially from his rational power of discrimination to determine things that are good or bad. Thus, he emphasizes it as a particularly human capacity. It also follows from the capacity to imagine the future. This emphasizes the forward-looking nature of fitting natural Right. It also shows how it involves a judgment that goes beyond the strict dictates of law. However, this does not mean that it is less than law. Grotius is quick to add that anything contrary to this judgment is also contrary to *jus naturale*.<sup>29</sup>

In Grotius’ realm of concessive natural Right, one is not constrained by precepts, and can licitly choose from a plurality of options with equal moral validity. However, there may also be situations where one is not constrained by strict precepts, yet one among the many licit possibilities may still be more honourable than the rest. This more lofty option is distinct from the others, because it actually goes *beyond* obligation (in the sense of rendering what is due). This reconfirms that fitting natural Right is not lower than mandatory natural Right, and even suggests that it may be higher.

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<sup>27</sup> Grotius, *DJB* 1.1.10.3, 39.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid., Prol.9, 13.

Indeed, although such honourable actions are often described, along with the other licit options, as (strict) *jus naturale*, Grotius describes this as a misuse of the term. This presumably follows the fact that the inclusion of such honourable actions under *jus naturale* would implicitly expel the other licit (but not necessarily honourable) options from *jus naturale*. Obviously, this would be problematic; these merely licit options are not contrary to *jus naturale*, and thus must be considered a part of it. Of course, these honourable actions that go beyond strict obligation are also not contrary to nature. However, rather than being in accordance with nature, they seem to transcend nature. This points toward the existence of a moral realm beyond strict natural justice.<sup>30</sup>

Indeed, another component of this 'wider' sense of justice is the knowledge of how to use those things that belong to us as part of strict *jus* – presumably where concessive natural Right confers a liberty or a property right. For instance, this judgment may lead us to allocate these goods to those who are wise, or to those who are close to us, or to those who have greater need. Thus, strict *jus* may determine what is ours, but *jus* in the wider sense guides us in exercising or distributing those things that are ours, according to the conduct of the situation or the nature of the thing.<sup>31</sup> Thus, from the beginning, Grotius draws an important distinction between the formulaic nature of law and the imaginative nature of judgment, and lines it up with the strict and wider senses of justice.

Having completed his *Prolegomena*, Grotius proceeds to his discussion of the *jus* of war and peace. Grotius' first chapter examines the nature of war. Grotius begins his discussion of war, the immediate subject of the work, by defining war in a positivistic

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<sup>30</sup> Ibid., 1.1.10.3, 39.

<sup>31</sup> Ibid., Prol.10, 13.

sense. Citing Cicero and explicating Greek and Latin terms, he describes it as contending by force. More than this, however, war is not simply the action of fighting, but the condition of a lack of unity in which the participants find themselves. Thus, war can be described as a status, one applying equally to both parties. However, Grotius hastens to add that his concern is not with war *per se*, but with a just war.<sup>32</sup>

Thus, from the beginning we can see Grotius' willingness to define things in a purely formal and descriptive sense. In one sense, a nation that has declared war on another, carrying out a violent action, can descriptively said to be engaging in war. Indeed, at the beginning of his work, he leaves open the question of whether or not a war can be just. To define it in an exclusively normative sense would mean that if he came to conclude that no war could ever be justified, then the very concept of war would not exist.

However, Grotius also shows an awareness that this descriptive sense is quite limited. A nation that engages in a war for which there is no normative warrant is not engaging in war in the highest sense. The nation is not pursuing the true aim of war, which is to bring about justice. Such a nation has only the appearance of engaging in war, not the internal normative reality. In a teleological sense, the nation is not actually engaging in war.<sup>33</sup> This approach of methodologically separating categories, while simultaneously recognizing their interrelatedness with one other, is characteristic of all of Grotius' works.

However, before he can discuss *jus* in war, Grotius recognizes that he must

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<sup>32</sup> Ibid., 1.1.1.3, 34.

<sup>33</sup> Ibid., 1.1.1-3, 33-35.



discuss *jus* itself. When Grotius outlines what is meant by *jus*, he first defines it in the ‘objective’ sense as “that which is not unjust”. Thus, it seems to be a condition, one which implies an absence of negativity rather than the presence of positive characteristics.

He quickly moves on, ascribing to *jus* a second sense, one which is concerned toward the person, or the subject. Thus, in this sense, Right becomes associated with a person, conferring on the person the moral quality to justly do or have something. These may be particular rights over people or over things.

Next, Grotius quietly introduces a distinction into this second sense of justice as a moral quality related to a subject. This distinction, however, will become central to his thought. This justice may be either perfect or imperfect. When it is perfect, it is called a faculty (*facultas*). When it is imperfect, it is called aptitude (*aptitudo*).<sup>34</sup>

Grotius proceeds to describe the perfect *jus*, concerning a faculty. He formulates it as a right to one’s own (*suum*), which follows the classic definition of justice. Grotius now links this with the category earlier outlined in the *Prolegomena*: perfect *jus* is *jus* “properly or strictly so called.” These include powers, ownership or usufruct, and credit, to which debt corresponds inversely.<sup>35</sup> This appears to correspond to the narrow sense of *jus* he identified in the *Prolegomena*, which is concerned with respecting property, and providing restitution and compensation. The name he gives for this faculty, featuring perfect *jus*, is “expletive justice” (*justitia expletrix*). According to Grotius, this is Aristotle’s rectificatory justice.<sup>36</sup> It will become evident in the remainder of *DJB* that this

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<sup>34</sup> Ibid., 1.1.4, 35.

<sup>35</sup> Ibid., 1.1.5, 35-36.

<sup>36</sup> Ibid., 1.1.6, 36; 1.1.8.1, 36-37; 2.20.6.1, 469.

category of justice can be located in the second distinction of Grotius' private letter examined above, corresponding to that component of natural Right proper that is mandatory. These dictates are “well and truly *jus*,” lining up with the strict or perfect sense of *jus*.

On the contrary, aptitude is the consideration of what Grotius calls “attributive justice” (*justitia attributrix*). It is here, in describing attributive justice, that Grotius first makes mention of virtue. In particular, he references those virtues that do good to others, such as generosity and compassion. Rather than being demanded by impersonal law, attributive justice proceeds from the person. He relates it to the Greek word *axia*, which connotes the dignity or honour of a person. Grotius also re-emphasizes its forward-looking character, as another example of attributive justice includes “foresight in matters of government.” It is rendered as something that is ‘fitting’ or ‘suitable’ (*id quod convenit*). Soon after, he refers to something that is not simply a matter of justice, but of virtues. This corresponds to a higher sense of Right, but can still be included in justice, as long as it is referred to as the broader sense of justice.<sup>37</sup>

Thus, this category is akin to what Grotius had identified in the *Prolegomena* as the “wider” or “more extended” meaning of justice. It will also be shown to be the realm in which natural law does not operate, but instead gives way to a wider sense of natural Right. This category can also be located in the second distinction of Grotius' earlier letter, under that category of natural Right that is appropriate or fitting. While it is not mandatory, it is indeed becoming. It may not be natural in the strict sense, but is in harmony with nature. This suggests that it is not only consonant with nature, but builds

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<sup>37</sup> Ibid., 1.1.7-9, 36-38.

upon it, adding another dimension to it.

Although Grotius purports to follow Aristotle's bifurcation of justice, he now takes issue with Aristotle's arithmetic and geometric proportion. For Aristotle, these two mathematic terms were the defining characteristics of each. Aristotle's rectificatory justice was concerned with the shares or external goods possessed by two people, independent of the people. Thus, the two shares were the relevant consideration. Distributive justice concerned itself with the relation of those two shares to two other independent measures of value in the persons. Thus, the relevant consideration was the proportion of the share to the measure of value in each.

For Grotius, however, such considerations are too deductive and mathematical. Rather, the relevant distinction between each category of justice is the matter with which it is concerned, as stated above. In other words, expletive justice is concerned with making things right by giving others their due. On the other hand, attributive justice goes beyond what is due, being concerned with doing good to others.<sup>38</sup>

This can be seen in the examples that Grotius provides. A partnership carried out according to expletive justice may indeed require providing goods proportionate to some other consideration of value, as in Aristotle's geometric justice. Conversely, in an exercise of attributive justice, such as the determination of best candidate to appoint to a public office, the decision will be made based on a simple proportion, as in arithmetic justice, if there is only one such candidate. Thus, mathematical terms are too simplistic to differentiate Grotius' two types of justice.

Grotius then clarifies his earlier statement about the "matter with which each is

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<sup>38</sup> Ibid., 1.1.8.2-3, 37.

concerned” with an example from Xenophon’s *Training of Cyrus*. Here Cyrus gives a small tunic belonging to another to a smaller boy, and a larger tunic to a larger boy. If both tunics had belonged to Cyrus, such an assignment would be an exercise of attributive justice. It would be a determination of which tunic was more fitting for each boy. However, there is a prior issue in play that must first be settled: the proper ownership of the tunics in the first place. In this story, the first tunic was unwillingly taken from its rightful owner. Because this first criterion of expletive justice was not satisfied, the action could not be just, even if it showed a great deal of fit according to attributive justice.<sup>39</sup> Expletive justice appears to be a precondition for attributive justice.

Grotius also rejects Aquinas’ principle of public vs. private as a relevant dividing line between the two categories of justice. Expletive justice is not always private, nor is attributive justice always public. If the state reimburses a private citizen for something he has provided to the public realm, this is an exercise of expletive justice; it is simply repaying him what is owed. On the other hand, if a private citizen voluntarily donates a property to the state, this is an exercise of attributive justice.<sup>40</sup> This further shows that the fundamental distinction between expletive and attributive justice is not whether the matter takes place in public or private life. Rather, he points toward the more relevant distinction between what is strictly owed and what is fitting. The distinction is not jurisdictional; rather, it dwells in the way that the situation is approached.

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid. Nonetheless, public *jus* is superior to private *jus*, because instances of public *jus* are exercised by the community (*communitas*), and are ordered by the common good.

### *Expletive Justice*

This distinction between expletive and attributive justice is further worked out as Grotius continues his examination of war in *DJB*. While Grotius does not return to an exposition of this structure, he explicitly and implicitly returns to this distinction throughout the work. This is particularly true of expletive justice. Through the use of many examples, the strict sense of justice is illustrated more clearly than it was in his brief conceptual treatment in his first chapter. These examples reveal seven characteristics of expletive justice, and a correspondingly sharper contrast with attributive justice.

#### *Expletive Justice – Focus on External Possessions*

The first characteristic is a focus on external possessions. This can be seen, for example, in Grotius' use of the categories of ownership to describe expletive justice.<sup>41</sup> Ownership generally describes goods that are external to a person. Indeed, ownership is the realm of private law. It involves things over which absolute mastery or possession can be claimed. This requires that they be rendered inert and lifeless, such that they are amenable to control.

The same is largely true of credit, to which debt inversely corresponds. Debts are goods over which one ought to have ownership, but which have not yet come into one's possession. In other words, rather than securing an existing possession, debt focuses on procuring a new possession. Repayment of debt does not require a change in the internal

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<sup>41</sup> Ibid., 1.1.5, 35-36.

disposition of the debtor. Rather, it requires the transfer of tangible goods.<sup>42</sup>

However, if such is not available, then expletive justice seeks something of equal value.<sup>43</sup> There are many potentially equivalent substitutes for that which is sought. This reveals the interchangeable nature of the relevant subject matter, further emphasizing its impersonal nature. Indeed, in the case of debt repayment, the unit of currency is paper money, which does not even have any value on its own; rather, it is a sort of second-order representation that is interchangeable for any material good. Its representational nature indicates that it is purely a substitute. Conversely, the things for which it can be exchanged are commodities that are bought and sold. They are impersonal belongings whose value is simple, as they can be adequately measured in quantitative terms, as represented in cash value. There are no qualitative or multi-dimensional factors to consider.

### *Expletive Justice – Calculative Reasoning*

As a result, determination of expletive justice seems to involve purely calculative reasoning. The relevant reasoning processes are simple rather than complex. It is possible to reduce all relevant considerations into a single measure, which can then be quantified. It is the sort of calculation that could, in theory, be carried out by a computer. Thus, only technical skills are needed to bring about expletive justice. This can be further seen in the fact that Grotius links expletive justice to a faculty, a capability which automatically obtains – or does not obtain – in a person.<sup>44</sup> It is not a virtue of prudence

<sup>42</sup> Ibid., 2.7.2.1, 267-68.

<sup>43</sup> Ibid.

<sup>44</sup> See Oliver O'Donovan and Joan Lockwood O'Donovan, "Hugo Grotius (1583-1646)", in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, MI: Eerdmans, 1999), 790.

that must be cultivated through personal and uniquely human effort.

*Expletive Justice – Universal Prescriptions*

The simple nature of expletive justice further reflects the fact that expletive justice does not appear to admit of extenuating circumstances or adjustments based on the individuals involved. It does not matter whether the person paying the debt is a good person or a bad one; whether the person is freely acting to realize the spirit of the law, or acting against their will simply to avoid imprisonment. Either act fulfills expletive justice. Indeed, from the standpoint of expletive justice, the two acts are identical.

As a result, because expletive justice simply demands the achievement of a particular condition or equilibrium, it essentially sets out the course of action that would bring this about. Once one has determined the descriptive facts of the situation, the prescription is universally clear, because it is exactly comparable to other situations in different particular contexts. At this point, individual particularities do not matter; there are no exceptions that call for practical wisdom. Grotius' frequent references to expletive justice as “strict” justice further underscore the universal character of expletive justice.<sup>45</sup>

*Expletive Justice – Backward-Focused Orientation*

An additional feature of expletive justice is its temporal orientation toward the past. This helps to explain why Grotius so clearly links expletive justice with Aristotle's rectificatory justice. Expletive justice seeks to instantiate justice by restoring a previous equilibrium. In other words, it seeks to return to a state of being that existed in the past.

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<sup>45</sup> Grotius, *DJB* 2.7.4.1, 269.

It seeks to restore this original status, as is evident in repayment of debt. Grotius states that in this type of case, the fulfillment of expletive justice requires transfer of ownership. Likewise, this transfer of possession is proved by the result, which connotes an external change of ownership.<sup>46</sup> There is no concern about the future implications of the interchange between creditor and debtor. Indeed, even the very roles of “creditor” or “debtor” cease to exist once the debt is paid and the transaction completed. The matter is completed, with finality, and has no relevance to any future possibility *per se*.

#### *Expletive Justice – Perfect Fulfillment*

The finality that comes from the backward-focused nature of expletive justice leads to a further implication: expletive justice can be fully and perfectly implemented. Returning to the element of restitution in expletive justice, Grotius equates it with the concept of satisfaction.<sup>47</sup> This term, which implies that nothing more need be done, further emphasizes the finality of expletive justice. It is thus easy to tell whether or not justice has been carried out to the full.

Indeed, Grotius' choice of the term “expletive” points toward the centrality of perfection or satisfaction in this component of justice. The term is a cognate of the Latin word *explere*, which variously connotes an action that has been completed, fulfilled, discharged, satisfied, or perfected. The latter of these is instructive, as some recent observers have understood expletive justice as the realm of what later thinkers would label as perfect rights and duties.<sup>48</sup> These are rights and duties with a specific duty-bearer

<sup>46</sup> Ibid., 2.7.2.1, 267-68.

<sup>47</sup> Ibid., 3.4.1.1, 641.

<sup>48</sup> Samuel Fleischacker, *A Short History of Distributive Justice* (Cambridge, MA: Harvard University Press, 2004), 20-22, 139-40. See also Jerome Schneewind, *The Invention of Autonomy: A History of Modern*



and right-holder. Moreover, the duty is usually discrete, and its path to fulfillment clear.

### *Expletive Justice – Status*

Indeed, expletive justice does not appear to admit of degrees or of subtlety. Rather, it is a condition, one that applies to the entirety of its subject matter. The determination of justice within the boundaries of its proper sphere is clear, and the condition applies uniformly to the entire subject matter at hand.

This lack of degree or proportion in expletive justice can be seen in the measures Grotius permits in order to uphold ownership. If the only way to protect ownership over one's goods is to kill another who threatens that ownership, then killing is permissible. The comparative values of one's possession relative to the life of the robber are irrelevant.<sup>49</sup> Because ownership of the possession is a status, it is absolute, even over life itself. Under this status, any action is valid.

Furthermore, this status is binary. There are only two possible conditions: one is either just or unjust. The rightful owner is in a condition of justice, while the unjust usurper is in a state of injustice. This unambiguous status is also true of credit. If the debt has been fully repaid, justice obtains and there is nothing more to be done. If it has not, the remedy is clear. There is no judgment involved in determining whether or not justice has been served, or to what degree it has been served. Indeed, in Grotius' earlier discussion of the story of Cyrus, Cyrus' prudential determination that the larger tunic should go to the larger boy is irrelevant. According to expletive justice, there is only one

*Moral Philosophy* (New York: Cambridge University Press, 1998), 78-80; Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (New York: Cambridge University Press, 1996), 26-30.

<sup>49</sup> Grotius, *DJB* 2.1.11, 179.

consideration: namely, ownership of the larger tunic. Only once Cyrus could satisfy the expletive condition of owning the tunic could he engage in higher considerations of determining who could most appropriately use it for its intended purpose.<sup>50</sup>

As shown above, because expletive justice is a status, it deals not only with rectifying material injustices, but with the authority of one person over another. This is evident in Grotius' third modality of expletive justice, that of powers. A power enables one to act in a particular way, unimpeded by constraints. Such is the case when one possesses authority over another. Indeed, considerations of proportion are not strictly relevant to the status of authority *per se*. This reflects its binary condition: if authority is not absolute, at least within a defined realm, then it is not really authority at all. It must be clear who holds the authority, and who is subservient to that authority. These themes will be further illustrated with the later discussions of authority (Chapter 3) and punishment (Chapter 4).

### *Expletive Justice – Mechanistic and Systematic*

Because expletive justice deals with static objects, it allows concepts to be defined comprehensively and unambiguously. These formulations are comprehensive and complete; ostensibly, there is no meaning that is not captured by the text. It does not deal in poetic or metaphoric realities. Thus, every component can be included within a single system.

Furthermore, by defining everything as one-dimensional, corresponding to one binary status or the other, each bit of information can be manipulated in the same way: on

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<sup>50</sup> Ibid., 1.1.8.3, 37.

or off, just or unjust. As a result, everything can be absolutely placed into categories with no loss of meaning. Each data point (a term that itself denotes unidimensionality) is complete within its boundaries.

As a result, the information can be organized into a neat system in which each data point forms a discrete link in the chain. It operates sequentially, in a mechanistic fashion, in order to produce an output. Thus, the concept of justice can be reduced to the procedures of the justice system. The system asks a series of questions to which definite answers “yes” or “no” can be given, or which can be answered in a number. Each successive answer begets another such question, until the final output is determined: “just” or “unjust”. The system does not direct future action. Rather, it confers a status. Although a status may imply the need for action, the system cannot carry out the action.

This testifies to its character as a static condition, which can be changed instantaneously, as if at the flick of a switch. Expletive justice need not be carried out performatively over time. Indeed, such instantaneity conjures up the digital sequence of a computer alternating (however rapidly) between static states of being, something that can never duplicate the way that interpersonal interaction takes place dynamically through time.

#### *Expletive Justice – Private and Public*

To this point, Grotius’ expletive justice has either reflected or built upon the Aristotle’s rectificatory justice and Aquinas’ particular commutative justice. However, in regard to public and private, Grotius now makes a basic departure. Aquinas had argued

that particular commutative (and distributive) justice dealt with goods going to private individuals. Only general justice concerned those goods going to the community. However, Grotius made it clear from the beginning that expletive justice may correspond to goods terminating at either the person or the community.<sup>51</sup> Thus, expletive justice is not confined to the realm of private law, but is also relevant for dealing with common public matters. The fact that the public vs. private distinction is not Grotius' first point of approach to categories of justice indicates that there are other distinctions that are even more important, as have been treated in the foregoing discussion. This echoes his earlier treatment of the distinction between expletive and attributive justice as corresponding to the matter in question, not the jurisdiction. As far as justice is concerned, it is most fundamental to group together those matters in which the just result automatically and fully obtains, requires no prudential judgment, and is amenable to systematization in impersonal laws. It is less important whether the goods in question are justly possessed by an individual or the community.

This can be seen in the fact that expletive justice includes all things that can be perfectly judged as due, whether tangible or not. Ownership and credit concern those perfect rights over tangible, external goods, such as the determination of who is owed what in private law courts. On the other hand, powers concern authority over individuals, such as the punishment that follows the determination of guilt in criminal courts. Because it includes everything that is due, whether from an individual or from the state, Grotius effectively extends expletive justice to the subject matter of Aristotle and Aquinas' commutative *and* distributive justice. In doing so, Grotius emphasizes the idea

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<sup>51</sup> Ibid., 1.1.8.3, 37.

that simply giving one's due is not the fullness of justice. If something is due to another in mathematical fashion, whether arithmetic or geometric, it should be considered as only expletive justice. However, Grotius critiques Aristotle's mathematical approach to justice as being incomplete. There is another category of justice which will better encapsulate Aristotle's own idea of practical virtue. The fact that there is another category of justice shows the limited nature of merely giving one their due. Everything that had previously been considered "justice" is, for Grotius, incomplete.

### *Attributive Justice*

Throughout *DJB*, Grotius regularly sets out what is owed according to expletive justice. However, he follows by enumerating the content of a further obligation that transcends expletive justice. For example, while discussing the obligations of parents toward children, he undertakes to examine the word "duty", or *debitum*. While it has a strict meaning in expletive justice, its meaning is also sometimes taken more widely, when arising from a different source. In this case it also includes that which "cannot be neglected without dishonour." Again, Grotius recognizes the idea that what is honourable or virtuous transcends what is strictly due. Thus, the duties of justice spring not only from justice understood narrowly (as expletive justice), but also from a wider sense.<sup>52</sup>

### *Attributive Justice – Focus on Internal Person*

As mentioned above, attributive justice is the realm of "aptitudes" rather than "faculties." It does not obtain in the nature of things in simple fashion. Rather, it

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<sup>52</sup> Ibid., 2.7.4.1, 269-70.

requires the exercise of human will and virtue both in order to be ascertained, as well as to be carried out. This can be seen when Grotius links the term “aptitude” to the Greek word *axian*, which has to do with ascertaining the virtue of a person and ascribing the appropriate honour.<sup>53</sup> This term is used by Aristotle to describe the dignity of a person, which for him was a requisite determination for the bestowing of societal honours.<sup>54</sup> Here Aristotle does not refer to the kind of human dignity that automatically obtains in any person, simply by virtue of their human nature. Rather, this dignity corresponds more closely to what might be described today as virtue or character, in the sense of something which can – and should – be cultivated, and, consequently, which inevitably varies from person to person. Later, when discussing what is due to relatives, Grotius writes that there is no strict duty in expletive justice. Rather, the obligation originates in the same *axian*, what translators generally render as “what is fitting” or “decent.” Here is an even more direct reference to attributive justice, corresponding to the exact Greek term used in the original definition.<sup>55</sup>

Another common English translation of a word frequently used in conjunction with attributive justice is “convenient”, which may be the most accurate literal translation from the Latin. However, the modern English usage of the term is somewhat misleading, due to its connotations of utilitarian expediency. On the contrary, Grotius’ frequent use of the Latin *convenientia* implies several concepts distinct from – or even opposed to – the notion of expediency. The first is that of fit or suitability, which implies the suitability of a form to a natural standard, such as a person acting in accord with their inherent nature

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<sup>53</sup> Ibid., 1.1.7, 36.

<sup>54</sup> Aristotle, *Nicomachean Ethics* 5.6, trans. Martin Ostwald (Upper Saddle River, NJ: Prentice-Hall, 1999), 129-30.

<sup>55</sup> Grotius, *DJB* 2.7.10.1, 277.

or *telos*. The second is agreement, which implies an interpersonal realm whose acknowledgment is important and revealing. A third is harmony, in which a person is well-situated within the web of relationships which constitute his or her interpersonal reality. Of course, a polity that demonstrates these characteristics may also be efficient. In such a case, however, the expedient result should be viewed as a second-order by-product. While *convenientia* may often be associated with utilitarian goods, there is no necessary relation. Rather, the term *convenientia*, which Grotius frequently associates with attributive justice, should bring to mind the ideas of suitability, agreeability, and harmony on their own terms.

Thus, the strict sense of *jus* is not the most important one. This also shows how the internal condition of the person, which might be considered “subjective”, corresponds to a higher conception of justice than does “objective” justice, which is merely concerned with the second-order worldly consequences of the character of the people involved. Justice, in its highest sense, is fundamentally personal.

#### *Attributive Justice – Prudential Judgment*

The Latin etymology of “attributive justice” is also revealing. The verb *attribuere*, from which *attributrix* is derived, is often used in conjunction with allotting or assigning. This calls to mind the concept of using judgment in exercising one’s responsibility to assign shares of duties or benefits. More than once, Grotius uses the example of choosing the best person to carry out a particular role in public life, such as filling the position of a magistrate.<sup>56</sup> In such a case, there can be no clear, universal

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<sup>56</sup> Ibid., 1.1.8, 37; 2.17.3, 431.

instruction, inherent in the nature of things. One would not say that the job is due to the best job applicant, in a strict mathematical sense. Rather, one might say that it is fitting that the job be assigned to the deserving candidate. Indeed, no candidate for a job, not even the best qualified, can ever have a strict right to the position. If an inferior candidate is chosen, the better-qualified one has no legal recourse. As long as the person who makes the appointment has the right to do so, such an appointment does not offend against expletive justice. However, in showing poor judgment, it offends against attributive justice.<sup>57</sup>

This echoes Grotius' earlier references to the 'wider' sense of justice, which involves an imaginative judgment about how best to use or distribute one's possessions in particular situations. As Grotius states, "In moral questions,...even the smallest variation in circumstances alters the substance." As a result, in some situations the correct action may lean toward one extreme, in other situations the other extreme. There are often moments of doubt, "as when twilight fades, or when cold water slowly becomes warm."<sup>58</sup>

This contrasts with the abstract nature of calculative reason. Because mathematics deals with forms, there can be only one ideal and no intermediate forms. Thus, mathematical reasoning – which would seem to fit with the absolute nature of expletive justice – is inadequate to genuine moral reasoning. As he says, "What Aristotle wrote is most true, that moral knowledge does not admit of a certainty equal to that of mathematical knowledge." The 'rightness' of attributive justice cannot be calculated.<sup>59</sup>

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<sup>57</sup> See Oliver O'Donovan, "The Justice of Assignment and Subjective Rights in Grotius", in Oliver O'Donovan and Joan Lockwood O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (Grand Rapids, MI: Eerdmans, 2004), 181-82.

<sup>58</sup> Grotius, *DJB* 2.23.1, 557.

<sup>59</sup> Ibid.



*Attributive Justice – Imperfect Rights and Obligations*

In expletive justice, if something is due to another person, the recipient can be said to have a perfect right to it. The demands of justice are clear, as is the determination of the satisfaction of such justice. Justice can be carried out to the full. On the contrary, attributive justice confers no such perfect claim-right. As Grotius says, this “aptitude” or “fitness” is not *jus* properly so-called, because it confers no property on its holder.<sup>60</sup> Thus, attributive justice cannot be seen as dealing with possessions or commodities over which one has full sovereignty to dispose of at will. One cannot make a claim on the basis of attributive justice, or simply because one is fit for something. As he says, “if something is owed not out of strict justice, but from another virtue, such as generosity, gratitude, mercy, or charity, this debt cannot be collected by armed force any more than it can in the marketplace.”<sup>61</sup> Only from justice strictly speaking can restitution – the remedy in private law – arise. This further illustrates the connection of private law, and its constitutive elements (namely, commodities), with expletive justice.<sup>62</sup>

The reasons why attributive justice cannot be the realm of perfect claim-rights and duties follows naturally. The very idea of conceptualizing attributive justice along the lines of virtue is to go beyond what is strictly due. Indeed, the state can compel one to provide the goods owed in strict justice. However, it is more difficult for the state to compel one to exercise virtues. Indeed, the exercise of virtue is something that, unlike repayment of goods, seemingly cannot be done grudgingly. Nor can it be demanded by another. As Grotius says, “He who bestows a kindness has no right to a corresponding

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<sup>60</sup> Ibid., 2.17.2.2, 431.

<sup>61</sup> Ibid., 2.22.16, 555-56.

<sup>62</sup> Ibid., 2.17.2.2, 431.

favour; otherwise it would be a contract, not an act of kindness.”<sup>63</sup> Indeed, the incongruity of demanding (or even suing for) gratitude emphasizes the difficulty of claiming a possessive right to gratitude, even if attributive justice would call for it. Thus, the higher moral standard that enjoins gratitude, even in the 'perfect duty' sense of being directed toward a particular person in a particular situation, cannot create a corresponding claim-right held by the person on whom it ought to be bestowed.

Furthermore, in most cases it is not even clear what could fully satisfy the demands of attributive justice. One might be obligated to show gratitude, but how much gratitude is enough? Unlike a debt, where the fulfillment is perfectly clear, the demands of attributive justice are seemingly indefinite. The same can be seen in Grotius' own example of filling a public office. In this case, the true end is not the appointment of the person, but the carrying out of the office according to its proper function. Just as no applicant has a claim-right on the position, nor is it likely that any candidate can claim to perfectly fulfill the function of the office. Indeed, what would count as perfection? Even the greatest magistrates in history have committed imperfections. It is rather implausible to think of a political office being carried out in such a way that not a single person suffers a disproportionate burden, and all are not simply better off but actually as well off as they possibly could be within the limits of nature.

Yet despite the impossibility that attributive justice may bring a perfect, complete, and fully satisfactory result, Grotius still discusses it within his treatment of natural Right. He emphasizes that Right goes beyond a system of rights whose claims can easily be pursued in the legal system. Indeed, this is why a few commentators have suggested

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<sup>63</sup> Ibid., 2.22.16, 555-56.

that Grotius may play a role in developing the concept of imperfect rights.<sup>64</sup> However, it is a component that is not possessive. It is not the realm of a claim-right, but the opposite. Indeed, because it is done voluntarily, it is ultimately a gift. This further emphasizes the personal nature of attributive justice.

This can be contrasted with the claim-rights of expletive justice. As mentioned in Chapter 1, rights have been described as a way of conceptualizing justice from the point of view of the one who benefits.<sup>65</sup> Thus, they have a tendency to orient political discourse around the individual's pursuit of benefit maximization within the constraints of the system. In contrast, the gift-nature of attributive justice calls forth a recognition of the social (and thus political) nature of reality, and of dependence upon others. Rather than orienting political discourse around the perspective of the individual, it orients it toward the community.

### *Attributive Justice – Substantive Outcomes*

Furthermore, attributive justice does not deal with formal procedures. Rather, it is concerned with substantive outcomes. In the aforementioned example of assigning a role, expletive justice simply determines who will make the final decision about hiring. It may also set out some parameters within which the search must be conducted. In other words, it may eliminate certain people from consideration due to their unacceptable characteristics. Because it deals with the realm of (procedural) rights and wrongs, expletive justice can therefore identify a wrong choice. However, as long as the correct

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<sup>64</sup> Fleishacker, 20-22, 139-40. See also Schneewind, 78-80, and Haakonssen, 26-30.

<sup>65</sup> John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980), 205.

person makes the hire, and abides within the boundaries set out by the parameters, expletive justice is agnostic as to the outcome. It cannot identify a good choice, because the realm of goods is the realm of attributive justice. Thus, it grants to the person in charge of hiring the complete freedom to hire any person. However, that freedom still ought to be guided by attributive justice. If the appointer makes a poor choice, it will not violate expletive justice, but it will violate attributive justice. Attributive justice exists not to promote a quantitative amount of freedom; it is there to promote the qualitatively greatest use of that freedom.

#### *Attributive Justice – Action*

Moreover, the outcome of the hiring process ultimately resides in the actions of the employee, not in the (still partially procedural) decision to hire the person. The process of validly hiring anyone will cancel out the negative expletive condition of having the position empty. However, it does not automatically bring about the positive goods to be produced or fostered by the employee. Thus, even if attributive justice guides the hiring process and the best candidate is chosen, attributive justice must continue to guide the person in the performance of the job. There is no guarantee that even the best candidate will automatically carry out every aspect of the role in the best possible way. In other words, attributive justice is not best described as residing in decisions (i.e. about the initial hiring), because decisions are taken once and for all. Rather, attributive justice is fundamentally performative.

This testifies to the fact that, unlike expletive justice, attributive justice is

ongoing. Indeed, this follows from its very imperfect nature. A situation of expletive justice has a clear solution, and once it is implemented, full satisfaction is rendered. The issue is not ongoing; it has been resolved. Such is not, and cannot be, the case with attributive justice. Because attributive justice can never be perfectly fulfilled in any situation, the quest to act according to attributive justice is ongoing. It constantly strives toward an ideal that can never be perfectly instantiated in this world. Likewise, it cannot be broken up into a series of discrete cases with definitive decisions. Because it endures in time, the (multiple) relevant factors which must be considered in attributive justice are in a constant state of flux. Unlike expletive justice, it must be maintained in a dynamic fashion.

#### *Attributive Justice – Forward-Looking Orientation*

This follows from the fact that while expletive justice looks backward, attributive justice looks forward. Expletive justice seeks to rectify a wrong done in the past (or, in the example of hiring, to cancel out the negative condition of having a vacant position). By dictating an equal and opposite reaction, it cancels out the unjust condition created by the initial action. Once the injustice has been eliminated, the condition of justice in the strict sense obtains: as Grotius puts it, “that [condition] which is not unjust.”<sup>66</sup> It is as if the negative condition had never occurred. In contrast, attributive justice looks forward, imagining the possibilities of instantiating positive goods in the situations that may arise in the future. Its operation is not mechanistic, but creative. This recalls Grotius' description that the wider sense of *jus* follows from uniquely human capacity to discern

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<sup>66</sup> Grotius, *DJB* 1.1.3.1, 34.

general principles, and to deliberate on how best to apply these in concrete situations.<sup>67</sup>

*Attributive Justice – Public and Private*

The example of hiring an employee illustrates Grotius' early assertion that attributive justice is not limited to public matters (just as expletive justice is not limited to private matters). By declining to have distinct categories of private and public justice, or to outline the specifically public nature of justice, Grotius perhaps appears to depart from the Greek approach, which had emphasized the privative nature of private life.<sup>68</sup> On the contrary, however, all realms of life – both public and private – should be witness to a virtue that goes beyond the dictates of strict justice. This implies going beyond an emphasis on restitution of commodities owed to individuals, and focusing instead on the good of others and of the whole. Because Grotius lacks a specific category of justice for the public realm, some might interpret his thought as individualistic and as denigrating Aristotle's emphasis on the practice of politics as a public activity. However, this follows the fact that his basic distinctions of justice are between law and virtue, rather than between public and private. He is more concerned about how justice operates than about where it operates. Indeed, as will be seen later, Grotius' understanding of higher justice actually reclaims the idea of a politics (indeed, an entire moral philosophy) that is fundamentally outward- (and upward-)oriented. Far from focusing on the mere interests of the private individual, Grotius is concerned with the good of both the community and the entire moral universe.

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<sup>67</sup> Ibid., Prol.9-10, 13.

<sup>68</sup> Hannah Arendt, *The Human Condition*, 2<sup>nd</sup> ed. (Chicago: University of Chicago Press, 1998), 38.

*Attributive Justice – Contingent and Situational*

Because one must consider situations and persons, attributive justice cannot be systematic and formulaic. Its prescriptions do not flow forth as static and propositional forms that automatically inhere in the nature of things. Thus, it cannot provide perfect guidance in advance of particular circumstances. Rather, it issues in situational judgments. This does not mean, however, that its guidance is amoral, as in the merely coordinative regulations of human positive Right. Rather, it is somewhat akin to natural Right proper known by history. Although it must be manifested in human will in particular situations, this will is a manifestation of a pre-existing rightness.

Indeed, Grotius devotes an entire chapter of *DJB* to the topic of situational judgment. He states that in order to rightly consider competing arguments, which may refer to the judgment of a mean between extremes, those who lack such insight are duty-bound to seek counsel from the wise, in order that they may “rightly mould their practical judgment.” Grotius then cites Aristotle to emphasize the importance of consulting the wise.<sup>69</sup> This testifies to the fact that judgment can only be taught by those who already possess the virtue. It is not a technical skill that could be learned in libraries; practical experience dealing with its subject matter is necessary. Attributive justice can only be learned by observing those with the requisite virtue, and then by exercising those virtues oneself.

The fact that the just course of action under attributive justice is not clear to all, as it would be in a mathematical formula, further illustrates why Grotius emphasizes the

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<sup>69</sup> Grotius, *DJB* 2.23.4, 558-59.

importance of an “aptitude.”<sup>70</sup> Attributive justice will best be carried out by someone who has an aptitude for virtue. It does not inhere in an impersonal formula. As a result, its dictates are rarely simple. Recognizing the complexity of internal factors, it deals with multi-dimensional determinations of better and worse. This follows from its necessarily imperfect nature, and the fact that it is never clear how one could ever perfectly fulfill attributive justice.

### *Attributive Justice – Virtue*

Grotius also emphasizes that attributive justice does not simply require virtue to recognize, but also to implement. In other words, the virtues needed are not simply akin to prudence as an intellectual virtue, but are also virtues of the will. This can be seen throughout *DJB* (and, indeed, in the discussion of *de Aequitate* to follow). In one clear instance, Grotius says, “natural Right...considers not only that justice that we have called expletive, but also that of another nature, which includes other virtues, such as temperance, fortitude, and prudence.”<sup>71</sup> Thus, he clearly links that justice which is beyond expletive justice (namely, attributive justice) with the cardinal virtues. These virtues seem to be natural virtues that can be universally demanded of all people; in the following sentence, Grotius distinguishes it from that to which (Christian) charity obliges us. These statements echo his initial characterization of attributive justice as being “associated with those virtues that are beneficial to others, such as generosity and compassion”<sup>72</sup> In contrast, it would appear that expletive justice is impersonal, not

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<sup>70</sup> Ibid., 2.17.3, 431.

<sup>71</sup> Ibid., 2.1.9.1, 176.

<sup>72</sup> Ibid., 1.1.8.1, 37. See also O’Donovan and O’Donovan, 790-91.



requiring these personal virtues in order to be realized.<sup>73</sup>

This emphasis on attributive justice as the realm of virtue fits well with its locus as the realm of imperfect moral duties. Indeed, Grotius had already hinted at the impossibility of perfect virtue in his *Prolegomena*, when addressing Aristotle's understanding of virtue. Far from attacking Aristotle, he says that Aristotle "deservedly holds the foremost place" among philosophers.<sup>74</sup> However, he declares a stronger allegiance to the early Christians, who took from many philosophers but pronounced none as authoritative. These thinkers, drawing more from Plato, departed from Aristotle's conception of virtue as a mean. Echoing their thoughts, Grotius states that one cannot be too contemptuous of pleasure or honour or, for that matter, of evil in general. Nor can one ever worship God or desire heaven too much. Thus, virtue cannot always consist in moderation. The same is true in the opposite sense of having too little. One cannot consider it truly unjust to accept less than is owed to one, as justice (in the strict sense) is simply refraining from the goods of others.<sup>75</sup> Thus, unlike expletive justice, which can be perfectly implemented, the virtues associated with attributive justice can never be completely fulfilled. This further testifies to the dynamic, forward-looking character of the virtues.

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<sup>73</sup> Grotius, *DJB* 2.1.9.1, 176. See also 2.1.11, 179. It is noteworthy that Grotius describes as "virtues" only those virtues which Aristotle would describe as moral virtues; for Grotius, virtues of the intellect may not be virtues at all.

<sup>74</sup> *Ibid.*, Prol.42, 24. Grotius shows a characteristically Renaissance attitude in his concluding remark (Prol.45, 26): "Our purpose is to make much account of Aristotle, but reserving in regard to him the same liberty which he, in his devotion to truth, allowed himself with respect to his teachers."

<sup>75</sup> *Ibid.*, Prol.44-45, 25-26.

*Attributive Justice – Politics and Law*

This non-finite nature is implicit in Grotius' aforementioned distinction between the two uses of the term “permissible”. Even when the term is used normatively (rather than positivistically), it is limited, because it does not include the practice of the virtues. Something that is “permissible” corresponds to something that is non-negative. For example, Grotius points out that it is normatively permissible to marry rather than to be celibate, to marry several wives, and to leave one's pagan wife. However, while these actions may be licit according to natural (and not simply positive) law, that does not mean that they instantiate higher positive goods. Some permissible actions (such as these three) are nonetheless contrary to prudence, to honour, and to what one ought to do. A more honourable and noble standard would, respectively, enjoin celibacy, monogamy, and faithfulness in these situations. Later, Grotius links the idea of bare permission with rights. Grotius cites Quintilian the Father's instruction to “consider rights (*jura*) to be one thing, and justice another.”<sup>76</sup> Here is Grotius' clearest proclamation that justice – and not simply a more ethereal sense of honour – goes beyond one's rights. As O'Donovan and O'Donovan conclude, “there is an extensive and more important role for the idea of Right...than can ever be conveyed by the idea of ‘rights.’”<sup>77</sup>

Thus, not only in the positivistic sense but even in the normative sense, it is now clear that for Grotius to describe something as “permissible” is to describe it as less than ideal. This further testifies to Grotius' distinction between law and virtue. While the laws of expletive justice prescribe a minimum standard of action, virtue directs one

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<sup>76</sup> Ibid., 3.4.2.1-3, 641-43.

<sup>77</sup> O'Donovan and O'Donovan, 791.

forward toward a higher ideal. The existence of law in Grotius is not meant to supersede or to eclipse virtue. Instead, the reverse is true: law must be understood within the overarching framework of virtue.

### *Expletive and Attributive Justice*

Thus, while one may turn first to expletive justice, this impersonal realm of law is limited. Considerations of prudence or charity arising from attributive justice (and focused on the common good) ought to guide the exercise of expletive individual rights. Thus, while individual rights may be part of Grotius' understanding, they are not the highest part. Rather, individual rights must be understood and exercised within the framework of attributive justice.

Attributive justice thus appears to be the higher of the two types of justice. As Grotius says, one's duty is "sometimes taken strictly...by expletive Justice; and sometimes, in the wider sense, to indicate what cannot be neglected without dishonour." Grotius adds that such honour originates from outside expletive justice.<sup>78</sup> Thus, there can be situations where something is owed not out of expletive justice, but "natural fitness"<sup>79</sup> The converse is also true; the admonition of higher virtues may forbid what *jus* permits.<sup>80</sup> The mere fact that something is not owed out of expletive justice does not 'let one off the hook'. The strict dictates of the law according to expletive justice fail to capture the fullness of moral or political life. The law cannot reach to concerns of what is considered decent or honourable. Conscience reveals the limits of the law.

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<sup>78</sup> Grotius, *DJB*, 2.7.4.1, 269.

<sup>79</sup> *Ibid.*, 2.7.10.1, 277.

<sup>80</sup> *Ibid.*, 3.10.1.1, 716.

*Equity*

The limited nature of law can also be seen in the concept of equity, and it is instructive to examine Grotius' approach to equity. The law as a whole is often conceptualized as a tight-knit, self-contained system. It is true that legal theorists might acknowledge that a system of law is created in the absence of a system of law, and that its creation involves discretionary judgment. However, once it has been brought into existence, this system is seen as self-contained, not requiring reference to anything outside itself. Indeed, the very internal logic of written law eliminates the need for discretion or judgment. This is precisely what ensures an impartial trial with objective rules of justice and guilt. The effectiveness of the system is not supposed to depend on the political wisdom of judges; rather, it is designed to rely on their technical expertise. Indeed, it is not really a judge who judges; it is the law. The law is master; the judge servant.

Equity is thus a curious legal concept. It enters the legal arena for the specific purpose of opposing the prescription set out by the law. Such might seem improper, even seditious. Perhaps this practice might be justified by the recognition that judges are only human, after all. Perhaps their interpretations of the law are open to legitimate question.

Yet this is not what equity does. Equity opposes the prescription without arguing that the judgment was strictly in error. Equity thus does not argue that the strict determination of justice is incorrect on its own terms, and that it needs to be altered in order to succeed on its own terms. Rather, it advocates for a higher moral reality than the legal system is capable of achieving on its own terms. Thus, if admitted, its presence

serves as a perpetual testament to the limited nature of law. The acknowledgment of a legitimate place for equity testifies to some form of natural Right beyond the positive law.<sup>81</sup>

The concept of equity goes back to the Ancient Greeks, as detailed in the previous chapter. It is a concept that testifies to the spirit of the law; to a moral reality that transcends the written law. However, *aequitas* undergoes a slight transformation in the Augustinian approach of the Protestant Reformers. These thinkers were charged with a great sense of the sinful nature of even the best governors. Accordingly, they de-emphasized the place of moral hierarchy between judge and criminal, in light of the fact that the judge himself was a criminal in the eyes of the God, the ultimate righteous judge. The result was to re-frame equity through the lens of mercy or clemency. Equity had always been meant to transcend the law and to give the person their true desert, rather than that demanded by the strict law. This generally meant a reduction or elimination of the sentence. However, in the eyes of the Reformers, the true desert of every person before God was eternal damnation. Fortunately, God met this situation with unmerited mercy. This result – in which the person was condemned under law but set free by the ‘equity’ of the Divine Judge – meant that equity was a gift rather than a desert.<sup>82</sup>

Those who portray Grotius as making a decisive break with the Classical and Christian tradition assert that Grotius moves from a framework of Natural Right to a

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<sup>81</sup> It should be noted that in contemporary usage, the term “equity” is often taken to connote “equality”. While equality is one possible way to conceptualize equity, it is not the only possible way. Indeed, throughout most times and ages, equity actually led one away from a strict adherence to the principle of equality.

<sup>82</sup> Oliver M. T. O'Donovan, “Law, Moderation and Forgiveness”, in *Church as Politeia: The Political Self-Understanding of Christianity*, ed. Christoph Stumpf and Holger Zaborowski (New York: Walter de Gruyter, 2004), 9-10.

framework based on natural law or individual possessive rights. This contains the implicit assumption that the law (or its negative formulations as possessive rights) contains the fullness of justice. As a result, there is no spirit of the law which transcends the text of the law.

Fortunately, Grotius has left us with a treatise entitled *de Aequitate, Indulgentia, et Facilitate*, or *On Equity, Indulgence, and Good-Naturedness*, a manuscript published only after his death. Although translated into French and German, it remains untranslated into English to this day. One would have to search far and wide in the literature to find a single mention of this work.<sup>83</sup> This brief tract, however, provides ample evidence for the place of equity the thought of the “father of modern international law”. Moreover, it offers a glimpse into Grotius’ balance of classical and Christian elements in his treatment of that concept, and its relation to other concepts.

### *De Aequitate*

Grotius begins the treatise by asserting that equity, indulgence, and good-naturedness are virtues of the will. For instance, knowing what is equitable is a virtue of the intellect, but carrying it out is a virtue of the will. This allows Grotius to reaffirm his emphasis on the primacy of the will, and the fact that mere theoretical knowledge is insufficient. Indeed, these virtues are not simply a matter of practical reason, but of practical action. Furthermore, this approach echoes his emphasis in other writings on the importance of ethics, even to the point of placing it above (or, at the very least, co-equal

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<sup>83</sup> Indeed, I have been unable to locate a single reference in the English literature.

with) metaphysics.<sup>84</sup>

Grotius then turns to equity in particular. He first examines received definitions. Some take equity to be the whole of justice, while others see it as the discretionary action of a judge in filling a gap in the law. Grotius begins with a descriptive account, siding with the latter. He defines equity as “correcting the law where it fails on account of its universality.” Positive laws are necessarily finite. However, the human situations to which the laws apply are infinite.<sup>85</sup> Here can be seen Grotius’ acknowledgement of the limits of laws – indeed, of words – to bring about true justice. Indeed, it is the universality of laws that makes them inadequate to provide clear judgments for the infinite possibilities of particular situations.

As a result, a strict adherence to the laws sometimes results in a judgment which is opposed to the original intention of the lawmaker. For instance, the law compels a person to return an object borrowed from another upon their request. However, if the original owner has become insane, one ought not to return the sword. Thus, it is necessary to follow the spirit of the law.<sup>86</sup>

Thus, the force of obligation does not come from the words of the law, but from the intention and will of the legislator. As a result, interpretation – guided by the intention of the legislator – is essential. By focusing on intention, Grotius reaffirms the place of the rational will in his philosophical anthropology.<sup>87</sup> In fact, it is the province of equity to ascertain intentions, even in regard to promises, or to the application of clear

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<sup>84</sup> Hugo Grotius, *De Aequitate, Indulgentia & Facilitate* (*Traité de l'équité, de l'indulgence, et de la facilité*), trans. de Courtin, 1703, 1.4.

<sup>85</sup> Ibid., 1.4-5.

<sup>86</sup> Ibid., 1.5-6.

<sup>87</sup> Ibid., 1.13.

intentions.<sup>88</sup>

Thus, equity comes into play when laws conflict with one another, and requires recourse to the first principles of nature.<sup>89</sup> Equity does not remove the obligation of the law. Rather, it advocates that the law does not oblige in a particular fashion in a particular case. Grotius gives the example of a person who kills another in self-defence. The rightness of defending oneself is one of the basic principles of nature. In such a case, the person should be pronounced as not guilty – not because the law proscribing murder ceases to apply, but because the action cannot be considered as murder.<sup>90</sup> It is not that the force of the law changes; it is that the particular act of killing in question does not actually qualify as murder.

Grotius does mention one limit to the kind of positive laws which can be overturned through equity: namely, those positive laws which are simply reiterations of the first principles of nature. Grotius offers several examples of such principles, beginning with the commandment of virtue and the prohibition of vice, and proceeding to specific laws such as loving and serving God, refraining from adultery, refraining from theft, and living holily, honestly, and soberly. Unlike those laws which are subject to interpretation, these basic laws cannot be defective as a result of their universality.<sup>91</sup> Thus, Grotius' thought appears to include a place where propositional laws are supreme and absolute, and another realm in which equity can and should operate. However, these propositional laws are laws of nature, not merely positive laws.

Grotius immediately applies this approach to the interpretation of divine

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<sup>88</sup> Ibid., 1.9.

<sup>89</sup> Ibid., 1.12.

<sup>90</sup> Ibid., 2.5

<sup>91</sup> Ibid., 1.8.



revelation. The first principles of nature are inherent in God, and cannot be subject to equity. However, those positive commands of God that are not rooted in such first principles *can* be subject to equity. These would be overruled by recourse to the principles of nature which God himself has implanted in humanity.<sup>92</sup> This demonstrates Grotius' characteristic consistency between his natural philosophy and his theology. This consistency will subsequently allow the export of theological principles into his natural philosophy, when it comes to his treatment of authority and of the Atonement.

Equity applies not only to the determination of guilt but also to the imposition of punishment. However, this is not necessarily a boon to the one convicted; equity may actually require a harsher sentence than that prescribed by the law. Grotius uses the example of a more severe punishment for murder when the crime is a parricide (later repeated in his lengthy discussion of punishment in *DJB*).<sup>93</sup> This indicates that equity is not simply a reduction of the law. The law does not set up an outer boundary beyond which equity cannot go. Rather, much of the law exists within the horizon of equity. Indeed, the purpose of positive law seems more practical: to compel adherence by threatening sanctions.

Thus, Grotius appears to understand equity in an interpretive sense. It acknowledges the limits of the law. Indeed, it acknowledges the nature of law as having come from a prior will of the legislator, rather than the rational propositions that came from his mouth. This testifies to its emphasis on discerning the intention of the governor, rather than his external acts of legislation.

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<sup>92</sup> Ibid., 1.7.

<sup>93</sup> Ibid., 1.10.

In the administration of positive law, equity is the place of the judge.<sup>94</sup> It is the theoretical practice through which the judge ascertains the original will or intention of the lawmaker. In the theological realm, it is employed by the theologian who seeks to interpret the commands of God. This is done by reference to God's will, as known through the principles of natural law instilled in creation. Thus, in one sense, equity can be understood in a value-free, descriptive sense, because it refers to the lawmaker, rather than principles of Right. However, there remains an overarching normative reality: the will of the lawmaker ought not to run contrary to natural Right. (Things are simpler for the theologian, as there can be no such problem with the will of God.)

As equity is the task of the judge, it seems that he may be compelled, under strict justice, to employ it. At the very least, Grotius argues that a “just judge” will not give a ruling according to the obvious action, but according to equity.<sup>95</sup> However, the actual exercise of equity could not proceed along the deductive methods of strict justice. Indeed, because expletive justice is codified as a systematic framework of propositions, it cannot allow for unforeseen situational discrepancies or discretion on its own terms. In fact, the laws of expletive justice purport to treat everyone the same. This uniformity, however, may actually result in a less just outcome. Thus, equity must employ the imaginative reason of attributive justice in order to creatively ascertain the spirit of the law in these new circumstances. This points toward the idea that there is a reality beyond the written law. Furthermore, although expletive justice may perhaps call for equity, attributive justice is primary in carrying it out.

<sup>94</sup> Hugo Grotius, *De Satisfactione Christi (The Satisfaction of Christ)(SC)* 2.3, trans. Oliver O'Donovan and Joan Lockwood O'Donovan, in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, MI: Eerdmans, 1999), 816.

<sup>95</sup> Grotius, *DJB* 2.10.9.2, 326.

In many ways, Grotius' concept of equity echoes Aristotle's treatment of the subject in his *Rhetoric*. According to Aristotle, equity plays a central role in properly distinguishing between wrongs, faults, and misfortunes (a classification to be further discussed in Chapter 4). Equity thus pronounces as not guilty. Indeed, according to Aristotle, equity represents “not the deaf insensible law, but the living, merciful lawgiver.” This allows a stronger emphasis on intention relative to words, both in regard to the legislator's creation of the law and the defendant's apparent violation of it. In determining intention, equity also looks to the character of the person, presumably to determine whether the intention arose from a momentary passion, or from the injustice (or justice) of the defendant's settled character.<sup>96</sup>

Aristotle, however, sees the judge in a more technical capacity than Grotius, being constrained by the letter of the law. Equity is not the province of the judge, but the arbitrator. More substantially, Aristotle does not distinguish between the verdict of “not guilty” and pardon of the guilty criminal. The following section shows that these are two distinct concepts for Grotius.

The second section of *de Aequitate* deals with the concept of indulgence. This is quite distinct from equity. Equity dictates that the law does not oblige in a particular way, in a particular case. For instance, a law against murder remains in force, but the killer on trial is not considered as a murderer. On the contrary, indulgence removes the obligation of the law in the case.<sup>97</sup> It does not arise when laws conflict. Rather, it arises where a law is good law, not superseded by another law, and yet is unjust in a particular circumstance.

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<sup>96</sup> Aristotle, *Rhetoric* 1.13, trans. W. Rhys Roberts, in *The Complete Works of Aristotle*, ed. Jonathan Barnes (Princeton, NJ: Princeton University Press, 1985), 2188 .

<sup>97</sup> Grotius, *De Aequitate*, 2.4.

Here Grotius gives the example of a law requiring that public magistrates be at least 25 years of age. This is a just law, because most adults under the age of 25 lack the requisite ability to be good magistrates. However, in exceptional cases, there may be a person under 25 who demonstrates sufficient prudence to carry out the position well. This does not mean that the law ceases, or that the judge somehow deems the person to be over 25. Indeed, because it would be imprudent to require rulers to spend their time examining every under-25 aspirant to office, it is good that the law remains in place. Rather, in the particular case, the ruler may remove the force of the law which bars those under 25 from office. However, Grotius hastens to add that the obligation of this law can be removed only in a case where justice and public utility will not be injured.<sup>98</sup> A dispensation is null and void if it violates natural or divine Right.<sup>99</sup> Thus, the freedom of action associated with indulgence is necessarily subject to the guidance of justice.

As with equity, while there is a realm of positive laws subject to indulgence, there is also a realm in which no indulgence can be granted. This would apply to positive laws that reiterate a specific injunction of natural law.<sup>100</sup> Grotius uses the example of punishment. Some punishments, such as capital punishment for murder, cannot be excepted – presumably owing to the aforementioned prohibition of murder as one of the fundamental principles of nature. In other acts that are contrary to natural justice without violating a specific formulation of natural law, the punishment can be reduced. However, punishment cannot be waived entirely, because it is a first principle of nature that crimes must be punished. Here can be seen a principle which is crucial to Grotius' overall

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<sup>98</sup> Ibid., 2.1-5.

<sup>99</sup> Ibid., 2.13.

<sup>100</sup> Ibid., 2.15.

treatment of punishment, particularly in his theology. There may be some legitimate flexibility in the administration of the specific punishment prescribed by the positive (civil) law, but it cannot be waived *entirely*. Only in crimes which violate only the civil law, and not nature itself, can the ruler grant a full indulgence from punishment.<sup>101</sup>

There appears to be a further difference between equity and indulgence. Equity seems to relate to the judgment of whether one has violated the spirit of the law. Thus, it appears to be concerned with the determination of the status as guilty or not guilty. By contrast, indulgence seems to come into play once the determination of guilt has already been made, perhaps even through the exercise of equity. It is thus fitting that the agents able to employ equity and indulgence are different. While equity is the realm of the judge, indulgence is the province of the one who holds *imperium* – that is, political authority. Only the ruler, or a magistrate acting in his stead, has jurisdiction to grant indulgences from civil laws.<sup>102</sup> Likewise, as head of the household, only a father can make exceptions from the domestic laws. Indulgence is not a technical activity by a disinterested third-party judge. Rather, it is the province of the ruler, who has care for the community, and who enacted the laws in the first place.

This contrast can be seen in the virtues employed in each. The judge must use practical reason to ascertain the internal intention of the lawmaker, and the internal character of the person on trial. However, the ruler must also exercise practical virtue. Not only must he discern internal factors, but he must act for the good of the person on trial. Indeed, he must act for the good of the entire community. Thus, although Grotius

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<sup>101</sup> Ibid., 2.14.

<sup>102</sup> Grotius, *SC* 2.3, 816.

earlier rejected a specific category of justice for the public realm, the concern of indulgence for the common good demonstrates the importance of politics. The implications will become even clearer in Grotius' understanding of the Atonement.

It would thus appear that indulgence is not required according to strict justice. Rather, attributive justice enjoins the ruler to grant indulgences in cases where it would conduce to the good of the individual, as well as the good of the community. Refraining from granting an indulgence is never unjust in the strict sense. However, in some cases, an indulgent action would be more harmonious with the good. This recalls Grotius' description of attributive justice as that which is "in harmony with nature."<sup>103</sup> Indulgence especially helps to show the overarching horizon of natural Right within which politics exists.

Not surprisingly, Grotius immediately points out the theological analogue. Just as a good ruler grants indulgences when it is not contrary to justice and is in line with his (morally praiseworthy) intention, so God grants indulgences when his positive commands to humanity are contrary to his intention.<sup>104</sup> This shows that, just as Grotius draws clear distinctions between natural and positive law, he draws distinctions between those principles which are inherent in God's character and those positive commands issued by God – further evidence of the consistency between his natural and theological thought. Likewise, just as one can only grant indulgences for violations of positive laws over which one has a legitimate authority, Grotius makes it clear that no earthly ruler is free to give an indulgence to the positive commands of God.<sup>105</sup> It is instructive to note the

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<sup>103</sup> Grotius, letter to Willem de Groot, 18 May 1615, 209-210.

<sup>104</sup> Grotius, *De Aequitate*, 2.8.

<sup>105</sup> *Ibid.*, 2.11.

contrast with equity, where people retain the flexibility to determine whether or not their action falls under a particular Divine commandment.

This reference to theology is appropriate. The very concept of indulgence, or pardon, not only goes beyond what is demanded in law, but in justice. It bestows mercy on a person in a way that mirrors the Reformation transformation of equity. Thus, Grotius allows a place for a virtue that takes its lead from the mercy of God and the recognition of the fallenness of humanity. However, he does so without jettisoning the classical concept of equity, or the underlying belief that this world can see some conception of justice (expletive justice, at the very least). However, while recognizing a place for natural justice, he also acknowledges that it may be incomplete in light of the remaining need for divine-inspired grace. This also provides the possibility for the ruler to follow God's merciful example.

Grotius' third category is called *facilitate*, which translates somewhat imperfectly as good-naturedness. This is a virtue which leads us to relax our right, as Grotius suggests, from our good will or for the sake of peace. The term *facilitate*, which has connotations of ease, affability, or friendliness, applies to those who are not rigorously attached to their interests.<sup>106</sup>

In its brevity, Grotius' section on good-naturedness leaves something to be desired. However, it seems clear enough that good-naturedness applies to private individuals who possess a right. A consideration of the greater good then leads them not to exercise their right. Grotius suggests that it is practiced most commonly when laws are

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<sup>106</sup> Ibid., 3.1-3.

most contrary to natural equity.<sup>107</sup> However, he is unclear as to whether this good-naturedness is compelled by equity, arising from an obligation; whether it arises from a charity that transcends obligation and is offered as a free gift; or whether it can arise simply from the arbitrary whims of the right-holder. What does seem clear, however, is that good-naturedness is the realm of two individuals, and is thus a private action, not a political action.

Grotius concludes the discourse with the statement that none of these three virtues are contrary to justice. Equity is not unjust because justice obeys not the terms or limits of the law, but the intention of the legislator. Indulgence is not unjust because the obligation of the law, being a representation of the will of the legislator, ceases when the legislator wills it. Good-naturedness is not unjust because the law does not force us to exercise our rights. Under these formulations, the exercise of indulgence and (especially) good-naturedness may appear potentially arbitrary. Indeed, under expletive (or strict) justice, any act that is “not unjust” is permissible. Thus, all such acts are normatively equal, and one can be chosen arbitrarily over the other. It is only attributive justice that counsels better and worse acts among those permitted in strict justice.

This exposition of these three concepts helps to illuminate Grotius’ meanings in other texts. Returning to Grotius’ treatment of obligations arising from promises in *DJB*, Grotius cites Maimonides’ uncovering of a tripartite distinction among the Hebrews. First is that which is due under strict *jus*, which Grotius translates this as *judicium* (the dictate of the judge). The second is translated as *justitiam*: that which is due in accordance with equity. Finally, there is that which is beyond all requirements of what is

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<sup>107</sup> Ibid., 3.2.



due, which characterize someone “overflowing with good things”. These are things given out of pure generosity, gifts which endear a population to their ruler.<sup>108</sup> These seem to correspond to Grotius' categories of strict law, equity, and indulgence.

He continues this passage with a reference from the Greek New Testament, where Christ admonishes the Pharisees for neglecting mercy, justice, and righteousness. His philological analysis points toward the term justice, as in the Book of Maccabees, as referring simply to what is strictly due. In contrast, “righteousness” here corresponds to the Attic Greek word *dikaiosyne*, the philosophical term for justice in the overarching sense.<sup>109</sup> This reaffirms the interpretation of *de Aequitate* as pointing toward a framework of natural Right.

### *Conclusion*

Grotius begins his discussion of natural Right by examining several foundational concepts. He begins by justifying the very existence of natural Right by reference both to intrinsic and extrinsic components. While natural Right is inherent in reality, it is also expedient to follow. This fits with the concept of human nature that he goes on to outline. Humans share a self-interested nature with animals. However, they also have the capacity for reason and society, one that elevates them above animals. Grotius then proceeds to outline his epistemology. This includes three components: revelation, history, and reason.

Moving on to Grotius' conception of Right, he includes several distinctions that

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<sup>108</sup> Grotius, *DJB* 2.14.6.1, 383-84.

<sup>109</sup> *Ibid.*

sometimes align with (and sometimes overlap) his three modes of epistemology. Ultimately, Right flows from God. It may be revealed in the positive commands of God (Divine positive right), or it may be ascertained in the principles of human nature that God has implanted in creation (natural Right). Natural Right includes natural Right proper as well as human positive laws. These positive laws must be obeyed because subjects have made a promise to do so – one guaranteed by natural Right. However, such promises cannot be contrary to Divine positive right, or to natural Right proper. Nonetheless, if these promises (or statutes) eventually gain universal assent, they may be incorporated into natural Right proper.

Natural Right proper is then divided into expletive and attributive justice. Expletive justice follows the classical tradition of commutative justice by using calculative reason, observing universal rules (rules fully knowable in propositional form and systematizable within a body of self-contained laws), and prohibiting (as well as redressing) negative actions. It is paradigmatically employed in matters of private possessions, with its objects being external possessions or external acts of the person, rather than character or intentions that are internal to the will.

However, in recasting this category as expletive justice, Grotius actually develops this tradition. He points out its orientation to the past, seeking to restore a previous condition, as if the act were undone. Most fundamentally, he points out its perfectly fulfillable nature, making it universally coercible. As a result, he breaks with the tradition in seeing expletive justice as relevant for public life. This allows him to conceptualize it as a status that confers a right of valid action on a person. Thus, its

considerations are formal rather than substantive, and concern procedures rather than outcomes.

However, the freedom accorded by such a status is ungoverned by expletive justice itself, and finds itself fulfilled in the exercise of attributive justice. Attributive justice includes several aspects of the classical conception of commutative justice. It requires prudential reason, must consider factors of context and history, requires equity to discern the spirit of the law, and promotes positive goods – most notably by fostering virtue in the souls of its subjects. However, attributive justice goes beyond commutative justice, in pointing out its forward-looking orientation. This follows from its defining characteristic as corresponding to an infinite standard of goodness that can never claim perfect completion. This standard also guides the exercise of one's valid status, corresponding to good substantive outcomes rather than merely permissible ones. Attributive justice also guides the whole of life, public or private, although it testifies to the interpersonal and thus political character of all of human existence. Finally, unlike the classical sense of distributive justice, which still depended on being ordered to an overarching sense of justice, Grotius' conception of virtue actually blurs the lines between attributive justice and justice in the overarching sense.

Grotius' treatment of equity also burnishes his understanding of justice in the broader sense as transcending the strict dictates of law, and as requiring prudential reason and corresponding to internal intentions. While it is demanded in strict justice, it requires virtues that transcend technical determinations of law. His concept of indulgence further emphasizes virtue over law, and also points toward the public character of existence.

Although it is not required in strict justice, it is enjoined by attributive justice. Moreover, it draws on the Christian idea that natural justice is insufficient, and on the virtues that point toward a higher realm of moral and political life.

It is true that Grotius' explicit references to expletive and attributive justice are somewhat sparing. This likely accounts for the scant scholarly attention paid it. In some cases, one is able to use his discussion of "strict" and "higher" justice as a proxy. In other cases, his distinction between "external" and "internal" justice is helpful. Ultimately, however, Grotius prefers to leave his structure implicit in his treatment of more immediately practical issues. Perhaps this is actually appropriate, in light of Grotius' conception of law and history (and, by extension, idealism and empiricism). If knowledge is largely discerned in practice, it should reveal itself more often (and more richly) in illustrations and examples than in strictly theoretical investigations.

As a result, an examination of other political concepts will help to illustrate Grotius' conception of justice. Indeed, attention to these examples shows how this structure of expletive and attributive justice is almost universally implicit in Grotius' approach to political life. This is particularly visible in areas that have been under-explored in the literature. Later chapters on punishment and Atonement theology will help to fill two such gaps. However, the following chapter turns to an issue that is commonly treated by the discipline, but with an incomplete comprehension of the justice that undergirds it. This is Grotius' concept of authority.

## CHAPTER 3

### GROTIUS ON AUTHORITY

It is common to see Grotius described as a social contract thinker. In a discipline preoccupied with justifying democracy, the origins of consent theories of government are of obvious interest. Grotius is historically situated in a time and place in which theories of consent were beginning to develop momentum. As a result, it is natural to assume that Grotius would have been part of this current.

As is so commonly the case with Grotius, the scholarly consensus is not exactly wrong, *per se*. Grotius' texts contain some references testifying to the role of consent in the formation of the state. It is even true that Grotius opens the possibility of discussing political concepts in an analytic, value-neutral sense. The concepts of authority and the state are not entirely incoherent when separated from the question of a pre-existing framework of justice.

However, these concepts are nonetheless quite limited when studied in isolation. Such an approach often misses not simply the nuances, but the deeper underlying reality of the Grotian project. Just as law and rights are ordered toward justice, so is the consent that institutes civil authority. Indeed, justice is the overarching framework in which the institutions of the state exist. This chapter will show the ways in which both expletive and attributive justice are prerequisites for political authority. It will also show how both

components of justice are necessary for the continued existence of the state and public authority.

Indeed, this chapter will explore not only the institution of civil authority in *DJB*, but its relation to pre-civil realms both (temporally) before and (spatially) outside of it, including the topic of legitimate authority in war. It will also examine Grotius' understanding of the right of rebellion and civil disobedience. Furthermore, while *de Imperio* obviously deals with the nature of sacred and secular authority, it provides a much more comprehensive treatment of the nature of authority in general. This work provides an exposition of various types of rule, as well as the judgment that corresponds to each. In doing so, it further illuminates Grotius' conception of indicative and imperative components of authority. It also lays out the purposes of governing authority, more fully revealing the moral importance of positive law. Ultimately, it points toward Grotius' basic understanding of government and law, and thus to natural Right and natural law.

### *Pre-Civil Society*

As seen in the previous chapter, the *Prolegomena* of *DJB* lays out Grotius' philosophical foundations. Here he presents his defense of natural justice, his conception of the person, and his tripartite epistemology. He continues to outline his conceptual apparatus in the first chapter of Book I, with a discussion of justice and *jus*. In the following chapter, he addresses the objections of pacifists. However, the remainder of Book I is devoted to his understanding of authority.

Nonetheless, despite his attention to the topic of authority in *DJB*, it must be read as part of his overall purpose for the work. Throughout the analysis, he does not explicitly address the conceptual foundations of authority (as he will later do in *de Imperio*), but treats the topic only inasmuch as it relates to international relations. In fact, Grotius' first chapter on authority does not even begin with a discussion of authority *per se*. Rather, it begins with a discussion of the distinction between public and private war.

This discussion of public and private war points toward Grotius' conception of civil society in relation to its alternatives, or what scholars today sometimes refer to as the 'state of nature' (a term Grotius does not use). The very existence of private war may seem somewhat unusual to contemporary readers. Yet it provides an indication of Grotius' emphasis on natural justice. In particular, he recognizes that the force involved in war is not the exclusive prerogative of organized sovereign states. The moral justification for coercive force does not rest on the consent or recognition of others. Rather, war exists on a continuum of naturally justified force that includes police actions in the domestic public realm, as well as police-type actions in pre-civil society, and even punishment in the (non-public) realm of the household.

For example, the right to wage war is not fundamentally different from the right of a private person to ward off a would-be robber.<sup>1</sup> Nature endows people with the liberty to defend their life, limb and liberty by force. This is not (ordinarily) inconsistent with the nature of society and the *jus* of others.<sup>2</sup> Thus, the right to exercise coercive force precedes the creation of the state. (Indeed, it may exist in individuals even after the

<sup>1</sup> Hugo Grotius, *De Jure Belli ac Pacis (DJB) (Law of War and Peace)* 1.3.1.2, trans. Francis W. Kelsey, intro. James Brown Scott, Carnegie Classics of International Law, No. 3, Vol. 2 (New York: Bobbs-Merrill, 1925), 91.

<sup>2</sup> Ibid., 1.2.1.1-6, 51-54.

creation of the state.) Put another way, civil society is not a condition of a normed existence. Rather, it comes into being in order to promote the goods and norms that are already present.

Nor is civil society a condition of social (or perhaps even political) existence. The life outside of formal political authority is not a life of atomized individuals. These pre-civil norms do not simply govern individuals in relation to themselves (or to God). Rather, they are distinctly social norms, and may include both “equatorial” and “rectoral” (superior-subordinate) relationships. This can be seen from the fact that there are other forms of authority that exist prior to, or in addition to, or outside of civil society.

More specifically, it is the moral faculty of *jus* that exists in nature. Grotius defines an action according to this *jus* 'truly understood' as “anything being done from an honourable and just faculty”.<sup>3</sup> Elsewhere, he describes it as “a moral quality making a person competent to have or to do something justly.”<sup>4</sup> This *jus* may confer a status of “owner” and “owned object”, as in property. However, this *jus* may also include the status of “ruler” and “ruled”, as in governmental authority. This demands an examination of the ways that the latter form of *jus* is justly acquired. According to Grotius, there are three ways in which one may acquire *jus*: generation, consent, and crime.<sup>5</sup>

### *Sources of Authority*

Generation is straightforward. When a child is born, he is naturally subject to the authority of the parents to whom he owes his existence. This seems to follow from the

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<sup>3</sup> Ibid., 1.4.3, 140.

<sup>4</sup> Ibid., 1.1.4, 35.

<sup>5</sup> Ibid., 2.5.1.1, 231.



fact that children are unable to govern themselves through the exercise of reason. Thus, parents are permitted – indeed, responsible – to govern and direct the child. This necessarily includes the use of coercive force.

However, this parental authority does not imply a radical absence of limits on action. Rather, a higher obligation requires parents to act according to the good of the child. Hence, this grants them a status of superiority, but not an absolute freedom of action. Rather, this authority is ordered toward an end beyond the interests or even the good of the parents.

Nonetheless, this parental *jus* is not lost through misuse. If the father punishes too harshly, he does not thereby cease to be the father. Even if he commits an act against the child that violates a clear natural law, his paternal *jus* is not jeopardized (although God will hold the father to account for his actions). Although the status of “father” is ordered to a particular action, unjust action does not invalidate the status. This status of superiority over the child cannot be usurped by others, or by the child himself.

As a side note of interest, children themselves are able to have a real *jus* over things (in other words, ownership of possessions). However, owing to their lack of reason and judgment, they are not able to exercise this *jus*. They can possess but not use.<sup>6</sup> Here they possess a status without being able to exercise it until they reach the age of reason and judgment. This idea of possessing a status that cannot be exercised will recur in Grotius' conception of political authority.

This coming of age also changes the nature of the parental authority over the child. At this point, *jus* can only be exercised over the child inasmuch as it affects the

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<sup>6</sup> Ibid., 2.5.2.2, 232.

family as a whole. In matters relating only to the child himself, the parents no longer have authority. Thus, the child now possesses a personal *jus*, or moral faculty, over himself. Just as the parents had a higher obligation to exercise their *jus* for the good of the child, the child has a higher obligation to exercise his *jus* by showing affection, respect, and gratitude toward his parents. However, since this obligation does not arise through strict *jus*, this *jus* itself is also not lost through misuse.<sup>7</sup>

### *Punishment*

The second source of personal *jus*, or authority, is punishment. As Grotius has stated in his *Prolegomena*, it is a property of “*jus* properly so-called” (which we can now recognize as expletive justice) that crimes must be punished. This is not a requirement of civil society; it is a universal requirement of human existence (which is to say, human society). Thus, when a person commits an offense against natural Right, he or she automatically becomes subject to punishment. This is no less true in the absence of a formal apparatus of law enforcement. This reveals a crucial point: the subjection of criminals to punishment does not arise from their prior consent. Rather, the need for punishment is an independent source of *jus* over another person.

The idea of punishment as necessary in expletive justice leads to a further implication. If a violator of natural law is subject to punishment, he or she must therefore be subject to a punisher. Conversely, in order to legitimize this infringement on the person, the punisher must be in a position of superiority to the one being punished. Thus, punishment confers a natural punishing authority on those who have not committed the

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<sup>7</sup> Ibid., 2.5.2-3, 231-32.

same – or similar – crimes.<sup>8</sup> This reveals an implicit point that will be emphasized later in Grotius' more detailed treatment of punishment: the just authority to punish does not arise from victimhood, even if indirect. One who is directly victimized by a particular criminal act, but who is guilty of that same act toward someone else, cannot justly punish the one who victimized him. Thus, Grotius' conception of the origins of authority includes a necessarily moral component, one that may precede the institution of civil society. This concept will be the subject of Chapter 4.

### *Consent*

The final source of *jus* is consent. With generation and punishment, one's subordinate role comes about automatically. A *jus* is conferred on another person over oneself. Consent is different. There is a realm of latitude in which there are no prohibitions of preceptive natural law. In these areas, there is no universal requirement to act (or to refrain from acting) in a particular way. Thus, individuals are free to make promises to act one way or the other, secure in the knowledge that they will not offend natural law. Examples might include economic contracts or marriages. Once these agreements are made, however, their performance becomes a requirement of natural Right, under the sub-category of human positive right discussed above. It is a voluntary surrendering of one's freedom to act, because it allows the other person to compel a singular course of action. As a result, this promise confers a *jus* on the promisee.<sup>9</sup>

As mentioned above, the possibility of promises is limited by natural law; one

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<sup>8</sup> Ibid., 2.20.3.1-2, 465-66.

<sup>9</sup> Ibid., 1.3.16.2, 121.

cannot make a promise contrary to pre-existing natural law. Yet the power of promise is so strong that it may still have an element of binding force even in the case of unjust promises. Grotius uses the example of a person who makes a contract with a hit man to kill a person. Both parties to the contract are making promises contrary to natural law. As a result, because the promise to pay the killer creates an inducement to kill, the promise is not morally binding. However, if the hit man carries out his evil deed, the promise no longer serves as a continuing inducement to commit a crime. Thus, the higher obligation that invalidates the promise is no longer in effect. As a result, the promisor is now obligated to deliver on his financial promise to the hit man.<sup>10</sup>

The associations formed by consent need not be private, as in marriage. They may also be public.<sup>11</sup> Here Grotius makes reference to the idea of a nation or a people. A nation is not simply a numerical aggregation of individuals – or, as Grotius narrows it, fathers of families.<sup>12</sup> A thousand heads of households, each making mutual-protection promises with each other, do not constitute a nation. Grotius does not use the category of “nation” as differing only in degree from the category of “individual.” Rather, a nation is a people that has “a single essential character or spirit”. In other words, a nation is unified by a common vision of the person – of what it means to be human and to live with other social beings. This, Grotius states, is the “full and perfect life of civic society.”<sup>13</sup> Thus, although consent is necessary, it is not sufficient. This consent must reflect a deeper unity that pre-exists the decision to unite.

Grotius continues by asserting that the institution of public authority or

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<sup>10</sup> Ibid., 2.11.9, 335-36.

<sup>11</sup> Ibid., 2.5.17, 249-50.

<sup>12</sup> Ibid., 2.5.23, 286.

<sup>13</sup> Ibid., 2.9.3.1, 310-11.

government is the first act or product of a people. This re-emphasizes the idea that the people (or nation) precedes civil society. Nonetheless, it also emphasizes the importance of the governing authority as a crucial part of the nation. Grotius describes the government as a “bond which binds the state together, that is, the breath of life which so many thousands breathe.”<sup>14</sup> In this original agreement, the people confer on the governing authority a *jus* of governing, or a status that delineates superiority and subordination. Indeed, Grotius describes this “civil power” as “the moral faculty of governing a state”, which resembles his earlier definition of *jus*.<sup>15</sup>

When a people comes together to institute government, it is free to choose the particular form. As Grotius says, “just as there are many ways of living, one being superior to the other, and of which each person is free to choose from all of them as he wishes, in the same way, a people is able to choose the form of government it wishes.”<sup>16</sup> The people may transfer *jus* in an absolute sense, or they may retain their control in particular aspects of public life. In other words, people are free to choose a republic, a limited monarchy, an absolute monarchy, or any possible variation thereof. Ultimately, Grotius is not positing a limited array of forms of *imperium*, or government, each of which is the ideal form of “republic”, “monarchy”, etc. Rather, the people choose exactly what kind of *jus* they will confer on the governing authority.<sup>17</sup>

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<sup>14</sup> Ibid., 2.9.3.1, 310-11.

<sup>15</sup> Ibid., 1.3.6.1, 101.

<sup>16</sup> Ibid., 1.3.8.2, 104.

<sup>17</sup> Ibid., 1.3.10.5-11.1, 113-14. This freedom to determine the nature of governing authority reflects the freedom to choose in any other consensual arrangement. The matter in question does not dictate a particular mode of use or possession. For instance, a tract of land can be owned absolutely, allowing the owner to use, sell, or transfer the property without restriction. It can also be used in a usufructuary manner, with the user possessing the right to sell or transfer this use-right but not the property itself. A third option is a rental in which a person can use it only for a temporary period. Likewise, different use-options are available: single-use passage, use as a road, or use for cattle-grazing.

Notwithstanding the freedom granted to the original consenters, there are some essential functions that Grotius does seem to assume will characterize any government. Here Grotius follows Aristotle's tripartite division quite clearly. The first function is the making of laws. This governs what Grotius describes as general or universal interests. The second is the political, or deliberative, function. This deals with particular interests of a public nature. This may include matters such as war and peace, or what might be called international relations, as well as domestic issues such as tax and spending. The third function is judicial. This function attends to particular interests in the private realm. This involves the settling of controversies between individuals.<sup>18</sup> It is noteworthy that Grotius draws separate (and seemingly exclusive) categories for law and politics. He also draws attention to the fact that while law deals with universal realities, politics deals with particular realities, and thus requires deliberation.<sup>19</sup>

Ultimately, a people is not compelled by natural law to choose a particular form. Rather, the absence of natural law confers on them a freedom to choose. Nonetheless, some options are preferable to others. While the freedom is granted under expetive justice, citizens ought to use attributive justice to discern the best arrangements for their particular time and place.

However, the validity of the original agreement (or of subsequent legislation) is not rendered invalid simply because it is not in full harmony with attributive justice. As long as it does not violate the strict dictates of natural law, or expetive justice, it holds good. Thus, Grotius allows significant latitude to the free choice of human wills, even

<sup>18</sup> The placement of criminal law is somewhat unclear, as Grotius does not mention it in this section. Initially, its element of adjudication would seem to place it in the 'judicial' category. However, its public nature – as seen in its emphasis on crimes against the state – would place it in the 'political' category.

<sup>19</sup> Ibid., 1.3.6, 101-02.

when they may not be the wisest choices. He later argues, “the extent of a people's *jus* is not to be measured by the excellence of one form or another, each of which is judged differently by different men, but from its free choice.”<sup>20</sup> Thus, any chosen arrangement becomes the valid government. Indeed, once the nation has made the promise to the ruler, it is obligated in expletive justice to live by that promise, even if it was not the wisest promise. (This certainly underscores the importance of exercising attributive judgment in making such promises.) Once a promise has been made (thus conferring a *jus* on the governing authority), it cannot be undone by reference to attributive justice. Fortunately, however, the holder of *imperium* is thereafter obliged to follow attributive justice in exercising his (wider-than-appropriate) *jus*.

Grotius also adds an interesting side-note: *imperium* is primarily extended over a people, and only secondarily over territory. In fact, in some cases – such as *imperium* over an army – the former is sufficient. This reinforces Grotius' conception of the state as fundamentally personal. Governing authority is primarily a concern for the people of the nation, not the resources of the nation.<sup>21</sup>

As acknowledged earlier, the creation of the state is not an absolute moral imperative, commanded in preceptive expletive justice. The pre-civil state of man is not an unnormed condition. Indeed, the state is not even a necessary condition for enforcement of natural law. However, attributive justice suggests that it is better for people to choose to create the public tribunals not found in nature. Because of the difficulty of impartially meting out justice, it is conducive to peace and justice to institute

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<sup>20</sup> Ibid., 1.3.8.2, 104.

<sup>21</sup> Ibid., 2.3.4.1, 207.

impartial third-party judges. As Grotius says, “the dictates of equity and natural reason declare that such a praiseworthy institution should have the fullest support.”<sup>22</sup> The state is not necessary, but it is praiseworthy. In other words, people does not offend against strict expletive justice by failing to create a state. Rather, a nation is guided by attributive justice to come together to form civil institutions of *imperium*.

It is revealing that Grotius implicitly places the creation of the state under concessive natural Right rather than strict preceptive natural law. If he did not wish to justify the state as being a necessity of reason under expletive justice, there is another category he could have chosen. This is the category of natural Right known by history, or what Grotius sometimes calls primitive, or empirical, natural Right. This category does not partake of rational necessity, as (for instance) the natural law dictating that protection of life is an obligation of any person at any point in history. Nor, however, is it part of attributive justice, which provides the guidance of wisdom and virtue in particular situations. Rather, it concerns those things that have been practiced since the primitive era of the human race, and have subsequently gained the universal assent of humanity.

Notably, this is where he places the institution of property. Private property is not known to be rationally necessary, but universal human assent has revealed it, through time, to be essential. For this reason, there is now a universal moral obligation to respect the property of others. Interestingly, however, Grotius not place the state in this category. In other words, the creation of the state is less necessary even than the institution of private property. It is not a universal obligation. Natural law (and natural Right) are thick enough to be known, taught, and informally enforced even outside of civil society.

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<sup>22</sup> Ibid., 1.3.1.2, 91.



A basic moral social existence does not require the institution of formal civil authorities and legal statutes.

Indeed, this is what allows Grotius to posit such robust norms in international affairs: relations outside of the state are analogous to relations between those who do not yet live in civil society. International relations lacks formal law, and even lacks any agreed-upon formal superior authority that might have the power to make binding commands. Yet the absence of positive law does not indicate an absence of political discussion about how to order international affairs. There can be (and often is) a society of international actors who are able to conduct public affairs through diplomatic discourse. Politics can take place in the absence of positive law.<sup>23</sup> (Of course, natural law applies as strongly as ever.)

This further explains why Grotius can endorse private war. One always has an authority to enforce natural law, except when one has made a promise with others to delegate that role (in relation to those others) to the enforcement mechanisms of the state. However, the state's monopoly on force extends only toward those inside the state. Thus, private individuals remain free to exercise (just) force against individuals outside their own state, or even against other states. Indeed, if there is insufficient time for recourse to the formal state apparatus of a third-party judge, necessity and equity permits individuals to use force even within the state (for example, in defending oneself from a robber).<sup>24</sup> Likewise, states may conduct wars against non-state actors. Although only wars between states are 'legal' wars, wars involving non-state actors (including individuals) may

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<sup>23</sup> Indeed, this is the theoretical approach of the English School of international relations, which accords Grotius pride of place as its intellectual progenitor.

<sup>24</sup> Ibid., 1.3.2, 92; 1.3.4.3, 98.

nonetheless be just. Grotius uses the analogy of a legal will compared to a codicil, or a legal marriage compared to a marriage among slaves. Grotius makes it clear that a war may be just (*iusta*) even if it is not formal (*iniqua*) or not legal (*illicita*). Grotius' chief concern, of course, is with justice.<sup>25</sup> Thus, while it is desirable that a war be formal, it is by no means necessary. The same is true of civil society in general. It is desirable that a state be formed, but it is by no means necessary.

### *Status of Supreme Authority*

In the formation of the state, the status of authority is essential. Indeed, this status of supremacy of power must be implicit in any agreement to establish civil society. It is essential to the state, and for good reason. Grotius outlines three types of status relations: superior, equatorial, and subordinate. One who is in a position of superiority or equality may constrain another. For example, Grotius argues that everyone has the right to constrain a debtor, forcing him to make good on his debt. Such a debt, however, arises only from the prior consent of the debtor; he was not directed by natural law or a political superior to assume the obligation. On the contrary, however, a command can be issued only by one who is superior, not by an equal.<sup>26</sup>

This distinction between constraint and command is important. In the equality of pre-civil society (or international relations), everyone is justified in restraining others from offending against natural law, and in punishing offenses that have already been committed. However, one with a merely equatorial *jus* can issue no positive commands.

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<sup>25</sup> Ibid., 1.3.4.1, 97.

<sup>26</sup> Ibid., 1.3.17.1, 124.

At most, an actor in this position can promulgate the pre-existing moral dictates of natural law. The issuance of commands, however, requires a superior *jus*. Indeed, Grotius defines a command as “an act of one having superior authority”<sup>27</sup> They cannot be effective without an assurance that they cannot be overruled by a higher *jus*, or a higher will.<sup>28</sup> Thus, the supremacy of the governing will is a prerequisite for the possibility of governmental action, whether executive or legislative.

Indeed, for this reason, the ruler is not technically a part of the community. In contrast, Grotius describes the ruler as “the one in whom the power of the whole resides.”<sup>29</sup> For this reason, the (positive) law does not apply to the ruler *per se*. Rather, the ruler is the one who makes the laws for the community. The ruler *qua* ruler cannot be simultaneously director and subject. As Grotius says, “no one can bind himself by means of law; that is, in the manner of a superior.”<sup>30</sup> However, the ruler as private citizen may still be bound by the ruler as governor. For instance, his own personal property is subject to the public laws that he makes for the state. However, the public property within his control is not subject to the public laws.

The importance of the supremacy of power gives important indicators to Grotius' philosophy of law. In the contemporary analytic jurisprudence debate between legal positivists and legal realists, Grotius can (anachronistically) be classified as a proto-realist. Where positivists will argue that a law has an independent existence (though not necessarily a moral one), realists assert that law is nothing more or less than the command of the superior. Grotius is closer to the realist position, but goes one step

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid., 1.3.7.1, 102.

<sup>29</sup> Ibid., 2.4.12.1, 228.

<sup>30</sup> Ibid.

beyond: he emphasizes that law is not merely the command, but the will of the ruler. By emphasizing the internal will rather than the external command, he intertwines personality with law, thus adding a subjective element. Moreover, assuming the ruler has a consistent will, this adds an element of continuing stability. In a certain sense, this reflects Aquinas' definition of justice, in which he adds "the constant and perpetual will" to the classical formulation of "rendering what is due." Thus, although law is universal (within its jurisdiction), it is still 'subjective', in the sense that it inheres in the subject who issues it. The law does not exist as an independent impersonal reality. Of course, ultimately, law must be understood within the broader horizon of normativity. The will of the ruler may or may not be consonant with natural Right.

The importance of supreme power creates an issue that Grotius must address. What happens when a supreme governor voluntarily assumes limitations? One common apparent limitation is the existence of a legislature. Grotius argues that this limitation is a mirage, however. The legislature exists at the pleasure of the ruler himself. Even if its approval is necessary for acts of government, such approval is essentially an extension of the will of the ruler.<sup>31</sup>

A more substantial limitation, however, comes from promises. What happens when a governor makes a promise, thus conferring a *jus* upon the promisee? Does this not make his own *jus* less than absolute? According to Grotius, it does not. The authority of the absolute governor is not compromised, because he still maintains a sphere of authority in which he is free to act as he wishes. Essentially, the ruler has simply hived off part of his existing sphere of authority, which does not render the

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<sup>31</sup> Ibid., 1.3.18, 124-25.

remaining sphere of authority any less supreme, even if the sphere is now slightly smaller. The same is true of a promise made to God. Such a promise also binds the ruler, but does not make him any less absolute as a ruler. Grotius hastens to add that he is not here speaking of adherence to natural law, divine law, or *jus gentium*, the observation of which is binding upon all kings regardless of their voluntary promises.<sup>32</sup>

Thus, while Grotius rejects popular sovereignty (at least after the original creation of the state), he seems to accept divided sovereignty. Although a unity of *jus* within a particular jurisdiction is necessary in order to govern, not all areas of public life need be governed by the ruler. In their constituting agreement, the people can decide which areas of *jus* to transfer (absolutely) to the authority, and which to retain. Thus, public life may be divided into separate jurisdictions. Within the ruler's areas of jurisdiction, however, his authority must be subject to nobody else. As Grotius says, “sovereignty is a unity, in itself indivisible.” It is as if there are separate heads over each area, rather than the nation having two heads that may conflict with each other.<sup>33</sup> Thus, while Grotius insists on the theoretical unity of supreme power, he allows a significant place for what, in practice, appears to be divided sovereignty.

### *Right of Rebellion*

Returning to practical politics, the necessary supremacy of power in the governing authority leads to a further – and substantial – implication: the people can have no right of rebellion. Indeed, if the people retained this right, it would mean that they ultimately

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<sup>32</sup> Ibid., 1.3.16.1, 121.

<sup>33</sup> Ibid., 1.3.17, 123-24; Grotius provides a litany of examples in 1.3.20, 125-130.

possessed the supreme power. This would subject the ruler to the constant scrutiny of the public. In particular, it would allow the people to withdraw their support from the ruler at any moment (or in response to any act of governing authority). In other words, the supremacy of power that gives effect to the commands of the ruler could be terminated at any time. Every command of the ruler would be greeted with doubt as to its continued effectiveness. As a result, the ruler would be entirely unable to act.<sup>34</sup> According to Grotius, popular sovereignty would result in the “utmost confusion”.<sup>35</sup> Indeed, such a right of rebellion would threaten the peace and order that is the very purpose of the state. In this chaos, human society would degenerate into a “non-social horde”, such as those of the Homer's Cyclopes.<sup>36</sup> Grotius clearly places order ahead of individual sovereignty. (His frequent citations of Augustine may not be accidental.)

Grotius draws a comparison with the realm of private *jus* over possessions. One who misuses property does not cease to be a property-owner. Likewise, according to nature, “governing authority (*imperium*) is not lost through its misuse, unless the (positive) law specifically declares so.”<sup>37</sup> He also draws the comparison with private promises. One is not released from a promise to another person simply because the promisee is a violator of natural law. Indeed, if this were grounds for release, what promise could ever be secure, given the fallen nature of humanity? This is particularly true of the difficult and messy realm of politics. As Grotius says, “the moral goodness or badness of an action, especially in matters relating to the state,...is frequently obscure,

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<sup>34</sup> Ibid., 1.3.8.13, 109.

<sup>35</sup> Ibid., 1.3.9.2, 111.

<sup>36</sup> Ibid., 1.4.2.1, 139.

<sup>37</sup> Ibid., 2.1.9.2, 176-77.

and difficult to analyse.”<sup>38</sup> Even if it were appropriate for subjects to hold the sovereignty, they have a limited capability to determine the overall justice of any particular governing regime, and thus its fitness to continue governing. However, the fact that the people have promised to obey renders this point moot in any case.

Grotius distinguishes this anarchic right of rebellion from temporary sovereignty, which he believes is more justifiable. Here the ruler is unquestionably supreme, but only within a defined time frame. However, the relinquishing of sovereign authority cannot be at the pleasure of the people; it must be arranged in the original agreement.<sup>39</sup> This also reflects the idea that the people cannot break the promises that they have made in the original constitution of the state. Thus, Grotius is willing to concede that sovereignty need not be perpetual in order to be effective.

Of course, given that the people are free to choose the nature of the authority to which they will promise loyalty, they may place limitations on the actions of the ruler. In the event that the ruler violates these provisions, the ruler would be the one to have broken the promise, thus nullifying the duty of obedience by the people. However, in the absence of such explicit stipulations, natural justice dictates no automatic right of rebellion, and the status of governing authority remains unaltered. Thus, the binding nature of the people's promise is not altered by subsequent governing actions that contravene natural law.<sup>40</sup>

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<sup>38</sup> Ibid., 1.3.9.2, 111.

<sup>39</sup> Ibid., 1.3.11.2, 114.

<sup>40</sup> To use the anachronistic framework of the social contract, one might be tempted to say that in the former case, the contract is between the people and the ruler (as in Locke), but in the latter case, it is only between the people (as in Hobbes). Such an interpretation, however, would obscure the fact that Grotius uses the framework of promise, not of contract. In the case of unrestricted governmental authority, the people still involve the ruler in their promise, because the ruler is the recipient of the promise. A promise is like a contract in that it involves at least two parties; however, it is unlike a contract in that it may oblige only one

### *Civil Disobedience*

It should be noted, however, that there are at least three separate types of unjust behaviour that the ruler might commit. The first is wrongful behaviour in the ruler's personal life. Such might include impiety, adultery, or things that generally set a bad example. No person can claim that such action invalidates the ruler's *jus*.

A second type of unjust action is unjust because it imposes an unfair burden on the particular subject of the command. This would be a breach of what is fitting, suitable, agreeable, or harmonious (*convenientia*) under attributive justice. For example, conscription of a particular person for forced labour, with no reason given for the particular choice of person, would clearly place an excessive and unjustifiable burden on the individual chosen. Yet there is nothing inherently wrong with labouring. Thus, if people are subjected to unjust or capricious treatment from the ruler, they ought to endure it rather than to resist. Grotius here cites Socrates' *Apology*, and it seems clear Grotius believes it is better to suffer than to commit injustice.<sup>41</sup> Indeed, the prosperous individual will go down to ruin if the state falls; but the downtrodden individual will be brought up by the state. Moreover, the Christian can rest assured that such long-suffering will not fail to achieve its (eternal) reward.<sup>42</sup>

A third type of unjust action is a command that orders subjects to carry out actions contrary to strict natural Right or the commands of God. Demanding worship of political rulers, murder of innocents, or blasphemy against God are examples of such violations of

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party. This promise to the ruler itself constitutes the governing authority of the ruler, even if the ruler is only a recipient of the promise. This differs from Hobbes' covenant, in which the people covenant amongst themselves, and the creation of the Leviathan is a by-product – even if inevitable – of this covenant.

<sup>41</sup> Ibid., 1.4.1.3, 138.

<sup>42</sup> Ibid., 1.4.4.2-4, 141-43.



expletive justice. In other words, rather than inflicting an injustice on the subject, the ruler is commanding the person to commit an injustice against God or nature (and, quite likely, another person). In this third case, subjects are fully free to resist these commands. Indeed, under natural Right, subjects are forbidden from following them. Thus, such commands do not compel the subject. Indeed, while the people cannot punish the ruler, they are responsible to publicly register their opprobrium.<sup>43</sup> The authority of the ruler, as regards the imperative force of the commands, is dead on arrival.

In other words, there is a substantial distinction between the status and the exercise of governing authority. Status is unchallengeable; exercise is highly proscribed. This distinction between status and action is already familiar. Indeed, it reappears in Grotius' later discussion of child kings (just as it has already appeared in the issue of children owning property). In such a case, the child holds the status of sovereign authority. However, because his age prevents him from governing, his exercise of that authority is silent.<sup>44</sup> In this way, through his unjust command to violate natural law, the governor infantilizes himself.

This should also serve to mitigate the shock of Grotius' extreme limitations on the justified possibility of rebellion. Grotius appears to give unjust rulers great impunity for their actions by denying subjects the right to replace such rulers. Yet what he takes away with one hand, he gives back with the other: while unjust rulers remain on the throne (or in office), the depth of their injustice (or inattention to public justice) corresponds to the size of the sphere of individual freedom to justifiably enforce natural right on one's own.

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<sup>43</sup> Ibid., 1.3.8.16, 111.

<sup>44</sup> Ibid., 1.3.15.1, 120-21.

Despite his wide latitude for civil disobedience, Grotius devotes surprisingly little attention to it. This is likely a result of the fact that he believes it so obvious as to be unworthy of extended treatment. Often it is simply implicit in his treatment of other subjects. This can be seen, for instance, when he considers the common conjecture that a ruler must be subject to the people in the event that he governs badly. He goes on to say that if this means that a manifestly wrong command should not be obeyed, it is simply repeating “what is true and is acknowledged among all good men.”<sup>45</sup> Occasionally he makes the point more forcefully, arguing that obedience to natural law is “an infallible rule, inscribed on the minds of all men”.<sup>46</sup>

Observers are sometimes quick to point out that in the latter half of Chapter 4, Grotius does list thirteen types of situations in which rebellion may be justified. Here he carefully enumerates a few situations of “extreme and imminent peril.” In these situations of unavoidable necessity, one is outside the bounds of normal morality, and rebellion is indeed possible. This echoes other references in *DJB* to the subject of necessity. For example, he devotes an entire section to arguing that, in cases of absolute necessity, one may use the property of others.<sup>47</sup>

Indeed, Grotius argues that an implicit exception must be assumed in the original constituting agreement of the state, as nobody would willingly agree to any arrangement that would threaten their own existence. Indeed, the promised agreement – even one that

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<sup>45</sup> Ibid., 1.3.9.1, 111.

<sup>46</sup> Ibid., 1.4.1.3, 138.

<sup>47</sup> Ibid., 2.2.6, 193-94. Later, Grotius hints at a possible theoretical justification for such an exception. In a subsequent discussion of necessity, he argues that – rather than contradicting natural law – necessity simply reduces the naturalness of law to the barest sense of animal nature, to which he referred in the beginnings of the *Prolegomena*. While this sense of nature is lower, is it nonetheless still part of nature. See 2.6.5, 261-62.

confers absolute power – assumes that the ruler cannot make himself an enemy of the people. As Grotius says, “the will to govern and the will to destroy cannot coexist in the same person.”<sup>48</sup>

Even in the case of a rebellion to save lives, however, Grotius imposes significant constraints. The ruler's life must be spared, and no malicious falsehoods can be promulgated to unjustly besmirch his honour.<sup>49</sup> Moreover, in a situation where such self-defense would so imperil the common good as to result in the deaths of many more, a person would be compelled to sacrifice himself for the commonweal.<sup>50</sup>

However, Grotius places such a high value on order that a people are not permitted to rebel against a usurper of the title to rule, if that usurper governs justly. Indeed, Grotius actually assumes that the deposed ruler would prefer the governorship of the usurper to anarchy. Furthermore, if a usurper comes to possess unmolested *imperium* for a lengthy period, time may eventually confer on him the legitimate *jus* of authority, even if his rule has not been explicitly authorized by the people. Accepting the weight of possession is clearly preferable to requiring the judgment of individuals as to the legitimacy of the new regime, which would open the door to chaos.<sup>51</sup> Thus, in some cases, the people may be unjustified in rebelling even against an (initially) unjust usurper. This also shows how Grotius extends consent to include the tacit consent of historical practice. This again testifies to Grotius' emphasis on history and practice, as explicit agreement may not be necessary.

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<sup>48</sup> Ibid., 1.4.11, 158.

<sup>49</sup> Ibid., 1.4.7.6-7, 151-52.

<sup>50</sup> Ibid., 1.4.7.2-4, 149-50. In regard to a republic, Grotius is significantly less restrained. See 1.4.8-9, 152-54; 1.4.13, 155-56.

<sup>51</sup> Ibid., 1.4.15-20, 159-63.

Likewise, after having suggested this possibility of justified rebellion, Grotius devotes the remainder of this section counseling against using such a right. Indeed, Grotius' devotes more space to this counsel in Section 7 than he does to the entirety of sections 8-20, in which he outlines the justified possibilities of rebellion. Here we see further evidence that any so-called right of rebellion is an exception to his system, not a prominent feature.

Indeed, Grotius begins his chapter on "War of subjects against superiors" by making it clear that such war is *not* generally permitted. This is not a right that is always reserved by the sovereign people, a perpetual sword of Damocles hanging perilously close to the neck of the executive. Rather, justified rebellion is the rare exception which proves the natural law forbidding rebellion.

### *Conclusion*

While Grotius' understanding of the creation of the state involves consent, it does not arise from a purely self-interested desire to protect one's life. Rather, this consent creates a state that will protect natural Right. However, the state does not simply add imperative weight to the pre-existing commands of expletive justice. After all, violations of such commands could already be punished in pre-civil society. As will be seen more clearly in *de Imperio*, it also allows for discernment and promulgation of laws in the moral realm left open by expletive justice. This allows civil society to promote the higher goods of attributive justice – the conception of the uniquely human good that motivates a people to institute political authority.

The creation and sustenance of the state does, indeed, require that the a ruler be vested with the expletive status of governing authority. By ensuring that he is supreme within his jurisdiction, this status allows for the order and peace that is necessary for distinctively human political society. Yet while possession of the status of sovereign authority is *descriptively* the *sine qua non* of a state, this authority must be exercised well in order to instantiate the good and true aims of the people. Thus, the *prescriptive* essence of the state goes beyond mere the legal-positive status of governing authority, and reveals to the ruler the wider normative horizon within which he must govern. Thus, expletive justice does not simply compel the subjects to keep their initial authority-constituting promise to the ruler, but it also compels the ruler to uphold and promote the the precepts of natural law. In the event that he fails to do so, subjects are free (indeed, obligated) to resist his commands. Thus, while a ruler is largely unassailable in his status as ruler, he may still be impotent to command, as a result of his inability direct his people toward the purpose of political life (namely, the development and enjoyment of their rational and social nature, leading to a knowledge of transcendent realities.) Thus, there is a stark contrast between the invulnerable status of *imperium* and the highly-prescribed exercise of *imperium*.

Indeed, at the very end of his detailed analysis of the nature of sovereignty, Grotius concludes by re-emphasizing the distinction between the possession of the *jus* of supreme authority and the exercise of this *jus*.<sup>52</sup> A legal-positive description of valid governing authority is only a starting point for the higher political-(super)natural understanding. The fact that the former can be understood on its own does not obviate its

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<sup>52</sup> Ibid., 1.3.24, 137.

need for ultimate fulfillment in the latter.

### *De Imperio*

Throughout Grotius' discussion of authority in *DJB*, one ought to keep in mind that *DJB* is not a treatise on the foundations of government. Its primary concern is the justice of a prescribed component of governmental activity: that of war (or, more broadly, international relations). In fact, in light of the possibility of private war, Grotius' counsel is not even limited to governments, but extends to all people. As a result, *DJB* is not the only – or even the best – place to look for Grotius' understanding of the foundations, nature, and extent of public authority. Rather, Grotius' under-explored *de Imperio* – a treatise ostensibly delineating the relation between public authority and sacred matters – provides a more detailed treatment of Grotius' understanding of authority. This, in turn, permits a fuller discussion of the status and the exercise of authority, and the interplay of expletive and attributive justice in it.

The first decade of the seventeenth century was a good one for Grotius the prodigy. In 1601, at the age of eighteen, he was selected (over a distinguished Professor of History at the University of Leyden) as the official chronicler of the history of the (newly-independent) low countries.<sup>53</sup> This was the first step of his rapid ascent up the ladder of Dutch society. Two years later, he would begin to establish himself in literary circles with the publication of *Adamus Exul*. His own rise coincided with the remarkable rise of small, newly-independent Holland as a major seafaring and trading power. That

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<sup>53</sup> Hamilton Vreeland, *Hugo Grotius: The Father of the Modern Science of Natural Law* (New York: Oxford University Press, 1917), 39-40.

same year, the Dutch East India Corporation would be formed, and its early commercial and military success in the East Indies would give rise to the controversy over the capture of a Portuguese fleet. This event inspired Grotius' first major work, *de Jure Praedae*, advancing his profile (and popularity) with a defense of the Dutch action. Soon after, he would become the Pensionary of Rotterdam, essentially becoming the mayor of Holland's second-largest city. By the end of the decade, he would be the right-hand man of Johann van Oldenbarnevelt, the Prime Minister of the Estates-General of Holland. By 1610, at the age of twenty-seven, Grotius was approaching the pinnacle of public and intellectual life in Holland.

The century's second decade would bring Grotius into much stormier waters. Holland was rapidly becoming a commercial center, and along with that came a remarkable influx of foreign guests and ideas. Along with this came theological controversy. Oldenbarnevelt advocated a 'middle way' approach to politics and religion, allowing a state church large enough for a wide spectrum of theological persuasion. At that time, however, a controversy began to rage at Dutch seminaries over questions of predestination and grace. This controversy would envelop Grotius, although, in truth, he did not do much to shy away from it. The orthodox Calvinist party sought to convene a synod to enforce assent to what is today known as the 'five points of Calvinism'. Grotius believed that the state should intervene to prevent such a synod, and *De Imperio Summarum Potestatum Circa Sacra* was written partly to advance this agenda. However, the aims of this work go far beyond the immediate impetus for its writing. It aims to lay out a comprehensive understanding of the relation between church and state. More

fundamentally, in order to determine the role of the state in governing church affairs, Grotius must go back to the very foundations and justification of political authority.

The first four chapters of *de Imperio* are a defense of the role of the supreme powers in spiritual matters. This is not a topic limited to this work. Grotius deals with the question of religious and secular government in several of his other works, including occasional references in *DJB*. However, it is most fully explored in *de Imperio*, as it is the express purpose of the work. Grotius' first sentence describes the term “supreme power” as that which has governing authority (*imperium*), and being subject to no other authority – except for God (*imperio Dei*).<sup>54</sup> Thus, he emphasizes at the outset that even the supreme governing power exists within a moral horizon outside his own realm. In other words, the universe is governed by a power to whom even the political authority is subject.

### *Tripartite Epistemology*

Consequently, the government of the state must consider this higher moral order. Political life does not exist simply to ensure the flourishing of the natural or purely physical realm. Such concerns are included in its role, to be sure, but they do not exhaust it. Rather, its ultimate purpose is to promote a particular conception of the Good. Because the Good deals with the whole person, and the person is able to participate in a higher reality, the supreme governor ought to be concerned with matters of religion. As

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<sup>54</sup> Hugo Grotius, *De Imperio Summarum Potestatum Circa Sacra (On the Power of Sovereigns Concerning Religious Affairs)* 1.1, critical edition with introduction, translation and commentary Harm-Jan Van Dam (Boston: Brill, 2001), 156-57. It is appropriate that Grotius separates the concepts of governing authority (*imperium*) and supreme power (*summum potestatum*). This shows that the practice of government is not exclusive to the supreme power. This is consistent with Grotius' taxonomy of four types of rule (or government), of which only one is exclusive to the supreme power.



Grotius says, “as far as divine things excel human ones, so much more glorious, more useful and even more necessary is knowledge of divine matters than of human ones.”<sup>55</sup> Indeed, that which is the sole concern of priests – the arranging of divine matters – is also the chief concern of the supreme powers.<sup>56</sup> Thus, there is no strict separation between sacred and secular matters. The only difference between the two is that the ruler has less latitude in sacred matters. This is because mistakes in sacred matters are more disastrous, and because a larger share of sacred matters are already defined by divine positive law. However, while these limitations pertain to the exercise of one's governing *jus*, they do not affect the *jus* itself.<sup>57</sup> This implicit distinction between status and action, which receives much attention in *de Imperio*, will be discussed later.

To support his claim that supreme governing authorities should attend to such lofty matters, Grotius employs his characteristic tripartite epistemology. He provides evidence from reason, revelation, and historical authorities (both sacred and secular).<sup>58</sup> From reason, he argues from the nature of supreme authority, deducing that it would not actually be supreme if it had no authority over spiritual matters. He also draws the analogy that just as man must be directed by an undivided will, the civil body requires a supreme head. He then refers to revelation, mentioning sources from the Bible, as well as from church history, pointing to the practices of the church over time. He also cites philosophical authorities in secular history, pointing to Plato's argument in the *Statesman* that the art of politics governs the other arts, and Aristotle's declaration that politics is

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<sup>55</sup> Ibid., 5.8, 266-69.

<sup>56</sup> Ibid., 2.6, 196-99.

<sup>57</sup> Ibid., 3.15, 230-33.

<sup>58</sup> Ibid., 1.3-9, 158-73.

architectonic because it directs education.<sup>59</sup> Thus, from the beginning, Grotius rejects a strict dichotomy between natural and supernatural, secular and sacred. The state exists to promote the good life as it relates to the entire person.

Grotius later reaffirms the importance of history when he finally comes to his discussion of synods – the ultimate polemical purpose of this theoretical work. Synods are not commanded by natural or divine law. Indeed, because they do not arise from direct precept, their very existence is a testament to their evolution through history. History may provide both precepts and examples, and Grotius briefly dwells on the distinction. A precept is universally binding, and can be known from the theoretical principles of reason. In contrast, an example illustrates the precept, and shows what would be prudent in particular circumstances. Its guidance is situational, not universal. Thus, examples show that, while synods have value in some times and places, they may be harmful in other circumstances. Without the knowledge-source of history, the church could never have availed itself of the benefits of synods. However, the governors of the church must also exercise the situational prudence to discern when the convening of a synod would actually be detrimental. Thus, Grotius reaffirms both reason and history (sacred and secular) as legitimate sources of moral counsel, despite their distinct modes of operation.<sup>60</sup>

### *Order as Practical and Existential*

As stated above, Grotius conceives of the political realm as being ordered toward

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<sup>59</sup> Ibid., 1.3, 158-63.

<sup>60</sup> Ibid., 7.2, 326-31.

the higher realm of religion. However, the benefits of commingling sacred and secular flow both ways. Indeed, Grotius asserts that a ruler cannot “neglect knowledge of church government, for nothing is more excellent than this or more important to the integrity of the state.”<sup>61</sup> The promotion of this “prime and principal [human] end” (namely, religion) also provides extrinsic benefits to the political order itself. Taking up Augustinian themes, Grotius argues that the devout practice of religion makes people “quiet, obedient, patriotic, and observant of *jus* and equity.”<sup>62</sup>

Indeed, religion is a boon to the morality of the state not only through its direct emphasis on moral precepts and sanctions, but even indirectly, through its doctrines and its ceremonies. The turning of the soul toward the divine also helps to cultivate moral virtues; piety and public morality are related. Here he cites Book II of Plato's *Republic*, emphasizing that the necessary virtues are not merely intellectual but existential, corresponding to the whole person.<sup>63</sup> This emphasizes the place of practical (and not simply intellectual) virtue for Grotius, and does so while pointing to the necessary role of the transcendent in developing this virtue. Indeed, Grotius argues that religion even helps to cultivate the virtues needed for government. As he says, “religion furthers knowledge and knowledge religion.” Conversely, there are two major obstacles to right judgment: ignorance and wickedness.<sup>64</sup> This indicates that virtue corresponds to the whole of the person – not simply reason, but also will and desire.

Indeed, when Grotius turns to discuss Christianity, he emphasizes practice over doctrine. Christianity is not like metaphysics or history or linguistics, which are best

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<sup>61</sup> Ibid., 6.6, 298-301.

<sup>62</sup> Ibid., 1.13, 174-79.

<sup>63</sup> Ibid., 1.13, 178-79.

<sup>64</sup> Ibid., 5.8, 266-69.

practiced by experts who can comprehend their complex subtleties. Rather, it is simple and plain. The teachings of the Gospel – God's complete revelation in the person of Christ – are easily understandable, even to those commoners who spend their days in labour rather than study. Thus, the heights of Christianity are not limited to theologians, or attained in the ever-more-precise development of doctrine. Rather, the fullness of the faith is open to all through the practical and experiential manifestation of the Christian virtues.<sup>65</sup> For this reason, the “soul of the church” is most fully manifested in peace and unity among Christians. Indeed, Grotius attributes what he sees as the noble and admirable character of the early church to its very love and harmony. This further illustrates that action, not assent to propositions of doctrine, is the essence of Christianity. Fortunately, Grotius argues that matters of action are as clear and easy to understand as matters of doctrine are murky and difficult – citing no less an authority than Chrysostom.<sup>66</sup>

This understanding of practice over doctrine may actually help to explain why Grotius is so comfortable with the idea of a lay supreme authority governing the church. On a very basic level, doctrine does matter. However, the essential doctrines of Christianity are simple to understand. As a result, it is unlikely that the governor will lack competence in this area.<sup>67</sup> Nor are controversies likely to arise over these well-established central tenets in the first place. However, in more detailed and obscure – and

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<sup>65</sup> Ibid., 5.9, 268-75.

<sup>66</sup> Ibid., 6.9, 308-13.

<sup>67</sup> Ibid., 5.9, 268-75. Grotius does admit the possibility that the governor may rule badly on these matters. However, all men are fallible; passing this role on to someone else is no guarantee of good government. He adds that Divine Providence is able to work through bad rulers as well as good ones. After citing Augustine, he says, “sometimes calm weather is more useful to the church, sometimes a storm.” See 8.2, 374-77.

thus inessential – matters, controversy is much more likely. This is particularly true of theological constructs and terms not found in Scripture (such as “*homooousion*”, “Trinity”, or “unbegotten”). Indeed, one of the most significant threats to Christian peace and unity is this very dogmatic controversy. Correspondingly, one of the best ways to foster unity is to abstain from definitions in matters other than “those doctrines necessary or very profitable for salvation.”<sup>68</sup> He cites the authority of Augustine and other church fathers, who counsel against defining things. He also argues that the historical disagreement of theologians over fine points of doctrine has not harmed the body of faith, as least in cases where this disagreement did not spread to the many faithful. He also points to the fact that the church resolved the Pelagian controversy without addressing issues of free will and predestination, and that the Council of Chalcedon was able to describe Christ as one person with two natures without inquiring into the precise manner of the hypostatic union.<sup>69</sup>

Indeed, a wealth of theological erudition may be detrimental for a church governor, because he may become attached to specific doctrines on inessential matters. On the contrary, precisely by nature of his lay status, the governor will be unable to take a rigid position in controversies over detailed and specific matters of doctrine.<sup>70</sup> Grotius argues that the ruler must take on the extremely difficult task of being moderate in knowledge.<sup>71</sup> Christian devotion is more important than knowledge. The true Christian leader recognizes the importance of avoiding schism, as seen in the great efforts of the

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<sup>68</sup> Ibid., 6.9, 310-11. Compare this with Hobbes' insistence in *Leviathan* that one can say nothing without the prior foundation of definitions: they are “but insignificant sounds”. See Thomas Hobbes, *Leviathan*, Bk. 1, Ch. 4, ed. C. B. Macpherson (New York: Penguin, 1968), 100-110.

<sup>69</sup> Ibid., 6.9, 308-13.

<sup>70</sup> Ibid., 8.6, 380-83.

<sup>71</sup> Ibid., 5.9, 270-21.

Christian emperors to avoid schism, as well as the indifference shown it by Julian the Apostate.<sup>72</sup> Indeed, Grotius praises Constantine for preventing schisms by cutting off discussion of useless questions, and – in a barely concealed polemic – longs for rulers of his day to do the same.<sup>73</sup>

Thus, because order is practical rather than propositional, and is manifested in peace and unity, schism is more of a threat than heresy. Conveniently, nobody is more uniquely well-suited to deal with such a threat than the supreme ruler, as he is already concerned with maintaining peace and unity in the realm of secular government. Indeed, given that religion includes public worship, it will be difficult for him to ensure secular peace without first fostering religious peace.

The implications for politics, even in a secular sense, are easy to extrapolate. Grotius' relatively greater concern over schism points toward the importance of order and unity, a matter which is distinctly public and even political. It is more important to maintain a “middle way” that will ensure harmony in a particular polity than it is to insist upon conformity to a pre-arranged written constitution. Order is political and practical, not propositional. Good political rule is more important than a well-developed written constitution and ever-more-specific laws.

### *Natural Right and Natural Law*

This emphasis on order as existential rather than propositional points toward Grotius' overarching conception of natural Right and natural law. As in his private letter

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<sup>72</sup> Ibid., 6.9, 308-13.

<sup>73</sup> Ibid., 8.6, 380-83.

and *DJB, de Imperio* also explores Grotius' structure of natural Right. In this exposition, he affirms that acts may be morally definite or morally indefinite, even prior to the institution of government. On a basic level, this simply reaffirms his belief in natural justice in the broad sense (namely, the idea that morality precedes the positive agreement of the state.) Thus, authority is not only political, but may precede the state: positive law authority includes both that of God and that of a father over a household.<sup>74</sup>

More importantly, however, this distinction between definite and indefinite moral realms aligns with Grotius' earlier distinction (in his private letter) between preceptive and concessive components of strict (or mandatory) natural Right. This becomes even clearer when Grotius later turns to discuss the two senses of the term “natural”. The first sense is absolute, commanding actions such as the worship of God, honouring one's parents, and refraining from harming the innocent.<sup>75</sup> This accords with his understanding of expletive justice. These acts, being obligatory or forbidden, fall under preceptive natural Right.

Yet while natural law issues directives in areas that deal in universality, even prior to the institution of civil society, there is another sense of nature: not absolute, but “according to human circumstances.” This appears to correspond to the realm of concessive natural Right, in which natural law does not prescribe a particular path, but permits a plurality of licit courses of action. Among these licit options might include default practices such as common ownership of things or bestowing inheritances upon the next of kin. However, this realm of permissive natural Right is often governed by

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<sup>74</sup> Ibid., 3.2, 208-09.

<sup>75</sup> Ibid., 7.2, 328-331.

attributive justice, as called for by the circumstances. Thus, practices in this realm are mutable by prudent human action, as seen in the institution of private property and the directive of a testament. These actions, guided by attributive justice, limit the sphere of concessive natural Right by allowing governors to make additional positive rules. Thus, this is the realm of specifically political action.<sup>76</sup> In his particular circumstances, Grotius believes that attributive justice counsels against exercising the concessive natural right to hold a synod.

#### *Nature as Immutable*

Interestingly, in his discussion of nature, Grotius includes as natural even those principles that proceed in a stable and consistent manner out of supernatural foundations. He gives as an example the idea that the Trinity is one God, and thus deserving of worship. This illustrates the implicit principle that the term “natural” is primarily known in opposition not to “supernatural”, but to “arbitrary”. Indeed, unlike natural laws, positive decrees may be limited by (and thus relative to) time, and are therefore mutable. This mutability, in turn, testifies to the existence and relevance of the will of the authority who issues them. Because this authoritative will is not necessarily known by those subjected to it, it may be seen from their outside vantage point as arbitrary (*arbitrario*). (Indeed, if the reasoning were universal and unchangeable, and therefore knowable in advance, it would instead be part of natural law.) Hence, the defining characteristic of the term “natural law” seems to be its immutability, rather than its separation from sacred matters. Correspondingly, the defining characteristic of positive law is the fact that it

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<sup>76</sup> Ibid., 7.2-3, 326-35.



derives from will and is mutable.<sup>77</sup> Thus, Grotius appears more concerned to draw distinctions between natural and positive law than between natural and supernatural law. In turn, this points toward the importance of his distinction between natural law, as the realm of immutable truths, and natural Right, as the realm in which will and judgment are manifested.

This emphasis has further implications. On the one hand, it reaffirms Grotius' earlier statements on the interlinked nature of the natural and the supernatural. The fact that natural laws can pronounce on Divine matters shows that some aspects of religion are required even according to natural law. On the other hand, however, it also appears to emphasize the unique importance of the will, by separating it more clearly from nature.<sup>78</sup> This emphasis on the will brings with it an emphasis on the person, or the subject. Its 'subjective' character, however, does not decrease its importance or banish it from the highest sense of justice or Right. Rather, Right is necessarily personal – as is God, its ultimate source. Grotius does not have a merely deist conception of God as creator of nature. Rather, his understanding of God is fundamentally Christian, because of his emphasis on God's active will. God exercises this will by entering into history – that is, intervening into the changeless created order – and acting out of concern for the good of the people he has created.

Naturally, this Divine action may include positively willed commands. Such commands are may be permanent, or they may be temporary. They may also be universal, or given only to some people.<sup>79</sup> This potential relativity to time and place

<sup>77</sup> Ibid., 3.3., 208-09.

<sup>78</sup> This may be another indicator of themes in Grotius' thought as being subsequently taken up by Kant, with its distinction between nature and will and its association of the person with the latter.

<sup>79</sup> Grotius, *DJB* 1.1.15, 45.

testifies to God's prudential consideration of historical-situational factors. This also points to natural Right as ultimately transcending 'objective' nature.

### *Five Purposes of Government*

The aforementioned role of positive governmental directives in instantiating attributive justice further supplements Grotius' reasons in *DJB* for entering into civil society. This can be seen in the five-fold taxonomy of purposes of the state that Grotius sets out in *de Imperio*. Government does not exist simply to add imperative weight to those prescriptions that already exist in natural law. Such a function is, to be sure, one of its purposes. Indeed, his first stated purpose of government is to remove obstacles to adherence to natural law, and and to provide support to the cause of justice. This purpose is also correlated with his second purpose, that of removing occasions for temptation. A third purpose builds on this, in that the imperative force of punishment creates incentives to adhere to pre-existing directive moral truths.<sup>80</sup>

However, moral reality is not exhausted by immutable natural laws that arrive, as it were, already predetermined. Such dictates of expletive justice are only part of the story. There is another area of natural Right that is open to the human guidance of contingent courses of action in particular situations.<sup>81</sup> This opens up a space for the practice of politics proper, as characterized by the practical virtues. This may also apply to the situational determination of how best to carry out natural law. The realm of politics allows for such prudential determinations, in regard to both moral means and ends. This

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<sup>80</sup> Grotius, *De Imperio* 3.11, 220-23.

<sup>81</sup> *Ibid.*, 3.12, 225.

corresponds to the fourth of Grotius' purposes: government regulation allows natural law to be carried out in a decent and ordered fashion.<sup>82</sup> Such things must be interpreted according to time, place, manner and persons, which emphasizes the central role of prudence.<sup>83</sup>

Grotius' final purpose of government, however, is more intriguing. Where an official government sanction adds imperative force to the pre-existing indicative weight of natural law (as seen in his third purpose), Grotius mentions that it also adds additional *indicative* weight to the conscience. Politics is not simply about punishment, but about knowledge of moral truths. The state is not simply coercive, but educative. It should not simply add extrinsic reasons to follow natural justice. Rather, it should add to the chorus of intrinsic reasons.<sup>84</sup> This may explain Grotius' later suggestion that the law should not simply give specific ordinances. Rather, it should contain preambles that educate subjects on the reasoning that supports the commands or prohibitions. One should not rely solely on the sword, but also on reason. This is the best way to ensure harmony among the people governed.<sup>85</sup>

This final purpose of government provides an independent moral grounding for the existence and integrity of the positive human law itself. This high regard for the law as a whole, which helps to account for Grotius' later conservatism regarding the right of rebellion, is consistent with Aquinas' high view of the law. (This can be seen in his statement that one ought to accept the suffering of some injustice, because public honour and respect for the law is valuable in itself, and may be undermined by constant protest.)

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<sup>82</sup> Ibid., 3.11, 222-23.

<sup>83</sup> Ibid., 3.4, 208-11.

<sup>84</sup> Ibid., 3.11, 220-23.

<sup>85</sup> Ibid., 6.10, 312-15.

However, it is also consistent with the value that Grotius places on legal validity, independent from moral rightness.<sup>86</sup>

In this way, Grotius' understanding of positive law (and executive government) actually allows a place for governing authority as discovering and promulgating indicative truths of natural justice. This is made possible by his natural Right framework. If he were to conceptualize natural justice strictly through a natural law framework, ignoring natural Right, natural justice could only then be knowable through a specific and detailed set of natural laws. By closing off attributive justice, this would leave only two realms for government.

The first would be the realm of strict natural law morality. This realm would already be fully known through laws of nature. The task of government would be nothing more than the addition of imperative weight (that is, coercive force) to the indicative power of these natural laws. Such positive laws would have no ontological existence in the discernment of moral truth. They could exist only as incentives to follow already-existing natural laws.

Of course, these pre-existing natural laws would not direct or limit action in all areas of existence; a significant realm of human action would be outside its purview. This realm of concessive natural Right would be entirely amoral. This would open up a second realm of governmental action: that of simple co-ordination. One classic example would be the directive that motor vehicles must drive on the right side of the road. Of course, once the state makes such a determination, people are morally bound to follow its command. However, such laws do not (and cannot) ever point toward a natural sense of

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<sup>86</sup> Ibid., 3.4, 210-11.

morality. The choice of one country to drive on the right side of the road says nothing about the inherent moral superiority of driving on that side. The choice of other countries to drive on the left side is – and always will be – equally morally legitimate. In fact, the ruler of a country could justly make this decision by flipping a coin. Moreover, if such a directive is not given effective imperative weight, its indicative power would cease to exist. If this absence of enforcement led all to ignore the law, driving instead on the left side of the road, it would cease to be moral to drive on the right side. Thus, a natural law framework allows for enforcement of pre-existing natural law and co-ordination in amoral matters.

However, Grotius' natural Right framework allows for a third moral realm of government. Under this framework, the realm of concessive natural law is not entirely amoral. Rather, part of this realm of freedom exists within a morality that pre-exists the statutes of government. Thus, this realm is unlike the second realm of co-ordination, because its morality pre-exists its enshrinement into statute law. It also differs from the first, because its normative content cannot be known in advance by philosophers, through universal formulations of natural law. Rather, in this realm, nations are free (indeed, enjoined) to make positive laws as is most morally fitting in the situation. Because these regulations cannot be discerned outside of practice, they will likely differ from one context to another.

Thus, on one hand, these regulations testify to a normative reality that precedes them. On the other hand, the particular formulation of such a directive is not known through extra- (or even pre-) political natural law, because it is not knowable outside a

particular community and situation. Thus, in this realm, the positive law actually plays a role in discerning (and promulgating) principles that could not have otherwise been known. Here, positive law has independent *indicative* weight, by distilling the inherent moral truth discerned in practice into a statute that can be promulgated to all. This contrasts with the first realm, in which positive law has imperative but not indicative weight. It also contrasts with the second realm, in which the positive law has indicative weight only inasmuch as it is also imperative. In the third realm, positive law points toward true morality regardless of enforcement. This adds to the moral knowledge that is already known through pre-political natural laws.

The first of these three realms is governed by expletive justice. There is no moral freedom in this area; states are morally compelled to enshrine these laws of nature into positive law. In doing so, the state simply adds imperative weight to these already-existing natural laws. However, in Grotius' system, there are few such laws. These include the protection of life, limb, and property, as well as restitution and punishment.<sup>87</sup>

The second realm is also governed by expletive justice, but in a more contingent fashion. Because this realm is not already governed by the pre-existing commands and prohibitions of natural law, this area is by nature a realm of human freedom. The governor is able to eliminate this freedom by imposing co-ordinative laws. However, expletive justice demands that these laws be followed not because their morality is inherent, but because the people who constituted the state have promised to obey the commands of the ruler. Under expletive justice, one is universally required to keep one's

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<sup>87</sup> Grotius, *DJB* Prol.8, 12-13.

promises.<sup>88</sup> Indeed, this is what allows human positive right to participate in natural Right. The only exception to this rule, of course, is when the ruler gives a directive to violate pre-existent principles of natural law. Indeed, Grotius' understanding of promise seems to imply that one cannot promise to violate natural law.

The third realm, however, is the realm of attributive justice. This is also a realm of human freedom. Here rulers enact positive laws that are not demanded by the strict dictates of natural law. However, nor are these laws arbitrary. Rather, these positive laws correspond to what is fitting or appropriate in a particular situation. Thus, attributive justice allows (some) positive laws to play a role in discerning natural justice, by allowing history, practice, and prudential judgment as its sources. Thus, Grotius' attributive justice accords positive laws the possibility of having their own ontological directive weight.

The second and third realms are both inaccessible to pre-civil society. Pre-civil society is unable to govern areas of particular time and place: areas in which natural law, owing to its blunt universality, must remain silent. Thus, the existence of superior and subordinate status that gives rise to the possibility of positive laws permits not only the efficient co-ordination of the second realm, but also the instantiation of attributive justice in the third realm. Although the institution of civil society is not a moral imperative under expletive justice, these latter two categories point to the benefits – both self-interested and moral – of instituting civil society in the first place.

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<sup>88</sup> Ibid.

### *Status and Action*

As has been mentioned, an essential aspect of civil society is the institution of governing authority, and the status of “superior” and “subject” that follows. Where Grotius' very first sentence of *de Imperio* testifies to a realm that transcends politics, a realm to which political life is ultimately ordered, his second sentence points toward this equally important theme of governmental status and action. Having defined “supreme power” as the person or body having the status of rulership, Grotius proceeds to point out that the possession of such authority is different from the actual exercise of authority. In particular, he distinguishes between the status of possessing the *jus* of authority (*pro jure*), and the manner in which it is carried out (*pro ius habente*).<sup>89</sup>

In order to address this issue more substantively, Grotius concludes Chapter 5 by addressing the conceptual foundations of *jus*. This passage – as with his treatment of the issue in *DJB* – displays the subtlety of Grotius' treatment, and provides another example of why he is so often misread. Grotius begins by defining *jus* as a moral faculty. This passage would seem to vindicate those who read Grotius as a possessive rights thinker.

In a higher sense, however, the mere possession of authority is not an end in itself, but a bare prerequisite for governing action. Indeed, *jus* corresponds only to legal validity (*actus ratus*). Grotius immediately distinguishes such validity from true rightness (*actio recte*). Hence, this moral faculty provides only the procedural component of the act. In order to ensure a just outcome, the additional consideration of rightness enters into play.<sup>90</sup> This distinction between status and action will subsequently

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<sup>89</sup> Grotius, *de Imperio* 1.1, 156-57.

<sup>90</sup> *Ibid.*, 5.11, 274-77.



serve as an organizing principle for the remainder of the book. For example, Chapter 6 is entitled “How to rightly use one's governing authority.” He will begin it by reiterating the distinction between possessing a *jus* and exercising it well. Valid possession does not guarantee good use.<sup>91</sup>

Grotius then goes on to describe this *actio recte*. Here he enumerates four characteristics. First, this rightness comes from a well-formed understanding. One must have a declarative knowledge of truth, rather than simply a *jus*. Second, it requires an honourableness of purpose. Thus, the intention of the individual is paramount. A right act cannot be determined solely by its tangible, external characteristics that are visible to the world. Rather, it proceeds from the will of the person. Third, *actio recte* requires the virtue of moderation. One must restrain one's personal desires and appetites. Rightness is not simply a matter of theory, but involves the moral virtues. Finally, one must consider the circumstances. Thus, prudential judgment is necessary. There is no universal law of reason that can dictate the proper course of action.<sup>92</sup>

Later in Chapter 6 comes Grotius' strongest statement about the difference between the status of possessing a right and the action of exercising it. Pointing toward the necessary aptitude for the latter, he states that “the rules for exercising one's duties extend through all the virtues and beyond mere *jus*.”<sup>93</sup> Here is his strongest indication of the importance of virtue in exercising one's right. It is true that one will never be outside his right, even without virtue. However, without virtue, one will never act rightly. Natural rights lead to natural Right.

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<sup>91</sup> Ibid., 6.1, 292-93.

<sup>92</sup> Ibid., 5.11, 274-77.

<sup>93</sup> Ibid., 6.13, 316-19.

Yet Grotius' willingness to allow *jus* to stand on its own as a descriptive legal reality reaffirms the place of expletive justice. The possession of this moral faculty remains a procedural prerequisite for just action. Grotius points to the Old Testament example where the Hebrews would have been wrong to rebuild their temple without the assent of their pagan king Cyrus.<sup>94</sup> Thus, in one sense, possessive rights are self-sufficient on their own. One who has the right to act is safe from acting illegally.

Moreover, by exercising the right poorly, one does not lose the right. Grotius gives examples of a bad verdict by a judge, a prodigal use of one's resources, or an unduly harsh parent. None of these actions invalidate the position of judge, owner, or parent.<sup>95</sup> Indeed, if a wealth of expertise in judgment were a precondition for the possession the *jus*, many honest civil judges would be put out of work simply because other lawyers have more expertise.<sup>96</sup> Later, he asserts that "nobody may be denied his right on account of liability for misuse; otherwise nobody's right is safe."<sup>97</sup> The aptitude of judgment is not the same as the *jus* of judgment. One who does not have the fitness for judging does not thereby lose the right. Even if it is best, as Plato said, that philosophers become kings, they are not therefore at liberty to usurp the throne.<sup>98</sup>

### *Right of Rebellion*

The fact that the poor exercise of *jus* does not invalidate its status reinforces Grotius' denial in *DJB* of the right of rebellion. The possibility of just government

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<sup>94</sup> Ibid., 5.12, 276-79.

<sup>95</sup> Ibid., 5.11-12, 274-83.

<sup>96</sup> Ibid., 5.14, 284-85.

<sup>97</sup> Ibid., 8.2, 375.

<sup>98</sup> Ibid., 5.14, 284-87.

requires the security of the right to govern. Indeed, the possibility of issuing effective governing commands relies on the ruler's status as supreme. If the power is not supreme, then it is not ultimately powerful, because the possibility of its imminent overthrow will lead subjects to ignore its governing commands. Thus, due to the need for (and because of the existence of) its supremacy, the *jus* of political authority cannot be lost through its bad exercise. Armed resistance can take place only against those of equal status, not against rulers, to whom one is subordinate.<sup>99</sup>

Nonetheless, Grotius seems aware of the apparent incongruity of his simultaneous emphasis on natural justice and his reluctance to condone rebellion against unjust authorities. This may account for his clarification that, while the position of lawmaking and judging is supreme, it is clearly not infallible (which will become clear in his subsequent discussion of the different types of rule and judgment).<sup>100</sup> If the ruler's poor (or even evil) governance results in an injustice against a person, or against prudence and good order, subjects may be obliged to endure them. (Indeed, such patient endurance may be beneficial to the church; one is reminded of Grotius' earlier dictum about how the church is sometimes better served by a storm than by calm weather.)<sup>101</sup> God has given the sword only to the ruler; no amount of injustice committed against themselves is sufficient to justify armed revolution.<sup>102</sup> The ruler is within his right to order such things; the order

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<sup>99</sup> Ibid., 3.14, 226-31.

<sup>100</sup> Ibid.

<sup>101</sup> Grotius argues that one may flee the country, but the Christian resorts to such an option at his own peril, as Christianity requires submission to rulers, even unto death.

<sup>102</sup> Grotius' justification for the ruler's monopoly on coercive force is not entirely consistent. In *de Imperio* he tends to use theological justifications, suggesting that the ruler is appointed by God. However, he never alludes to any theory of divine right. Elsewhere, he leans heavily on his tripartite theory of the origins of authority: generation, consent, and crime. These leave little room for divine appointment. (One might suggest that the original sin of humanity confers authority on God under the category of "crime", but Grotius never appears to follow this line of reasoning himself).

is valid. However, subjects are not to accept them as actually being just. As a result, if the ruler's evil governance results in a command to commit an injustice against God, they are not obliged to follow the governor's command. Indeed, even though the order is legally valid, they are obliged by a higher standard *not* to follow this command.<sup>103</sup>

This demonstrates the relevance of the distinction between status and action. There is no circumstance by which the status of governorship can be lost. The ruler cannot be removed even for issuing commands against God's law. On the contrary, however, the governor's ability to legislate or exercise binding judgment is highly limited. Grotius speaks of the term "supreme power" in such a way that implies the pre-existing limits of divine and natural law. For this reason, any command that is contrary to the divine or natural law (constituting the moral horizon within which he operates) will be rendered inert.<sup>104</sup> Thus, while his status is secure, his exercise of that status is highly limited. As Oliver O'Donovan describes it, Grotius' supreme power is "unchallengeable from below and perilously exposed to judgment from above."<sup>105</sup>

However, this perilous exposure is not simply to judgment from above, but also from below. While Grotius' relatively strong role for government in sacred matters might lead one to believe that he wishes to emasculate subjects (or the church), this perception would be mistaken. While the ruler's *imperium* is unassailable, *imperium* must be understood within Grotius' wider understanding of the nature of rule. Indeed, *imperium* is only one of several forms of rule. There are other types of rule that subjects (or the

<sup>103</sup> Ibid., 3.14, 226-31; 5.4, 265; 5.12, 276-83; 6.14, 318-21. What, then, of the ruler issuing such evil commands? As Grotius says, "a stern judgment awaits him from the King of the church, who will not let the church be unavenged." See 8.2, 376-77.

<sup>104</sup> Ibid., 3.13, 226-27; 4.13, 258-59.

<sup>105</sup> Oliver O'Donovan, "Review: *De Imperio Summarum Potestatum Circa Sacra*" *Theological Studies*, Sept. 2003 (64:3), 629.

church) may exert – even over the ruler himself. This requires an exploration of one of the most valuable theoretical contributions of *de Imperio*: its taxonomy of types of rule or governance.

### *Types of Rule*

Grotius begins by discerning two fundamental categories of rule (*regimen*): directive and constitutive. Directive rule corresponds to the indicative function of Right. It is then sub-divided into two species. Grotius terms the first of these species “persuasive rule.” Under persuasive rule, those ruled do not lose their freedom of action. This type of rule has force on account of the prestige that belongs to its counsel, but not any direct power to command. Grotius gives the example of the sort of advice commonly dispensed by physicians, lawyers, or counselors.<sup>106</sup> Its exercise may help others to better exercise their freedom. However, it does not impose a strict or direct obligation to act in a specific way.

Thus, one would exercise persuasive rule in the realm of natural Right. Persuasive rule governs the realm of human freedom permitted in concessive natural law. It has no binding force from human will. Even its indicative weight can never be perfectly binding, because it cannot partake of certainty. This does not mean, however, that one is morally free to ignore persuasive guidance.

The other type of directive rule is termed “declarative rule”. Under this category, as well as all remaining categories, those ruled do, in fact, lose their full freedom of action. Declarative rule does not create an obligation; it has no imperative weight on its

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<sup>106</sup> Grotius, *de Imperio* 4.6, 246-49.

own. However, declarative rule makes someone aware of an obligation according to strict natural law. It is not the mere giving of advice about better and worse courses of action, as with persuasive rule. Rather, it points out the pronouncements of natural law, which are direct and clear. By promulgating the natural law to the subject, it renders effective the imperative force of God that inheres in the natural law.

To illustrate declarative rule, Grotius uses the example of a physician informing a patient that he must change his habits, or else he will die. Once the patient understands this declaration, he is now bound to follow it as a command. However, its binding force comes not from any *jus* that the physician has in himself, but because natural law itself imposes an obligation to care for one's own health and safety. The same is true of philosophers who direct moral and political life through their knowledge of natural law.<sup>107</sup>

Thus, declarative rule is operative in the realm of natural law, where the moral and political standard is clear, unchanging, and absolute. It functions by promulgating the dictates of expletive justice. As with persuasive rule, any binding force does not come from human will. However, unlike persuasive rule, declarative rule can render effective an already-existing discrete and clear natural obligation.

The other genus of rule is called constitutive rule, and it corresponds to the imperative function of Right. It, too, is divided into two species: that based on consent, and that based on authority (*imperium*). Consensual constitutive rule gains its power from the positive agreement of two or more parties. One party confers on the other party

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<sup>107</sup> Ibid. Considering Grotius' strong distinction between natural law and positive law, one might get the impression that natural law is purely declarative and positive law purely imperative. However, because natural law originates in the divine creation of the universe, it is implicitly also imperative, as it originates in the command of God. The difference between natural law and positive law does not actually correspond to the distinction between directive and imperative force, but whether it is known through reason or through authority.

(or parties) a (temporary) imperative force over itself through its own positive agreement to transfer this pre-existing *jus*. Within a small area of jurisdiction, this confers a status of “superior” on the one possessing the rule, and of “subject” on the promisor. (Of course, the involved parties may simultaneously be promisor and promisee.) It brings into existence an obligation that did not previously exist in natural law, even though natural law now serves as a guarantor of that obligation. This is the realm of human positive right.

The final species is that of *imperium*, which might most accurately (and inelegantly) be described as “naturally authoritative constitutive rule”. This *imperium* flows from a status of superior and subordinate that is ordinarily comprehensive and permanent. In other words, the obligating force of the specific order does not come from the consent that the parties have given it (other than perhaps in the original institution of the state). Rather, it has intrinsic obligatory force, arising from the status of superior and subordinate that is inherent in its governing nature. This superiority obviously applies to the supreme power, although it may be delegated to inferior magistrates to exercise on his behalf. There is only one type of naturally authoritative constitutive rule that is not derived from a political superior: that carried out by the head of a household. Nonetheless, the head of the household is subject to the *imperium* of the supreme power in his role as citizen.<sup>108</sup>

These various forms of rule can be laid out in the following table:

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<sup>108</sup> Ibid.

	TYPES OF RULE			
	Directive (Indicative)		Constitutive (Imperative)	
	Persuasive	Declarative	Consensual	Natural
Type of Right	Natural Right	Natural Law	Human Positive Right (Private)	Human Positive Right (Civil)
Type of Justice	Attributive Justice	Expletive Justice	Attributive or Expletive Justice (or neither), but guaranteed by Expletive Justice	Attributive Justice and Expletive Justice
Type of Relation			Equatorial Relation	Superior/ Subordinate Relation

### *Tasks of Imperium*

As its title would suggest, the primary focus of *de Imperio* is that of naturally authoritative constitutive rule, or *imperium* (although his conception of civil disobedience, to which we will soon return, will rest on the other types of rule). Here Grotius further divides *imperium* into three tasks, each of which Grotius accords its own chapter in the book. The first task is that of legislation. This is an act of authority that applies to society as a whole. The second function he calls “jurisdiction”. This involves carrying out the administration of these laws, as they affect individuals (or groups) in a particular time and place. As jurisdiction includes actions such as banishment, punishment appears to fall under this category. Grotius also appears to include the judicial function within jurisdiction, using the example of a lawsuit. The third function does not have a common name, but Grotius describes it as “allocating permanent



functions.” It appears to consist in the selection of subordinate officials to carry out the role of jurisdiction.<sup>109</sup> Following his insistence on the indivisibility of governing authority (at least within a particular jurisdiction), the governor may delegate jurisdiction to an inferior magistrate, but he does not – indeed, cannot – alienate it.<sup>110</sup>

Here Grotius delineates clear roles for what Aristotle would have called *techne* (or *poiesis*), and *phronesis*. Legislation is something that is made, and remains static. However, jurisdiction involves making political decisions in everyday matters of practice. Although the law purports to limit the licit options one may choose, the law must be understood in light of equity. He draws a distinction between the technique of lawmaking that is universally applicable within the realm, and the practice of politics, as it relates to the situational governance.

This mutability of law in the task of jurisdiction follows from its source in the will of the lawmaker. Unlike nature, which exists outside time and does not change, will is subject to change. The law is only a second-order sign of the first-order reality. (For this reason, the (first-order) will of the lawmaker in any given situation can never be subject to his own prior (second-order) law.)<sup>111</sup> Indeed, any positive law is bound to be at least slightly obsolete in the new situations that arise after its initial proclamation. Grotius' understanding of law and command is thus consistent with his approach in *DJB*. However, this does not mean that the purposes served by the will are necessarily mutable; the only necessary mutation is in the second-order acts of governing that flow from the will.

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<sup>109</sup> Ibid., 8.1, 374-75.

<sup>110</sup> Ibid., 8.11, 386-87.

<sup>111</sup> Ibid., 6.13-14, 318-21.

The importance of this practice can be seen in Grotius' discussion of the Old Testament. Even the positive commands of God (which are distinct from natural law) must be interpreted according to the will of God. Grotius cites examples where, for instance, King David permitted the eating of consecrated bread in order to ward off starvation, without bringing divine judgment upon himself. In such a situation, God's will was different from – and higher than – the specific prohibition he had given to the Hebrews. Equity is required in interpreting any positive law – even the positive laws of God himself.<sup>112</sup> Thus, Grotius' treatment of equity here reflects the position he laid out in *de Aequitate*. Ultimately, the making of legislation is ordered to the executive practice of jurisdiction, thus emphasizing the importance of political judgment.

### *Types of Judgment*

Considering Grotius' recurring distinction between status and action, it is appropriate that the status of constitutive rule does not itself determine the content of that rule. Rather, it is only a precondition for the exercise of judgment. Thus, after outlining the several types of rule, Grotius devotes a chapter to the concept of judgment. Indeed, to each type of rule (even indicative rule) corresponds a type of judgment (persuasive, declarative, and imperative). Thus, the theoretical categories of rule each have modes of action, or personal virtues, associated with each.

Grotius' introduction to the topic of judgment again testifies to some of his philosophical and anthropological assumptions. He begins his study of judgment by asserting that acts are preceded by judgment. Thus, from the beginning, he re-

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<sup>112</sup> Ibid., 8.15, 390-91. See also *DJB* 1.3.4.3, 98.

emphasizes that a person is not reducible to the external acts that can be seen. Rather, these acts are manifestations of a will that is capable of rational judgment. He then treats the concept of the will in both a positivistic and teleological sense. In a purely descriptive sense, it may be accurate to say that an act of commanding merely depends upon a prior will. However, in order for this will to be right (*recte*), there must be agreement between that will and reason. This reason, in turn, must agree with the object itself. Thus, while an act itself is dependent simply on will, a good act is dependent upon a reasonable will that corresponds to a reality outside itself. This reference to an overarching normative reality testifies to Grotius' ontological realism, as opposed a nominalism that would deny the existence of a normative reason independent of the individual will.<sup>113</sup>

This assertion that an act (including a law) proceeds from a rational will testifies again to the derivative (and frozen) nature of the law. This can be seen in Grotius' later refutation of the common aphorism that scripture (or the law) is a judge. In a simplistic sense, of course, the maxim is correct, because scripture (and law) may serve as a standard. However, the aphorism can, at most, only be figurative, presumably because a personal will is necessary in order to judge properly.<sup>114</sup> Because law is only a manifestation of will at a particular point in time, it must be interpreted according to that (ongoing) will. This further echoes his emphasis on the importance of equity.

Fittingly, nowhere is Grotius' emphasis on situational prudence more evident than at the end of his chapter on judgment. Here, he qualifies all the advice he has given about

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<sup>113</sup> Ibid., 5.1, 262-63.

<sup>114</sup> Ibid., 5.6, 266-67.

the proper exercise of one's *jus* of judgment, stating that it is not eternal or even always useful. His theoretical account of a practical virtue can only go so far. As he says, “no precepts for prudence are universal, since prudence includes a knowledge of particular facts.” The proper prescription varies with the person, the place, and the time. Indeed, the fact that one is looking for judgment in the first place indicates that the matter cannot be settled according to a strict law of God or nature.<sup>115</sup>

### *Simultaneously Overlapping Rule*

Likewise, it is appropriate that Grotius uses the term “judgment” in regard to all four types of rule. This helps to emphasize that the concept of judgment is not primarily understood in terms of coercive will. Rather, he primarily uses the term to refer to the rational exercise of deliberation. As a result, judgment is not limited to the ruler, but is universal. This universality of judgment provides a counter-weight to Grotius' understanding of civil disobedience, as well as his conception of secular government of the church.

Indeed, the possibility of civil disobedience flows from the very fact that Grotius does not limit the concept of rule or government to *imperium*. Notably, this four-fold taxonomy of rule does not only empower subjects in relation to the governor, but also the church. Although pastors of the church do not hold imperative weight, they exercise considerable directive authority. They do not partake of legislation or jurisdiction in the true sense, because these involve the physical coercion of imperative judgment. However, the preaching of the Gospel does bear a sort of resemblance to legislation.

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<sup>115</sup> Ibid., 6.13, 316-19.

Likewise, the power of the keys – the ability of pastors to apply the promises and threats in the Gospels to individuals – resembles jurisdiction. However, this directive judgment does not constitute a governing function; pastors do not actually bind and loose, but merely announce what God has bound and loosed. This emphasizes their important role in exercising declarative rule.<sup>116</sup>

Pastors also exercise significant persuasive rule, in proclaiming the truths of God. Grotius also draws an analogy with a town crier, whose role is to publicly proclaim the judgments already delivered by someone with legitimate authority. Grotius also compares pastors with physicians, who frequently give counsel that one ignores at one's own peril. Of course, this does not mean that physicians are involved in administering justice.<sup>117</sup> Likewise, Grotius is clear that the church does not possess *imperium*, reaffirming his emphasis on the indivisibility of governing authority in *DJB*.

Yet, as discussed above, if the political authority does not learn how to exercise his *imperium* well, he will soon find himself unable to govern his subjects. Thus, despite this indivisibility of *imperium* in the public realm, it is nonetheless possible – and in some senses, essential – for him to be simultaneously ruled by others. This follows from the existence of the four different types of rule. For example, while a governor has *imperium* over all people in the nation, a counsellor may have persuasive rule over the governor. Likewise, a philosopher or pastor may have directive rule over him.<sup>118</sup> Indeed, the directive presence of the church throughout space and time coexists with the

<sup>116</sup> Ibid., 9.2, 394-97; 9.6-8, 400-07.

<sup>117</sup> Ibid. Grotius addresses the practice of withholding the eucharist as a liberty, much like a doctor may refuse a cup of water to a patient if it is inappropriate for the patient. Because it does not exercise force over the recipient, it is not a (governing) act of jurisdiction.

<sup>118</sup> Ibid., 4.12, 256-59.

imperative position of the supreme powers. As Grotius says, “no judgment among men has more weight (*auctoritate*) than the former, and no judgment among men has more power (*potestate*) than the latter.”<sup>119</sup> His separate terms for the effectiveness of each also emphasizes their different modes of action. Thus, if the ruler does not submit to the directive rule of pastors (or of other subjects wiser than himself), his imperative rule will be rendered inert. Of course, he will retain his position as ruler, but he will be unable to rule. This serves to emphasize the distinction between the institutional and active understandings of the term “government”. In the institutional sense, his government is secure; in an active sense, it may easily crumble.

Thus, while Grotius emphasizes the indivisible and unassailable status of governing authority, at the same time he emphasizes that the supreme authority may himself be ruled by others in other ways. The supreme authority is supreme only in regard to coercive force; there are other methods of rule in which he may not even rule, let alone in supreme fashion. The ascription of sovereignty – in the sense of absolute power – to Grotius' ruler is not entirely accurate, owing to Grotius' nuanced understanding of ruling authority.

### *Indicative and Imperative Right*

Some have argued that because imperative rule is limited to political rulers, it would seem to be the *sine qua non* of politics. In one sense, this is correct. Politics, in the strict sense, is defined by the use of coercive force. Thus, it is possible to see in Grotius a value-neutral definition of politics that, in limited fashion, stands on its own.

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<sup>119</sup> Ibid., 5.7, 266-67.

As long as there is the rule of a superior over subordinates (thereby bringing into existence imperative rule), one necessarily has a political order.

However, this status indicating the existence of political order says nothing about whether the order is good or bad. In order to address politics from a normative perspective, one must go beyond examining the status conferring the possibility of political rule, to an examination of the actions that follow. *Good* politics must be guided by directive rule.

This reconfirms Grotius' justification for natural Right as including both intrinsic and extrinsic factors. Although extrinsic factors may be the efficient cause of government, intrinsic factors are the final cause. This further demonstrates Grotius' simultaneous approach to politics as a positive-descriptive reality and as a natural-normative one. Just as the existence of the natural realm does not lead Aquinas to discount the existence of the supernatural, the fact that one can describe politics in the lower sense does not eliminate the existence of the higher. As will be seen in the following chapter, the ultimate failings of the lower realm on its own terms actually point toward the existence of the higher realm. Legal positivism leads to natural law – or, more accurately, to natural Right.

### *Conclusion*

Grotius' discussion of authority in *DJB* illuminates two important points. The first is the fact that natural Right exists prior to the institution of the state. The fact that the state is morally salutary but not morally necessary points toward the role of attributive

justice in guiding people to form civil society. The second comes from Grotius' highly limited right of rebellion, and his wide latitude for civil disobedience. This points to the distinction between status and action, and shows that a ruler's status may be near-absolute even as his freedom of action is highly limited.

These two themes of authority from *DJB* are more fully explored in *de Imperio*. In regard to the former, Grotius provides a five-fold explication of the purposes of government. One of these purposes is for positive laws and judgments to reveal and promulgate indicative truths of morality that, in their particularity, are not yet known through universal natural laws. The subsequent possibility of promoting the goods of attributive justice strengthens the reason for instituting civil society. It also points to the importance of situational judgment rather than exclusive reference to universal propositions.

In regard to the latter theme of *DJB*, Grotius lays out a four-fold taxonomy of types of rule that further illustrates how the ruler's actions may be limited. Grotius reaffirms that the ruler's status of *imperium* is invulnerable, quashing the right to rebellion. However, the governor's exercise of that form of rule may itself be ruled by the persuasive, declarative, and consensual rule of others. If it is not, the ruler may provide his subjects with great latitude for civil disobedience, thereby limiting his own exercise of *imperium*. Thus, while the church is ruled by the state in one sense, in another sense it may be the one governing the state. The practice of rule and government is wider than the imperative force of the state, which is why it can be undertaken outside the formal apparatus of the state. Politics is wider than civil institutions.



In addition to illuminating these two concepts from *DJB*, *de Imperio* also manifests Grotius' rejection of a strict separation between the sacred and the secular. The political ruler is responsible not only for the material well-being of his subjects; his government must operate by reference to a higher realm. The aim of the state is not simply to protect and enlarge private (or even public) property, but to promote a quality of character that shapes – and transcends – the state. Indeed, order is existential rather than propositional, and the ruler must attend to the good of his subjects as persons, rather than simply the conformity of their acts to impersonal laws.

*De Imperio* also develops the idea of natural law and natural Right. This is most evident in Grotius' distinction between the strict sense of nature and the circumstantial sense. It can also be seen in Grotius' understanding of the twin purposes of legislation and jurisdiction, which reflect the realms of *techne* and *phronesis*. In employing both categories, Grotius makes room both for universal laws that are inherent in nature, and judgments that require the virtue of prudence in ascertaining the right course of action in particular situations. The latter can particularly be seen in his recurring references to the importance of equity, which testifies to the inadequacy of universal propositional formulations to fully encapsulate justice. It is also evident in Grotius' defense of the morally indicative role for positive law, transcending matters of mere amoral coordination.

In each of these areas, Grotius emphasizes considerations that line up with expletive and attributive justice. Under expletive justice, preceptive natural Right allows a place for calculative reasoning that deduces universal natural laws. Likewise, expletive

justice grants a status that is the valid prerequisite to the rule of the state. However, concessive natural Right allows the guidance of attributive justice in areas where natural law is silent but morality is not. Likewise, the governor may (and should) use his governing authority to introduce positive laws that help to instantiate and promulgate this attributive justice. While expletive justice provides validity, the practice of equity and the virtues of attributive judgment determine (and instantiate) rightness. This rightness of attributive justice is not limited to material concerns, but points toward the role of the sacred in cultivating a quality of character in the souls of the people.

Returning to Grotius' schema of the origins of authority in *DJB*, we recall the three sources from which authority over others can arise: generation, consent, and crime. While the first two are commonly espoused by political theorists, the idea of natural punishing authority is quite distinctive to Grotius. Indeed, it serves as a clear contrast to many thinkers of his own time. For instance, Suarez had argued that the right to punish could come only from voluntary agreement. This meant that criminals could not be punished outside of civil society. In contrast, Grotius argues that natural justice can be enforced outside of civil society.<sup>120</sup> Punitive authority need not necessarily be civil authority.

This conception of punishment as natural rather than civil testifies to the centrality of punishment in Grotius' theory of justice. It points to the fact that civil society is not exhausted by the protection of life and the enforcement of promises. Likewise, it grants him a justification for the enforcement of natural Right in international relations. Indeed,

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<sup>120</sup> Richard Cox further draws out the distinctiveness of Grotius' understanding of punishment as natural rather than conventional, and its place in the history of political thought. See Richard Cox, "Hugo Grotius," in Leo Strauss and Joseph Cropsey, eds., *History of Political Philosophy* (University of Chicago Press, 1963), 344-53.

as can be seen in his original treatise on the topic, the idea of criminal punishment is uniquely important to Grotius. The following chapter will explore his treatment of the matter in greater depth.

## CHAPTER 4

### GROTIUS ON PUNISHMENT

Punishment is a strange and sometimes uncomfortable subject. One of the purposes of moral and political life is to prevent harms to the person. Yet punishment involves the intentional infliction of such harms, sanctioned by the state. How can this paradox be explained? To many 'enlightened' ears, it cannot. Traditional punishment ought to be banished, with financial penalties and counseling used instead. Others argue as though the law is sufficient in itself, and that its declarative power (to use a Grotian term) renders coercive force unnecessary. Yet when the unity of declarative and imperative weight is broken, we are no longer discussing the same concept of *imperium*. Indeed, traditionally one of the central pursuits of political philosophy has been to justify the nature and extent of coercive force, on the assumption that some coercion is necessary. Hence, a discussion of law enforcement should be germane to nearly any avenue of inquiry in the discipline.

This chapter will explore Grotius' understanding of punishment, particularly in reference to punitive war. There are several reasons why this subject is central to Grotius' conception of justice. First, the performative, imperfect nature of punishment helps to separate the concepts of law and politics for Grotius, by illuminating the latter. This philosophical distinction between law and politics (and the metaethical distinction

between rules and virtue on which it is based) helps to provide further substance to Grotius' distinction between expletive and attributive justice. Second, a discussion of punishment helps to illustrate the extent to which Grotius' understanding of justice transcends the protection of property, thus demonstrating how his understanding of politics includes a place for specifically public goods. More specifically, it shows the limitations of a politics based on individual possessive rights. Third, it illuminates a concept of *jus* that transcends individual claim-rights, indicating that the holder of *jus* may instead have a specifically public duty to foster the common good. Fourth, punishment helps to illuminate the place of virtue in politics, including the central classical political virtue of prudence. This especially follows from the fact that for Grotius, punishment (as opposed to restitution) is inherently ordered to (and its success or failure measured by reference to) the internal intention or character of the person. Finally, Grotius' understanding of punitive war particularly emphasizes the fact that many acts commonly considered private actually have public implications, further militating against the reading of Grotius as relegating large swaths of existence to the private realm. This reaffirms Grotius' understanding of just punishment as existing prior to civil society, testifying to its fundamentally natural character and moral ends.

This chapter will begin with a brief explanation of wars of self-defense and restitution, showing how, in many ways, they function as a paradigm case of expletive justice. In order to show that Grotius' philosophy of politics transcends expletive justice, it will then proceed to examine Grotius' treatment of punitive war. This section on punitive war will begin with Grotius' weighty – and original – examination of punishment

*per se*. It will follow by linking Grotius' philosophy of punishment to its application in war and international relations. It will conclude by examining Grotius' treatment of the conduct of war. This will further illustrate the linkage of attributive justice with virtue, and show how expletive justice points toward its own self-transcendence in attributive justice.

### *Defensive/Restitutionary War*

Grotius' distinction between expletive and attributive justice, and the constitutive attributes of each, can be seen in the structure of *DJB*. After finishing his theoretical foundation in the *Prolegomena* and Book I, he proceeds to examine the justified causes of war in Book II. In other words, this Book examines the situations in which one might possess the legitimate authority as war-maker.

Early in Book II, many sub-divisions become apparent in this structure of just causes for war. These various thematic categories reflect his approach to justified war-making authority. Grotius begins in Chapter 1 by asserting that there are three justified causes of warfare.<sup>1</sup> These three causes are then methodically explored throughout the Book: self-defense (Ch. 1); obtaining that which is owed to us, or restitution (Chs. 2-19); and punishment (Chs. 20-21). Conversely, Chapter 22 examines unjust causes of war and Chapter 23 those causes which are likely unjust. The following chapter treats those which are unjust but pardonable, and the final two chapters discuss waging war on behalf of others.

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<sup>1</sup> Hugo Grotius, *De Jure Belli ac Pacis (DJB) (Law of War and Peace)* 2.1.2.2, trans. Francis W. Kelsey, intro. James Brown Scott, Carnegie Classics of International Law, No. 3, Vol. 2 (New York: Bobbs-Merrill, 1925), 171-72.

The first chapter is clear and obvious. Defense of life and property is a noncontroversial issue for states; in fact, most thinkers have no problem extending this right even to private individuals. Grotius also draws this parallel: defensive war follows directly from the justified resistance of an armed robber in the domestic realm. In fact, his treatment of defensive violence is largely private, and only late in the chapter does he make the obvious analogy to public war. A person and a state may both justly exercise violent force in defense of lives. This defense of life also includes the defense of limb or of chastity.<sup>2</sup> Indeed, if only expletive justice is considered, one may kill even in defense of property. However, the property in question should be of non-negligible value.<sup>3</sup> Moreover, in all of these cases, the danger must be immediate and certain.<sup>4</sup> A pre-emptive war brought on by fear is illegitimate.

In regard to the defense of life itself, Grotius notably argues that natural justice permits war from the point of view of defending life, rather than from the guilt of the assailant. This can be seen in Grotius' extensive treatment of the acceptability of slaying an innocent party who accidentally blocks one's escape route while fleeing an assailant. According to the strictest sense of nature, one is justified in killing the person. Thus, the right to kill another in defense of one's person can be conceived according to tort law, because the other person is innocent of any criminal wrongdoing.<sup>5</sup>

Grotius then proceeds to the second just cause of war, that of restitution. This

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<sup>2</sup> Ibid., 2.1.6-7, 175.

<sup>3</sup> Ibid., 2.1.11, 179.

<sup>4</sup> Ibid., 2.1.5, 173-75.

<sup>5</sup> Ibid., 2.1.4.1, 173. Grotius later qualifies this principle by asserting that the same does not apply to defense of property, because there is a fundamental disparity between the property and life. Here the permissibility of taking life in order to defend property arises only because of the guilt of the robber, suggesting a criminal law paradigm instead. See 2.1.9.1, 176.

section is long enough to be organized according to Grotius' tripartite epistemology. The first sixteen chapters examine the reasons by which states have legitimate authority to wage war in order to retake goods which, under natural law, either belong to them (Chs. 2-10) or are owed to them (Chs. 11-17). Chapters 18 and 19 examine those goods to which a state has a right under the historical natural law proceeding from the volitional (or positive) law of nations. Thus, Grotius emphasizes two potential sources of *jus ad bellum*, or a legitimate status as war-maker: natural law and positive human law. This emphasis on both reason and history illustrates his pluralistic epistemology.

True to his tripartite epistemology, Grotius also inserts references to those Biblical just causes legitimated by his third source of moral knowledge, that of direct divine revelation. However, Grotius sees no instances of such divine fiat in the common era. In regard to defensive and restitutionary war, Christian charity generally limits, rather than expanding upon, the naturally just causes of war.<sup>6</sup> One of the most important examples is Grotius' strong belief that Christian charity does not permit one to exercise the aforementioned natural liberty to kill an innocent bystander who blocks one's only path to safety.<sup>7</sup> In such a case, one must instead give up their own innocent life rather than taking that of another. Thus, even though this counsel is a restriction to Christians, one can already see the (attributive) mode of operation in which a higher virtue limits the exercise of the permissions afforded by natural law.

Defensive (or restitutionary) war can be seen today in the United Nations Charter, which permits war only when a state has been attacked. In other words, only in the name

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<sup>6</sup> In regard to punitive war, the opposite is often true.

<sup>7</sup> Ibid., 2.1.4.1, 173.



of self-defense, of protecting the inviolability of state sovereignty, can war be undertaken. In such a case, the invaded state is entitled to defend against the aggression, and to ensure restitution by recapturing the territory unjustly annexed by the aggressor. In legal terms, the aggressor incurs a debt to the offended state, which can only be repaid by returning the conquered territory to its pre-war status. Such a defensive war is analogous to repayment of debt in private law. Civil courts are concerned with property, whether arising from contracts or according to tort law. This appears to correspond to Grotius' original "ownership" and "credit" sub-categories of expletive justice. In the case of ownership, it does not require recourse to independent moral standards, beyond an agreement to keep one's promises. The obligation arises only when a nation makes such a promise, as is seen in peace treaties. In the case of tort law, the moral obligations are purely negative: avoidance of others' property. Thus, the implicit conception of law in defensive war need not go beyond private law. Private law is the realm of liabilities, rather than the realm of punishment.

Likewise, because the offense that justifies a restitutionary war is a property violation, it is essentially a procedural violation. There is nothing inherently wrong with a particular governing authority possessing a particular piece of territory. Indeed, if the inhabitants of that territory had originally decided, in their initial formation of a state, to join what would ultimately become the aggressor nation, then the dominion of the 'aggressor' over that territory would be wholly just. However, this was not the procedure by which the aggressor nation came to take hold of the territory. Rather, it was the unjust procedure of forcibly taking the territory without the consent of the inhabitants. Thus, as

with the returning of property in the domestic sphere, a war to drive out the aggressor still merely redresses a procedural wrong.

However, this limited conception of war does nothing to change the aggressor's acquisitive desires or restrain the aggressor from future offenses. Nor does it allay its neighbours' fear and mistrust. It looks only backward, attempting to return to the previous state of being. Only the possession of territory has been altered; personal character and social trust remain unreformed. Thus, much like with a robber, it is necessary to invoke the criminal law paradigm; the aggressor must also be punished.

While the Just War tradition permits self-defense as a valid cause of war, since its Augustinian beginnings it has also consistently emphasized punishment as a valid cause of war. In fact, in its early stages, punishment was seen as the primary purpose of just war.<sup>8</sup> Citing the authority of Augustine, Grotius says that just causes fall into two categories: to reclaim what was wrongfully taken (restitution), or to punish uncorrected wrongs.<sup>9</sup> Thus, in his organization of *DJB*, Grotius is following in the classic tradition of just war theory. Moreover, the existence of punitive war shows the importance of criminal punishment in addition to private law. The state (and war) exist for purposes beyond the protection of property.

#### *Idea of Punishment: Expletive and Attributive*

In order to justify punitive war, Grotius must first discuss the practice and purposes of punishment itself. Criminal punishment is a subject that had received little

<sup>8</sup>James Turner Johnson, "Historical Roots and Sources of the Just War Tradition in Western Culture," in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (New York: Greenwood Press, 1991), 9-10.

<sup>9</sup>Grotius, *DJB* 2.1.2.2, 171-72.

direct attention up to Grotius' day. Indeed, legal historian J. M. Kelly describes Grotius' extensive treatment of the philosophy of punishment in Chapter 20 as the "first extensive self-contained major treatise on criminal punishment."<sup>10</sup> Hence, the philosophy of punishment appears to be of interest to Grotius in a way that it is not for previous thinkers.

The issue of punishment is a particularly salient illustration of expletive and attributive justice. Not only does it involve both types of justice, but it helps to illustrate the interplay between the two. The centrality of the categories of expletive and attributive justice become immediately visible in this chapter, as Grotius' first order of business is to determine which category applies.

In some ways, punishment appears to fit into expletive justice. One who punishes must first possess the strict *jus* of punishing. This accords with Grotius' placement of the discussion in Book II, which ostensibly discusses the just status of war-maker. In fact, Grotius' third sub-category of expletive justice, that of powers, seems to make room for this very status. As seen in Grotius' discussion of the origins of authority, such a status can arise by generation, consent, or crime. By committing a crime, the criminal confers a right on the punisher and the desert of punishment upon himself.<sup>11</sup> Thus, expletive justice seems to be relevant to punishment to the extent that, as in restitution, it confers a status. In this case, rather than distinguishing between a creditor and a debtor, it delineates punisher and criminal. This status is a necessary precondition in order for punishment to be carried out.

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<sup>10</sup> J. M. Kelly, *A Short History of Western Legal Theory* (New York: Oxford University Press, 1992), 238.

<sup>11</sup> Grotius, *DJB* 2.20.2.3, 464-65.

On the other hand, Grotius points out one substantial difference between the two: punishment is not exactly due to someone in the way that a debt is due a creditor. One would hardly say that a criminal has a right to be punished, given that this claim is not sought after and seldom brings any joy to the recipient. Likewise, as Grotius says later, it is consistent with (strict) *jus* to confer a benefit on anyone at any time, but the same is not true of punishment.<sup>12</sup> Rather, the person holding this expletive right has only a difficult duty. Thus, the language of the claim-right is inappropriate here. Instead of the language of rights, it is more appropriate to say that it is fit that someone be punished, or that the subject is worthy of punishment. As seen above, these terms instead connote attributive justice.<sup>13</sup> Thus, unlike private law, which can be situated fully and unproblematically into expletive justice, criminal law cannot be fully understood simply by reference to expletive justice.

Beyond Grotius' explicit argument, however, exists another implicit problem facing any attempt to situate punishment neatly into expletive justice. Because restitution involves material goods that can be quantified, there is little about which to deliberate. This is true both in regard to determining the current state of justice or injustice, and, in the latter case, in determining the remedy that would restore the condition of justice. Thus, the matter at hand, as the Latin term *explere* would suggest, is simply to implement justice. It is a simply matter of changing the status of the possession (or territory) in question, which fully instantiates justice. In other words, just as expletive justice dictates the current status of justice, so it also dictates the course of action to follow. Indeed, the

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<sup>12</sup> Ibid., 2.21.8.3, 536.

<sup>13</sup> Ibid., 2.20.2.2, 464.

term “action”, with its dynamic connotations of performing deeds in time, is somewhat misleading in this context. All that is required is the instantaneous changing of status, somewhat akin to the way that any digital electronic machine alternates (however rapidly) between binary conditions.

The case of punishment, however, is different. Expletive justice can only determine the current status of justice or injustice, and thus confer valid status of “punisher” and “subject of punishment”. However, it cannot provide any standards that will suit the true ends of punishment. There is no sense of proportion; according to Grotius, one who wrongs another becomes subject to punishment, without any external restraints on the punisher. This is an unlimited right: even the slightest injury, under expletive justice, may be punished by death.<sup>14</sup> In the strict sense, or the descriptive sense, one might say that punishment has been administered. However, it would be difficult to say in any meaningful way that justice has been served.

As a result, expletive justice cannot, in itself, provide a remedy in criminal law, or a way to move from injustice to true justice. Indeed, because of its interpersonal nature, punishment progresses toward justice in a complex fashion. It is not the mere instantaneous transferring of a status. Rather, punishment is a performative type of justice. It is carried out dynamically over time, and ideally involves interpersonal interaction between the criminal and the punisher. Because the status automatically leads toward action in punishment, punishment appears to have a significant attributive component.

Furthermore, unlike debt repayment, where the prescription is guaranteed to fulfill

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<sup>14</sup> Ibid., 2.1.10.1, 178.

justice entirely, punishment can never produce perfect justice. Because it strives for justice in time, consists in action, and takes place in the interpersonal realm, it can never arrive at the finality necessary to be considered as perfect. If the ultimate purposes are the common good of the community, at what point is the common good completely instantiated? Thus, the extent to which a punishment will successfully instantiate justice is necessarily an open question. Unlike expletive justice, it is not something that can be determined in a formula. As Grotius says, “the determination of the punishment requires much prudence and equity.”<sup>15</sup>

This recognition that expletive justice cannot fully account for punishment points toward the obvious role of attributive justice. This approach is a Grotian innovation. The tradition of commutative and distributive justice had envisioned punishment through the lens of commutative justice. However, because of its performative nature, Grotius shows that punishment cannot fit entirely within expletive justice.<sup>16</sup>

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<sup>15</sup> Ibid., 2.20.9.4, 477.

<sup>16</sup> Ibid., 1.1.8.1, 36-37. Grotius does also deny that punishment can fit neatly within attributive justice, but only in the way that people commonly conceptualize attributive justice (that is, as the older concept of distributive justice). For instance, he shows how some believe that attributive justice relates to those punishments that are given out in proportion to the crime. However, Grotius has already stated that this 'geometric' proportion, as seen in Aristotle's understanding of commutative justice, is not properly characteristic of attributive justice. Anything that is due according to the strictness of mathematics (whether arithmetic or geometric) would correspond to expletive justice rather than attributive justice. Others categorize punishment as part of attributive justice as a result of the fact that it proceeds from the whole to the part, or from the community to the individual. Grotius does not deny that this is true, but he rejects the distinction between public and private as distinguishing attributive from expletive justice. (See 2.20.2.1-2, 463-64.) In other words, punishment does not fit into attributive justice as people commonly understand attributive justice (which is to say, as distributive justice). However, Grotius never says that there is any problem with placing punishment into his *own* understanding of attributive justice. The problem is not with the incompatibility of punishment and attributive justice; it is with the common understanding of the nature of attributive justice. For further discussion, see Oliver O'Donovan, “The Justice of Assignment and Subjective Rights in Grotius”, in Oliver O'Donovan and Joan Lockwood O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (Grand Rapids, MI: Eerdmans, 2004), 184-86.

### *Purposes of Punishment*

After concluding that punishment cannot comfortably fit into expietive justice alone, Grotius proceeds to examine the purposes of punishment. He finds three: “correction,” “example,” and “satisfaction.”<sup>17</sup> Although the criminal is the immediate subject of punishment, the three aims therein (or what one might call the final causes) are respectively directed toward various parties: correction to the perpetrator; deterrence to society at large; and satisfaction to the direct victim. Appropriately, all of these look forward, testifying to their attributive character.

Reformation looks ahead to the healing of the internal constitution of the offender. Here Grotius uses the image of medical treatment, and cites its description by Plutarch as “surgery for the soul”. He also refers to the vice that motivated the crime, describing it as a habit that must be changed by adding a deterrent.<sup>18</sup> This testifies to the internal will that preceded the criminal act. Correction may also involve removing the offender from society for a time, thereby eliminating the opportunity for reoffending. In doing so, the community also benefits from ensuring that it will not be subject to future repetitions of this crime at the hands of the offender. This threat of imprisonment also creates a deterrent to crime. This is directed toward the benefit of the community as a whole, seeking to ensure its future adherence to the law. This component of punishment is termed “exemplary”, as it seeks to make an example of the criminal to others. Finally, satisfaction looks toward the victim of the crime, that he may not be similarly maltreated by others. This is different from restitution, as Grotius does not make reference to the

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<sup>17</sup> Ibid., 2.20.6.1, 469.

<sup>18</sup> Ibid., 2.20.6-7, 469-71.

transfer of goods from the criminal to the victim.<sup>19</sup> Furthermore, as stated earlier, pure vengeance – which merely gratifies the spirit of the sufferer – is contrary to natural law, inasmuch as it is concerned with the nature of society.<sup>20</sup> Indeed, when dealing with the purposes of punishment, Grotius appears to downplay the retributive nature of punishment. Satisfaction is not done for the sake of vengeance, but, it would appear, for the sake of the one (or the others) who were wronged. Thus, the act of punishment is not an end in itself; it is a means to further ends.<sup>21</sup> Here Grotius emphasizes the inescapably social (and thus public) nature of punishment. Grotius also emphasizes the forward-looking nature of criminal punishment (in all three purposes) by citing two ancient thinkers to support his claim. In Plato's *Laws*, he states the punishment is exacted not because a wrong has taken place, but to prevent future recurrence. Likewise, Seneca states that “punishment will never have reference to the past, but to the future.”<sup>22</sup>

### *Internal and External Factors*

This does not mean that expletive justice is irrelevant to punishment. Crimes must have external consequences in order to be punishable. Grotius states that purely internal offenses cannot confer a true *jus* of punishment; these must be left to God. In other words, there must be an offense against expletive justice, such as an external injury, in order to give rise to a right to punish. Likewise, one cannot punish for a failure to

<sup>19</sup> Ibid., 2.20.8-9, 472-78. See also 2.20.10.7, 481.

<sup>20</sup> Ibid., 2.20.5.1, 467-68; 2.20.10.2, 478-79.

<sup>21</sup> Ibid., 2.20.5.4, 469.

<sup>22</sup> Ibid., 2.20.4.1, 466. Grotius does identify one exception: that of God's final punishment in the hereafter (see 2.20.4.2, 467). However, this does not take away from the forward-looking nature of punishment. Because God's final punishment is outside time, and connotes finality, it *cannot* look forward. Indeed, everything that looks forward directs its gaze toward this ultimate end – one that is outside of history.



positively instantiate those goods which flow from the higher virtues of attributive justice. Punishment requires the criminal to have actively violated the strict laws of justice.<sup>23</sup>

However, once external wrongdoing has been established, the internal intention becomes the primary matter in punishment.<sup>24</sup> As he states, it is the will that proceeds to these external acts that is usually liable to punishment.<sup>25</sup> Thus, once this right to punish has been established, the actual course of punishment must consider more wide-ranging factors of intention that fall under attributive justice. Indeed, this is essential if one considers the forward-looking intention of punishment, which aims to correct the internal character of the criminal.<sup>26</sup> Thus, expiatory justice is not irrelevant. However, while it is temporally first, it finds its higher fulfillment in attributive justice.

Grotius refers to this dichotomy between external and internal factors from the beginning of his works, citing Plato's distinction in the *Laws*. Plato distinguishes between the external condition of “benefit or injury”, and the internal “disposition and character” which guides such action. This testifies to a fundamental distinction between redressing the external conditions of the victim and the aggressor, on the one hand, and addressing the injustice in the soul of the perpetrator, on the other. Plato further elaborates on this distinction by describing the purposes of each. While the law should provide compensation for injuries, it should more fundamentally try to “create friendship” between doers and sufferers. Thus, punishment must attempt to bring about a personal transformation, both in the soul of the perpetrator, and, consequently, in the

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<sup>23</sup> Ibid., 2.20.20.2, 489.

<sup>24</sup> Ibid., 2.20.18, 487.

<sup>25</sup> Ibid., 2.20.39.2, 503-04.

<sup>26</sup> Ibid., 2.20.20.1, 489.

political relation between the involved parties.<sup>27</sup>

*Criminal vs Civil Law: Wrongs and Faults*

Grotius' distinction between expletive and attributive justice is further visible in his comparison of the injustices present in private and public law. He states plainly that punishment should be related to the guilt of the perpetrator, not the injury of the plaintiff.<sup>28</sup> Indeed, this very distinction between guilt and injury leads Grotius to reference Aristotle's discussion of the matter in Book V.8 of his *Nicomachean Ethics*. This passage is of such importance to Grotius that, in the midst of his own work, he provides a full Latin translation of Book V.8 (a labour unnoticed by those observers who portray Grotius as contemptuous of Aristotle). This “truly notable” passage outlines three possible situations which may arise in a court of law. The first Grotius translates as “wrongdoing” (*injuria*, or the opposite of *jus*): that which is premeditated and done deliberately. In this case, the person himself is judged as unjust. This corresponds to the idea of crime.<sup>29</sup>

The second category he calls “fault” (*culpa*): that which is done consciously but without deliberation, motivated instead by a passion such as anger. This includes a situation where there is no evil intent, but where better foresight would have revealed the unintended negative result of one's action. In such a case, the person is said to have acted unjustly, but is not said to be unjust himself. This corresponds to common law torts, or “delict” in civil law systems (a term derived from a Latin synonym for “*culpa*.”)<sup>30</sup> The

<sup>27</sup> Ibid., 2.1.2.1, 171. The reference from Plato's *Laws* is to line 862b.

<sup>28</sup> Ibid., 2.20.2.1, 463-64.

<sup>29</sup> Ibid., 3.11.4.2-4, 725-26.

<sup>30</sup> Ibid. In contemporary parlance, these faults correspond to common law torts. A fault might correspond

third circumstance, known as “misfortune” (*infortunia*), concerns that committed in ignorance, where the outcome could in no way have been foreknown. Here, although there may be an obligation to restitution, as in a private law contract, there is no injustice. Grotius also makes mention of Aristotle's less well-known discussion of the matter in his *Rhetoric*, in which he employs a similar taxonomy of wrongs, faults, and misfortunes.<sup>31</sup> Here Aristotle further confirms that in all offenses against the law, “the intention of the mind is the main point, and not the external act: it is this intention that constitutes the whole turpitude and injustice of the act, and which is therefore always implied in the word denoting the crime.”<sup>32</sup>

Aristotle further explores this distinction between guilt and injury and its relation to justice. One who acts justly from deliberate purpose is said to be a just person. However, one who produces a just result without having deliberated and fully intended to bring it about, is said only to *act* justly.<sup>33</sup> Correspondingly, Aristotle distinguishes between doing (something) unjustly, or “acting wrongly” (*adikein*), and doing that which is unjust (*adikon pratein*). The former corresponds to the internal intention of the person carrying out the action. Grotius calls this the (in)justice of causes. In contrast, the latter

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to an intentional or negligent tort, where the tortfeasor commits an act with some knowledge of consequences, but without fully intending the plaintiff's loss of goods. A misfortune corresponds to a loss of goods visited upon a plaintiff without any conscious knowledge by the defendant. Those legal systems employing a negligence conception of tort law would limit torts to Grotius' conception of faults. Those employing a strict liability approach would also include Grotius' misfortunes. For a basic outline of the legal categories, see, for instance, Kenneth J. Vandeveld, *Thinking Like a Lawyer: An Introduction to Legal Reasoning*, 2<sup>nd</sup> ed. (Boulder, CO: Westview Press, 2011), 196-99.

<sup>31</sup> *Ibid.*, 3.11.4.5, 726-27.

<sup>32</sup> Aristotle, *Rhetoric* 1.13, trans. W. Rhys Roberts, in *The Complete Works of Aristotle*, ed. Jonathan Barnes (Princeton, NJ: Princeton University Press, 1985), 2188.

<sup>33</sup> Grotius does say otherwise in *DJB* Prol.44, 25, where he counts as fully unjust something committed under the influence of a passion. However, even Aristotle includes in the first (fully criminal) category “the gratification of all inordinate passions”, indicating that both seem to draw limits on the extent to which the influence of passion can mitigate criminal intent.

indicates an external state of injustice arising from the result of the action in the world. Grotius calls this the (in)justice of effects.<sup>34</sup>

Grotius builds upon this distinction between guilt and injury by distinguishing between the “doer” and the “deed”. The (in)justice of effects, in which one has merely *acted* unjustly, may result in one being considered guilty according to strict justice, according to the letter of the law. However, Grotius argues that nobody can be truly unjust without knowing that he is committing an injustice. Thus, in a case where one commits an ‘objective’ injustice in ignorance, the person’s intention can be considered innocent. Thus, in the ‘particular’ sense (referring to the deed), the action may not be just. However, in a more general sense, the doer may not have acted contrary to justice. Although the deed may have been done without (external) *jus*, the doer is yet without (internal) guilt. Although only one party in the dispute may possess the moral quality of *jus*, both sides may yet be innocent of injustice in their being.<sup>35</sup> This offers a clue to the distinction between *jus* and justice in the highest sense.

This distinction is again visible in Grotius' chapter on the sharing of punishments, where he begins by distinguishing between a wrong, which is sufficient for guilt, and a fault, which corresponds to a mere liability. As he says, a fault does not always indicate the presence of a wrong, because a wrong requires evidence of evil intent. Rather, a fault is a sure sign of a liability.<sup>36</sup> This distinction is reaffirmed throughout the chapter, as Grotius makes clear that the relevant consideration for punishment is guilt rather than injury. In the next eight sections of his chapter on the sharing of punishments, he

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<sup>34</sup> Grotius, *DJB* 2.23.13.1-3, 565-66.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, 2.21.1.1, 522.

considers how a participation in punishment arises from a participation in guilt, rather than injury.<sup>37</sup>

This approach has natural implications for Grotius' approach to redress. Wrongs, proceeding from deliberate injustice in the will of the offender, do not simply call for restitution, but for punishment. Faults, in which an unjust action is committed, render the guilty party liable to restitution, but often not to punishment. However, mere misfortunes arising from necessity do not deserve punishment or even necessarily create a liability for restitution.<sup>38</sup> Likewise, because wrongs take their lead from guilt rather than injury, rulers cannot punish children for the crimes of their fathers. Nor can children be kept in penal servitude when the father dies before completing the punishment. However, a liability is different: when a father dies before paying a debt, his heirs must continue to pay off the debt.<sup>39</sup>

Thus, Grotius' distinction between criminal and civil law runs throughout his treatment of the topic of punishment and redress. He is careful to distinguish between internal guilt and external injury. While defensive and restitutionary actions fall under the redress of injury, punishment deals with internal personal guilt.

#### *Positive Commission and Negative Omission*

At this point, it should be clear that this distinction between fault and wrong generally corresponds to the distinction between attributive and expletive justice. This is further illustrated when Grotius appears to identify two sources of external wrongdoing.

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<sup>37</sup> Ibid., 2.21.2-9, 523-37.

<sup>38</sup> Ibid., 3.11.4.6-8, 727-29.

<sup>39</sup> Ibid., 2.21.19, 544-45.

In a mere fault, the harm is caused by negligence: the person is aware of their action, but not fully conscious of its consequences. The culpability is in omission: the failure to deliberate, and thus to anticipate the natural consequences. Because the fault is one of inaction, it appears to be a sort of passive fault. On the contrary, the person committing who commits a wrong is fully aware of the negative consequences of their action, and chooses to act nonetheless. In this case, the wrong is active, as it lies in the deliberate(d) commission of a deed. This is the origin of guilt.

This distinction illustrates the particularly active nature of Right, when understood in its full sense. As we recall, Grotius' first definition of *jus* is "that which is not unjust." Because strict expletive justice is a condition that obtains when no injustice is present, this strict justice is, in a sense, passive. However, attributive justice transcends the mere absence of injustice. It is the realm of positive, constructive action in which the virtues go beyond what is demanded in strict justice. Its active character further implies that it is fundamentally personal. This echoes Aristotle's statement that justice in its fullness is done out of deliberate purpose.

Indeed, this active nature points toward the fact that virtues must be freely willed. If they are produced under compulsion, it is not true virtue, but only the external appearance of the effects of virtue. The honourable character of virtues such as mercy, generosity, and gratitude disappears when these things become compulsory. For example, when one gives money to another because the law states that he has a debt, it does not require the virtue of generosity, even though the virtue of generosity may involve giving money to another. Likewise, unless it is safe to remain ungrateful, there

is no virtue in gratitude.<sup>40</sup> As law increases, the possibility of virtue decreases.

Furthermore, Grotius' emphasis on perfection as a central distinguishing characteristic of expletive justice is also applicable. At least in theory, it is possible to perfectly omit all negative acts that violate expletive justice. The external demands of expletive justice can be satisfied. However, one can never perfectly instantiate the positive commission of good acts. One is always omitting some positive action that could otherwise be undertaken.

This is particularly visible elsewhere in *DJB* where Grotius returns to discuss Aristotle's third category, that of complete ignorance. Much like Aristotle, Grotius repeats that ignorance of the law fully takes away the wrongdoing. Because ignorance is a passive fault rather than an active one, one can understand why it would be completely irrelevant to guilt, which attaches to active violations. This is further reinforced when Grotius says that even negligent ignorance lessens the fault.<sup>41</sup>

However, Grotius does place some limitations on the excuse of ignorance. There are two basic principles so fundamental to society that the severity of their transgression cannot be mitigated. These include the existence of an unseen Creator-God, as well as his active oversight and care for the world and righteous judgment.<sup>42</sup> The moral imperative of obeying and worshipping God follows naturally from these premises. These ideas are the foundations of both natural religion and human society; they are the very precondition for the possibility of political order. Grotius substantiates this claim by

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<sup>40</sup> Ibid., 2.20.20.1-2, 489.

<sup>41</sup> Ibid., 2.20.43.2, 507-08.

<sup>42</sup> Ibid., 2.20.45-46, 510-14. Grotius' willingness to punish such grave impiety provides further context for his supposedly 'impious hypothesis'. If he is truly trying to subvert religious belief or render it irrelevant, it is surely strange that he should advocate punishing those who reject God's existence.

reference to his extrinsic justifications for natural Right. Citing Lactantius, he argues that without God's grace, nobody would respect God, and without his judgment, nobody would fear and obey God. Without the very idea of eternal rewards and punishments, ultimately grounded in God, no person would ever act virtuously or follow the laws of the state.<sup>43</sup> However, Grotius also argues that these propositions have universal assent, removing the excuse of ignorance.<sup>44</sup>

### *Determination of Punishment*

Once guilt has been dissociated from fault, it is then necessary to determine the extent of guilt that applies, and the corresponding punishment. This may involve employing equity. As Grotius has stated in *de Aequitate*, equity frees from the operation of the law by recourse to the intention of the lawmaker. Thus, it may determine that the act in question actually does not violate the law, because it is not the kind of activity that the lawmaker intended to prohibit when he created the law.

In many cases, however, the judge may determine that the act does, in fact, violate the spirit of the law. As a result, the judge must then determine an appropriate sentence. Here both expletive and attributive justice play a role. Expletive justice dictates that nobody may be punished beyond his intrinsic desert. It is worth noting that this inherent desert, however, may differ from the punishment set out in the positive law. Here the judge must refer not to positive law, but to pre-existing principles of justice. Indeed, in

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<sup>43</sup> Indeed, this line of reasoning prefigures (part of) Grotius' approach to the Atonement. There he argues that if God relaxed entirely the penalty for sin, not requiring Christ's death as a substitute, the resulting 'cheap grace' would lead humanity to ignore God and reject virtue.

<sup>44</sup> Ibid., 2.20.45-46, 510-14.



some cases, the desert may actually exceed the maximum penalty set out by the law.<sup>45</sup> Thus, expletive justice does not govern desert by guaranteeing the limits of positive human law. Rather, it involves a preceptive natural law that dictates a mathematical proportion between an act and its intrinsic desert.

However, expletive justice does not determine the content or parameters of this outer bound of punishment. Indeed, this determination of desert is a “difficult and obscure” topic.<sup>46</sup> Calculative reason is inadequate to the task, as external factors of fault are irrelevant. Rather, ascertainment of criminal intent plays a crucial role. One must consider the offender in terms of character, desires, freedom of judgment, and mitigating reasons.<sup>47</sup> Likewise, a judge ought to consider a person’s past and present character.

Thus, Grotius writes specific passages outlining how a punisher must consider the particulars of an individual’s context, such as the historical-situational conditions. One must consider the place, the time, the opportunity of wrongdoing, and the other person involved.<sup>48</sup> A criminal who broke the law in order to avoid “death, imprisonment, pain, or extreme poverty” should generally be judged in light of these extenuating circumstances.<sup>49</sup> Indeed, this estimation of desert is particularly important in cases where natural causes largely circumvented the perpetrator’s ability to employ reason and judgment.<sup>50</sup> The importance of internal motive also leads him to distinguish between severity of the law broken and the manner in which it was broken. One’s intention when breaking the law is more important than the impersonal (expletive) law which was

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<sup>45</sup> Ibid., 2.20.32, 498-99.

<sup>46</sup> Ibid., 2.20.28, 494.

<sup>47</sup> Ibid., 2.20.37, 502.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., 2.20.29.1, 494.

<sup>50</sup> Ibid., 2.20.31.1-2, 498.

broken.<sup>51</sup> Thus, the determination of particular punishment must involve the judgment of attributive justice.

Grotius' treatment of intention provides a glimpse into his philosophical anthropology. Grotius essentially begins with Aristotle's conception of virtue and vice, but generally dismisses the vicious man, saying that "if any one delights in wickedness for its own sake he is beyond the pale of humanity."<sup>52</sup> Rather, most people are incontinent, being led astray by their desires. The problem is not usually ignorance, as the classical Greeks would have argued. Here can be seen Grotius' Christian understanding that includes the (sinful) will. This can also be seen in the fact that he does not reject all material desires, as might a pre-Christian Platonist. Indeed, he argues that some desires are natural and good, such as the desire to avoid evils – a statement that also tells against the reading of Grotius as a modern Stoic.<sup>53</sup> This helps to explain his greater willingness to consider excusing crimes committed out of a desire to avoid physical pain, rather than crimes committed by reference to unnatural goods, such as power for its own sake, revenge, or the pursuit of pleasure, greed, and vainglory.<sup>54</sup>

Nonetheless, in his discussion of punishment, Grotius seems to acknowledge a difference between the vicious man and the incontinent one. He argues that one ought to punish more harshly the one whose entire character is devoted to wrongdoing than one who was simply carried away by desires. Evil habits are worse than evil acts. This testifies to the fact that (external) acts are second-order manifestations of the (internal)

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<sup>51</sup> Ibid., 2.20.46.1, 513.

<sup>52</sup> Grotius, *DJB* 2.20.29.1-3, 494-95.

<sup>53</sup> This argument is presented in H. W. Blom and Laurens C. Winkel, eds. *Grotius and the Stoa* (Assen: Royal van Gorcum, 2004).

<sup>54</sup> Grotius, *DJB* 2.20.29.1-3, 494-95.

will. Here Grotius seems to emphasize the idea of a settled character, again showing shades of Aristotle.<sup>55</sup> He reinforces this idea when he quotes Seneca's counsel that "The wise man will forgive many; he will save many persons whose character is not sound but is curable."<sup>56</sup>

In rare occasions, however, this may not be possible. In the case of "men with incurable character," where it is certain "that by living they will grow worse," Grotius allows that desert may include capital punishment. Interestingly, Grotius cites Seneca's analysis that in such cases, it is to the advantage of such men that they should die. Such a conception of self-interest is surely not what most observers have in mind when they frame Grotius as a possessive individualist. In this case, protection of one's most treasured 'possession' (life) must be contrary to a higher 'self-interest': that of the soul.<sup>57</sup>

In addition to intrinsic factors of desert, extrinsic factors of the general public good must also be considered. After all, the purposes of punishment include not only reformation, but deterrence. Injustice must be measured first of all by the degree to which it has been carried out; those crimes only partially carried out are less serious than those completed. Next, they must be measured by the degree of harm to the public. Finally, they must be measured by the subject matter: whether they affect life itself, or marriage and the family, or mere physical goods.<sup>58</sup> Ultimately, there are four considerations in determining punishment: "the greatness...of the harm done, the frequency of such crimes, the strength of carnal desire, and the opportunity for the act."<sup>59</sup>

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<sup>55</sup> Ibid., 2.20.30.3, 496-97.

<sup>56</sup> Ibid., 2.24.3.3, 570.

<sup>57</sup> Ibid., 2.20.7.2-3, 471.

<sup>58</sup> Ibid., 2.20.30.1-2, 495-96.

<sup>59</sup> Ibid., 2.20.37, 502.

Thus, within these limits set by inherent desert, punishment is then adjusted according to the extrinsic reasons.<sup>60</sup> This testifies to Grotius' recognition that criminal law is a fundamentally public exercise, with the criminal's act ultimately being directed against the common good – a recognition that will be even more explicit in Grotius' treatment of the Atonement.

### *Pardon (Indulgence)*

In Grotius' initial discussion of equity in *de Aequitate*, he follows it with another subject of equal (if not greater) importance: that of indulgence, or pardon. Unsurprisingly, he revisits the subject in *DJB* (as he will to an even greater extent in *de Satisfactione*). In contrast to equity, which determines that a particular case does not fit within the intention of the law-maker, indulgence or pardon suspends the operation of the law in a particular case. Unlike equity, indulgence actually annuls the law, at least within the parameters of the case at hand. Its relation to justice thus differs from equity. Equity seems at least to hint at the interplay of both forms of justice. Expletive justice would seem to demand the exercise of equity, but the prudential reasoning of attributive justice then determines whether (and how) it applies. In contrast, while expletive justice can never demand indulgence, attributive justice may call for it. Strict justice will always obtain, even if a pardon is not granted. However, “regard for others or rectoral justice” may advocate pardon. Thus, this distinctively governmental sense of justice may lead to a departure from what the dictates of expletive justice.<sup>61</sup> Indeed, Grotius makes a point to

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<sup>60</sup> Ibid., 2.20.28, 494.

<sup>61</sup> Ibid., 2.20.27, 493.

criticize Vazquez for saying that the only just cause of suspending the law is equity, rather than pardon. Hence, the judge's verdict – even if equitable – is only the beginning of punishment, not the end. At this point, the ruler must consider whether the equitable punishment is truly appropriate to the particular case at hand, or whether justice in the full sense would be better served by pardon.

Grotius begins his treatment of pardon by refuting the Stoic argument against it (which should give further pause to those who read Grotius as a modern Stoic).<sup>62</sup> Where the Stoics had argued that punishment was deserved and thus could not be remitted, Grotius argues that punishment is permitted and can be pardoned.<sup>63</sup> This illustrates Grotius' natural Right – rather than natural law – perspective. Expletive justice does not compel an exact punishment according to natural law, but rather confers a right to punish the criminal. Because this right grants a (concessive) freedom rather than (preceptively) dictating the punishment, the ruler may exercise higher wisdom in remitting the punishment. The course of action is not strictly set out in law; freedom appears to begin where law ends. Thus, expletive justice is not the end of the matter, because attributive justice may counsel pardon. Indeed, both God and men are praised for pardoning the guilty.<sup>64</sup>

This right to pardon does not, however, confer a radical freedom, unmoored from a higher existential-personal guide to action. Indeed, Grotius suggests some general guidelines for pardon, examining two types of situations where it may be laudable. The first situation provides an “intrinsic cause” for pardon, where the lawful punishment is

<sup>62</sup> Indeed, a few paragraphs later, he further criticizes the Stoics for wasting time with endless discussions about terms, which is unbecoming of philosophers. See 2.20.23, 491.

<sup>63</sup> Ibid., 2.20.21, 489-90.

<sup>64</sup> Ibid., 2.20.4.1, 466.

nonetheless severe relative to the crime. The second provides an “extrinsic cause”, which generally refers to the public good.<sup>65</sup> For instance, in a crime known to few people, public prosecution may be unnecessary or even harmful to the public. Likewise, if the offender has been corrected and has offered satisfaction to the victim, there may be no need for punishment.<sup>66</sup>

### *Central Role of Prudence*

However, in keeping with the complex nature of carrying out punishment, a punisher is not always free to pardon the criminal. Even though clemency is in some cases admirable, it cannot (much like punishment) be applied indiscriminately. The *jus* of punishment is not a right that can be given up arbitrarily; it is a responsibility that must look beyond the whims of its holder. For example, in crimes of the worst type, the punishment must be exacted to the full. In other words, there is at least a small realm where law does fully constrain the possibilities of human prudential judgment, and expletive justice must fully govern the punishment. In other cases, however, governors are responsible to exercise the judgment of attributive justice, which may lead to punishment or clemency (or any point in between).<sup>67</sup> This freedom cannot be exercised arbitrarily, but must follow from Grotius' initial exposition of the purposes of punishment: satisfaction, reformation, deterrence (or the public good). A governor requires a “worthy reason” in order to suspend punishment. Indeed, if it was foreknown that the individual would take advantage of the ruler’s clemency and continue actions

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<sup>65</sup> Ibid., 2.20.25-26, 492-93.

<sup>66</sup> Ibid., 2.20.22.1, 490.

<sup>67</sup> Ibid., 2.20.23, 491.

destructive of the community, presumably it would be imprudent for the ruler to waive the punishment. As a result, on some occasions clemency might actually be imprudent or uncharitable to the whole. Lacking a good reason for pardon, the governor would be guilty of violating “governmental justice”.<sup>68</sup>

Thus, in the strict sense of expletive justice, any course of action is available to the ruler. However, this attributive “governmental justice” suggests a higher standard, characterized by both generosity and prudence, that ought to guide his action. Attributive justice does not simply oppose a simple conception of punishment with a simple, one-dimensional conception of pardon; it is not a binary choice. Rather, attributive justice considers many qualitative factors in pointing toward a higher purpose. The common good may be served by punishment, pardon, or some combination of both.

This complex nature of attributive justice can further be seen in Grotius' assertion that these “worthy reasons” for pardon cannot be defined with exactitude.<sup>69</sup> Here he again addresses (and rejects) Aristotle's idea of mathematical proportion. It is not usually just to give a punishment whose proportion follows the strictness of mathematics, because it may not reflect the conditions of the situation. Two men may commit the same crime and be given the same punishment, but the poor man may be highly burdened while the rich man is easily able to bear it. Likewise, the social shame may be heavily punitive to the man of high repute, but of little consequence to a man of low repute.<sup>70</sup>

Furthermore, after the civil law has been instituted, one must also consider the

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<sup>68</sup> Ibid., 2.20.24.1-3, 491-92.

<sup>69</sup> Indeed, this calls to mind Grotius' own recognition in *de Imperio* that there are limits to treating the subject of practical reason in a book. None of the theoretical guidelines he lays out here for practical virtue can be “eternal or even always useful”; as he adds, “no precepts for prudence are universal”. See Grotius, *de Imperio* 6.13, 317.

<sup>70</sup> Grotius, *DJB* 2.20.33, 499.

value of the positive law itself. The act of punishing does not simply follow from natural justice, but it also serves to uphold the integrity of the positive law, which is a good in itself.<sup>71</sup> This reaffirms the value of positive law on its own terms, as discussed extensively in the previous chapter.

### *Punitive War*

With this framework in place for punishment, Grotius can now apply it to his exposition of justice in war. After examining Grotius' treatment of 'public' and 'private' war in Chapter 3 of Book I, many of the applications are straightforward. This follows from Grotius' understanding that the realm outside civil society is subject to natural Right. Because crime confers a natural punishing authority over the offender, punishment does not depend on the creation of formal mechanisms of the state through the consent of its people. As a result, a nation is able to wage war to punish another nation, even if the two nations have not consented to an international standard of law and mechanism of enforcement. Furthermore, these actions are not limited to nations; individuals may engage in private war, and a nation may engage in war against individuals from other nations. The only jurisdictional restrictions on war arise from the consensual agreement that a nation has made to authorize 'domestic' institutions of civil authority, thereby creating a subjection to that authority.

Thus, just as defense and restitution of property in war follow from their analogue in the domestic realm, so does punitive war follow from Grotius' exposition of punishment. All of the considerations mentioned above play a similar role in punitive

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<sup>71</sup> Ibid., 2.20.24.1-3, 491-92.



war: the requirement of an offense against expletive justice; expletive justice as conferring a status on the punisher; the distinction between fault and wrong; the importance of prudence in determining internal intent and considering external circumstances; the need for punishment to look forward; the need to consider both internal desert and external consequences in governing the wider (now universal) public order; the need for attributive justice in determining the level of guilt (if any); and the possibility of pardon.

*Punitive Jus as Non-Possessive*

However, Grotius' discussion of punitive war helps to draw out several implications of the practice of punishment. One consideration in particular helps to strengthen the linkage of defensive war with external possessions and punitive war with internal intentions, as well as showing the importance of the common good over individual rights. A frequent cause of a restitutionary war is the expletive right to collect what is owed by the ruler of another nation. This claim-right is so absolute that, in order to collect on the debt of the ruler, the just side may even keep the property of his subjects. This reaffirms the fact that the relevant element in restitution is the external goods themselves. If it is impossible to recover them from the proper person, then they can be recovered from a person of some relation. Thus, it is more important that the goods be returned, than that the loss be borne by the most appropriate person. In war, as in peace, restitution is justified by reference to the party to whom restitution is owed, rather than the guilt of the other party.

In punitive wars, however, the just side is not permitted to forcibly take property from subjects as *punishment* for the wrongs of the ruler.<sup>72</sup> This echoes Grotius' earlier idea that, while debt can be forcibly transferred to an inheritor, punishment cannot. In regard to debt, the *jus* of the creditor (arising from his injury) trumps the innocence of the inheritor. In regard to punishment, however, the guilt of the wrongdoer trumps the *jus* of the punisher. This flows from the fact that the primary element in punishment is not the right of the punisher, but the guilt of the subject of punishment. Another way to conceptualize the matter is as follows: In restitution, there is only one person with the right to restitution, but this right can be satisfied by claiming the goods of anyone related to the debtor. In punishment, the inverse is true. The right to punish is held by any person not guilty of the same crime (as seen in the discussion of pre-civil society in Chapter 3), but can be exercised only on the person who deserves it.

Thus, in debt repayment, the matter begins with the claim-right of the creditor, not the debt of the debtor, and seeks to find someone who can plausibly deliver on that claim. On the contrary, in punishment, the matter begins with the wrongness of the guilty party, not with the punitive right of the punisher, and it subsequently seeks to 'find' a party that can plausibly deliver the punishment. Thus, punishment is justified not primarily by reference to the nation possessing the *jus* of punishment, but rather to the subject of punishment. Moreover, as the *jus* is potentially held by everyone and exercised on behalf of the common good, it is fundamentally public. This further reflects the fact that punitive wars originate by reference to the common good, rather than by reference to the *jus* of the punisher.

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<sup>72</sup> Ibid., 2.21.17-19, 543-45.

This, in turn, underscores the fundamental difference between the *jus* of ownership held by a rightful claimant, and the *jus* of punishment. In private law, the claim-right holder originates a claim. On the contrary, the 'holder' of the *jus* of punishment responds to an already-existing need for punishment. This further indicates that the latter type of *jus* is not a claim-right. Rather, it is a demanding responsibility.

This indicates that Grotius' understanding of *jus* cannot simply be possessive. Rather, punishment testifies to the place of the common realm and its overall good. It also reflects the difficulty Grotius immediately recognizes in his initial attempt to conceptualize punishment as exclusively fitting into part of expletive justice. It is true that that punishment necessarily follows the (expletive) fact that another has become a lawbreaker. However, the exercise of punishment must transcend expletive justice.

This helps to counter the perception of methodological individualism in Grotius' earlier pronouncements. In the beginning of *DJB*, it appears that Grotius is attempting to de-emphasize the importance of the public realm by departing from the scholastic practice of lining up his categories of justice with private and public matters. However, Grotius does this not to minimize the importance of the common good, but to play up the difference between the strictness of justice in law, and the wider sense of virtue. Indeed, Grotius' seminal role in developing a philosophy of punishment testifies to the importance of the public good in his thought, even if he does not have one specific category of justice that corresponds to the public good. Just as punishment is not reducible to restitution, but is qualitatively different from it, so the public good is not reducible to an aggregation of private property claim-rights, but is qualitatively different.

*Symbolic Reasoning in Punitive War*

As stated earlier, property can be taken from subjects for the restitution owed by rulers, but punishment cannot be given to subjects in place of their rulers. It is interesting to note that this distinction between restitution and punishment holds good even if the punishment in question is nothing other than the loss of property. In other words, property *qua* property can be taken from subjects for the restitution owed by rulers, but property *as punishment* (that is, representing something beyond itself), cannot be taken from subjects when the punishment is directed toward rulers.<sup>73</sup> Thus, although the results of restitution and punishment may appear the same when one examines the external effects (namely, the transfer of property), punishment involves a higher-order reality, because in such a case, the property represents something beyond itself. This further emphasizes the fact that restitution involves only scientific language, which assumes only one dimension of meaning, and it takes for granted that the language involved is fully adequate to the essence. On the contrary, punishment involves symbolic elements, thus requiring recourse to imaginative reasoning in order to discern its higher-order meaning. This is consistent with the fact that the relevant concern in punishment is the internal intention of the person, which – unlike the external nature of tangible property – is not immediately accessible to the measurements of scientific rationality.

Indeed, this follows from another comment Grotius makes immediately in Chapter 20 about the specific nature of punishment. He defines punishment as “an evil of suffering which is inflicted because of an evil of action.” He points out that these harms, when understood in a simple, literal sense, may be identical to those who suffer on

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<sup>73</sup> Ibid., 3.13.1-2, 757-58.

account of misfortune or disease. Yet it would be a misuse of the term to describe sufferings from misfortune or disease as punishment.<sup>74</sup> Thus, punishment cannot be understood simply by reference to the external actions carried out. Rather, the concept involves the requisite symbolic imagination to connect the imposed suffering to the internal condition of the subject. The external effect of the punishment, such as the bruising from corporal punishment, is merely a means to an end, rather than an end in itself.<sup>75</sup>

### *Punitive War as Public*

At this point, having granted the legitimacy of punishment, one might still suggest that punishment nonetheless exists for the sole purpose of protecting property. If the improper acquisition of territory is conceived as a tort, and punitive war is simply aimed at preventing such future incursions, one might simply conceptualize the punishment as punitive damages. These can be assessed in a private law court, without reference to criminal law.<sup>76</sup> Perhaps the ultimate end is still possessive.

However, Grotius' understanding of punitive war goes beyond the 'punitive damages' model, and indisputably into the realm of criminal punishment proper. Not only may punishment be carried out after the territory is returned and reparations are exacted for the costs of doing so, but it may also be applied in the very absence of violations of territory in the first place. This can be seen in Grotius' qualified

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<sup>74</sup> Ibid., 2.20.1.1, 462.

<sup>75</sup> This is particularly true in light of Grotius' insistence on the forward-looking nature of punishment, and his rejection of pure retribution.

<sup>76</sup> Some would argue that punitive damages already partakes of criminal punishment, not least in its very terminology, which is something of an oxymoron on its own terms – thus rendering the objection moot. Nonetheless, at the very least, punitive damages are assessed for property crimes in private law.

endorsement of punitive war against countries which have offended not against other countries, but merely against natural law. Such violations might include piracy, cannibalism, or impiety toward parents. This testifies to Grotius' conception of punishment as being intended to prevent actions in which the wrongness is substantive and inherent, rather than being manifested in physical outcomes. For example, as an outlaw activity, piracy displays a contempt for the very idea of law. Cannibalism *per se* shows a dishonour to the person; contempt for parents does the same.<sup>77</sup> None of these crimes necessarily cause damage to the property or external possessions of another right-holder. Rather, they indicate an evil will, or guilt, on the part of the perpetrator. Such 'victimless' crimes may also be punished in the domestic realm: Grotius gives examples of suicide and bestiality.<sup>78</sup> This contrasts with property offenses, in which there is a direct victim. Thus, punishment is not simply undertaken to deter the violation of property, but even to deter crimes with no property implications.

Indeed, Grotius' emphasis on the necessarily public nature of crime demonstrates the meaninglessness of the very term 'victimless crime' for him. Any crime against natural law shows a disdain for law and Right, and thus is automatically a crime against the common good. This is evident in his assertion that punishment can even be administered when a population shows great impiety toward the gods they believe in,

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<sup>77</sup> One might argue that Grotius' examples of punishment for dishonour *can* actually be framed along private law lines, by attempting to conceptualize honour as a possession that can be taken and subsequently restored (as in suits of defamation). However, this possessive framework becomes less credible considering that Grotius later includes the honour due to God. Indeed, this paradigm would be uniquely antithetical to Grotius, given that his understanding of the Atonement is less inclined to portray God's honour along possessive lines than any Christian thinker before him. Thus, Grotius has a unique emphasis on punishment for offenses against nature and that inhere in the will, rather than seeing punishment as directed toward procedural or formal issues such as security of property. (Indeed, his treatment of the Atonement will further strengthen this concept of crimes against nature.)

<sup>78</sup> Grotius, *DJB* 2.20.44.2, 508-09.

because of its necessarily detrimental effect on public morality.<sup>79</sup> Indeed, Grotius devotes several sections to an exposition of the negative – if indirect – consequences of dishonour to God (or even the gods). Here he cites a welter of (non-Christian) authorities who testify that religion is the “bond of right training” (Plato), and the “cement of all society” (Plutarch), and who assert that impiety is “the first cause of crime for weak men” (Philo). This is no less true in the realm of punitive war than it is in domestic affairs.<sup>80</sup> Hence, the dichotomy of crimes against others and ‘victimless’ crimes is inaccurate. Both cause harm to human society. As will become even more apparent in Grotius’ treatment of the Atonement, no man is an island.

### *Punitive War: Necessity of Expletive Justice*

To modern ears, this justification for punishment may appear rather retrograde, leading one to conclude that Grotius must be an apologist for religiously-motivated colonial oppression. Yet Grotius’ subsequent qualifications actually demonstrate an inversion to the supposed colonialist mentality. Grotius makes it clear that other peoples

<sup>79</sup> Ibid., 2.20.44, 508-10; 2.20.51, 521. Grotius does limit this punishment only to those who have offended those commandments of natural religion common to all; punishment of non-Christian nations for violations against the Christian God is not acceptable. See 2.20.42, 507. Grotius’ willingness to permit punishment of those outside one’s own country Grotius thus allows punishment even for those outside one’s own country puts him in agreement with Innocent III over Vitoria, Vazquez, Azor, and Molina. See 2.20.40.3-4, 505-06.

In correlating religion and public morality, one might attempt to argue that Grotius is reducing religion to public morality. It is true that Grotius comments on the importance of religion in maintaining public order in several different passages (see, for example, 2.20.44.3-6, 509-10). However, Grotius here cites Plato and Aristotle, among others. Conspicuously absent are Averroes and Marsilius. Indeed, only once does Grotius cite Marsilius, when he says that “things which are sacred are public” (see 3.5.2.1, 659). Even in this case, however, Grotius is making the point that sacred things can be governed by the ruler of a state because the ruler has care over things both sacred and secular, rather than because sacred things are valuable only in relation to the secular outcomes they promote.

<sup>80</sup> Ibid., 2.20.46.1-4, 513-14; 2.20.44.3-6, 509-10. Indeed, it is *more* true; Grotius adds that religion is particularly important in international relations, where there is no common positive law to take its place. Referring to the law of nations, he argues that these “laws themselves receive their validity chiefly from fear of the divine power.”

cannot be punished through military conquest for failing to convert to Christianity.<sup>81</sup> Nor can other Christian nations be punished for espousing diverging or supposedly heretical interpretations of Christianity.<sup>82</sup>

This prohibition of holy wars for the spread of Christianity coheres with Grotius' overall method in *DJB*: that of carefully distinguishing the content of Christian revelation from the dictates of natural reason. He is clear to differentiate between what is binding on all and what is expected only of Christians. The dictates of Christianity go beyond justice, and its full exercise cannot be demanded in natural justice.

Hence, a right in justice cannot arise from supernaturally revealed religion. Yet this does not mean that Grotius seeks to eliminate or even downplay the public importance of religion. While Grotius does not expect non-Christians to live up to those Christian standards that transcend nature, he does expect them to adhere to merely natural standards. These would seem to include the four basic principles of natural religion detailed above, and the obligations of obedience and worship that follow. These can be enforced because they are knowable through reason and history, independent of special revelation. However, Grotius here reduces his four principles to two, acknowledging the non-universality of monotheism and a Creator-God.<sup>83</sup> Yet while (some) ignorance is invincible, impiety is not. This is why other nations can be punished for failing to live up to their *own* pre-existing religious standards.<sup>84</sup>

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<sup>81</sup> Ibid., 2.20.48, 516-17.

<sup>82</sup> Ibid., 2.20.50.1-5, 518-21.

<sup>83</sup> Ibid., 2.20.47, 514-16.

<sup>84</sup> Ibid., 2.20.44-46, 508-14; 2.20.51, 521. It is important to note that Grotius does not here indicate a moral relativism: this immunity would be valid only inasmuch as their religion is consistent with natural religion. To take one obvious example, Aboriginal religions living up to their own principles of human sacrifice (an example which was not merely hypothetical in Grotius' day) would not be exempt from punitive war.



This relation between knowability and accountability is also consistent with Grotius' understanding of the obligatory force of law. People cannot be held accountable for their failure to uphold a standard of which they were unaware. Indeed, Grotius' widespread use of the distinction between being (internally) unjust and carrying out an (external) injustice allows him to provide punitive (if not restitutionary) immunity for those who, through their own ignorance, merely *acted* unjustly (rather than *being* unjust). In practice, this is evident in his surprising dictum that nations can wage a war that is objectively unjust without being said to be unjust themselves. It is possible for a nation, acting in good faith, to carry out a war that is objectively unjust. In such a case, while the one side carries out an injustice of effects, neither side *is* unjust in regard to causes.<sup>85</sup>

In keeping with the justificatory necessity of crimes against expletive justice, Grotius also adds that wars cannot be waged against other nations in order to promote the goods of attributive justice. Even if the other nation would be better off, such goods must be freely chosen by the people themselves. As he says, “For those who have the use of their reason ought to be free to choose what is advantageous or not advantageous, unless another should have obtained a particular *jus* against them.”<sup>86</sup> This reflects his earlier emphasis on the idea that virtuous actions cease to be so when they are coerced instead of chosen freely.

This emphasis that other nations can be punished only for violations of natural law illustrates Grotius' assertion that expletive justice is, indeed, necessary in *jus ad bellum*. In a punitive war, the offending nation must have committed an offense against

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<sup>85</sup> Ibid., 2.23.13.1-5, 565-66.

<sup>86</sup> Ibid., 2.22.12, 551.

strict natural law, or expletive justice. An offense against attributive justice, or against the supernatural moral standard of Christianity is insufficient grounds for war. This is also true of defensive and restitutionary wars, which require a strict obligation on the part of the subject nation. A nation cannot wage war in order to collect something owed from generosity, gratitude, pity or charity, any more than an individual could claim such in a court of law.<sup>87</sup>

### *Third-Party Punisher*

The fact that punitive war arises from an offense against natural law, rather than the external damage to the goods of another, reaffirms the fact that the valid title to punish has no necessary connection with direct victimization. Grotius began his discussion of punitive war by showing that any nation free of similar crimes may punish these so-called 'victimless' offenses against natural law. In other words, a third-party state may punish offenses not directed against itself. Indeed, Grotius says that it is actually more noble to punish wrongs not directed against oneself. Furthermore, it is also wiser that punishment be given by one other than the victim, due to the likelihood of partiality and prejudice in meting out justice.<sup>88</sup>

Indeed, if direct victimhood were a requirement, then third-party states would actually be prohibited from punishing. Grotius understandably sees this conclusion as theoretically and practically absurd, because it would prohibit third-party judges in civil society. This would eliminate one of the benefits of entering into civil society in the first

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<sup>87</sup> Ibid., 2.22.16, 555.

<sup>88</sup> Ibid., 2.20.8.4, 473-74; 2.20.40.1, 504-05.

place. Likewise, it would restrict law enforcement to direct victims of crime, a task that would be most obviously difficult for murder victims.<sup>89</sup> This also emphasizes another link with the criminal law paradigm, in that the punisher has no personal self-interest in exercising punishment.

Grotius acknowledges the uniqueness of his idea that third-party states can engage in punitive war, distinguishing himself from a legion of earlier writers such as Vitoria, Vazquez, Azor, and Molina. These others require that a punisher either possess a right of jurisdiction (which reduces punishment to domestic politics), or that the punishing state itself be injured. However, such a view either limits punishment to positive law (in the case of domestic politics), or views punishment through a private law framework of punitive damages. Under the former, pre-civil society cannot feature any concern for the common good, because crimes cannot be punished. Under the latter, only victims can punish crimes, and then only those directed at themselves. These thinkers implicitly suggest that effective concern for the common good arises only with the creation of the state. In contrast, Grotius' conception of pre- (or extra-) civil society already involves a concern for the common good, as anyone of moral standing can punish crimes against anyone else. Indeed, such crimes are not simply committed against anyone, but against everyone; they are inherently public, as is their punishment. Thus, Grotius emphasizes the existence of a natural public realm that precedes the creation of the state. In contrast to these other thinkers, this allows for a conception of human consociality prior to the creation of the state.<sup>90</sup>

<sup>89</sup> See Hugo Grotius, *The Satisfaction of Christ (SC)* 2.6, trans. Oliver O'Donovan and Joan Lockwood O'Donovan, in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, MI: Eerdmans, 1999), 817.

<sup>90</sup> Grotius, *DJB* 2.20.40.1-4, 504-06.

*Punitive War: Rights and (Imperfect Duties of) Virtue*

While all rulers have the expletive right to punish other nations for crimes against natural law, it is not clear that any particular nation has a perfect duty (in expletive justice) to do so. After all, none has made a promise to do so, one whose nonperformance would constitute a violation of duty. Indeed, no nation is likely to want to undertake such a task, given the cost in blood and treasure. Yet while no specific nation has this duty, it would still constitute an injustice in the moral universe for the wrong to go unpunished. Thus, there can be an objective wrong even if nobody has committed a subjective wrong (by failing to exercise a perfect duty).<sup>91</sup> This demonstrates that the perfect moral rights (and even duties) of expletive justice are inadequate to fully account for moral reality. In fact, it reaffirms the idea that imperfect (attributive) duties can exist in the absence of a corresponding claim-right.

Hence, a nation (or nations) must be guided by attributive justice to undertake the virtuous sacrifices necessary to bring about just punishment. This further emphasizes the fact that the *jus* of punishment is not always a claim-right, but may instead confer a duty that requires one to sacrifice one's possessions. The freedom conferred under the absence of a natural law does not mean that one is outside a moral horizon. Although there may be no perfect duty, there remains an imperfect duty.

This idea of acting according to a standard of goodness that transcends one's strict duty in justice can further be seen in Grotius' chapter advocating wars on behalf of others, or what might be known today as humanitarian intervention.<sup>92</sup> In such a case, a

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<sup>91</sup> This tells against Villey's reading of Grotius as eliminating objective right. It also tells against the idea (held by Hohfeld, among others) that all rights and duties are perfect (and thus reciprocal).

<sup>92</sup> Ibid., 2.25.

nation risks the lives of its own soldiers in the name of saving nationals of other countries. This seems to further emphasize the idea of the common good of humanity over the rights of a country's own soldiers, who must potentially set aside their right to life.

The fact that punishment must be undertaken for the good of others is consistent with Grotius' emphasis on the character of the punisher. In aiming to produce virtue in the offending nation, a punishing nation must display virtue in its exercise of punishment. Punishment should not be motivated by the vengeful desires or injured pride of the offended party. Such would follow from desires ungoverned by reason.<sup>93</sup> Rather, punishment must take its bearings from an other-oriented desire to reform the subject of punishment, or, more broadly, a service to "human society."<sup>94</sup> Thus, the punishing nation must refrain from punishing too heavily. It must also hold back from punishing in an internal state of malice. This emphasis can also be seen in the requirement that the punisher be free of the very crime for which it punishes the guilty party.<sup>95</sup> Thus, the punisher must not only aim at the (internal) good of the recipient, but its own internal character must be virtuous.<sup>96</sup> For these reasons – and also, no doubt, the likelihood that all involved parties will have their hands dirty – Grotius reiterates his belief that it is more honourable for a third-party state to exercise the punishment.<sup>97</sup>

Grotius' discussion of punitive war also includes the subject of clemency.

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<sup>93</sup> Ibid., 2.20.5, 467-69.

<sup>94</sup> Ibid., 2.20.40.1, 504. More generally, 2.20.7-9, 470-78. One might contrast this with Hobbes' assertion that vainglory and diffidence are two of the natural passions in man, and his expectation that they cannot be changed, but only overwhelmed by the threat of force, which arouses the comparably greater passion for self-preservation.

<sup>95</sup> Ibid., 2.20.7.1, 470-71.

<sup>96</sup> Ibid., 2.20.40.1, 505.

<sup>97</sup> Ibid., 2.20.40.1, 505; 2.25.8, 583-84.

Attributive justice does not simply require punishing for the good of the person; it involves the determination of whether – and how much – to punish in the first place. This may mean involve declining to exercise punishment to the full, or at all. Even though states have the right to punish, they are not automatically at liberty to exercise their rights.<sup>98</sup> Rather, a punishing nation ought to exercise prudence, weighing situational considerations and their implications for “the good of mankind in general,” or what Grotius refers to as “that greater society” of all humanity.<sup>99</sup> While (strict) justice may not demand such clemency, it is fitting to goodness (*bonitati*), to moderation (*modestiae*), and is characteristic of a lofty soul (*animo excelso*).<sup>100</sup> The term “fitting” is another indicator of attributive justice. Such pardon is not required in strict justice. However, a refusal to pardon might nonetheless be inappropriate to the higher spirit of justice. Indeed, the exercise of the virtues, in the service of the “public good,” may enjoin the remission of punishment.<sup>101</sup>

For these reasons, Grotius spends a full chapter exhorting rulers not to charge rashly into war, even if the cause is just.<sup>102</sup> No one should think that simply because “*jus* has been adequately established,” that “either war should be undertaken immediately, or even that war is permissible in all cases.”<sup>103</sup> Indeed, the remainder of the chapter is devoted to explaining cases in which one should consider foregoing one’s right to war.

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<sup>98</sup> Ibid., 2.20.23, 491.

<sup>99</sup> Ibid., 2.20.9.1, 475-76; 2.20.44.6, 510.

<sup>100</sup> Ibid., 3.11.7.1, 731.

<sup>101</sup> Ibid., 2.20.23, 491.

<sup>102</sup> Ibid., 2.24

<sup>103</sup> Ibid., 2.24.1.1, 567.

*Jus in Bello*

In his discussion of punitive war, Grotius has dealt with the justification for punitive war. He has also discussed the practice of punishment that results from it. However, there must be a third component that connects those two items. In the event that one has a right to wage punitive war, prior to actually delivering punishment, one must successfully – and justly – wage the war.

Just War theory has traditionally been divided into two components: *jus ad bellum* (the justice of the decision to go to war), and *jus in bello* (the justice of carrying out the war). While Book II addresses the *jus ad bellum* of restitutionary and punitive wars, Book III deals with the *jus in bello* of carrying out these wars. This organization of *DJB* according to the division between the acquisition of the (legitimate) status of war-participant, and the good exercise of that authority, has been rather unnoticed in the literature, which has largely overlooked Book III altogether. Here, once again, the status conferred by expletive justice points toward the exercise of attributive justice. Just as prudence and clemency may dictate a moderate course of punishment, these virtues ought to direct the war that leads to that punishment.

Grotius devotes the first chapter of Book III to an exposition of the restraints on waging war demanded by the law of nature, or expletive justice. His opening premise, however, is not especially restrictive: we are understood to have a right to carry out those actions necessary to secure the end of the just war. Thus, according to strict natural law, the ends generally justify the means. There is little consideration of proportion. In fact, the law of nature permits even the killing of women and children in order to capture those

evildoers whose wrongdoing gave rise to the *jus* of punitive war.<sup>104</sup> This re-emphasizes the unlimited nature of the status of the *jus* of punishment, at least when understood exclusively within the framework of expetive justice.<sup>105</sup>

This follows from Grotius' earlier assurance that, if necessary to save one's own life, one is entitled to kill another person who accidentally impedes one's flight path. (In the case of punitive war, one might instead imagine a police officer defending himself while on a manhunt.) As can be seen from the potential innocence of the person blocking one's escape, this right does not arise from the wrong of another, but from the right that nature grants a person on their own behalf.<sup>106</sup> Thus, this right in the strict sense is individualistic, rather than taking its lead from the common good. It is not limited by considerations of proportion or public outcome.

However, here Grotius already alludes to limitations beyond natural law, as he mentions that we are not always permitted to exercise strict *jus* to the full. The natural virtue of prudence must ascertain whether the good end sought will outweigh the evil committed in its service. Moreover, the virtue of charity directs the Christian not to press his right to the full limit. He ought to consider the good of others rather than his own.<sup>107</sup> Thus, even in this section, Grotius points toward the limitations of expetive justice, a theme to which Grotius will devote significant attention later in Book III.

Indeed, considering that he follows his twenty-six chapters in Book II with an equally hefty twenty-five in Book III, Grotius clearly has no shortage of *jus in bello* restraints. It is notable, however, that Grotius devotes only this solitary first chapter to

<sup>104</sup> Ibid., 3.1.4.1, 600-01.

<sup>105</sup> Ibid., 3.1.2.3, 600.

<sup>106</sup> Ibid., 3.1.2.1, 599.

<sup>107</sup> Ibid., 3.1.4.2, 601.



those restraints demanded by strict natural justice – of which there are very few. This already points to the relatively small place of a law-based framework in Grotius' understanding of justice in war. Rather, Grotius sees the bulk of *jus in bello* as arising from three other sources. The first, the subject of chapters 2 through 9, arises from the tradition of accumulated conventions of nations, or *jus gentium*. The second and third sources are not laws at all, but virtues: those of moderation (*temperamenta belli*), which Grotius examines in Chapters 11 through 16, and of faith (*fide*), or the keeping of promises, whose treatment spans chapters 19 through 24.

This section outlining *jus gentium* adds further restraints to those scant dictates of natural law. However, these additional limitations still hardly reassure the reader. For instance, under this standard, Grotius understands unlimited pillage, even of sacred property, to be permitted to just warriors.<sup>108</sup> Even the natural law permission of killing women and children remains unchanged.<sup>109</sup> *Jus gentium* seems to embolden – rather than restrain – those undertaking a just war.

Yet Grotius himself seems to recognize the harshness of this description. Indeed, at the end of this entire section on *jus gentium*, he adds a final cautionary chapter through which everything prior must be understood. The first section of this chapter is entitled “In what way honour may be said to forbid that which law permits.” He opens this chapter with the statement, “I must retrace my steps, and must deprive those who wage war of nearly all the privileges which I seemed to grant, yet did not grant to them.”<sup>110</sup>

This caveat arises from his re-invocation of the distinction between what can be done

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<sup>108</sup> Ibid., 3.5.1-2, 658-62.

<sup>109</sup> Ibid., 3.4.9, 1-2, 648-49.

<sup>110</sup> Ibid., 3.10.1.1, 716.

with impunity under law (whether natural or human positive law), and what corresponds to a higher moral order. Indeed, he now acknowledges that what was said of *jus gentium* is simply what is permitted with impunity among nations, or among international tribunals that exercise compulsive force.

Hence, many of the rights granted under strict justice or positive international customs confer only an immunity from (temporal) punishment. They do not justify such actions according to natural Right. For example, Grotius makes it clear that even if a country permits naturally wrong actions, such as theft, this does not mean that one can commit them without guilt.<sup>111</sup> While the law may confer a freedom from (temporal) punishment for the thief, it does not justify the offense against natural Right.<sup>112</sup> Indeed, this distinction between what is lawful (*licet*) under positive law and what is free from fault (*vitio*) under natural law is a primary organizing principle in Book III of *DJB*. This echoes his initial discussion in the *Prolegomena*.<sup>113</sup> As in that discussion, his use of the term “permissible” in the beginning of Book III in a narrowly positivistic sense does not prevent him from later identifying its wider normative sense.

Thus, many of these licit actions are not praised by good men and ought to be avoided on higher grounds. They deviate from natural Right (*recto regula*), which includes both strict *jus* as well as that which is enjoined by the higher virtues.<sup>114</sup> Grotius also goes on to cite the distinction, evident in a legion of eminent historical authorities, between positive statutes and true justice (the latter of which he sees as inextricably linked with honour). Grotius identifies this as the distinction between (strict) *jus* and

<sup>111</sup> Ibid., 3.4.2.1-3, 641-43.

<sup>112</sup> Ibid., 2.1.14, 183.

<sup>113</sup> Ibid., Proleg.41, 24.

<sup>114</sup> Ibid., 3.10.1.1, 716.

(higher) *justitia*.<sup>115</sup> Thus, upon arrival at Chapter 11 (which begins to examine the virtue of moderation), Grotius enters the realm in which the permissions of strict justice are no longer sufficient. Rather, he is now in a realm where the virtues associated with the higher standard of attributive justice must guide the exercise of human freedom.

Indeed, throughout the remainder of Book III, Grotius frequently employs the language of “internal” and “external” justice. This calls to mind his earlier distinction between guilt and injury. In doing so, it emphasizes the importance of the internal intention of the doer, not just the deed. This particularly emphasizes the nature of higher justice as corresponding to virtues of character, rather than simply the external acts governed by natural law. There is a distinction between possessing a *jus* in strict natural justice, and acting according to the highest sense of justice.

What, then, are the true guidelines for war, according to this higher standard of internal justice? The remainder of Chapter 11, through to the end of Chapter 15, outlines these restraints on war that go beyond strict natural law and *jus gentium*, following instead the standard of internal justice. Here Grotius systematically treats each of the issues he had dealt with in the section on *jus gentium*: killing, pillaging, retaining property, and acquiring *imperium* over a conquered people. Each chapter, as stated in its title, purports to explain the practice of moderation in war. Thus, the counsel of this internal justice appears to be grounded on virtues rather than legal propositions, whether natural or positive. This can be seen in the fact that these restraints are not demanded of nations, but rather, encouraged of them.

This difference between the permissions of strict natural law and the restraint of

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<sup>115</sup> Ibid., 3.10.1.2-3, 716-17.

the higher virtues is illustrated, for example, in Grotius' treatment of pillaging. This practice involves the destruction of the property of others. Considering the importance of protecting property in expletive justice, one of three exceptional conditions must be in place in order to pillage without offending against *jus*. These proceed from Grotius' fundamental understanding of property. The original primitive agreement to institute private property included an implicit exception in cases of necessity, one that allows the destruction of property. For example, Grotius furnishes the example of casting into the river the sword of a third party that a madman is about to use. The second condition occurs in the case of a debt arising from an inequality. This appears to follow from a fundamentally unjust contract, perhaps compelled by extortionate measures. A final condition arises from when someone deserves punishment.<sup>116</sup>

Thus, if one of these three conditions applies, pillaging will qualify as permissible in justice, as it will not be contrary to justice. However, even when these conditions permit pillaging, there are additional considerations of virtue involved. The virtue of prudence is needed in order to determine whether this pillaging will achieve a legitimate end – namely, the speedy conclusion of hostilities. Moreover, intention matters: pillaging should be motivated by the virtue of prudence, not by its usual origin in malice.<sup>117</sup>

Unfortunately, pillaging generally does not conform to these standards. Indeed, due to the low esteem in which virtue is held in his day, Grotius eventually makes recourse to self-interest, demonstrating the advantages that follow from exercising moderation in pillaging. This is reminiscent of his defense of natural right in the

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<sup>116</sup> Ibid., 3.12.1.1, 745.

<sup>117</sup> Ibid., 3.12.1.2-3, 745-46.

*Prolegomena*. Although he provided justifications there (using reason, revelation, and history) for the intrinsic worth of natural Right, that defense was not exclusive of extrinsic justifications for natural Right. At this point, however, he now seems more reluctant to resort to such reasoning. He does so only after stipulating that it is not part of his purpose to determine what is advantageous, and he begs the reader's forgiveness for having resorted to such a self-interested line of argumentation.<sup>118</sup>

Yet while the exercise of these moderating virtues transcends strict justice, it remains part of natural justice. These virtues are not supernatural Christian virtues, possessed only by Christians enabled by the grace of God. Rather, they are virtues that the best of the pagan Greeks and Romans often displayed, examples that Grotius is all too happy to cite.<sup>119</sup> He appears to further underscore the natural character of these virtues by contrasting them with the even wider restrictions enjoined by the Christian virtue of love. Yet, although these virtues are natural, they do not follow the formulaic and propositional nature of strict natural law. Rather, they reside in the person.

Grotius reinforces this understanding of higher virtues in his subsequent contrast with equity. In the following chapter, Grotius begins by examining again “the equity which is required, or the humanity which is praised” in the matter of retaining governing authority over those who have submitted in war. Here he draws out a specific difference between these two categories: while the exercise of equity is required, exercising humanity is praised.<sup>120</sup> Thus, where equity seems to partake of both expletive and attributive justice, exercising humanity relates only to the higher of the two senses of

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<sup>118</sup> Ibid., 3.12.8.1, 754-55.

<sup>119</sup> See, for example, Ibid., 2.24.2.4, 569.

<sup>120</sup> Ibid., 3.15.1, 770.

justice. This is consistent with Grotius' exposition of equity in relation to indulgence and good-naturedness in *de Aequitate*. Equity is about determining the true (rather than apparent) *jus* of a person in the first place; once this has been accomplished, indulgence or clemency may involve relaxing that *jus*.

### *Central Role of Prudence*

Not surprisingly, the exercise of such humanity often counsels a nation to give up its right to retain *imperium* over a captured people. Indeed, conquered peoples should always be treated with clemency, and even the fruits of war should be shared with them.<sup>121</sup> Strict natural rights-based justice would surely not demand such magnanimity, but Grotius advocates it nonetheless.

However, this exercise of humanity is not simply the arbitrary ceding of the right; less control over others is not always more praiseworthy. Indeed, because the just title to war often arises from the acquisitive nature of the aggressor, public safety and lasting peace – for which a punishing nation is responsible – may demand that this *imperium* not be returned to the offending nation.<sup>122</sup> In other cases, prudence might call for compromises. Full societal membership might be extended to the subjugated nation, effectively sharing *imperium* with them. Alternatively, governing authority might be returned to its original holders, but with troops from the punishing nation left in the territory, or tributes demanded.<sup>123</sup> Even if the justly victorious nation retains full *imperium*, the conquered people ought to be ruled with clemency, because such treatment

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<sup>121</sup> Ibid., 3.25.12, 776-77.

<sup>122</sup> Ibid., 3.15.1, 770.

<sup>123</sup> Ibid., 3.15.3-6, 771-73.

is conducive to lasting peace.<sup>124</sup> Thus, it appears that the exercise of the virtue of generosity and humanity still ought to be governed by prudence. Even in its exercise of virtue, attributive justice does not follow the simplistic and absolute mode of expletive justice. As the terminology reminds us, attributive justice is not a matter of mere implementation, but requires judgment.

Thus, the restraints arising from this higher justice are more reassuring to contemporary readers, and undoubtedly to his own as well. Where natural law and *jus gentium* permit virtually any means in pursuit of the ends of a just war, the higher virtues of attributive justice counsel a much different path.

### *Rights and Virtue*

Throughout this discussion, it is clear that a failure by the punisher to exercise the higher virtues of attributive justice would not constitute a violation of the *jus* of the punisher (or, as we may be wont to think of it, the rights of the subjects of punishment). If another nation has offended against natural law, it becomes subject to the absolute punishing authority of another nation. This follows from one of Grotius' three natural sources of authority: that of crime. Because this status of authority is absolute on its own terms, the subject population retains no rights against its just punishers. Thus, while the punisher has a higher obligation to act according to moderation, the subjects of this military action do not possess an equal and inverse right to demand it. Much like a convicted criminal can never claim a right to clemency, nor can the subjects of an offending nation make any such demand in justice. (Indeed, if anything, the opposite

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<sup>124</sup> Ibid., 3.15.12,.1-2, 776-77.

would be true, as their punishment is deserved.) Crude and harsh punishments, to be sure, would be contrary to the good of the subjects, and to the good of the situation. The unfortunate subjects of punishment could not, however, claim any violation of strict rights-based justice. It is virtue, not justice, that beckons the punisher toward a higher path of restraint.

Hence, according to strict natural law, there is very little which is impermissible in war. If justice endorses the cause, it places few restrictions on pursuing that end. This strongly testifies to the limits of strict justice. Expletive justice alone does not result in the kind of world that we want or that we ultimately approve of. In response, Grotius would likely say that if they wanted to prevent these harsh but (strictly) just punishments, they should not have offended against justice in the first place. This undoubtedly sounds harsh to our ears, and perhaps for good reason. However, Grotius would presumably respond that only a society with a lack of respect for law and justice would see it that way. Even more importantly, however, Grotius would likely respond that this only serves to emphasize the importance of higher virtues. Thus, one may indeed look to Grotius for a defense of rights. However, if one truly wants to be treated with humanity, one must appeal to something beyond rights.

Indeed, the restrictions in war that make war a somewhat more dignified and less inhumane practice come from the virtue of the punisher. There is no legal (or even minimally just) requirement to be moderate in war. Only the counsel of virtue, arising from a higher sense of justice, will bring about moderation. This higher standard applies to all; the virtue of moderation is a cardinal virtue, not a theological one.



This illustrates the divide between a right, on one hand, and goodness, on the other. Grotius' strict justice, dealing in the realm of rights, is a rather harsh place. Like a petulant and unremorseful child defending himself to a frustrated and vindictive parent, one will not get very far by demanding their rights. Rather, one ought to appeal to a higher standard of goodness, one that calls forth the virtues of those exercising their rightful authority. When the ruler or punisher submits himself to a higher authority, the outcome will be better for both parties than the adversarial insistence on getting one's due. Grotius does not have a proto-Smithian conception of an invisible hand that will direct self-interest toward the best of outcomes. As will be seen later, this is very consistent with Grotius' understanding of God's supernaturally charitable – and naturally prudent – gift in the Atonement.

### *Conclusion*

Grotius' discussion of punishment helps to illustrate several aspects of expletive and attributive justice. As with matters of private law, punishment begins with expletive justice: possession of the *jus* of punishing is a precondition. This can only arise from the criminal's active offense against natural law; a failure to practice attributive justice is not sufficient. Unlike private law, however, this expletive *jus* does not confer on the punisher a self-interested claim-right, but an onerous responsibility. Furthermore, once this status has been granted, expletive justice has little more to say. Unlike in private law, the crime does not automatically dictate an equal and opposite remedy. In order to carry out punishment normatively – that is, by reference to its true purposes – one must instead

look to the counsel of attributive justice. Only this situational judgment is adequate to look beyond the external fault of the act, and to determine the guilt of the person. Indeed, one must consider the doer and not simply the deed; true (in)justice resides in the internal and active will of the person. Likewise, one must look forward to include considerations of the common good, considering both internal desert and external example. For this reason, the higher virtues of attributive justice may counsel indulgence, or pardon. However, even such pardon must be governed by a prudence that considers the person and the situation.

Grotius' discussion of war illustrates his concept of private and public (i.e. criminal) law. It is clear from the beginning that Grotius' understanding of the justification and purpose of war is not limited to the defense of external possessions, such as the protection of property or territory. Rather, a nation may punish another nation, acting not as a plaintiff pursuing restitution of territory, but as a governor of the international moral universe. Thus, punitive war follows Grotius' discussion of punishment in general. Punitive war is not to the benefit of the punisher, but rather, for the internal good of other states and the common good of humanity. However, the mere right to deliver punishment calls forth the exercise of the higher virtues of attributive justice (and, for the Christian, even charity). This, in turn, points toward the importance of good character in a punisher, as the punishing country must be willing to put its own soldiers in harm's way for the sake of other nations. As a result, punitive war illustrates the non-possessive nature of the right to punish, as well as the higher-order realities of the internal will, and the importance of intention. Finally, Grotius' treatment of *jus in bello*

underscores his distinction between expletive and attributive justice, providing a bracing illustration of the limitations of strict justice and the importance of virtue.

Thus, Grotius' emphasis on punishment draws out the centrality of attributive justice in his thought, as well as demonstrating the fundamentally public purposes of the state. In this role, the state attends to the specifically common or public good, Government does not exist simply to guarantee the private and possessive claim-rights of individuals, but to foster a broader common good.

Indeed, attributive justice appears to be particularly conducive to the practice of politics. Grotius mentions it early on in *DJB* as the realm of “foresight in matters of government.”<sup>125</sup> He does not say that expletive justice has no place in the life of the polis, or even in punishment. Yet while expletive justice may distinguish law-breakers from law-abiding, and grant authority to properly punish, attributive justice relates to the action of actual punishment to follow. Thus, expletive justice would appear to be the realm of *law*, not of (specifically political) *rule*. Conversely, political rule, or governing, is not simply the implementation of laws arising from the absolute rights inhering in expletive justice; it implies a practice involving the human capacity for foresight. There is a difference between the expletive justice of punishing *per se*, and the attributive justice of punishing in the particular circumstances in which a ruler is situated.<sup>126</sup>

Grotius' distinction between public and private, and the robust place he accords to politics over law, is not limited to *DJB*. Indeed, it is not limited to natural justice. Rather, the place of politics is central to his very understanding of that which

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<sup>125</sup> Ibid., 1.1.8.1, 37.

<sup>126</sup> Oliver O'Donovan and Joan Lockwood O'Donovan, “Hugo Grotius (1583-1646)”, in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, MI: Eerdmans, 1999), 790-91.

transcends nature. This should not come as a surprise, considering Grotius' constant interweaving of theology and political philosophy. In particular, Grotius' understanding of punishment in the Atonement of Christ does not simply follow his treatment in *DJB*, but actually completes it. It is here that Grotius' philosophy of punishment, his understanding of criminal and civil law, and his emphasis on attributive justice, is clearest. Grotius' originality in the philosophy of punishment is, if anything, superseded by his originality in his philosophy of divine punishment. To this we now turn.

## CHAPTER 5

### GROTIUS ON THE ATONEMENT OF CHRIST

One of the most striking realities in Grotius scholarship is the disjunction between how the contemporary world sees Grotius, and how he saw himself. In international relations, Grotius is today renowned for opening the door to positive international law. Nonetheless, as this study has sought to show, Grotius understood the concept of positive law as existing within a much wider framework of natural Right. In regard to the place of religion in *DJB*, Grotius is best known for his *etiamsi daremus*: the impious hypothesis that supposedly asserts the existence of natural law apart from God. However, that work is full of references to a source of Right that transcends natural justice, and Grotius even devotes considerable text to explaining the Biblical guidance regarding war. Hermeneutically, the discipline tends to give such pride of place to *DJB* as to render negligible any insights from other works. However, in succeeding centuries Grotius would be known for his Christian theology and apologetics, of which one work was published 133 times in a dozen languages. Even in his personal life, Grotius is thought of as a lawyer and a diplomat. Yet he devoted the last two decades of his life to the practical pursuit of the re-unification of the Christian church.

In Chapter 3, this study has attempted to show that Grotius' theo-political treatise *de Imperio* is of paramount importance in understanding Grotius' overall conception of

authority. In doing so, this illustrates the fact that Grotius' theological treatment of issues is not simply derivative of his 'secular' thought. Rather, his theological works help to illuminate the rest of his political thought. While *de Imperio* is a worthy example, perhaps an even more important (and underappreciated) contribution of theology lies in Grotius' treatment of the Atonement of Christ.

Grotius' attempt in *de Imperio* to ward off a synod was unsuccessful. The 1618 Synod of Dort affirmed the 'five points of Calvinism', which countered the five points of the Remonstrance that Grotius had signed. Grotius' troubled decade ended with a sentence of life imprisonment, an immediate consequence of having been considered officially unorthodox. Two years later, he would escape from prison and be welcomed at the royal courts of Paris. However, from that time on he was effectively *persona non grata* in his home country. Indeed, throughout this process arose rumblings that Grotius was actually in league with Faustus Socinus, Europe's most notorious heretic.<sup>1</sup> Socinus had argued that Christ's death was not actually necessary for salvation. In order to counter this heresy (and rehabilitate his own reputation), Grotius took up the pen against the Socinian theory.

The subject of the Atonement is one of the major theological-philosophical issues in Christianity. Christianity was unique among religions in its gospel annunciation of the hope of felicitous eternal life after death. This hope is predicated on the death and resurrection of Christ. All orthodox Christians affirm these two propositions. However, there is no universal consensus on the relation between the two.

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<sup>1</sup> Henk J. M. Nellen, "In Strict Confidence: Grotius' Correspondence with his Socinian Friends," in *Self-Presentation and Social Identification: The Rhetoric and Pragmatics of Letter Writing in Early Modern Times*, ed. Toon Van Houdt (Leuven: Leuven University Press, 2002), 227-46.

Christianity argues that humans have violated God's justice, and are incapable of making things right on their own. Indeed, the punishment is outlined in the first negative command God issued: "of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat of it you shall surely die."<sup>2</sup> The penalty for breaking the law is death, which has traditionally been understood as eternal damnation of the soul, not simply bodily death.<sup>3</sup> As a result, any understanding of Christ's role in atoning for human lawbreaking must contain an implicit conception of law, punishment, and justice.

Over the years, theologians have offered several different theories that attempt to explain how Christ's death atones for human sin. Grotius' theory is one of these, and it has gained wide currency in Arminian Protestantism, most prominently in the Methodist church. His theory, known as the "governmental" theory, serves to illustrate the possibility of internal moral virtue and its connection with punishment and redemption. A study of Grotius' *de Satisfactione Christi* reveals many themes that build upon the portrait of Grotius already outlined in earlier chapters on structures of justice, political authority, and criminal punishment. Although political theologian Oliver O'Donovan has suggested that Grotius' reconstruction of this conception of just punishment is "one of his most valuable theoretical contributions,"<sup>4</sup> *de Satisfactione* has received little scholarly examination, and virtually none outside the realm of theology.

Grotius' originality in this realm is particularly visible in comparison to the two dominant theories of Grotius' day: the "satisfaction" and "penal substitution" theories.

<sup>2</sup> Genesis 2:17, New King James Version.

<sup>3</sup> Hugo Grotius, *Defensio fidei Catholicae de satisfactione Christi adversus Faustum Socinum* (*A Defence of the Catholick Faith Concerning the Satisfaction of Christ: Against Faustus Socinus*) (London: Printed for Thomas Parkhurst and Johnathan Robinson, 1692), Bk 1, 30.

<sup>4</sup> Oliver O'Donovan and Joan Lockwood O'Donovan, "Hugo Grotius," in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, MI: Eerdmans, 1999), 790.

These two theories emphasize the expiative nature of the Atonement. In contrast, for Grotius, while God's action in the Atonement does satisfy expiative justice, it also points toward the need for attributive justice, which is then exercised by God. Thus, in doing so, Grotius' theory reaffirms the central themes of attributive justice. These include the standards of distributive justice that Grotius inherited: prudential-situational reasoning; a focus on substantive outcomes rather than formal procedures; a recognition of the public nature of human existence; an emphasis on the spirit of the law, rather than the letter; and a concern for internal character (or soul) of the subject, rather than justice in a depersonalized, 'objective' sense. This theory also exemplifies the unique characteristics that Grotius' attributive justice adds to the traditional conception of distributive justice: a focus on action rather than status; an emphasis on positive actions rather than negative restraints; a forward-looking perspective, and a recognition of the inadequacy of categories of perfection or completion. In doing so, this 'governmental' theory emphasizes the political character of existence and human action. It also emphasizes Grotius' comparatively strong emphasis on right by nature, in contrast with natural law or natural rights. Finally, it points toward the limits of justice and the need for the transcendent.

### *Satisfaction Theory*

As with many Christian doctrines, the precise operative nature of the Atonement was not immediately apparent at the time of Christ's death and resurrection. Christ's apostles were not expecting his resurrection, with one famous doubter demanding



physical evidence of the fact. While belief in Christ's work was quickly connected with salvation, the operative nature of the resurrection's efficacy for salvation was not addressed until much later.

In the eleventh century, St. Anselm of Canterbury suggested what came to be known as the satisfaction theory. As this theory uses the language of debt and repayment, it is sometimes referred to as the “commercial theory”. It introduces the idea of an object (or at least a unit of account) that mediates the relationship between humans and God. Justice is classically defined as rendering to those what they are due. Because of who God is (e.g. all-holy, all-powerful, Creator), justice demands that humanity pay him constant and perpetual honour. However, in original sin, humanity becomes guilty of failing to provide what was owed. As a result, humanity has contracted a debt of honour. One might suggest that humanity could simply provide extra honour in the future, in order to repay this demerit. However, in repenting and providing as much honour as possible, humanity is doing only the minimum that justice requires. Even if people are no longer accumulating a deficit, there remains a debt from before. Nor is there any possible way to accumulate a surplus with which to satisfy this debt. As a result, humans must suffer eternal punishment in the debtor's prison of the afterlife.

Christ the Son also owes God the Father such honour, which (unlike sinful humanity) he perpetually offers. However, Christ also went beyond what he owed the Father: he humbled himself to be made in human likeness, and offered his innocent life on the cross. As a result, he earned an infinite storehouse of merits – a positive balance on the ledger, so to speak. These merits can be applied to the debts of the whole church,

to pay the requisite honour to God. God has promised that to those who are part of the church, he will graciously bestow sufficient merits from Christ's death upon the cross to cover their collective demerits. This allows the church – and by extension, its members – to render satisfaction to God.

Aquinas echoes this understanding of Anselm. However, he outlines another factor in the equation. Justice does not simply concern the repayment to God of the honour unjustly withheld from him. The action of sin also gains for the sinner unjust temporal benefits or pleasures. As a result, justice demands temporal restitution: people must endure temporal pains equal to the pleasures gained from sin. This is done through the punishments of temporal penance, as set out by one's confessor on behalf of God. These may include sacrifices, abstinence, prayer, fasting, or other punishments. Once these have been completed, satisfaction for temporal punishments is rendered. Thus, the baptized Christian is able to return to a state of grace, and to avail himself of the sacraments of the church.

Of course, this process cannot occur without God's active grace. The generous initial offer to transfer Christ's merits to Christians is entirely a prerogative of divine operative grace on the passive person. Likewise, because it is impossible for a person affected by original sin to repent and join the church, the person's initial acceptance of this offer requires God's operative grace. Thus, satisfaction for the loss of honour is entirely dependent upon God.

However, temporal penance is slightly different: one must render this penance of their own free will. Nonetheless, even a Christian is incapable of freely carrying out the

temporal punishments necessary to render temporal satisfaction, without the co-operation of God's grace. Thus, God's co-operative grace acts together with a person's active will. Thus, both God's grace and human free will, on their own, are necessary but insufficient conditions for satisfaction. Moreover, by promising these merits to those who return to him, God is obligated in justice to provide them to those who – dependent upon his grace – fulfil his conditions.<sup>5</sup>

God's co-operative grace is crucial to Aquinas' understanding of the justification that is necessary for salvation. Over one's lifetime, God infuses grace into one's being through the sacraments of the church. In addition to baptism and penance, ongoing sacraments such as the eucharist and marriage (or holy orders) are the mechanism of this infusion. Thus, as an ongoing, gradual process, one that involves both divine grace and human participation, justification is synergistic. It is thus part of the same process as sanctification.

Aquinas further develops the idea of merits with his division of sins into “mortal” and “venial” categories. God is infinitely good, and people are obligated always to orient themselves toward him. A venial sin is an act in which a person instead turns toward a finite good, but without turning his entire orientation away from God. In contrast, a mortal sin is one in which the person actively turns his orientation against God, thereby failing to honour God. Thus, even after accepting Christ's payment for original sin, people may incur future debts. Those who die in a state of mortal sin – and thus in a debt of honour to God – are outside God's grace and will be punished eternally. However,

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<sup>5</sup> Some might dispute this language. To be more specific, God is not obligated in natural justice. However, God has made a freely-willed promise to bestow grace upon those who co-operate with his instruction. Thus, in justice, he is now bound to keep his promise.

even some who die without such a debt of honour to God may not have fully paid the temporal penalty for the pleasures of sin. Such individuals must first satisfy the requirements of restitutionary justice by enduring punishment in purgatory. Both eternal and temporal justice must be satisfied; however, temporal justice may still be satisfied after death.

Although people cannot offer God more honour than he is due (thus necessitating Christ's role), it is nonetheless possible for Christians to perform supererogatory service that goes beyond what he demands of them (which, of course, is always done freely but through the co-operation of God's grace). Examples of such piety might include almsgiving, pilgrimages, chastity, poverty, and obedience. Indeed, God has promised heavenly rewards to those who please him. As a result, such supererogatory acts earn merits from God. Because of his promise, God is now obliged in justice to bestow these merits upon those who carry out such acts. These merits are not as transferable as the merits of Christ, because they cannot be used to pay others' debts of honour to God. Yet although the grace and glory of these merits cannot be transferred, their satisfactory value for temporal penance can be. Thus, if a person renounces their claim on these merits, these merits can be applied to others' debts of temporal punishment, even in the afterlife. God has entrusted the church with the ability to apply the merits of one person's supererogatory acts to the debt of temporal punishment held by others. Such are known as indulgences, and they follow from this doctrine of the treasury of merits.<sup>6</sup>

The designation of “satisfaction theory” or “commercial theory” is quite

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<sup>6</sup> *Catechism of the Catholic Church* 1471-79, Revised ed., trans. Geoffrey Chapman (London: Burns & Oates, 1999), 331-33.

appropriate for this approach. God's moral economy demands satisfaction of the debt of honour, as well as the temporal debt of restitution. The penalty for sin is grounded in the objective order of the universe. A particular sin implies an equal and opposite penalty. One's balance of merits and penalties must not be negative. Once it is paid, the debt is satisfied. Having been fully repaid, it ceases to exist, as though the debt never existed in the first place. At this point, one can re-enter a condition of grace and receive the sacraments through which justification and sanctification are infused and the person is gradually made righteous. Furthermore, merits are transferable from one holder to another, and continue to hold the same currency in the eyes of God. The crux of the matter is the satisfactory value of the merit possessed by the person.

### *Penal Substitution Theory*

By the sixteenth century, the satisfaction theory was widely accepted in the Western church. However, the Protestant Reformation would introduce an alternative. Protesting the abuse of the church's ability to sell indulgences in order to fund construction of St. Peter's Basilica, Martin Luther denied that God had delegated to the church the power to grant indulgences as it desired. More significantly, Luther also took issue with the church's existing approach to justification. His argument was effectively as follows: According to the position enumerated above, both God's co-operative grace and man's free will are necessary conditions for acts of temporal penance. These acts are a precondition for God's justifying grace.<sup>7</sup> God is then obligated (by his earlier promise) to

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<sup>7</sup> The Roman Catholic rejoinder might argue that human free will is a necessary *but insufficient* condition for the works that lead to salvation. Thus, while works – on some level – lead to salvation, it is inaccurate to say that works done by human free will apart from grace lead to salvation.

grant salvation as a reward. As a result, salvation is, on some level, reliant upon the freely-willed works of man. Thus, according to Luther, on some level, salvation is given as a reward of justice, not as a gift.

John Calvin, the foremost systematic theologian of Reformed Christianity, echoed Luther's criticisms. As a result, he sought an understanding of the Atonement free of the possibility that salvation could in any way depend upon acts in which people had any degree of freely-willed participation. He also sought to avoid the idea that God could ever be required, in justice, to grant salvation as a reward based on merits. Calvin accomplished this in his penal substitution theory. According to Calvin, through original sin, humanity has incurred the necessity of punishment. This follows from God's command in Genesis that sin would result in the suffering of eternal death. Thus, the eternal punishment of all individuals necessarily follows from the fact that punishment is an inexorable and unalterable consequence of sin. As in the satisfaction theory, this premise is grounded in the order of things: sin against God demands retribution.

Likewise, as with the Roman Catholic understanding of mortal sins, original sin creates a fundamental separation between God and man. However, whereas the Roman Catholic conception views individuals as turning themselves away from God, the Reformed understanding is the opposite: God turns himself away from man. This is a necessary consequence of God's perfect holiness, which renders him unable to tolerate the presence of sin. Thus, the central issue is not the need to repay God the honour due him; it is the need to assuage God's anger at sin.

This results in a somewhat different understanding of justice. Although the

satisfaction theory holds that individuals with unsatisfied debts must suffer eternal punishment, this condition does not fulfill justice. Rather, justice can be fulfilled only when God has been repaid. Thus, the damned are never in a relation of justice to God. However, according to the penal substitution theory, justice obtains upon infliction of punishment equal to the crime. Thus, after death, there is a sort of justice that obtains in the order of the universe.

Despite this important difference in its relevant subject matter, the penal substitution theory agrees with the idea of the satisfaction theory that sinful humanity had no possibility of salvation from eternal punishment on its own. Nonetheless, even though such an outcome would be just, God wished to save some whom he had predestined to salvation, in order that he might display his love.

In his covenant with the Hebrews, God allowed the sacrifice of a spotless and innocent lamb to bear the punishment that sinful individuals deserved. However, these sacrifices could never be truly effective. Fortunately, the innocent Christ's sacrificial death fulfills God's covenant by remedying the incompleteness of the Hebrew sacrificial system. On Christ is laid the punishment for all the sins of all the elect – past, present and future. Thus, for the elect, the status of justification changes instantaneously at the death of Christ. Justification is therefore monergistic, or undertaken at one point for all time.<sup>8</sup>

This sacrifice propitiates God's anger, and allows him to be reconciled to sinful humanity. As with the original separation from God, this reconciliation is accomplished

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<sup>8</sup> Of course, in order to participate in this justification, the individual must be baptized and believe. However, God foreknew who would do so, and provided justification on their behalf.

entirely by God. It is not the individual who is reconciled to God through an active turning back to an awaiting God. Rather, it is God who is reconciled to the individual through an active bestowing of his grace on passive individuals. This reflects the fact that in the Reformed understanding, grace cannot be co-operative; it is only operative.

Thus, human free will is not a necessary condition for salvation. There is nothing in the works or nature of any person for which God can be obliged to grant salvation. Rather, justification is a status before God, or a forensic declaration. Because original sin results in the total depravity of human nature, a person cannot earn or even possess merits; sinful humanity merits only punishment. However, Christ's sacrifice gained merits *for Christ*. In his love, God chooses to determine the status of the elect by looking not at them, but at Christ, who is their interceder and mediator. Thus, the merits of Christ are not imparted to the elect, but imputed on their behalf. This provides the justification that results in eternal salvation. Thus, although the elect do not possess any merit *per se*, their status in God's eyes is *as if* their nature were meritorious.

Indeed, even to talk about specific sins is somewhat irrelevant from the Reformed understanding of justification. Because man's nature is corrupted by original sin and is totally depraved, all actions flowing from that nature are automatically sinful. Good actions can come about only through God's operative grace. The actions do not actively flow from the person; rather the person is the passive vessel through which God's grace operates. As a result, there need be no distinction between mortal and venial sins. All acts flowing from human nature are sinful. One's reconciliation to God depends on God's election, not on one's avoidance of mortal sins.



Furthermore, because Christ bore the eternal punishment for all of the past, present and future sins of the elect, there is no need for the person to undergo additional temporal punishment for specific sins. While God (or the church) may visit temporal punishments on the elect, these are in no way essential to justification, and thus to one's eternal status before God. As a result, there is no need for purgatory. Likewise, the incapacity for humans to do good works of their own free will eliminates any possibility of supererogatory acts by which the treasury of merit could be enriched, or from which indulgences could be offered.

However, together with belief, discipline, and other elements, temporal punishments may play a role in sanctification, in which the character of the person is changed by God's operative grace. As a result, the good works of a sanctified Christian manifest appropriate gratitude to God for the glories of his grace. These gifts are a particularly appropriate testament because they can play no possible role in securing any extrinsic heavenly reward. Rather, as with any true gift, they are offered purely for their own sake.

Thus, Calvin did not entirely eliminate the idea of merit. Whereas humanity merited damnation, Christ's punishment merited salvation. However, where the satisfaction theory focuses on the merits arising from Christ's sacrificial willingness to die, the penal substitution theory focuses on Christ's role as a bearer of punishment. Thus, Calvin dissociated the idea of merit from any freely-willed participation in the creation and employment of merits, whether by Christ or humans. Furthermore, he eliminated the need for God to contingently oblige himself, through his promises, to

distribute merits to those individuals who carried out good works. As with Luther, the concept of merits was dissociated from any kind of human action.

Likewise, Calvin eliminated the idea of merits as a possession that could be given to individuals in the church, thus allowing them to satisfy their debt of honour. Rather, the punishment for the sin of the elect is transferred to Christ and borne in his passion and death, which thus serves as a more or less exact substitute for the eternal punishment of the elect. When Calvin says that Christ merits salvation, the term “merit” is a verb, not a noun.

#### *Grotius and Socinus*

There are clear and important differences between the satisfaction and penal substitution theories. At the root of each, however, is an effort to understand the unique (and essential) role of Christ in providing the possibility of redemption for humanity. The Socinian theory of the Atonement did not do this. Rather, Socinus denied the divinity of Christ. Naturally, it follows that Christ's death was not essential for salvation. Unsurprisingly, both Roman Catholic and Protestant Christianity considered his theory to be heterodox.

Thus, Grotius' defense of the redemptive character of Christ's death was a defense of orthodoxy, not an innovation. Indeed, the beginning of his title – *A Defence of the Catholick church* – purports to testify to his own catholicity on the matter. The remainder of the title – *Concerning the Satisfaction of Christ (SC)* – adverts to the essential role of Christ. However, the way that he defends the necessity of Christ's death is different from

both the satisfaction and penal substitution theories.

In this defense, Grotius' legal distinctions play a central role. In fact, contained herein is probably Grotius' best exposition of the difference between private and public law. Ultimately, he argues, Socinus' position is faulty because it understands the Atonement through a private law framework.

*Private Law: Possessive, Calculative, and based on Rights*

Grotius begins by setting out distinctions between types of legal obligation. Specifically, Grotius carefully draws attention to the differences between payment of debt and punishment. The obligation to repay a debt is the realm of private law. Such debts may arise from voluntary contracts between two individuals, contracts which are permissible according to the law of the community, but not obligatory. For instance, if one promises a payment for services rendered, a legal debt comes into existence until the payment is made. Debts may also arise from common law torts (or “delict” in civil law systems), which corresponds to what Aristotle had called 'involuntary transactions'.<sup>9</sup> Here, in failing to return a borrowed object, one involuntarily assumes a debt – in the amount of the object stolen – to its rightful owner. In the case of contracts or torts, one would seek a remedy in a civil rather than a criminal court.

There are several noteworthy considerations involved in debt. The first is the exclusive concern with external possessions rather than internal qualities. As a commodity, debt exists in the material world and can be measured in tangible terms. In

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<sup>9</sup> Aristotle, *Nicomachean Ethics* 5.2, trans. Martin Ostwald (Upper Saddle River, NJ: Prentice Hall, 1999), 117 (1131a1-10).

Grotius' formulation, debt is the realm of "material equality." Its nature is simple and unambiguous; there is no deeper, hidden meaning beyond the legal terms involved. Having been broken down into its fundamental constituent part, it can be comprehensively known, eliminating the inherent need for interpretation associated with non-abstract language. Indeed, the quantitative nature of debt testifies to the calculative reason associated with it. Likewise, the relation between possession and possessor is unambiguous. Use of (or interaction with) such objects can be excluded from all others; to borrow a phrase from Descartes, the owner has complete "mastery and possession" of the object.<sup>10</sup>

For this reason, restitution is essentially predetermined by the facts of the case; if the unreturned object was ten thousand dollars, the debt to be legally enforced is the same. The determination of the nature and extent of the debt is, at least in theory, clear to all. In cases where it is necessary to determine an equivalent, a basic calculative rationality is invoked.<sup>11</sup> There is little need to consider particular personal or situational factors. Consequently, the course of justice is simple: justice is served when the object in question is returned to its rightful possessor.

As a result, the rectification involved in civil justice is to reverse the injustice: the rightful owner must be paid ten thousand dollars. Consequently, once the possession or object is returned, the victim is no longer deprived, and there no longer remains any breach of private justice or any ongoing harm. Thus, if the defendant is forced simply to

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<sup>10</sup> Hugo Grotius, *The Satisfaction of Christ*, Ch. 2.9, trans. Oliver O'Donovan and Joan Lockwood O'Donovan, in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, MI: Eerdmans, 1999), 818. O'Donovan and O'Donovan have provided a contemporary translation; however, their translation is limited to Book 2 of this work. All other citations are from the 1692 edition.

<sup>11</sup> Ibid.

return the object in question, one does not say that he or she has been punished. Indeed, in regard to externals, the offender is in the same position as before the offense. For this reason, one might say that private justice is backward-looking; it seeks to restore a prior condition that has been disrupted.

As a result, in purely private law, the intention of the defendant is immaterial; the fact that he or she intends to steal the object again at the first possible opportunity has no bearing on whether or not the particular debt in question has been repaid and the debt-related injustice rectified. As Grotius writes, “the primary and essential cause of the debt-in-nature is not the wrongness of what was done but the deprivation I suffer from it.”<sup>12</sup> Private law *qua* private law is not concerned with punishment.<sup>13</sup>

Another consideration concerns the involved parties. In private law, the dispute simply concerns the offender and the victim. When one sues another, one does not seek satisfaction from the state *per se*; rather, one seeks restitution from the offender. The role of the state is simply to guarantee those inter-individual rights, ensuring that the offender provides the goods promised. As a result, it is intrinsically desirable to be in the position of a creditor, as the just resolution of the matter entitles one to tangible benefits.

Having enumerated these characteristics, Grotius makes it clear that repayment of debt is the realm of expletive justice. It is concerned with external states of affairs, rather than considering active internal intention; it concerns the status of possession over things rather than action in time; it uses calculative rationality rather than prudence; it looks backward rather than forward; and it entitles individuals to claims rather than aiming at

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<sup>12</sup> Ibid., 2.10, 819.

<sup>13</sup> It is true that judges in private courts today are increasingly assessing punitive damages to offenders, importing punitive measures into private law. However, this practice is somewhat controversial, owing precisely to the fact that punishment has difficulty justifying its place in private law.

the common good. It is true that expletive justice does not correspond exclusively to the private realm (or attributive justice to the public realm), as Grotius makes immediately clear in the beginning of *DJB*. However, when one seeks the involvement of the state to redress an injustice in private law, attributive justice is not necessary. As seen in Grotius' earlier discussion of punishment, the same cannot be said of injustices in criminal law.

*Criminal Punishment: Personal, Prudential, Public, and based on Good*

On the contrary, punishment – the focus of public, or criminal law – differs in regard to both the nature of the remedy and the parties involved. After justice has been carried out in private law, the state has done nothing to change the offender's will. Without punishment, there is every reason to expect that the unlawful act will be committed again. It is for this reason that criminal law exists. If one incurred a debt with every intention of repayment, but subsequent circumstances made the debt difficult to repay, one may be brought by the creditor to a civil court. However, if one stole the same amount by burglarizing the creditor's home, criminal charges will be laid and punishment delivered. Indeed, not only is the direct external harm treated separately from criminal law, it is not even a precondition for criminal charges. For example, an unsuccessful attempted murder can be prosecuted (and usually is, with great severity).<sup>14</sup>

This seems to indicate that punishment must, on some level, concern the internal intention of the offender. Thus, the appropriate punishment cannot be determined merely by assessing the external facts of the case, and the wrong done by the perpetrator cannot

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<sup>14</sup> This does not mean that there is no external harm; the very idea of crime implies an offense against the common good. However, the harm need not be directed at any one individual, nor need it be externally visible.

be quantified through calculative rationality.<sup>15</sup> As a result, unlike in private law, justice is not brought about through an equal and opposite action to the original unjust action. Consider the aforementioned example of burglary. It would be strange if a judge should rule that justice would be served by providing the victim with legal immunity to carry out an equal act of burglary against the perpetrator. This reciprocal action – which, in civil law, is the essence of justice – would, in criminal law, undermine the very spirit of the law. This shows that the relevant subject matter in criminal law is not typically the deprivation suffered by the victim, but the intention of the offender.<sup>16</sup> In other words, while debt exists by reference to the external object, punishment exists by reference to the internal condition of the perpetrator. As Grotius points out, this explains why a debt of restitution can continue after death to one's offspring, but punishment cannot.<sup>17</sup> Thus, the practice of punishment must be considered as fundamentally personal.

This conception is consistent with Grotius' approach to wrongs, faults, and misfortunes in *DJB*. Private law corresponds to the latter two categories of fault or misfortune. Grotius was careful to state that these latter categories did not involve an actively wrongful intention. Rather, they arose by reference to a loss of external possessions by the plaintiff. However, unlike repayment of debt, punishment does not simply follow from external damages, but takes its lead from internal intention.<sup>18</sup>

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<sup>15</sup> Ibid., 2.10, 819.

<sup>16</sup> Again, as with most legal categories, the lines are somewhat blurred; for instance, an accidental killing may result in a charge of manslaughter. However, criminal charges typically connote criminal intent, and even take their bearing from it. For instance, there are several different degrees of murder, each corresponding to the level of pre-meditated intent.

<sup>17</sup> Ibid., 2.10-11, 819. This attests to Grotius' classical anthropology, including the concept of a rational will. I have addressed this claim more thoroughly in a previous paper. See Jeremy Geddert, "Grotius' Conception of Nature: Aristotelian or Hobbesian?", 13-20.

<sup>18</sup> Hugo Grotius, *De Jure Belli ac Pacis (DJB)* 2.20, trans. Francis W. Kelsey, intro. James Brown Scott, Carnegie Classics of International Law, No. 3, Vol. 2 (New York: Bobbs-Merrill, 1925), 462-521; 3.11.4.2-5, 725-27.

Furthermore, in criminal proceedings, the offended party is the entire community. By breaking the rules set out by the community, the common good of the community – its sense of trust and respect for authority – is itself damaged. It is not immediately obvious how to repair the damage. Unlike a civil wrong, the deed cannot be undone; it is no longer possible to return to the original equilibrium. A simple calculation instructing the state to carry out an equivalent action on the guilty party would, in the memorable words of Tevye in *Fiddler on the Roof*, leave everyone blind and toothless. Rather, punishment requires wisdom to ascertain what course of action would best conduce to the future good of the community. This can take the form of reformation of the criminal, and/or deterrence of others from committing the same crime. As Grotius emphasizes repeatedly, “All punishment aims at the common good, and particularly at the preservation of order and deterrence.”<sup>19</sup> Thus, punishment generally looks forward, not backward. Likewise, because punishment concerns the community as a whole, it must be delivered by those entrusted with the care of the community. For example, in a criminal case, it is the state (“the people”) which brings the charges and carries out the punishment. Ultimately, of course, the final authority rests with the governor of the community, who has been entrusted with this position.

However, this authority is not an entirely desirable position to hold. In private law, it is intrinsically desirable to be in a position of ownership or credit, because the right of legal action overlaps with one’s self-interest. In contrast, there is nothing personally advantageous about being in the position of punisher. Rather, punishment is

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<sup>19</sup> Ibid., 2.16, 820. See also 6, 143; 8, 185.



carried out for the sake of the entire community, not the individual who delivers it.<sup>20</sup> Indeed, any sensitive parent or public official is fully aware of the burdensome nature of punishing. Thus, although the proper punisher may possess a right to punish, even perhaps an exclusive right, such a right is much different from that of the creditor, whose right entitles him or her to a tangible personal benefit. This 'right' of punishment is not a right arising from credit or private ownership, because it is not directed at the benefit of the punisher. Instead, this 'right' actually imposes on its holder a difficult duty.

Thus, punishment involves a significant place for attributive justice. It focuses on internal intention, requires prudence, and looks forward. Even where it involves a right that is conferred by expletive justice, this right does not entitle its bearer to a possessive claim. Rather, it conveys a responsibility that must be guided by attributive justice.

*Governmental Theory: God as Criminal Punisher, not Private Law Creditor*

Having outlined his theoretical framework, Grotius then turns to the particulars of the Atonement. Grotius begins by making it clear that when Christ's death provides salvation from this penalty, it is because he *bears* the sins of humanity; he does not take them away.<sup>21</sup> Christ's bearing of punishment is the objective factor that permits forgiveness and redemption. Grotius also then affirms that the law itself is not changed or overturned. The law still condemns humans as guilty, and it still commands punishment. Thus, it is not Christ's death that takes away the verdict. The sin has been committed; it is not possible to return to a state where it has not. Rather, the normal

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<sup>20</sup> Ibid., 2.16, 820.

<sup>21</sup> Ibid., 1, 16-19

punishment for the sin, eternal death (as outlined in the law), is relaxed. In particular, Grotius carefully and thoroughly outlines the fact that this is not the mere remission of a debt to God; it is the deliverance from punishment proper.<sup>22</sup> This distinction is central to his entire argument.

The implications are quick to arise. The first is that because God is in such a position as punisher, he must be conceived as a ruler rather than a creditor.<sup>23</sup> God is not looking to collect a debt from individuals. Rather, he is the governor of the moral universe. The centrality of this component accounts for the subsequent naming of Grotius' theory as the "governmental theory".

The immediately relevant difference between a creditor and a governor is that an individual creditor has an absolute liberty to release a debtor from his obligation. In fact, if the creditor does not actively pursue legal action, such a release will be the *de facto* result. Just as the creditor has a right to collect on the debt, so he or she has a right to waive it without offending justice. This can be done because the situation of debt exists in the right of the creditor to possess an external object. The possessive right corresponds to the creditor, not the debtor. Whether the creditor collects or waives the debt has no bearing on anyone else. As far as the law is concerned, it is an absolute or radical liberty. This appears to correspond to Grotius' category of good-naturedness in *de Aequitate*.

However, an individual who has been victimized by a crime is not free to release the criminal from punishment. In fact, in the eyes of criminal law, the direct victim is not even the relevant party. Rather, the perpetrator has offended against the entire body

<sup>22</sup> Ibid., 5, 134-42.

<sup>23</sup> Ibid., 2.1-2, 815. This distinction also relates to the two different forms of *dominium*: sovereignty and ownership. Such might be the subject of an interesting study on Grotius, comparing him to other thinkers who emphasize ownership in politics.

politic. Because the governor is entrusted with the care of the community, only he can release the criminal from punishment.<sup>24</sup> Because the governor's role is fundamentally public, being undertaken for the good of the whole, he cannot arbitrarily withhold punishment in the way that a creditor can forgive a debt to himself. Rather, this decision must be made by reference to the “preservation of good order.”<sup>25</sup>

Here Grotius draws an important conclusion from the distinction between these two positions. While a creditor is necessarily the one who is injured, a ruler is not. Thus, the authority to punish does not derive from the claim-right arising from personal injury. Thus, God punishes not as injured party, but as ruler of the moral universe.<sup>26</sup>

Herein lies Socinus' error. Socinus treats God as an injured party, rather than a ruler of the moral universe. He effectively uses the terms “creditor” or “owner” to describe God's position.<sup>27</sup> Because salvation is God's action of waiving a debt, it can be done of his own volition, even arbitrarily, and with no concern for anyone or anything outside of God. It is not necessary for Christ – or anyone else – to be punished.<sup>28</sup>

### *Governmental Theory: Two Senses of Nature*

How, then, does Christ's role allow actually humans a release from punishment? Grotius continues by reasserting that punishment must be carried out. Indeed, the law gives the ruler a right to punish (that is, to condemn for all eternity). As Grotius argues, it

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<sup>24</sup> Ibid., 2.3 and 2.13, 816 and 819.

<sup>25</sup> Ibid., 5, 125.

<sup>26</sup> Ibid., 2.5, 817.

<sup>27</sup> Ibid., 2.4, 817.

<sup>28</sup> For a description of Socinus' position, see Ibid., 1, 44-49. Socinus sees the effect of Christ's death as displaying a supreme example of God's love for us. It is worth noting that this position is similar to the Moral Influence theory first suggested several centuries earlier by Peter Abelard.

is “properly natural” that a sinner be punished, as it necessarily follows “from the relation of the sin and sinner to the superior.” This is a truth which is universal and necessary in the “simple” sense.<sup>29</sup> This echoes the description in Grotius' earlier private letter of two types of nature, with the first being both mandatory and immutable.<sup>30</sup> Because this nature proper requires no knowledge of particular situations, it can be accurately conveyed in propositional statements. It is inherent in the structure of the universe that sin must always be punished, independent of whether a positive command has been issued. This echoes his earlier assertion that the law is not changed, and punishment is not eliminated. Thus, expletive justice grants God the authority to condemn sinners, and compels him to punish wrongdoing.

However, some things may be “less properly natural,” which is to say that they are “convenient”, or “fitting” (for example, that a son should succeed his father.)<sup>31</sup> This corresponds to the second category of nature in Grotius' private letter, that which is “becoming” or “appropriate”, and has a “harmony with nature.”<sup>32</sup> Fortunately, it is “sufficiently fitting to nature” that the punishment need not correspond exactly to the wrong. Following this principle, Grotius asserts that God's law specifying eternal death as the punishment for sin is not “simple” or “universal”; it is not inherent in the nature of things.<sup>33</sup> Rather, it is a Divine positive law, one that God issued because he thought it best for humanity. As a positive and penal law, it is flexible. At times, an alternative

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<sup>29</sup> Ibid., 3, 85.

<sup>30</sup> Hugo Grotius, letter to Willem de Groot, 18 May 1615, in Herbert F. Wright, *Some Less Known Works of Hugo Grotius* (Leiden: Brill, 1928), 208-10.

<sup>31</sup> Grotius, SC 3, 85.

<sup>32</sup> Grotius, letter, 18 May 1615, in Wright, 208-10.

<sup>33</sup> Grotius, SC 3, 85.

punishment might be “very fitting to the nature and order of things.”<sup>34</sup> As ruler of the moral universe, God is not required to carry out the full exercise of his right to punish with eternal death.

Indeed, this relaxation of punishment follows from the possibility of indulgence, also discussed earlier in *de Aequitate*. If punishment were to follow strictly from law, there would be no possibility of relaxation, and all of humanity would be unavoidably condemned. However, employing his earlier categories from *de Imperio*, punishment is not an (artificial) act of legislation but a (true) act of jurisdiction.<sup>35</sup> Thus, God's will continues to be active after creation, and it is carried out according to the good purposes of punishment. This possibility of relaxation is not a determination of equity, which would be carried out by a judge.<sup>36</sup> If this were the case, God the judge would have to determine that God the legislator did not mean for humans to be punished so severely, or that God did not intend for the category of “sin” to include the types of actions that humans have actually committed. Rather, relaxation of punishment is an act of indulgence or dispensation.

#### *Governmental Theory: Goods over Rights*

However, as an act of indulgence rather than good-naturedness, punishment cannot be relaxed for any “light cause.”<sup>37</sup> Rather, there must be a justification corresponding to a higher overarching common good of the moral universe. Fortunately, in the moral universe governed by God, there is just such a reason. This point forms the

<sup>34</sup> Ibid., 3, 87.

<sup>35</sup> Ibid., 3, 79-80.

<sup>36</sup> Ibid., 2.3, 816.

<sup>37</sup> Ibid., 3, 87.

crux of Grotius' entire understanding of goods and rights, of strict and higher justice. If the full punishment of rights-based justice were to prevail, humanity could have no reasonable grounds for hope. With the prospect of inevitable eternal damnation to follow, humanity would have no motivation to practice religion. The worship of God would fade away, and knowledge of God would follow. This course of action would still be just. There would be a natural balance between the sin committed and the punishment given. Despite its strict justice, however, it would cause an irreparable rupture in man's consciousness of the transcendent. It would close off the possibility of knowing that which transcends justice.

Furthermore, the cultivation of Christian virtues of faith, hope, and charity would also inevitably fade away. Although these virtues would remain intrinsically good, and could alleviate some suffering on earth, the absence of any eternal reward would undoubtedly dim the zeal with which people would approach the disciplines of cultivating each. Without extrinsic motivations, the pursuit of virtue purely for its own sake would be a daunting task. Furthermore, all of the gains would be lost at death, when the torments of eternal damnation would presumably be unmitigated by these virtues.<sup>38</sup>

In his role as moral governor of the universe, God knew that justice would be served by simply requiring humans to perish eternally. Obviously, however, God did not desire such an outcome, because it would mean the end of the goods of worship and Christian virtue. These goods are higher than natural justice. As a result, God thought it best to provide the possibility of redemption, allowing humanity to escape eternal punishment. Thus, instead of all humans suffering eternal punishment, Christ vicariously

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<sup>38</sup> Ibid., 5, 116.

suffered punishment through his death on the cross. In doing so, God demonstrated his governmental wisdom by allowing an alternative, out of regard for the common good of the universe. God gave up his “properly natural” rights in natural justice, as it were, in the name of a higher overarching good, one which was “sufficiently fitting to nature”. Thus, expletive justice is an incomplete framework through which to conceptualize the Atonement. Attributive justice is also necessary.

*Governmental Theory: Central Role of Prudence*

In relaxing the punishment, but not eliminating it entirely, God achieves an ideal prudential balance between mercy and punishment. Although punishment can be relaxed, it cannot be relaxed absolutely, in the way that a debt *can* be waived entirely. If punishment were to be entirely relaxed, it would offend against the natural law principle that sin must be punished. While God must act according to attributive justice, this does not mean that he can do away with expletive justice.

Why is this so? The presence of sin is good evidence that humans suffer intrinsic weakness of will, and need external assistance to act rightly. An absolute remission of punishment would eliminate the credibility of God’s threat to punish, creating no external incentive for people to reform their ways. Recognizing no eternal extrinsic penalties for non-compliance, humans would inevitably fail to fear God, ceasing to worship or to develop virtue.<sup>39</sup> Ironically, the extreme of complete mercy would produce the same result as would the extreme of strict justice: the end of religion and virtue. Thus, God

<sup>39</sup> Ibid., 3, 81. This does not require Grotius to believe that humans obey God solely out of fear; they may instead obey out of love. However, the healthy dialectic between obedience from love and obedience from fear requires the possibility of the latter, which in turn requires the credible threat of punishment. This dialectic is central to Grotius' entire theoretical outlook.

still must still show his displeasure with sin in order to preserve the moral reality of the universe.<sup>40</sup>

Indeed, only the death of Christ, the Son of God, could serve as a punishment strong enough to demonstrate the seriousness of sin to the world.<sup>41</sup> In addition, Christ's passion and death also demonstrates the ultimate punishment which will befall unrepentant sinners, encouraging their own moral reform and pointing them toward the salvation of their souls.<sup>42</sup> Thus, God must exercise prudence to determine the appropriate balance between the overly heavy – though naturally just – punishment permitted by the law, and the imprudently generous exercise of mercy. Of course, in sacrificing his son, this prudent course of action also requires (and allows) God to show the fullness of his charity toward humans.<sup>43</sup> It is not simply a matter of God the Father exercising prudence. It is also a matter of God the Son stepping in to suffer an undeserved punishment.

#### *Comparison to Dominant Theories – Public and Private*

Grotius' theory is not radically new. Indeed, in many ways it follows one or both of the dominant theories. A comparison helps to draw out both the continuities and the changes in emphasis. In regard to the immediate beneficiary of the Atonement, Grotius echoes the satisfaction theory. In the penal substitution theory, Christ dies for those individuals who have been chosen by God to receive his grace. Although one may collectively refer to these individuals as 'the elect', the term represents a simple

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<sup>40</sup> Ibid., 6, 152.

<sup>41</sup> Ibid., 5, 117, 121.

<sup>42</sup> Millard J. Erickson, *Introducing Christian Theology*, ed. J. Arnold Hustad (Grand Rapids, MI: Baker Books, 1992), 243.

<sup>43</sup> Grotius, *SC* 3, 88.



aggregation of individuals, rather than a corporate body. The term arises only from the fact that more than one individual has been predestined by God to salvation, rather than from the social and political character of one's relation to (and with) God. In contrast, together with the satisfaction theory, Grotius sees God's grace as being given to the church. Only secondarily, by believing in Christ and being received into the church, do individuals then partake of that grace. Thus, Grotius declines to side with the individualistic nature of the penal substitution theory.

Indeed, Grotius' theory allows him to emphasize the corporate nature of salvation to a degree that even the satisfaction theory does not permit. While the satisfaction theory requires one to join the church in order to partake of salvation, that salvation atones for a matter that is between the individual and God. Although the merits are given to the church, they are effective for the demerits of individuals. On the contrary, the governmental theory requires one to join the church because the matter at hand is the sin of all humanity. The entire moral universe (or at least the church) must be saved from every individual's sin. The nature of God's moral government is not simply a one-dimensional relation between the governor and each individual person. Rather, it is a multi-dimensional relation between God and individuals as well as between individuals with each other.

Thus, while the satisfaction theory sees Christ's death as providing merits to the church, which subsequently provides them to its constituent members, Grotius' governmental theory sees Christ's salvation as directly effective for the church as a whole. One might even perhaps argue that this renders the effect of original sin more

intelligible: just as the stain of Adam's original sin spreads to all of humanity, so do the effects of every subsequent individual sin. Thus, Christ's death not only saves people from their own sin, but it also saves them from the effects of the sin of others.

This corporate emphasis is consistent with Grotius' use of a criminal law paradigm rather than a private law paradigm. His emphasis on God as governor rather than judge particularly emphasizes the fact that sin is not simply committed against another individual, or against God, but against the entire moral order created and governed by God. Grotius thus has a rich conception of the idea of a sin against nature.<sup>44</sup> Of course, in sinning against God's order, one is sinning against God; unlike the King of France, God can well and truly say, "*l'etat, c'est moi*". Thus, unlike the penal substitution theory, and building off of the satisfaction theory, Grotius particularly emphasizes the public nature of the Atonement.

#### *Comparison to Dominant Theories – Merits*

Yet despite the fact that Grotius' criminal law lens invites a public component that calls to mind the satisfaction theory, Grotius' emphasis on punishment instead of honour as the relevant matter aligns him more closely with the penal substitution theory on that point. It is true that Grotius has an objective component to his understanding of the Atonement, one that corresponds to expiatory justice. Indeed, the English word "satisfaction" is one of the best translations for the term *expiare*. However, Grotius does not portray the satisfactory nature of the Atonement as consisting in repayment of honour

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<sup>44</sup> This echoes Grotius' earlier justification of punitive war against countries that display impiety against the gods.

to God. Rather, it corresponds to the objective fact that sin calls for punishment. As with the penal substitution theory, he does not believe that restitution is a necessary precondition for salvation.<sup>45</sup>

However, Grotius' understanding of punishment as involving both expletive and attributive justice ultimately leads him to depart from the penal substitution theory on the question of punishment. For the penal substitution theory, the punishment must correspond exactly to the sin. Human sin calls for a specific penalty, one that cannot be relaxed for any reason. It is a purely retributive theory. In contrast, Grotius sees strict expletive justice as requiring punishment *in general*, but not demanding any specific punishment for specific sins. Unlike the penal substitution theory, the punishment undertaken by Christ does not have a value exactly equal to that deserved by humanity (or at least by the elect).

Indeed, in this way, Grotius departs from both theories. Although the satisfaction theory used the idea of a debt of honour, it nonetheless argued that Christ's death gave at least as much honour to God as was owed by humanity. Thus, both satisfaction and penal substitution thinkers see a clear, objective and logically straightforward relation between human sin and Christ's substitutionary satisfaction, one that is grounded in the strict order of things. Consequently, in both of the prevailing theories, expletive justice can fully account for the Atonement. This is why both use the language of merit(s). Although the idea of merits may not be entirely identical from one theory to the other, both seem to imply the idea of a credit of account that must reach a certain condition before a person

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<sup>45</sup> One might argue that this is inconsistent with Grotius' emphasis that restitution is one of the fundamental components of expletive justice.

can be justified in God's sight. Sin implies an objectively discernible remedy or punishment – one that, once completed, will return the sinner to a state of justification.

In contrast, because of the role of attributive justice, Grotius sees Christ's death as a fitting or appropriate punishment. It does not correspond exactly to the punishment that humanity deserved. However, because the matter was one of criminal law rather than private law, expletive justice did not (indeed, could not) stipulate a specific repayment.

Thus, Grotius rejects the idea of merits, or any stock of merits held in the church's treasury. In doing so, Grotius also reconceptualizes the term “indulgence”. Under the Roman Catholic approach, the very possibility of an indulgence required an objective merit equivalent to the debt owed to God, even if the indulgence was granted at the discretion of the church (in God's stead). However, for Grotius, there is no comparable requirement that indulgence require any such merit. It is not a good object that an authority can disburse at its discretion. Rather, indulgence is a relational act of mercy, unmediated by the units of account represented by merits. It is a verb, not a noun. God does not grant an indulgence; he acts indulgently. This mercy, however, is not given arbitrarily. It is governed by the virtue of prudence, which ascertains the good of the person and the entire moral universe.

Thus, rather than being an exact substitute or sacrifice for a previous act of man, Christ's death serves the multi-dimensional purposes inherent (under expletive justice) in punishment: satisfaction, deterrence, and reformation. In other words, the satisfactory role of Christ's death does not arise from his value as satisfying an exact repayment of debt or punishment, and being the only one who could have done so. Rather, Christ's

death is the best imaginable way to bring about the purposes of punishment.

*Comparison to Dominant Theories – Justification and Sanctification*

Grotius' approach to justification and sanctification variously displays elements of both satisfaction and penal substitution. Grotius follows the penal substitution theory in seeing justification as monergistic. Because Christ's death atones at once for both past and future sins, justification does not require temporal penance or purgatory. As a result, Grotius also follows the penal substitution theory in clearly separating justification and sanctification. It is an objective truth of expiatory justice that punishment must be given for sin. Once human sin is properly punished, humanity is justified. Thus, its monergistic mode of action separates it, in a sort of way, from sanctification.

However, for Grotius, the reason that expiatory justice demands punishment is precisely because of its forward-looking effects. Without punishment, God's future government would become ineffective. This would render him unable to sanctify people. Thus, as in the satisfaction theory, Grotius also believes that the Atonement is effective both for justification and sanctification. Indeed, because Grotius does not have an explicit conception of the sacraments of the church in infusing virtue, Grotius sees the Atonement as playing a particularly robust role in enabling sanctification. It is true that this divine co-operation, in the form of Christ's death, is monergistic, taking place at one time. However, its effect is synergistic, in that it contributes to the sanctification of the church in countless ongoing future instances.

Moreover, as in the satisfaction theory, Grotius seems to imply that sanctification

*is* actually relevant for the status of one's soul. Indeed, the governmental theory seems to suggest that justification is only a door to sanctification. This appears to indicate that it is a necessary but insufficient condition for salvation. Unlike the penal substitution theory, Grotius does not see sanctification as a mere by-product of justification. If one is justified but not sanctified, one may yet lose one's salvation. Thus, although Grotius' monergistic approach to justification seems to eliminate the idea of a separation between initial and final justification, his understanding of sanctification as relevant to salvation seems to hint at just such a *de facto* concept, further echoing the satisfaction theory.

This distinction between justification and sanctification shows Grotius' attempt to incorporate elements of both theories. As in the penal substitution theory, Grotius' conception of justification is forensic: it deals with a status, it is imputed to us, and it is objective. In other words, it is done *for* humanity. However, as in the satisfaction theory, Grotius' conception of sanctification is experiential: it deals with our being, it is imparted to us, and it is subjective. In other words, it is done *in* humanity.

However, Grotius retains the Reformed rejection of the categories of mortal and venial sin. One's salvation can be lost only through the active rejection of the church and one's baptism into salvation. Only with such a total renunciation can one turn oneself away from God. One might think of the difference between lying to one's spouse and divorcing one's spouse. Only in the latter is there a total renunciation of the status of marriage.

Because of the relevance of sanctification for salvation, Grotius does not deny the concept of virtue. Unlike the Reformed approach, people do not have a nature that is

wholly determinative of their acts. Yet despite Grotius' belief in free will, supposedly aligning him with the satisfaction theory, he still echoes the concern of Luther and Calvin to emphasize the gift-nature of the Atonement. However, Grotius does not accomplish this by denying the co-operation of human will. Instead, he argues that God is never compelled, at least in the strictest sense of justice, to provide salvation. This follows from the fact that he sees the Atonement through his lens of punishment rather than debt repayment. Grotius agrees with the penal substitution theory that (strict) justice obtains when punishment is delivered. Thus, justice did not require Christ's sacrifice; God did not send Christ to die knowing that this was the only way God could receive the honour owed him. Thus, it can be conceived as a pure gift of grace<sup>46</sup>.

### *Analysis of Governmental Theory*

Grotius' understanding of the Atonement thus reflects and further illuminates many of the themes in his earlier discussion of expletive and attributive justice. One of the most central factors, as discussed above, arises from the absence of merits in his framework. To be sure, the penal substitution theory (and even the satisfaction theory) do not view God's action through such a commodified lens as does the Socinian theory. However, Grotius does not simply reaffirm one or the other against Socinus; rather, his defense against the Socinian theory carries him to a position that rejects a private law (or economic) framework altogether.

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<sup>46</sup> Of course, Grotius' robust place for sanctification seems to open the door for the idea that God might be required, in justice, to confer salvation on one whose character, through sanctification, has become virtuous.

*Criminal Law and Expletive Justice*

This rejection of merits is enabled by Grotius' characterization of the Atonement as an exclusively criminal matter. Because restitution is part of private law, it is irrelevant. The idea of a reckoning of merits is quintessentially expletive. This can be seen in its calculative reasoning, its focus on external units of account (particularly in the satisfaction theory), its immutability, the universality of its applicability, the private nature of its concern (i.e. between two actors), and its focus on right rather than good.

However, by conceptualizing the Atonement in accordance with his understanding of criminal punishment, Grotius shows that expletive justice does not demand that anything (such as merits) be restored to God. The matter is not the individual's need to possess sufficient merits to ensure the right to salvation. This does not mean that he rejects the idea of expletive justice entirely. However, in punishment, expletive justice does not suggest a strict correlation between crimes and punishments (unlike in private law). Expletive justice does not – indeed, cannot – determine the content of that punishment. Rather, expletive justice dictates that punishment must be given, and grants God the right to punish.

Thus, the objectivity of expletive justice lies in the fact that in breaking God's law, man has automatically and inherently committed an offense against the goodness of the moral order created and governed by God. Its perfection has been sullied. Without punishment, God would be tacitly endorsing these evils. Thus, God must express his disapproval of sin. Grotius thus provides some foundation for what is today known as the expressive theory of punishment.



However, the objective demand for punishment cannot be reduced to mere disapproval. Indeed, without actual punishment, others will come to see that there is no consequence to be paid for wrongdoing. Without imperative enforcement, the declarative value of the law will be rendered irrelevant. Both imperative and declarative components are necessary: God is both all-powerful and all-wise. For this reason, God's right (indeed, God's duty) to punish man inheres in man's act of lawbreaking. Even if particular crimes do not call for particular punishments, the idea of crime calls for the idea of punishment.

This is true both in theory and in practice. Because Grotius' conception of law must be understood within a political framework, it automatically implies imperative sanctions against its violation. As Grotius says, law is "not something internal in God, or the very will of God, but a certain effect of his will."<sup>47</sup> Because law is a second-order manifestation of will, if the defiance of a law did not necessarily require punishment, it would mean that the law never existed in the first place. In a practical sense, man's knowledge of an absence of punishment would result in others never following the law, rendering moot in practice its entire imperative weight. As a result, man's sin cannot go unpunished.

### *Punishment as Fundamentally Political*

The absence of a correspondence between specific sins and specific deserts of punishment indicates that God does not punish *sins* in particular, but *sin* in general.<sup>48</sup>

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<sup>47</sup> Grotius, *SC* 3, 83.

<sup>48</sup> Indeed, according to Grotius, this enables the possibility of substitutionary punishment. *Ibid.*, 4, 101.

This particularly emphasizes the corporate nature of sin, and the fact that the wrongs are not simply a matter between the culprit and the victim, or even between the offender and the Divine governor, but also concern every other person in the moral order. Inasmuch as others are upholders of the integrity of the moral reality (represented most tangibly by the law), the perpetrator has threatened them, by openly challenging the sanctity of their order and the authority of their protector.

As governor of this moral order, God cannot allow such treason to stand. If he did, it would cause the breakdown of the entire order going forward, disabling the possibility of fostering sanctifying virtue. Thus, it is an objective, universal, and immutable truth of expiatory justice that God must testify to the goodness of that moral order. In fact, for Grotius, this is the very definition of satisfaction. As he outlined in his initial discussion of the purposes of punishment, satisfaction is undertaken on behalf of the one who is victimized by the crime. Because God punishes on behalf of the moral order, he requires satisfaction. However, the purpose of satisfaction is to ensure that the victim (in this case, the moral order) will not be prone to similar future violations. Thus, satisfaction is demanded by expiatory justice.

*How* that satisfaction comes about, however, is a matter for attributive justice. It must be determined by reference to the future common good of the moral order. This shows that Grotius does not conceive of satisfaction as retributive. Retribution looks backward, to find a punishment equal to the crime. Because of this equality, retribution fully satisfies justice. Thus, it does not point beyond expiatory justice. However, because Grotius' conception of expiatory justice does not suggest a clear and objective correlation

between particular sins and particular punishments or remedies, attributive justice is necessary in order to determine and carry out the actual punishment. Thus, the success that expletive justice demands in achieving the tripartite ends of punishment (satisfaction, deterrence, and reformation), is determined by the subsequent performative instantiation of attributive justice. In Grotius' understanding, even the expletive necessity of satisfaction points beyond itself.<sup>49</sup>

### *Natural and Positive Law*

This distinction between the strictness of expletive justice and the flexibility of attributive justice helps to deal with one objection to Grotius' theory. One might argue that Grotius' theory is problematic because the punishment of Christ is not the exact punishment set out in God's law. However, Grotius argues that God's command specifying death as the *particular* punishment for sin is a positive command, not a natural law. It originates in the will of God as lawmaker. Until natural laws, which are immutable, this Divine positive law can thus be relaxed as time and place suggest, if there is a good reason to do so. (As Grotius explains, there is indeed a very good reason to do so.) As a result, there need not be an exact correspondence between the actual punishment suffered by Christ and the prescribed punishment of humanity.

What cannot be changed, however, is the principle of natural law discussed above,

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<sup>49</sup> Even those who have given even cursory study to *de Satisfactione*, such as Christian Gellinek (see *Hugo Grotius*, (Boston: Twayne, 1983)), often misread Grotius as denying the necessity of satisfaction. This is likely due to the fact that Grotius understands satisfaction differently than previous thinkers, rejecting the idea of retribution. Indeed, his stated intention in the title is to defend the necessity of satisfaction, and to expose the difficulties in the Socinian elimination of satisfaction. However, Grotius does not make it easy on the reader: his book on the necessity of (objective) satisfaction actually vindicates (subjective) relaxation of punishment.

which states that crime in general must be punished. The natural law does not state how the punishment must be given or lay out the severity of the punishment. That is left to the prudent discretion of the governor. However, the need for punishment is grounded in an objective order of right. This is why, *pace* Socinus, Grotius does indeed believe that satisfaction is essential to the Atonement. And Christ, through suffering punishment, is that satisfaction for human sin, thereby opening up the possibility of eternal life and closing off the inevitability of eternal death.

### *Duties and Rights*

As stated above, expletive justice is relevant not only in demanding punishment for sin in general, but also in granting God the right to punish those who have broken his law. Because he has such a right, God's punishment can never be unjust in the strict sense, regardless of the course taken. In its procedural or formal component, the course of action is guaranteed to be just even before the action is undertaken. However, such a status gives no indication as to what kind of punishment might actually best conduce to the common good in any particular situation. This universal right is mute when it comes to the prudential, public decision as to what kind of action to pursue. While the pure reason of expletive justice demands punishment and grants God the right to deliver it, moral-existential virtue, or the practical reason of attributive justice, ought to guide this exercise. The former leads to the latter.<sup>50</sup> Thus, God's subjective right to punish exists within the overarching framework of a virtue-based ethics.<sup>51</sup> This is evident in his

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<sup>50</sup> One wonders whether it might be accurate to describe the moral status of a right as simply the condition of the possibility of truly just action.

<sup>51</sup> Perhaps the best recent exponent of this understanding is Jerome Schneewind, *The Invention of*

acceptance of Christ's death as a substitute.

An important implication of this conception is that God's right to punish with eternal damnation does not necessarily imply a corresponding duty to exercise the right to the full. Indeed, God chose not to do so, out of higher considerations of charity for humanity. Thus, he cannot possibly have had a duty to punish humanity to the full extent allowed by the right. In fact, one might almost say the opposite: the higher good of hope and charity created a higher obligation for God not to pursue this right to its full extent. Thus, the existence of a right to punish does not imply a perfect duty to punish, but rather, may actually imply an imperfect duty to relax punishment. Duties and rights are not perfectly reciprocal.<sup>52</sup>

### *Divine Will over Nature*

This emphasis on attributive justice also allows Grotius a richer conception of the person – including the possibility of seeing God as a person. The fact that God prudently deliberates over a course of action that will best conduce to the future good of the moral universe demonstrates God's (semi-)independent will. If God's nature – as perfectly known through absolute laws – determined all of his actions, then he would be unable to relax the penalty set out in the law of (his) nature. There could be no deliberation between the demands of the law and the future good of the people, because the law would be decisive. However, this is not the case; in contrast to the Reformed position, God's will is not simply the mechanistic executive of his nature.<sup>53</sup> Rather, although God is

*Autonomy: A History of Modern Moral Philosophy* (New York: Cambridge University Press, 1998), 77-78.

<sup>52</sup> Grotius, *SC* 3, 83-84.

<sup>53</sup> See W. G. T. Shedd, *Dogmatic Theology*, Vol. II, 3<sup>rd</sup> ed. (New York: Charles Scribner's Sons, 1891), 355-58. In such a case, if God's nature includes both punishment and mercy, which one would apply?

unchanging, his will is rational and – more importantly – capable of deliberation, and he thus responds to particular situations in particular ways. In this case, of course, God prudentially upholds the tension between punishment and mercy in a creative fashion, without compromising either. To use Grotius' categories from *de Imperio*, God's action in the Atonement is not an act of legislation, but an act of jurisdiction.<sup>54</sup>

This reflects Grotius' earlier assertion that God's (temporal) laws, which are a second-order instantiation of his (time-transcendent) will, can be given only to some people, such as the Hebrews of the Old Testament. It also reflects Grotius' view that God's positive laws are changeable, and even subject to interpretation through equity. Likewise, God's punishment, in the exercise of jurisdiction, is also a second-order effect of his free will. Thus, because God's actions are not strictly predetermined by his nature, Grotius shows the centrality of his belief in a personal God with a free will. However, God's will is not arbitrary, even if it is sometimes inscrutable to humanity (as befits an infinite God). God always acts in accordance with attributive, or governmental, justice: a property that resides in God.<sup>55</sup>

### *God as Active*

Grotius' conception of God as governor rather than creditor also helps to demonstrate God's active will. The Socinian view requires of God only passivity, because God simply need not collect on his debt. Indeed, this view is consistent with the pre-Christian understanding of forgiveness as an indifference to harm, one that falls under

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<sup>54</sup> Grotius, *SC* 3, 79-80.

<sup>55</sup> *Ibid.*, 5, 122. Of course, there are a small number of principles – the fundamental principles of nature – that may be known as unchangeable laws.

the virtue of temperance.<sup>56</sup> God might determine that, in his perfection, he does not need repayment, and that would be the end of the matter. This would seem to fit under Grotius' category of good-naturedness in *de Aequitate*.

Grotius' theory indeed has echoes of the idea that God does not require restitution. God does not *need* anything from man. In his omnipotence, he is never lacking in any way. The honour that we fail to render to God does not detract from God's 'stock' of honour. Thus, to Grotius, the idea of sin as incurring a debt to God seems less than fully intelligible. Nor is sin even a direct offense against his holiness. God's relationship to the world is not that of a victim, who has been directly offended by the crime. Thus, God's concern is not to be made whole, as in private law. He is not concerned with his possessive claim-rights.

However, the matter does not end there. If it did, God would simply be giving up his *jus* of authority (and the subsequent exercise of his rational will) altogether. Instead, God retains his governing responsibility, taking on the task of deciding how best to exercise his rational will.<sup>57</sup> This befits his role as that of wise and loving governor. God's creation has been violated by sin, and he is concerned with the good of his subjects.<sup>58</sup> Although God is self-sufficient, he does not simply ignore humanity. Rather, God actively seeks out humanity in his grace. This may, of course, actually call for

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<sup>56</sup> Montague Brown, "St. Thomas Aquinas on Human and Divine Forgiveness," *St. Anselm Journal*, Vol. 6, No. 2 (Spring 2009), 1-8.

<sup>57</sup> See Grotius, *SC* 6, 134.

<sup>58</sup> As a result, some have argued that the final cause of the Atonement is ultimately external to God. Instead, the final cause is what the good of the moral universe (contingently) requires, rather than what the nature of God demands. As Storms argues, "although God can remit the penalty of sin without satisfaction [to himself]," according to Grotius, "he cannot do so in view of the welfare of the created order." Although this is something of a misunderstanding of Grotius' view of satisfaction, the observation is perspicuous. See Sam Storms, "Grotius and the Governmental Theory of the Atonement." <<http://www.enjoyinggodministries.com/article/24-grotius-and-the-governmental-theory-of-the-atonement/>>, retrieved September 16, 2011.

punishment. However, rather than pursuing a claim-right, this is instead a costly task for God. The good of humanity is best served by Christ, his dear Son, actively suffering a punishment that God judges as fitting. This emphasizes Grotius' Christian (rather than pagan) understanding of forgiveness as an active virtue, rather than a passive one. God does not simply display good-naturedness; rather, he acts with indulgence toward humanity, displaying his perfect love.

It is true that God is the target of sin inasmuch as an offense against the created order is an offense of treason against its creator and sustainer or governor. Likewise, punishment does uphold the dignity and glory of God's government. However, this glory is not an end in itself. Rather, the purpose of such government is to effectively cultivate virtue in (and thus to sanctify) the souls of his subjects. This emphasizes the fact that the goods of virtue transcend the rightness of justice. This focus on human welfare over strict nature points toward Grotius' emphasis on the good over the right.

### *Good over Right*

Indeed, unlike in other theories of the Atonement, Christ's death is not primarily concerned with restoring justice. God could have brought about the condition of justice in the universe by delivering to humans the eternal punishment prescribed in his law, which would have satisfied the demand of natural justice for punishment of lawbreaking. Thus, Christ's death is not necessary in order to bring about justice.

Why, then, did Christ voluntarily step in as a substitute for this eternal punishment? The answer illustrates Grotius' Christian understanding of the natural and



the supernatural. While justice may be the highest cardinal virtue, it is still only a natural virtue. However, God reveals to us that faith, hope, and especially love are virtues of a higher order. If all people were to know that they would suffer eternal death in order to bring about justice, they would lack any hope for the hereafter. In order to preserve the possibility of hope, God had to find another way to satisfy the requirements of expiatory justice. Likewise, if people knew there was no possibility of escaping ultimate punishment, they would cease to practice the Christian faith or to worship God. The just solution of damning humanity would disable faith and leave humanity in a desperate position. This illustrates the limits of justice for Grotius. Justice is giving people what they deserve, and sinful humans do not deserve as much as they might imagine. Eternal damnation, while showing God's justice, would not display God's love. Christ's action allowed God to maintain divine order while still extending forgiveness.

Thus, Christ's death does not represent the only way that an objective condition of justice can be achieved in the universe. It was not necessary or required in the objective order of things. Rather, it was fitting that Christ did this. The element of contingency in fact such this was not the only way to provide justice – or perhaps even forgiveness – further emphasizes the voluntary (and thus loving) nature of Christ's sacrifice.

*Forward-looking: Glorification, not Innocence*

With his substantive roles for both justification and sanctification in salvation, Grotius takes a notably forward-looking approach. This serves as another contrast with both theories, particularly the penal substitution theory. In that approach, the Atonement

looks backward to original sin, seeking to cancel out the status of sin. The satisfaction theory also looks backward, seeking to cancel out the debt of honour owed to God (even if its concept of sanctification allows a subsequent place for a future-oriented outlook). Indeed, if one were simply to look back to Christ's justification, it would seem that by providing satisfaction, Christ allows God to judge humanity as “not guilty”, and to remove the status of “sinful” from man.

However, such a state of innocence is not the same as the state of glorification. By being judged merely innocent, one could certainly avoid the punishments of the afterlife. However, it is unclear how one could attain eternal felicity. After death, one might instead subsist in a mere vaguely contented state of limbo. As a result, it is necessary for God to go beyond declaring a person as “not guilty,” to declaring the person as “righteous.” Acquittal is not sufficient; acceptance is necessary. (To be sure, the penal substitution theory asserts that the two are done at the same time. However, it is somewhat unclear how this can be done.) In contrast, Grotius provides distinct categories for each of these. Justification relates to remission of sin, but sanctification allows eternal glory.<sup>59</sup> The governmental theory is not merely concerned with the expiation of divine justice, but also its manifestation; its interest is not primarily retrospective, but rather prospective.<sup>60</sup> The event of the Atonement itself looks forward to the continued existence of God's government and the continued sanctification of Christians (and ultimately, to the hereafter). Thus, Grotius allows for a progressive path toward righteousness, rather than mere delivery from guilt. Ultimately, he does not point

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<sup>59</sup> Grotius, *SC* 1, 47-48.

<sup>60</sup> Contra Sydney Cave, *The Doctrine of the Work of Christ* (London: Cokesbury Press, 1937), 177. Given that he devotes a chapter in *de Satisfactione* to the subject of expiation, Grotius himself would likely reject this characterization, due to its misunderstanding of his nuanced understanding of satisfaction.

backward to the Edenic state of innocence, but forward to the Heavenly state of glorification.

### *God as Personal*

This emphasis on the growth of one's being, rather than the change of one's status, is a further contrast with the penal substitution theory. In the penal substitution theory, salvation appears to be binary. It is an either/or condition: a status outside of time. All of the elect are in the same fundamental state of the soul; so are those unfortunate ones not predestined for glory. There is no middle ground. On the contrary, Grotius' emphasis on sanctification means that the status of justification is only the beginning. It enables the process of sanctification, in which a person is actually changed over time. Every individual may be in a different relationship to God and his perfection.

Indeed, for Grotius, the Atonement's objective (expletive) component of justification leads to the subjective (attributive) component of sanctification. It is ultimately concerned with the relationship between (at least) two subjects, or persons: the individual and God.<sup>61</sup> Glorification is not simply an intellectual condition of having knowledge about God, but of actually knowing God in an existential sense. Moreover, this friendship with God is not dependent upon restitution of objects, as objective factors can never 'add up' to subjective growth. One cannot earn the friendship of another simply by providing that person with things; love cannot be bought. Because of the intersubjectivity of the Atonement, it can be said to be political, not economic.

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<sup>61</sup> Of course, this is an incomplete description, as seen in Grotius' emphasis on the corporate nature of the Atonement.

This is consistent with Grotius' emphasis that forgiveness is not dependent upon justice. In the satisfaction theory, God's forgiveness is predicated on an objective condition of merit-fulfillment. God is simply unable to forgive before justice has been satisfied. By eliminating the need for merit (a mediating object that also functions as a unit of reckoning), Grotius focuses on the direct subjective (or personal) relationship with God. The issue at stake is acknowledgement and repentance, not repayment. Indeed, Grotius sees forgiveness as radical, because no person can ever fully render to God what is just. This further emphasizes the gift-nature of God's forgiveness, as well as his offer of friendship. Likewise, a person's friendship with God is based on gratitude, not justice. This reflects Grotius' earlier idea that attributive justice can never be demanded as a strict right. Rather, because the virtues that enable it must be voluntary, Grotius emphasizes attributive justice as freely given. Inasmuch as it carried out grudgingly or under compulsion, it has only the external appearance of virtue, rather than truly being honourable.<sup>62</sup>

The forward-looking nature of friendship with God also emphasizes the impossibility of reaching completion (at least in this life). This is true not simply because God himself is infinite, but because the horizon of time looks forward indefinitely. One can never say that one's relationship with another subject is ever fully complete. Rather, the best that one could say is that the relationship continues to grow. The idea of completeness would imply a finality that requires one, at the very least, to transcend time. When one says that his or her relationship with another person is “finished”, it does not imply that the relationship has reached its ultimate goal. Rather, it illustrates the reality

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<sup>62</sup> See Grotius, *DJB* 2.20.20.1-2, 489.

that the only way to reach finality with another person is in death.

*Action as Open-Ended*

Indeed, Grotius' emphasis on looking ahead rather than looking backward brings him full circle to an explanation of why restitution is not the relevant consideration. Because external possessions are material objects, it is possible to undo the harm in private law. However, sinful human acts and intentions can never really be undone, because the past can never be recaptured. Indeed, it is hard to see how future honour could truly make up for past honour. For these reasons, the success of punishment is determined not by its attempt to recover a previous state of affairs or demanding a punishment equal to the crime. The idea of 'an eye for an eye' has been tried and found wanting, just as providing immunity to burglarize the home of a convicted burglar would be absurd. Even when punishment is delivered through a jail sentence, the idea that justice has been done once the term is served often tends to ring hollow. (This is even more of an issue when one seeks punitive damages for intangible wrongs such as "pain and suffering"). Rather, because punishment is ultimately concerned with the person, the only true way to resolve the situation is to change the character of the person. Thus, when one is dealing with criminal actions, Grotius seems to recognize the impossibility of returning to the past.

This is especially true because of Grotius' corporate conception of action. Sinful actions (indeed, all actions) are not simply directed at God. Rather, they carry on into the world on an ongoing basis. The consequences of action cannot be foretold. They are

potentially infinite, and cannot be undone. They do not cease simply because the authorities make the forensic proclamation that justice has been served. The law cannot chase them down and find them. Likewise, the dictates of expletive justice, with their atemporal delineation of status, are irrelevant to the case, which does not admit of perfect fulfillment, closure, or finality. However, through clemency, forgiveness and reconciliation, these criminal actions can be turned toward positive ends. Thus, by looking forward, action can be redeemed.<sup>63</sup>

### *Political Implications*

The foregoing discussion shows how expletive and attributive justice, and the components of each, are central to Grotius' conception of the Atonement. However, his approach to the Atonement is not merely illustrative of his other works. The fashion in which these components play out in the realm of theology also has subsequent implications for Grotius' 'secular' understanding of law, rights, and politics.

### *Punishment as Performative*

Grotius' theory of punishment, as with his thought in general, is notoriously tortuous and difficult to understand.<sup>64</sup> As a result, some commentators have taken his

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<sup>63</sup> Hannah Arendt, *The Human Condition*, 2<sup>nd</sup> ed. (Chicago: University of Chicago Press, 1998), 231-33, 236-39. This corporate understanding of sin further substantiates the description of humanity's relation with God. The subjective nature of the Atonement, and the fundamentally personal relation to God, should not be taken to connote an individualistic understanding of the person's relation to God. One's relationship with God, in both its positive and sinful elements, is undertaken in concert with others, and has effects, positive and negative, on the whole moral-political realm. The Atonement is not simply the restoring of a relationship with God. Rather, it is the restoring of a relationship with the created order created and governed by God.

<sup>64</sup> Samuel Fleishacker, *A Short History of Distributive Justice* (Cambridge, MA: Harvard University Press, 2004), 23.

pioneering treatise on punishment as a defense of a retributive theory of punishment.<sup>65</sup> Yet while Grotius does have an 'objective' component to his theory, it is not constituted in the usual element – that of retribution – employed in most 'objective' theories of punishment. Rather, the objective component arises from the normative (indeed, teleological) purposes of government: to care for the moral well-being of subjects. As examined above, from this arises necessity of holding together the declarative and imperative senses of ruler. For this reason, a ruler cannot allow crime to go unpunished. This is the 'objective' component of Grotius' theory: the formal statement that crime must be punished.

However, Grotius does not extend this objective component to the substantive content of punishment, other than to say that a punisher must take his lead from the common good. This reality is not only dynamic, but looks ahead to a horizon of infinite possibilities. As a result, the duty to punish that arises in expletive justice is indefinite, and must be carried out according to attributive justice, which transcends the finality and perfection of expletive justice. A particular crime does not call for a particular punishment. It is impossible to specify in advance of the wrongdoing what sort of punishment would be called for. In fact, it is impossible for someone removed from the situation and the overall political order to prescribe a punishment even after the crime is committed. While universal theoretical reason may begin the process by dictating the need for punishment, it is inadequate to bring punishment – or at least a punishment that meets the objectives of punishment – to completion.

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<sup>65</sup> Oliver O'Donovan and Joan Lockwood O'Donovan, "Hugo Grotius (1583-1646)," in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*, ed. Oliver O'Donovan and Joan Lockwood O'Donovan (Grand Rapids, MI: Eerdmans, 1999), 791.

Thus, instead of seeing satisfaction in terms of mathematical equilibrium, Grotius recasts satisfaction as performative. As a result, when punishment is considered as a whole, it fits under natural Right, not natural law. Although its performance does not follow absolute laws, it is not therefore relativistic or arbitrary. It must meet a standard, but that standard is not simple. One does not have a duty to act in a specific fashion defined in advance by law. Rather, one has a duty to act virtuously. Indeed, this virtue may require great sacrifice on the part of the ruler. More than once, Grotius refers to the example of the pagan King Zaleucus, who mandated a “wholesome and profitable” law that adultery be punished by the loss of both eyes. Some time after decreeing this law, his own son was caught in adultery. His decision was to remove one of his son's eyes, and to pluck out one of his own, thus preserving his son's capacity for sight. As Grotius describes it, “So he rendered unto the law the due measure of punishment, through a wonderful and equitable moderation, having divided himself between a merciful father, and a just legislator.”<sup>66</sup>

### *Politics as Personal*

Grotius' complete rejection of any private law elements in his Atonement theory has significant implications, especially in light of the fact that the prevailing alternatives all imply such a paradigm to a greater or lesser extent. Because these alternatives cast the Atonement more along the lines of economics than of politics, they could not be more foreign to Grotius. Perhaps more than any other factor, this tells against the common perception of Grotius as reducing politics to the protection of property. Had Grotius

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<sup>66</sup> Grotius, SC 4, 108-09.



wished to do so, he could have ignored the whole idea of criminal punishment and built off of the satisfaction theory. Indeed, where the commercial theory is ultimately reticent to take its metaphor of debt to extremes, Grotius could have unambiguously framed the honour owed to God as a possession to be returned.

Instead, he took the opposite approach. He did not simply follow Calvin in portraying the objective component of the Atonement as punishment rather than debt repayment. Rather, he argued for the very limits of an objective component, at least on its own terms.<sup>67</sup> Indeed, where the alternative approaches frame the Atonement through the lens of expletive (or commutative) justice, Grotius' theory has a more significant place for his reworked understanding of distributive justice than any theory before him. Without attributive justice, and the latitude it provides from “strict nature”, there is no way for God to accept Christ's bearing of punishment as sufficient to save humanity. Indeed, the very concept of justice is minimized in his approach, in recognition of the importance of grace. The Atonement is not primarily governed by the strictness of law, but by the natural and supernatural virtues displayed by God (and Christ).

The political character of the Atonement is tied to its future-oriented outlook. This arises the fact that the Atonement is about providing redemption while simultaneously preserving the integrity of God's government. This integrity is important by virtue of the effect that it has in shaping the character of its subjects going forward. The ultimate matter is not observable behaviour in regard to measurable external objects; it is the character from which these external actions flow. Thus, government does not exist simply to protect the performance of voluntary promises, or the integrity of

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<sup>67</sup> Of course, as his title adverts, he does not reject it altogether, as do his Socinian opponents.

individual possessions, but to promote a virtuous quality of character.

*Praxis over Poiesis*

Grotius' governmental approach also emphasizes the virtues of politics. Indeed, the fact that his entire theory of the Atonement rests on the *balance* between the two essential and yet mutually exclusive goods of mercy and punishment demonstrates the fundamental importance of prudence as a central orienting virtue. Christ's action in the Atonement is not governed by laws dictating that a sacrifice was needed. Rather, the Atonement is governed by a divine person. This emphasis on prudential government rather than law indicates that Grotius orders the practice of making (*techne* or *poiesis*) toward the higher reality of doing (*praxis*). Grotius does not eliminate *poiesis*, and even provides a space for it in expiatory justice. However, he shows that it can only find its fulfillment in the action of *praxis*.

This balance between justice and mercy is not simply an arbitrary assertion, but a conceptually central point. Throughout *de Satisfactione*, Grotius is very careful to preserve the tension between voluntarism and naturalism.<sup>68</sup> Substantively, God must exercise prudence because he must uphold both declarative and imperative elements without compromising either. If either one were lost, the possibility of morality would effectively disappear. Humanity would either lose hope, or would count on 'cheap grace'. Either one would remove any incentive for virtue. Thus, God must show his indicative example of love, but must also back this up with the threat of imperative force. Thus, the practice of government is not one that veers to the extremes of moral instruction or fear

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<sup>68</sup> Ibid., 3, 79-80; 4, 112; 5, 114; 7, 174.

of coercion. At its best, it should possess the capability for both. However, it must always be guided by the virtue of prudence that determines the appropriate balance of each, depending on the situation. Grotius does not aim for a perfect state, but a perfect balance. The spirit of Aristotle is alive and well.

### *Natural Right and Natural Law*

Grotius' emphasis on *praxis* over *poiesis* points to the importance of political rule over law. His emphasis on the inability of (universal) laws to express the fullness of moral reality (save for his basic few principles of natural law) imply that God's government is primarily one of parliamentary (or rather, monarchical) supremacy; God has no judicial review. Sovereignty does not reside in the strict and knowable natural laws of the Divine constitution; it resides in the person or character of God.

As a result, law is not absolute, and Grotius would not seem to advocate a written constitution. Law does not constrain politics. Rather, the opposite is true. Law is a tool for good government, and is oriented toward that end. Because of the absoluteness it claims on its own terms, the law is always limited in its attempts even to bring about justice. This can be seen in Grotius' earlier assertion that law is merely “an effect of [God's] will.”<sup>69</sup> In other words, it is a reification of God's will at a particular moment. However, God's will itself can never be frozen in time by being turned into a proposition. It is more central to ascertain the will of God than the law of God. For that reason, one must employ equity even in interpreting God's law.

Even more fundamental, however, is the fact that an equitable judgment – one that

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<sup>69</sup> Ibid., 3, 83.

gives subjects what they genuinely deserve by right – is likely to be insufficient. *Good* government calls for the exercise of indulgence and mercy, in which a ruler gives up his full right, in order to better promote the good of his subjects. Even a government that operates according to the spirit of the laws (and their attendant punishments) may be unnecessarily judgmental. Just judgments must be tempered with mercy, as guided by the overall orienting virtue of prudence in the governor (whether divine or human). The law is unable to do this. Law is only a second- (or third-) order reflection of ultimate moral reality. Grotius sums it up well in one pithy statement, cited (appropriately enough) from the Ancients. Here he says that the divine grace of the Atonement is “not according to the law, yet not against it; but rather, above the law, and instead of it.”<sup>70</sup>

This framework of right by nature (rather than natural law) helps to situate Grotius' realist philosophy of law. Positive law is, indeed, the will of the ruler. However, because law is not the essence of morality, political ethics is not reducible to the arbitrary will of the ruler. The ruler himself is subject to a wider overarching normative framework. In speaking of how the law cannot be relaxed absolutely, Grotius refers to “the reason that is the cause of the law.”<sup>71</sup> Thus, the law-maker exists within an intelligible horizon that is not of his own making. While a valid law is the will of the ruler, a good law is an instantiation of natural Right.

### *Conclusion*

In conclusion, Grotius' defense of Christ's death as necessary for salvation helps

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<sup>70</sup> Ibid., 5, 121-22.

<sup>71</sup> Ibid., 5, 119.

to illuminate many of his important themes. Ultimately, Grotius frames the Atonement through the lens of attributive justice rather than simply through expletive justice. It is grounded on his distinction between private and public law, or between debt and punishment. Grotius' exclusive use of a criminal law framework, rather than the implicit private law frameworks not only of Socinus, but even of the satisfaction and (to some extent) the penal satisfaction theories, results in his rejection of the category of merits. This approach shows his emphasis on (public) politics rather than (private) economics, a corporate emphasis that can further be seen in Grotius' belief that the Atonement takes place on behalf of the church, rather than simply for individuals. Indeed, this 'governmental' theory particularly emphasizes the social and political nature of sin (and of action in general).

Furthermore, Grotius' approach emphasizes the importance of prudence in God as he deliberates over a punishment that will best serve the common good of the entire moral universe. Thus, God himself is only minimally constrained by the natural law of expletive justice; the right of punishment under expletive justice must find its fulfillment in the prudential judgment of attributive justice. This testifies to the personal nature of God, whose will is not entirely determined by nature. In fact, God's rational will does not simply exercise calculative reason, but deliberates over unquantifiable factors. This prudential deliberation balances the extremes of justice and mercy, testifying to Grotius' balance between ethical naturalism and voluntarism.

Moreover, Grotius' approach to the Atonement particularly portrays God as looking not backward to the redress of damages, but forward to the sanctification of the

church. God is not concerned with the kind of justice that can be perfectly fulfilled; rather, he seeks to allow people to move toward an ever-greater participation in the theological goods grounded in his character. Likewise, God's goal is not innocence, but glorification. He seeks not to prevent (negative) violations of his honour, but to foster (positive) participation in his divine reality (in other words, friendship with God). Ultimately, God is not simply concerned with people's forensic status, but with their actions, which are grounded in their being. Thus, the important factor is not the restitution of external goods, but the promotion of a particular kind of internal character. This is best served by exercising the virtue of indulgence: relaxing the just penalty set out in the law, in order to allow people to maintain and develop the higher theological virtues of faith and hope. Outside of a very limited realm, the right is not absolute; rather, it is a gateway to the good.

It is worth revisiting the observation that Grotius conceptualizes the Atonement through attributive justice in a way that the satisfaction or penal substitution theories do not. The fact that expletive justice is not sufficient in itself, but is ultimately ordered to attributive justice, testifies to Grotius' understanding of nature and grace. What Grotius describes as “properly natural” or “necessary simply” is not the highest element of his thought. Rather, it must be understood in light of something ontologically and qualitatively higher. Indeed, according to the expletive justice represented by “proper nature”, there is no possibility for redemption. Pure expletive justice would, in the end, lead to the worst possible outcome, in which the entirety of humanity suffers punishment for eternity. In Grotius' conception, an Atonement theology governed only by expletive

justice allows no possibility of atonement in the first place. Nature itself, and the natural religion that is part of natural law, allows humanity to know many things about God and morality. However, its punishments for breaking such laws are unyielding in their strict natural justice. Lacking a concept of grace that transcends strict nature, natural religion does not provide the possibility of redemption.

As a result, natural religion and strict justice seem to undermine their own foundations. While they are internally coherent, they provide no ultimate hope of redemption for the person who has ever offended against them. Although these natural systems may continue to outline the truth about God and morality, one will yet be unable to stave off eternal punishment or obtain eternal felicity. As a result, there is little incentive to continue following them, worshipping God or cultivating virtue. Lacking a conception of grace, natural religion will be unable to sustain adherents. Even to make natural religion possible, grace is necessary.

The same is generally true of Grotian politics. The analogy between theology and politics is admittedly imperfect, because politics has no comparable conception of original sin. Nor is the authority of the political governor so great as that of the Divine governor. However, crime against the political order – cosmic or temporal – produces the same result. Unlike debtors (or tortfeasors), expletive justice provides no way for criminals to undo their acts against the dignity and integrity of the political order. While the law outlines a good (or at least innocent) political order in theory, on its own terms it fails to account for becoming. Once crime punctures the neat system, the impersonal law struggles to guide a diseased polity toward health. Only the action of the governor,

guided by the virtues of attributive justice that transcend nature, can lead his subjects toward the common good. As long as crime remains a realistic possibility, the political order will be unable to sustain itself according to purely strict nature. Ultimately, justice is not enough.



CONCLUSION:  
BEYOND JUSTICE

This study has set out to explore Grotius' conception of justice, as seen in his categories of expletive and attributive justice. This has been illustrated through his understanding of authority, punishment, and the Atonement of Christ. In doing so, however, it has also aimed to situate Grotius in a historical and intellectual context. In particular, it has been the burden of this study to show that Grotius' understanding of expletive and attributive justice places him in substantial continuity with the classical theories of Plato and Aristotle, as well as the Christian development of this tradition.

Plato inaugurates this tradition by describing how political justice requires a particular formal ordering of society, with the Philosopher-Kings as rulers. Aristotle puts forward a more detailed study of political justice, which he divides into “arithmetic” and “geometric” justice. With arithmetic justice, he acknowledges the importance of restitution of goods. This form of justice is concerned with the procedures by which one acquires an object. Its relevant parties are private individuals, with the state playing a role simply to guarantee rights between these parties. This justice of external objects is quantifiable and can be rectified through a calculative rationality. Aquinas renames this category “commutative justice”, but largely follows Aristotle in its understanding. It is the justice of objects; it is transactional, or procedural; and it is private rather than public.

Many observers have argued, explicitly or implicitly, that this commutative justice, shorn of any reference to extra-political justice, comprises the whole of justice for Grotius. Indeed, Grotius does have a conception of commutative justice that follows this aspect of the tradition. Here he shows the importance of external goods; the procedural nature of the matter; the calculative reason associated with bringing about justice; the potentially universalizable nature of its associated laws; and the possibility of systematizing the prescriptions in written language.

Indeed, in recasting this conception of justice as “expletive justice,” Grotius actually develops the tradition. He draws out the negative nature of its prescriptions, which simply prohibit problematic actions. He points out the backward-focused nature of rectification, and the way it attempts to return to a previous state of being. Indeed, expletive justice is particularly relevant to the status of a thing, and can be known theoretically. Perhaps most fundamentally, expletive justice is perfectly fulfillable, and can thus be expected of (and coerced in) all people.

However, the classical tradition argues that there is more to justice than simply this. Plato's formal tripartite ordering of society mirrors the deeper reality of the soul. Indeed, this political ordering is hollow on its own. It further requires rulers whose souls are able to participate in the substantive (and transcendent) justice of the Good. Because justice is located in the soul, this right by nature is fundamentally personal, and rational propositions of natural law are inadequate to its full truth. Likewise, the best kind of rule is not simply carried out according to legal formulations, but flows forth from the virtue of the ruler.

Likewise, Aristotle's bifurcation of political justice also includes geometric justice. This aspect of justice is fundamentally public, reflecting the political character of human existence. In order to carry it out justly, rulers must have situational knowledge of circumstances. Universal laws are inadequate to bring about justice, and equity is needed to discern the good in particular situations. Justice is not simply a matter of making impersonal laws that stand outside of time, but of acting as a good governor in human situations. It deals not simply with the objects of *poiesis*, but with the (human) subjects of *praxis*. As a result, governors require a knowledge of the internal character of the person(s) involved. This leads to a substantive outcome of rightness, not a simple ensuring of correct procedures of acquisition. Ultimately, however, this distributive justice needs to be put in the service of a higher good, one that corresponded to man's end.

Aquinas renames this category "distributive" justice. He acknowledges many of these Aristotelian themes: public over private; prudence over calculation; equity and situational judgment over universal prescriptions; virtue over institutional solutions; and practical virtue over (or at least in addition to) intellectual virtue. Aquinas also develops the epistemological place of history, strengthening the idea of truth as emerging from practice in particular situations. This flows from his idea of positive laws as potentially revealing truths in areas where natural law does not (yet) dictate a command or prohibition.

However, Aquinas is enamoured of the idea of law, and of possibility that history may converge on universal truths. Thus, he endeavours to cast natural Right in terms of

propositional laws wherever possible, potentially reducing its personal element. While he does not deny the place of virtue, it is sometimes overshadowed by the Roman law conception of *jus* as corresponding to external states of being. Likewise, he devotes much more attention to commutative justice than to distributive justice. Nonetheless, Aquinas does develop the importance of a higher order, with a richer differentiation between the natural realm of politics and the supernatural realm of Christian religion. While the realm of politics is an intermediate end, it is completed only in the supernatural realm.

Few observers have seen in Grotius much (if any) room for this conception of justice. However, Grotius' conception of attributive justice contains several elements that adhere closely to this tradition of distributive justice. Attributive justice is fundamentally concerned with the internal person, not external objects. Its reasoning requires the virtue of prudence rather than simple mathematical calculation. It considers particular situations, rather than relying on universal propositions. Indeed, it looks to the practice of politics rather than to the insensitive and impersonal dictates of law. It acknowledges that truth is found in situations, following Grotius' empirical emphasis on history as a source of knowledge. It is not simply concerned with procedures, but with substantive outcomes. Moreover, while Grotius does not align the public/private distinction with his categories of justice, he does re-emphasize the political nature of existence.

Beyond this, however, attributive justice also develops the tradition of distributive justice in a new and (appropriately) creative fashion. Grotius particularly highlights the forward-looking nature of attributive justice, in contrast to the focus of expletive justice

on the past. Together with his emphasis on virtue over law, Grotius also points to the importance of realizing positive goods rather than merely avoiding negative violations of rights. His attributive justice also especially emphasizes action and dynamism, rather than seeing justice as being captured in static conditions of being. Finally, and perhaps most crucially, Grotius emphasizes the necessarily imperfect character of attributive justice. This follows from fact that the indefinite virtues that it requires (which point toward the reality of God) are never perfectly realizable.

Perhaps because of Grotius' emphasis on the illustrative nature of history relative to systematic exposition, he does not always make his organizing structure of explicative and attributive justice especially clear. However, these two categories of justice are well-illustrated in his treatment of authority, punishment, and Atonement theology. Grotius' understanding of the origins of political authority, and his understanding of the state as salutary (but not essential), shows how attributive guidance, while not demanded in strict justice, nonetheless leads to a higher good. He also highlights the difference between the status of a ruler, which is nearly unimpeachable, and the actions of the ruler, which are under constant threat of civil disobedience. As a result, a ruler must exercise practical virtues, rather than relying on impersonal legal formulas. This points to the fact that order is existential, not propositional. Grotius' taxonomy of types of rule allows for the interpenetration of indicative and imperative rule, demonstrating that good politics transcends the self-interest of the state and points toward a higher moral realm. This is also evident in his understanding of positive law, which employs attributive justice to guide the exercise of rights. This rests on his understanding of natural Right, which

transcends the strict dictates of natural law.

Grotius' understanding of political authority as also arising from crime further emphasizes politics as substantive and concerned with moral goods, rather than simply protecting individual possessions. This criminal law paradigm reinforces the fundamentally public purposes of the state. Grotius' concept of just punishment also further illuminates the distinction between the status conferred by expletive justice and the action guided by attributive justice. The (expletive) right to punish is not a claim on a tangible good, but instead confers a difficult responsibility on its holder. The fact that status alone is mute when it comes to realizing the purposes of punishment shows the relative ordering of expletive justice to attributive justice. The punisher must exercise virtue in punishing, and must direct punishment toward the cultivation of virtue in his subjects. He must also consider the entire community, and look forward in an attempt to foster the common good. This practice further emphasizes the importance of political rule over impersonal law.

Finally, Grotius' understanding of the Atonement re-emphasizes the importance of politics over law by casting God as a governor rather than a creditor or judge. Through its corporate understanding of sin and Atonement, this theory also puts forward a fundamentally political conception of action. This emphasis on politics is also evident in the fact that God, as a person, is not compelled by laws of (his) nature, but prudently exercises his deliberative will to steer a course between the necessary extremes of judgment and mercy. This allows the Atonement to point toward the ongoing future sanctification of the church, rather than looking back to perfectly redress the damages to

God's honour. God does not simply seek innocence in people, which obtains in the absence of infractions, but their glorification, in which humans instantiate positive goods by existential participation in the Divine life. Ultimately, in contrast to both dominant theories of his day (and even today), Grotius primarily views the Atonement through the lens of attributive justice rather than expiatory justice. In order to allow the possibility of hope and faith, (and thus true religion and politics), strict justice must give way to a higher good.

### *Significance for Current Debates*

Grotius' conception of justice points the way toward addressing some of the impasses of political discourse today. To begin, Grotius helps to vindicate the practice of politics itself. Politics is often derided as a game in which self-interested partisans simply seek to preserve their own positions of power. Low approval ratings for legislatures tend convey public disgust at politics, and a belief in its inability to foster the common good. Constitutional courts are often seen as more legitimate avenues of conducting public business. However, Grotius shows the limitations of law, and the rights discourse implied therein. On the contrary, through his emphasis on the norm-revealing nature of history, he shows how politics can be the realm in which moral truth comes to be known. Practices may be a more accurate guide than purported beliefs, and may even reveal implicit beliefs. Indeed, as will be discussed below, this reflects Grotius' epistemological conviction that history is a source of moral norms, through the practice of positive law in areas left undetermined by natural law.

In his emphasis on culture, Grotius also shows that politics must operate by reference to a wider sphere of arts, literature, philosophy, and religion. Although politics is important, politics can only reach its highest ends when it operated by reference to extra-political realities. The limitations of politics are reinforced by Grotius' understanding that the higher sense of justice can only be instantiated imperfectly in politics; one should never look for ultimate solutions there. Only the lower sense of justice (expletive justice) can see true satisfaction of expletive justice. This operates only in the realm of negative freedom, or of possession of objects. In contrast, the positive fulfillment of the person must be an ongoing quest; no political program can ever bring about true satisfaction. This serves as a warning to ideologues who would promise utopian schemes. The more important the matter, the more limited the ability of politics to bring about satisfaction.

Grotius also reminds us that politics is a practice, not a science. This reinforces the value of first-hand experience and implicit or tacit knowledge. Theory and practice need to work together. Participant observation of politics should be considered vital to understanding politics.

Grotius also emphasizes the importance of responsibility. Rights are a beginning, not an end. There is a broader moral horizon within which the right-holder exists. The holder of a formal right still requires a substantive guide to its proper use. By pointing to the limits of rights, Grotius allows bearers of rights to exercise their liberties in a fashion worthy of their title. Thus, Grotius shows how politics can retain the concept of rights, while mitigating many of the political pathologies often associated with rights.



Indeed, this understanding of the higher purpose of rights extends to Grotius' fundamental conception of the origins and justification for the state. His conception of expletive justice shows that a legitimate government requires the consent of the government. However, the initial consent which institutes the structures of government is not sufficient to realize the true aims of politics. Rather, this consent of the governed places on the governors the weighty obligation to rule according to an independent standard of political goodness. Although the state requires consent, that does not mean that it is simply a contract produced under enlightened self-interest. Likewise, Grotius reminds us that politics should not be reduced to economics. While a good polity should certainly ensure the security of person and property, this is not its ultimate end. Politics should not be concerned about material realities to the exclusion of personal ones; indeed, both should be relevant.

Indeed, purpose of consent is to allow the more effective pursuit of higher goods. This serves as a reminder to citizens that the legitimacy that they granted to the political order necessarily implied the pursuit of higher aims. It also serves as an ongoing reminder that the rights they retain are to be used in the same way. Rights are not radical, but teleological. They do not shut down moral consideration, but call it forth.

### *Natural Right and Law*

While Grotius' conception of justice has many implications for immediate political debates, this study also illuminates Grotius' integrated positions in regard to metaethics (including competing conceptions of Right, law, and rights), philosophy of

law (and its relation to politics), rights and duties, theory and practice, objective and subjective realities, being and becoming, theology (and the relation of the natural to the supernatural), and Christianity (particularly its approach to forgiveness). For instance, his emphasis on attributive justice, or justice in the “wider sense”, points toward his conception of natural Right. To be sure, expletive justice does include a few natural laws which compel or forbid, thereby enclosing off a small sphere of human action from the realm of free will. In the remaining realm, expletive justice also confers natural rights, which grant individuals the status they need in order to validly exercise their free will. However, this large sphere of human freedom is not radically free. Rather, it is governed by a higher conception of natural Right. While all acts in this realm of freedom will be just in the strict sense of being valid, they will not be just in the wider sense unless they are guided by the higher goods of attributive justice. Indeed, this guidance is not a legal standard, but a cultivation of virtue in the character of the person. Ultimately, whether or not the person recognizes it, these virtues are ultimately grounded in the person of God.

This conception of natural Right (in relation to law) points toward what appears, on the surface, to be the paradox of Grotius. On the one hand, Grotius the lawyer spends considerable energy gathering and codifying Roman law. His *Jurisprudence of Holland* will serve as a central legal text for centuries to come, remaining in active use even until the twentieth century in South Africa. Moreover, he advances the understanding of law by showing how it can be understood in terms of individual rights.

Indeed, Grotius provides a healthy and independent ontological grounding for law, both natural and positive. There are a small number of propositions of natural law that

bind all of existence. For example, humans are commanded to worship God, or to refrain from taking the lives of others. In most other areas, natural law is silent. This allows space for positive law, as enacted by an authoritative political order. Indeed, Grotius seeks clear distinctions between what is known as positive law and what is known as natural law. Moreover, he allows for a systematizable science of law. He seeks clarity in law, and wants to establish it as methodologically separate from politics.<sup>1</sup> Indeed, in some ways, law naturally lends itself to concretization and systematization. Because it is not a living reality, it is amenable to (and functions best under) strict and well-defined criteria.

What is more, the law must be achievable. The very etymology of “expletive justice” shows the importance of perfect fulfillment or satisfaction as a distinguishing feature. From this, perhaps, follows its emphasis on preventing negative actions rather than promoting positive ones. The former requires subjects only to passively refrain from illegal acts, while the latter requires the active commission of morally good acts. Indeed, the law does not judge as “virtuous”, but only as “not guilty”. Complete omission of negative (illegal) acts is theoretically possible. Indeed, politics operates on the assumption that its subjects will ordinarily follow these laws.

Yet, having finally established the desirable concretization and achievability of law, Grotius proceeds to show the inadequacy of both characteristics. The standard of “not guilty” is a limited one. Moral existence is not simply about living the “not bad” life, but living the good life; this accounts for the pejorative connotations of the term

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<sup>1</sup> Hugo Grotius, *De Jure Belli ac Pacis (DJB) (Law of War and Peace)* Prol.57, trans. Francis W. Kelsey, intro. James Brown Scott, Carnegie Classics of International Law, No. 3, Vol. 2 (New York: Bobbs-Merrill, 1925), 29.

“legalism.” Thus, government must transcend law. It must be political and personal, with its goods represented (and displayed) by people who have the spirit of goodness within them. A good political order does not simply require adherence to the laws, or *politeuma*, but the cultivation of a particular way of life, or *politeia*. This is inculcated through the practice and virtues of statesmanship. This can be seen in Grotius' heavy reliance on the illustrations and examples of history. His approach is more inductive than deductive, and he believes human example to be a good guide. This is consistent with his Christian orientation, in which the personal example of Christ transcends the strictness of the Old Testament law.

The personal, virtue-based nature of positive goods also points to the difficulty of ascertaining positive standards of commission (as opposed to omission). At what point has someone carried out an act that is as beneficial as possible to the common good? The spectrum of positive acts that build up the community is indefinite, and the Divine example of perfect holiness is infinite. Perfection in the human world must be an artificial category when applied to human action, because of the atemporality it imposes on time-bound human existence. This recognition of the impossibility of full virtue may help to explain why Grotius' standards of expletive justice are relatively modest. This is particularly apparent in war, where he discerns few restrictions on prosecuting a war whose cause is just. It is perhaps appropriate that Grotius' seemingly inhumane conception of expletive justice leaves one wanting more. The stark inadequacy of perfectly-instantiated expletive justice only serves to emphasize the expansive (and crucial) guidance of the virtues of attributive justice. One might say that Grotius limits

(strict) justice, but through attributive justice, expands natural Right.

This can be seen in Grotius' distinction between legislation and jurisdiction, most prominently featured in *de Imperio*. He is careful to recognize the different modes of action in each, which echoes Aristotle's distinction between *poiesis* (guided by *techne*) and *praxis* (guided by *phronesis*). However, this does not mean that the two are incommensurable, like two ships passing in the night. Grotius argues that the system of law, in its impersonal strictness, is important – but only as a beginning. The *poiesis* of legislation must give be a tool in *praxis* of jurisdiction, or governmental rule. This is consistent with Grotius' philosophy of law, in which he conceptualizes positive law as a second-order effect of the will of the ruler. Grotius' understanding of expletive and attributive justice shows that law is ordered to government. Ultimately, Grotius is not primarily a natural law thinker, but a natural Right thinker.

### *Politics and Law in International Relations*

This apparent paradox of Grotius the natural Right lawyer continues into his practical prescriptions. Grotius is so keen to carve out a space for positive law that he takes the bold and original step of suggesting that it is possible to institute law in relations between states. This follows from his justification for entering civil society. Its creation is salutary, not least because it allows for the possibility of punishment through the formal and institutional channels of established law.

Yet the creation of a legal-judicial order, whether domestic or international, is never strictly necessary. Politics already exists in the 'state of nature', whether that be the

theoretical pre-political condition, or the actual present condition of international relations. Shared and effective norms – and even the punitive enforcement of these norms – are possible outside a formal legal framework. Grotius thus opens up a space for the creation of international law, and even encourages its development. However, he does so without insisting that such positive law is the only possible restraint on self-interested brute force. His emphasis on existence as fundamentally political, reflecting its fundamental normativity, opens up a space for true politics among nations, or what some English School theorists have termed “international human relations.”<sup>2</sup> This offers a classical Aristotelian alternative not only to 'realist' positions that see no possibility of moral reality in international relations, but also to liberal internationalist positions that see no moral reality outside of law.

Indeed, many English School thinkers identify Grotius as the intellectual progenitor of their approach, referring to a “Grotian tradition” in International Relations.<sup>3</sup> However, a recent lack of attention to Grotius' actual works has created some ambiguity about the nature of the Grotian tradition. For instance, it has left the English School divided on one of the central questions of international society: the acceptability of humanitarian intervention. A closer look at Grotius' foundational understanding of justice helps to illuminate this debate between so-called pluralists (who reject intervention) and solidarists (who admit the possibility and perhaps even the imperative).<sup>4</sup> Grotius'

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<sup>2</sup> See Martin Wight, *Four Seminal Thinkers in International Theory* (New York: Oxford University Press, 2005) and Hedley Bull *et al*, eds, *Hugo Grotius and International Relations* (New York: Oxford University Press, 1990).

<sup>3</sup> Ibid.

<sup>4</sup> Representative readings on the pluralist side include Hedley Bull, *The Anarchical Society*, 2<sup>nd</sup> ed. (New York: Columbia University Press, 1995) and Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (New York: Oxford University Press, 2000); Bull's recent work incorporates some elements of solidarism. Older versions of solidarism include Cornelius Van Vollenhoven, *The Three Stages in the*

placement of expletive justice within the overarching framework of attributive justice helps to solve this conundrum. While the procedural-legal status granted by expletive justice may confer a valid title to sovereignty, the subsequent exercise of governing authority is binding only when it follows the higher substantive-moral standard of attributive justice. As a result, while international society presupposes states with valid authority to pass international laws protecting their sovereignty, the violation of justice may remove the obligation of nonintervention by others. Nonetheless, prudence must still be employed in the determination of whether to intervene, as well as during the resulting intervention itself. This reading of Grotius shows that the pluralist reading of Grotius is partially correct, but ultimately insufficient. It also helps to substantiate some elements of the solidarist reading, while guarding against 'League of Nations'-type ventures that would pursue universalist solutions while deaf to political considerations.

### *Politics as Becoming*

Indeed, even in orders – domestic or international – that are governed by positive law, Grotius points toward the insight that a realm cannot be governed exclusively by law unless everybody is already law-abiding. The law can set out a standard, and can operate effectively as a closed system with full compliance. It need not account for the contingencies of human will entering this natural system from outside. However, once the monkey-wrench of crime is thrown into the machinery of law, there is no way for the law to move forward on its own terms. All it can do is to mechanistically look backward

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*Evolution of the Law of Nations* (The Hague: Martinus Nijhoff, 1919), and Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Yearbook of International Law*, 1946. A more recent (and nuanced) solidarist position is found in Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).

to determine conformity to or deviation from the law. Like a bug in a computer program, it can potentially identify its own problem, but it cannot fix it. The system requires help from a person outside.

In the realm of objects, which can be recovered or replaced, the idea of the justice system is relatively straightforward. In private law, expletive justice can – to a certain extent – stand on its own. Punishment, however, cannot be carried out even in part without reference to the outcomes to be served by punishment. This is why, unlike in private law, the determination of criminal status itself says nothing about how to resolve the issue. Just punishment requires a forward-looking human creativity. For this reason, it is much more difficult to say that justice has been done and the situation resolved once punishment has been given out. While objects can be returned, human action can never be undone. Without rehabilitation and even forgiveness, the ends of punishment are ultimately not served.

Indeed, once an injustice has been committed, the strict punishments demanded in justice may actually be an impediment to resolving the injustice. This is best illustrated in the practice of war. Any demand during hostilities that the other side be brought to full justice upon conclusion of the war may cause the other side to fight to the last man. Only an international political order that allows for the possibility of pardon can provide the grounds on which the losing party will be willing to accept a cessation of hostilities. Without forgiveness, there would be little hope of ending war.<sup>5</sup> Once one party had acted unjustly, a strict adherence to expletive justice could very well result in a perpetual war of

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<sup>5</sup> Oliver M. T. O'Donovan, "Law, Moderation and Forgiveness," in Christoph Stumpf and Holger Zaborowski, eds., *Church as Politeia: The Political Self-Understanding of Christianity* (New York: de Gruyter, 2004), 6.



all against all. Thus, an order that demands strict justice is unlikely to produce peace or justice.

### *Forgiveness*

This possibility of forgiveness is grounded in Grotius' understanding of politics as a personal (or subjective) reality. This provides another contrast with law, which can offer only impersonal (or objective) satisfaction, seeking to restore a previous state of being. Although the consequences of sin or crime cannot be undone, forgiveness allows the possibility that they can be redeemed going forward. This is particularly evident in Grotius' unique treatment of the Atonement. Obviously, every conception of the Atonement (even that of Socinus) involves some measure of God's grace. However, Grotius' understanding of the Atonement emphasizes Christ's death not as allowing justice to be done, but as transcending justice, because strict justice would dictate eternal punishment. This particularly emphasizes the gift-nature of forgiveness. Because the sin cannot be undone, one cannot go back to justice. The backward-looking terminology of restitution (or even innocence) is inapplicable. One must instead attempt to move forward to the Kingdom of Heaven.

Grotius' idea of forgiveness might also illuminate Hannah Arendt's discussion of the political importance of forgiveness and of new beginnings. In *The Human Condition*, she suggests that the limitations of action – unpredictability – can be overcome by forgiveness. Forgiveness is thus a precondition for promises – one of the central elements of political action, which (according to Nietzsche) raises man from the level of

beast. Indeed, Arendt even points out that the prerogative of modern heads of state to pardon criminals follows from Christ's proclamation of forgiveness. This is particularly noteworthy in light of the centrality of pardon in Grotius' conception of the Atonement. Thus, while Grotius emphasizes the importance of political action in understanding Christ's salvific role, Arendt reciprocally emphasizes the importance of Christ in understanding political action. Grotius' emphasis on forgiveness thus appears ahead of his time, and relevant to a post-modern discourse in which personal responsibility takes precedence over law.<sup>6</sup>

### *Imperfect Rights and Duties*

Grotius' recognition of the limits of natural law also opens up the possibility of imperfect rights and duties. His category of concessive natural law allows for a significant realm in which the commands and prohibitions of expletive justice are silent, conferring a right to act freely. Yet his conception of attributive justice shows that this realm is still governed by morality, even in the absence of a specific duty-bearer and right-holder. Indeed, even if the rights and duties set out in the written law (and in expletive justice) are perfect (in the sense of having a specific actor and recipient), they remain inadequate (in the sense of achieving the ends of political and moral existence). For this reason, several commentators have identified Grotius as a key figure in the development of the conception of imperfect rights and duties.<sup>7</sup> In fact, the role of virtue

<sup>6</sup> Hannah Arendt, *The Human Condition*, 2<sup>nd</sup> ed. (Chicago: University of Chicago Press, 1998), 236-40, 243-47. Some observers have argued that Grotius also puts forward a new theory of promise, which might offer further potential for dialogue.

<sup>7</sup> See Samuel Fleishacker, *A Short History of Distributive Justice* (Cambridge, MA: Harvard University Press, 2004), 17-25, and Jerome Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (New York: Cambridge University Press, 1998), 77-80

in Grotius' politics, and its locus in the character of the person, seems to indicate that these virtues ought to flow forth from the person, regardless of whether there is anyone in particular who can claim their performance as a right. Indeed, it is somewhat problematic to assert that others have a right to be treated beneficently. (After all, what degree of beneficence would satisfy that claim?) Likewise, inasmuch as the obligation is framed as a duty, it seems to detract from its nature as a free gift. (An Aristotelian understanding, at the very least, would see virtue as following desire, rather than sheer duty.)

The need to include imperfect obligations in one's moral world – and the benefits of a theory that can do so – is also illustrated in Grotius' conception of pre-civil society. Here there is an imperfect duty to punish, because expiatory justice demands that criminals be punished. However, it is not a duty resting on one single person or authority. Indeed, Grotius is clear that criminal law does not confer a punitive right on the victim, because the offense is against the entire community. Furthermore, justice is always better served when crimes are punished by someone other than the victim. A system without imperfect rights or duties would be unable to punish in the state of nature.

Grotius' introduction of the concept of perfect and imperfect rights and duties may help to overcome existing difficulties in rights discourse. For instance, the claim of a starving orphan to food is sometimes seen as being less theoretically solid than the claim of a creditor to collect on a debt. This is because only the latter has what legal theorist Wesley Hohfeld described as a perfect right: a definite claim on a particular individual that arises from an explicit consensual agreement. However, the notion of imperfect rights and duties shows that there may be a moral duty of care for others, even in the

absence of voluntarily-undertaken promises. This prevents rights discourse from being reduced to the individual accumulation of private possessions, and allows for a discussion of public and structural injustices. Recent studies by Martha Nussbaum and Charles Taylor have identified Grotius' development of the concept of international obligations.<sup>8</sup> However, an examination of Grotius' conception of imperfect rights and duties would help to provide philosophical grounds for this conception of an overarching good.

### *Objective Right*

Thus, one might say that attributive justice, inasmuch as it is the realm of imperfect rights or duties, is uniquely public. In this way, it corresponds not to a state of satisfaction between two individuals, but to a state of rightness in the entire moral universe. Many observers (particularly Michel Villey) have argued that Grotius' initial definition of justice glosses over objective right, focusing instead on the subjective right of expletive and attributive justice. However, here Grotius' attributive justice actually points back toward an overarching 'objective' sense of Right. Although it cannot be captured in universal propositions, its rightness concerns an overall state of being that transcends the immediate two actors.

Indeed, Grotius' public criminal law framework may actually be a richer conception of this overarching right than the traditional 'objective right' formulation. Criminal law does not actually deal with objects, but with people. Nor does Grotius believe that justice can be fully defined in words, which would further reduce it to an

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<sup>8</sup> See Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*. (Cambridge, MA: Harvard University Press, 2006) and Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007).

object. Indeed, Grotius does appear to include one of these traditional formulations – that of giving others their due – with expletive justice. However, by developing a concept of attributive justice that transcends such formulations, Grotius points toward an overarching moral reality in which a subject – a human person – lives and participates. Grotius thus emphasizes the fundamentally existential or personal characteristic of the overarching moral universe. The moral universe is guided by virtue, not simply by law. On the surface, Villey's concept of 'objective right' may appear to be a natural Right bulwark against relativism. However, such a framework fails to appreciate that the fullest conception of Right must transcend objective formulas. This personal right is instantiated in situations as a higher corrective to the limitations of a justice that is concerned with objects. The perfection of expletive justice is made possible only by imposing an artificially reachable standard and closing off the infinite horizon of justice or goodness. Grotius' emphasis on the (higher) value of 'subjective' considerations further shows the relevance of his ideas in a post-modern age. Likewise, his understanding of Christianity as personal and existential rather than dogmatic shows how Christianity can be an important element in the conversation.

### *Nature and Grace*

Because attributive justice points toward a standard that is never perfectly achievable, one might legitimately inquire into the appropriateness of the denotation “justice” to describe it. In fact, Grotius frequently uses attributive justice (or “higher justice”) in contrast to strict justice. (This helps to explain why so many observers have

either failed to account for it, or written it off as relevant only to Christians.) Indeed, in the realm of the Atonement, it is clear that these higher goods, and the virtues necessary to carry them out, transcend justice. Even in the realm of politics, the virtues of attributive justice are beyond the theoretical dictates of expletive justice. Thus, even in the realm of politics, Grotius' entire message seems to direct the reader beyond justice. As with the Atonement, on some level attributive justice is a gift, not a duty. Indeed, inasmuch as a duty obviates the possibility of free will, a gift particularly emphasizes the human capacity for free will. Perhaps it is in attributive 'justice' that one is able to be most truly human – which is to say, most in line with the person of God.

However, there is one sense in which this terminology *is* helpful. Throughout his works, Grotius rejects any strict separation between the realm of divine goods or virtues and human ones. Governors cannot claim that the higher standard of attributive justice, and the virtues necessary to carry it out, do not apply to them. By using the term “justice”, he helps to emphasize that he expects attributive justice of all rulers, not merely Christian ones.

Indeed, when addressing a topic in *DJB*, Grotius at various times outlines what expletive justice would demand, what the higher virtues would demand, and what the Gospel would demand. This shows that the demands of attributive justice are not as exacting as those of the Gospel. Grotius' carelessness in distinguishing between these latter two categories does occasionally make it difficult to discern what he expects of non-Christian rulers. Yet although the virtues of attributive justice ultimately seem to operate in the same mode as the Christian virtues, Grotius never says that one must be a

Christian in order to possess them. Indeed, his entire outlook in *DJB* is highly conscientious of reality of religious pluralism. His religious demands of non-Christians do not exceed those duties of natural religion. Yet the demands of natural Right, whether they correspond to the realm of religion or of attributive justice, nonetheless seem to call forth something beyond strict nature.<sup>9</sup>

An appropriate example might be that of forgiveness, or indulgence, which is obviously a crucial virtue for Grotius. This virtue, which Grotius sees as transcending strict justice, is present in pre-Christian thought of Aristotle. It falls under the virtue of magnanimity, or even temperance, in that one does not hold tightly to what they are owed. In this way, it is a passive virtue, because it holds one back from acting negatively. It is also a self-oriented virtue, not an other-oriented one. It allows a person to move on from the other person and the wrong they committed, as though it were indifferent to (or even beneath) them. (Indeed, this follows from Aristotle's conception of God as that which thinks about only the greatest thing – namely, itself). Although the Christian understanding of forgiveness contains an element of the naturalistic concept of holding loosely to things owed, it also goes deeper than this. Christian forgiveness is a positive virtue that is inherently outward-focused and actively engages the other in reconciliation. As a part of charity, its ultimate concern is the not simply the external good, but the moral good of others – even one's enemies.<sup>10</sup>

Indeed, as Grotius implicitly argues in *de Satisfactione*, God's forgiveness should

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<sup>9</sup> Indeed, among Grotius' wider four principles of natural religion is an affirmation of God as Creator. Thus, as the ground of existence, God must be outside of nature. This would seem to suggest that even natural religion cannot be purely natural.

<sup>10</sup> Montague Brown, "St. Thomas Aquinas on Human and Divine Forgiveness," *St. Anselm Journal*, Vol. 6, No. 2 (Spring 2009), 1-8.

be considered under the virtue of clemency, not of good-naturedness. In a certain sense, good-naturedness costs nothing to God; as the all-powerful maker of all things, he can give at will. However, clemency demands that God give up his right to punish a crime against the moral order he created, demanding a sort of humility. It also requires God's status as punisher to be guided by the good of his subjects. Of course, this is accomplished through the sacrifice of Christ. The Christian conception of forgiveness is costly, and is ultimately concerned with the good of others.

In his own unique way, Grotius' understanding of forgiveness and indulgence exemplifies this other-oriented Christian approach to forgiveness. God's governmental role shows that sin is not merely against God, but against the entire moral polity created and governed by God. Inasmuch as it concerns himself, God can give up his right to punish. However, such 'cheap grace' would have detrimental effects on others. God's forgiveness must consider the good of others, not merely his own honour.

Grotius' desire to convey Christian concepts (or at least concepts transcending strict nature) to a universal and secular audience may be another reason for the importance of punishment in his thought. The fact that punishment is given by the governor (or his subordinate) on behalf of the community means that the governor must consider the good of others. Indeed, the governor is the one person who – at least in his role as governor – *must* consider the good of others as a matter of purely expletive justice (even if expletive justice does not show him *how* to do this). While the higher virtues are encouraged to everyone, they are required by the governor. This allows Grotius to introduce the idea of virtues (which transcend justice) even in a discussion of justice *per*



se. In this way, Grotius is able to emphasize the other-oriented nature of (Christian) virtue even to a secular audience.

### *Grotius as Classical*

Grotius' conception of attributive justice suggests that he is more consonant with the classical tradition of right by nature than is often assumed. For instance, he sides with Aristotle in viewing justice and ethics as a practical virtue, against modern natural law (and especially natural rights) theories that are more apt to see political ethics as relating to intellectual virtues and as knowable through propositional statements. Aristotle also argued that a good polis comes about only through prudent political rule, which seeks to instill virtue in its citizens. Because there are no rules that are universally true in all situations, the *spoudaios* must be able to discern the good in unique and particular historical contexts. Thus, natural right resides more in concrete decisions than in general propositions.<sup>11</sup> Each of these themes are central to Grotius' category of attributive justice.

In fact, Grotius' engagement with Aristotle particularly reveals his emphasis on practical virtue. Obviously, his bifurcation of justice follows from Aristotle's earlier taxonomy, one that would have a continuing legacy in the medieval world. However, he takes issue with Aristotle's use of the terms "geometric" and "arithmetic" to describe them, because both terms are too deductive and nonsituational. One must consider persons and not mathematical formulas. In fact, Grotius effectively uses Aristotle's broad understanding of political virtue in Book VI of the *Nicomachean Ethics* to criticize what he sees as Aristotle's overly mathematical conception of partial justice in Book V of the

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<sup>11</sup> Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 159.

same.<sup>12</sup> Thus, where Grotius breaks with the words of Aristotle, he does it in order to more fully develop the Aristotelian spirit of *phronesis*.

This can also be seen in Grotius' emphasis on the action-oriented nature of attributive justice, the higher of the two senses of justice. Aristotle had argued that legislation was the highest activity of politics. However, the act of a legislature is not a true act; it is a law. It is constructed, or made, through the exercise of *poiesis*. In this sense, once it comes into existence, it is outside time and change. Through his conception of equity, Grotius shows that the law does not succeed even on its own terms. The law is a second-order sign of the will that enacted it, and interpretation is required even to discern its meaning. However, despite its perfectly fulfillable nature, even an equitable interpretation of the law is an inadequate instantiation of justice. Justice, in its highest sense, is not static but performative. As seen in Grotius' distinction between legislation and jurisdiction, the *poiesis* of law-making must give way to the *praxis* of governmental rule. Despite Grotius' training as a lawyer, despite his influential *Jurisprudence of Holland*, and despite the fact that *DJB* is primarily a work of law, Grotius actually points to the limits of law.

In this way, it may be even more accurate to look to Plato as a classical antecedent. Plato's conception of ethics as participation in the transcendent reality of the Good emphasizes that ethics is not simply a matter of theory, but a practical and even existential virtue. Likewise, Socrates' characteristic hesitancy to directly answer the questions of his interlocutors is indicative of the inadequacy of propositions to fully capture the spirit of the moral world. Plato's *Republic* attempts to show how the good

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<sup>12</sup> See, for instance, Grotius, *DJB* 1.1.8.2, 37; 2.20.2.2, 464; 2.20.33.1, 500; 2.23.1, 557.

polis mirrors the well-ordered individual, in his argument that order in society can arise only through order in the soul of the Philosopher-King. The wise ruler is a sort of ‘living law,’ because the law is contained within his soul.

### *Grotius as Christian*

The Christian understanding of God as transcendent and infinite adds an even stronger element to this Platonic theme of the impossibility of ever fully instantiating the fullness of Goodness in this world. Such a current runs throughout Grotius’ work, particularly his emphasis on virtue rather than law and expletive justice, which shows that justice in its fullest sense can never fully be instantiated. Rather, we are always striving toward a goal which is infinite. One should never expect perfect justice in politics. Politics must necessarily point to a Divine reality beyond itself.

This also helps to explain Grotius’ rejection of virtue as a mean. Several commentators have seen this as a modern break with Aristotle, as though Grotius is suggesting that virtue resides at a tangible, finite point at the end of the spectrum.<sup>13</sup> However, for Grotius, there is no finite point; the ‘spectrum’ is infinite. Thus, by portraying virtue as infinite, Grotius expresses the ineffable, existential, and practical character of virtue even better than Aristotle does in characterizing it as a mean. Grotius breaks with the words of Aristotle in order to more fully develop the spirit of Aristotle.

The Christian development of the classical tradition also puts forward a fuller understanding of the will and its connection with ethics. The idea that virtue ought to be freely chosen introduces significant tensions with the idea of law, as law is typically

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<sup>13</sup> For a representative example, see Schneewind, 77-80.

understood to restrict one's free will. As a result, while law can demand that one refrain from committing acts that are externally harmful, it is more problematic for the law to command that one act according to Christian charity. Grotius' attributive justice creates a place for this important supra-legal reality, especially inasmuch as it can be seen as pointing to the realm of charity.

Finally, interwoven with (and intimately related to) the concept of the will is the concept of personhood. Grotius' emphasis on the personal nature of justice follows in the Christian understanding of God as a person. As the Ground of morality and source of nature, it is somewhat questionable to view God as knowable through laws, as though he were part of nature. Rather, as the good governor of the moral universe, God is particularly known through his actions. The Old Testament is primarily the story of the relation between God and his people as it unfolds in time, rather than a series of commandments. The ultimate example of God's action, of course, is the New Testament account of the life and death of Christ. By providing redemption from the strict and severe punishment of a law-based order, God serves as the model for the practice of politics.

### *Rights and Justice*

In conclusion, Grotius is often seen as a crucial figure in the development of rights-based approaches to politics. The literature often treats him in conjunction with a discussion of positive law, leading to a de-personalized scientific approach. His understanding of politics is supposedly an individualistic one focused on self-interest

rather than right by nature. When his conception of natural justice is raised, it is often a thin conception focused on protection of property rights. Grotius' understanding of justice is thus seen to depart from the classical understanding of politics, particularly that of Aristotle. He is portrayed as rejecting the traditional category of distributive justice, as well as disavowing any substantive connection between virtue and justice. It is no wonder that some observers have even suggested that his thought finds its fulfillment in Hobbes or Locke. Tuck describes Hobbes as “the true heir of Grotius.”<sup>14</sup> Charles Taylor sees such a direct lineage to Locke that he describes these ideas as a “Grotian-Lockean theory.”<sup>15</sup> Even those who reject the supposed novelty of Grotius' approach, like Brian Tierney, still see rights as paramount for Grotius.

It is true that Grotius wrote in a Renaissance style, sometimes critiquing the medieval scholastics. Furthermore, his terminology was undoubtedly shaped by his world, and a cursory reading of his most (in)famous passages sometimes creates the impression that he embraced a modern and scientific approach to politics. This follows from Grotius' training as a lawyer. One would imagine that such an emphasis on prudence, charity, and virtue over law would have run contrary to his professional instincts. A quick glance at Grotius' life and context gives reason for many observers to read Grotius as orienting his politics around subjective rights.

In fact, a cursory reading of Grotius' best-known works also provides some evidence for this portrayal. It may be accurate to see in Grotius a partial foundation for modern rights theories, although – considering the importance of his separation between

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<sup>14</sup> Richard Tuck, “Grotius and Selden,” in *The Cambridge History of Political Thought 1450-1700*, ed. J. H. Burns (New York: Cambridge University Press, 1991), 522.

<sup>15</sup> Taylor, 170.

abstract natural law and dynamic human will – it is possible that Kant may be a more legitimate descendant than Hobbes. Grotius' notion of expletive justice certainly grants a place for abstract and static laws that are inherent in the nature of things, laws that provide absolute and universal protections independent of historical context, and whose implementation and administration requires only calculative reason. These laws may be formulated in terms of individual rights conferring a claim on an external good. Their discernment requires no special imagination of the future, nor any knowledge of ultimate goods, but simply of procedures. Their proper implementation may not require an assessment of the internal state of the people involved, nor any positive virtue in those who put them into effect. As a result, they can perfectly implement the negative condition achieved in the absence of injustice.

Yet while Grotius may have lived in a time of change, it would be hasty to ascribe to him a wholehearted embrace of the currents of his time. Indeed, it would be inaccurate even to see these as the center of his thought. Rather than rejecting the classical and Christian tradition, he actually builds upon it. A wider reading of Grotius' corpus, particularly those theological works for which he was best known in succeeding centuries, presents a much more nuanced picture. The protection of subjective rights in expletive justice is, to be sure, part of that picture. But it is only the beginning, not the end. While it may be temporally first, it is not ontologically highest. While rights confer a valid freedom of action, they are silent about how to exercise this freedom. Mere expletive justice brings about only the thinnest conception of justice, lacking a robust concern for the common good. Expletive justice would obtain if God condemned all

sinner to hell, or if a governor sent all criminals to the gallows.

Thus, there is a pressing need for attributive justice to guide human action. Attributive justice looks forward to imagine a substantive conception of the common good, and to instantiate that in particular contexts. It recognizes that justice is ultimately manifested in the character and actions of people, not in institutions or procedures. It also recognizes that perfect justice in the realm of persons (rather than possessions) could come only at the end of history, and seeks only the best approximation possible in a particular time and place. It does not see politics as a problem to be solved with finality through the application of abstract and universal principles, but recognizes politics as an ongoing practice that is fundamentally interpersonal. As a result, it requires – and cultivates – virtues in political actors and in the population as a whole.

Thus, Grotius shows that a conception of individual rights is not incompatible with higher goods; rather, such a conception finds its fulfillment in these goods. Thus, a Grotian approach to politics does not emphasize politics as impersonal or simply concerned with maximizing private possessions. It does not reduce politics to formulas, absolving unscrupulous political leaders from personal responsibility or ignoring the need to teach political responsibility to citizens. It does not advocate top-down solutions that ignore the particular history of communities. Nor does it lead to a legalistic adherence to a minimum standard of justice. Rather, it provides more inspiring possibilities: politics as an interpersonal practice, looking ahead to the future, motivated by a concern for the common good, and inspiring the cultivation of virtues that both strengthen the political community and point beyond it.

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