

Chapter 2

From the “*Imago Dei*” to the “*Bon Sauvage*”: Francisco de Vitoria and the Natural Law School

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Abstract The traditional interpretation of the doctrine on “nature” focusses particularly upon the relationship between the theories of Vitoria and Grotius, highlighting the differences in their lives and work, their spiritual affinities and doctrinal influence, particularly on *jus gentium*. It is important, both from a historical and from a theoretical perspective, to investigate to what extent the doctrine on “nature” developed by the “second scholastic” theologians (Vitoria, Vázquez, Suárez) has exerted an influence on their idea of natural law and, by extension, on the modern *Natural Law School*.

1 Introduction: A Triptych in the Manner of Ferdinando Gallego

*Quare non multo incertior erit diffinitio, si ex naturalibus procedat, quam si ex sacris litteris argumentaremur.*¹ According to Hans Thieme,² Francisco de Vitoria introduced the possibility of including the notion of *ratio naturalis* within divine revelation and the Sacred Scriptures, thus paving the way for the establishment of modern natural law. This presentation is based on the assumption that the way law is conceived is not so much dependent on the beliefs and intentions of those who manage to wield power in given areas of society, but rather on the familiarity thereof with the principles that provide the cultural foundation for a given historical era. Therefore, our endeavour is to investigate the secularisation of natural law,

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¹“For the definition will not be much more uncertain, whether we proceed from natural things, or whether we argue from the Sacred Scriptures”.

²Thieme 1973, 15.

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inasmuch as it allows for the creation of a stable bond among concepts pertaining to different cultural spheres, such as law, politics and scientific knowledge. To this end, we will examine a number of “strong ideas” that have a great deal of resonance and may have significant consequences, both in theory and in practice. In the modern era, these important ideas in the areas of law and politics have induced the belief that certain political institutions or legal clauses are necessary insofar as they are committed to a certain goal and are designed in a certain way; similarly, these important ideas have allowed for the success of conceptual apparatuses that are believed capable of producing unquestionable knowledge regarding the outside world in various fields of science.³

According to Ramón Hernández Martín’s research,⁴ Vitoria’s influence is felt in the works of the most relevant lawyers and philosophers of the seventeenth and eighteenth centuries. Hugo Grotius, for example, cited Vitoria 68 times in the *De jure praedae* and 58 times in the *De jure belli ac pacis* and was in agreement with the latter as to the injustice of going to war on the basis of religious beliefs, thus legitimising the subjects’ refusal to take part in the war itself.⁵ Alberico Gentili referenced Vitoria to support the claim, expressed in his *De jure belli*, that the Spanish were justified in waging war against the native populations of the New World because the latter denied the former passage.⁶ In his *De jure naturae et gentium*, Samuel Pufendorf explicitly mentioned Vitoria three times in order to disprove his reasoning on the topic of the Americas and affirm the right to hospitality.⁷ In the first of the *Two Treatises of Civil Government*, John Locke vehemently confuted Robert Filmer’s theory, and in doing so, he had to deal with the latter’s frequent references to second scholasticism. Even though Locke’s reasoning was concise and he thus avoided mentioning the authors in question directly, it is clear that he had them in mind, and many passages strongly hinted at Vitoria’s doctrine, as reprised by Francisco Suárez and Roberto Bellarmino.⁸ Moreover, he wrote about the wars in the Americas and received the testimonies of Garcilaso de la Vega and Fernando de Soto, among others. Another possible echo of Vitoria’s doctrines can be found in Thomas Hobbes’s works, according to the Dominican Scholar Guillermo Fraile, who studied the analogies between the political theorisations of the authors in question in his⁹ essay *Hobbes y Rousseau con Vitoria al fondo*.

Our view is that the influences and the impact of Vitoria’s theory on the modern theorisation of natural law can best be examined by keeping the theory itself in the rear-view mirror. The reader may note that our musings will be conducted in the

³Cavalla 2011, 161–162.

⁴Hernández Martín 1999, 87–112.

⁵See in particular on this topic: Puig Peña 1933, 543–606; 1934, 12–113; 213–314; Truyol Serra 1984, 17–27; see also Larequi 1929, 226–242.

⁶Gentili 1598, l. I, c. 19.

⁷Pufendorf 1727, l. III, c. 3, nn. 9 and 12.

⁸Locke 1690, First Treatise, ch. VI and VIII.

⁹Fraile 1964–1965, 45–62.

style of a triptych in the manner of part-Spanish, part-Flemish painter Ferdinando Gallego, some of whose artwork has been exhibited here in Salamanca. Like any true-to-form triptych, our dissertation is made up of a frame, a central panel and two side panels.

2 The Frame: The Historical and Political Coordinates of Modernity

The birth of the modern State In order to understand the modern age, two factors need to be taken into account. The first is that this period must be considered in the light of the progressive strengthening of an anthropocentric conception over a theocentric one. Therefore, the medieval theocentric perspective must be viewed as a kind of scenic background from which modern civilisation progressively detached itself through a slow process that is not apparent to the casual observer. The second is that the anthropocentric outlook in question constituted a reaction to a cultural and historical situation, full of divisions and readings. The universality principle implicit in medieval conceptions fell apart, and from a legal standpoint, this produced two consequences. The first was that modern national states had to establish their legal autonomy in order to establish their political autonomy; hence, they had to progressively distance themselves from the Empire and Roman law as *jus commune*. Just as Roman law had served as a unifying device in medieval times, it was now perceived as an obstacle to the establishment of national law. Therefore, legal methodology began to consider Roman law as a purely historical object of study. The second was broader in scope: the newly founded political communities, all affirming their sovereignty by no longer recognising the existence of a superior political authority, i.e. the Empire, generated international law issues.¹⁰

The discovery of the Americas The Emperor could no longer resolve conflicts of a legal nature, because the Empire had lost its universal reach and had become a state like any other. Moreover, international law issues were arising as a result of previously unheard-of situations, for example the discovery of new continents towards the end of the fifteenth century, which had the effect of broadening Europe’s cultural horizons. In medieval Europe, there were two great categories from an anthropological standpoint: Christians and non-Christians or, more specifically, those against Christianity, for example the followers of Mohammed. The discovery of the Americas posed a sudden challenge to European culture, as it implied that there was a third category of people who, while similar in physical features, had never known Christianity, i.e. the Indios. New issues arose: was it justifiable to wage war against populations who had never attacked Europe? Could these lands legitimately be colonised? Was colonisation itself acceptable? Was it licit to establish international trade? The medieval world was ending, partly because

¹⁰See Cavanna 1982, 381–478.

of the decline of the Empire, but also partly because of the exponential widening of Europe's horizons.

The end of religious unity Religious unity came to an end. The Pope was not only the symbol of spiritual unity, but also symbol of potential political unity, a famous example of this duality being the controversy arising between Portugal and Spain over the division of the Atlantic Ocean that was mediated by the Pope. At the end of the fifteenth century, the Pope was an internationally recognised force, but he represented one of the last instances of the setting sun of universality. The sixteenth century brought about multiple intra-religion rifts and a varied European religious landscape: Henry VIII's schism; Luther's protestant revolution; Calvin's protestant revolution. While Spain and Italy remained faithful to the Catholic faith, Germany was profoundly divided, and France was also divided between Catholicism and Calvinism. The modern world rose out of divisiveness. From a legal and political viewpoint, Catholicism, Calvinism and Lutheranism not only represented fractures within Europe, but they also represented ideologies that transformed the cultural landscape and thus decisively influenced modern thinking.

3 The Central Panel: The Theoretical Coordinates of Modernity

The modern hermeneutical categories of the Natural Law School The *Natural Law School* can be placed on the dividing line between two civilisations, the theocentric medieval and the anthropocentric modern. Before its representatives are introduced, we will focus on the features that set it apart from the classical school. These can be enumerated as follows: (a) individualism; (b) rationalism; (c) secularisation. However, there can be a "school" only insofar as these features are present in its representatives, since there is no discipleship among these authors and no homogeneous group of doctrines. The aforementioned features must be examined separately.

Individualism It is, in an ideological sense, the common element of all theories that consider the individual as the founding principle of the social and historical world. An individualistic civilisation does not need to justify the individual's existence within society, but rather the existence of society in relation to the individual.

Rationalism This feature is not limited to the belief that reason is more valuable than experience, but rather it is a stance that comes before either and identifies reason as man's ability to know the truth in all of its manifestations. It follows that reason is seen as greater than truth: modern rationalism posits that reason is the measure of truth, not the other way around. To quote Protagoras's motto, we could say that in the modern era man strives to be "the measure of all things".

Secularisation This is the most crucial, albeit difficult, concept. It is a strictly legal term, consisting of the dispossession of ecclesiastical properties conducted by modern states, starting with the Westphalia Treaties. Nevertheless, the term in

question has taken on a cultural meaning, signifying the act perpetrated by modern thinking, which amounts to ridding religious theories of their contents to an extensive degree, and turning the latter into secular models and mind frames. For this reason alone, secularisation is held in particular regard as a means of interpreting the passage from the medieval to the modern era: secularisation is the process by which every stance is subverted, while the façade remains intact.

Cultural secularisation can be further divided into two subcategories: secularisation by separation and secularisation by transformation.¹¹ The former proposes to keep the categories of sacred and profane radically distinct. In particular, sacred secularisation consists of exalting the value and purity of the sacred by expunging any connection with the profane sphere, whereas profane secularisation occurs when the sacred sphere is set apart from the profane sphere in order to preserve the latter’s “purity”. These two perspectives differ greatly, but at the same time, they are profoundly similar. They differ in intent: sacred secularisation aims to protect and give value to everything that is considered sacred, just as profane secularisation aims to devalue it in order to affirm worldly values. They are similar in effect: both conceptions posit a separation between the two spheres in question. It is a paradox of modern culture.

The second subcategory is harder to define, albeit more interesting. Secularisation by transformation occurs when the theocentric culture is slowly eroded from the inside, and its terminology, concepts and images, while formally maintained intact, are emptied of their contents, which in turn are replaced by secular contents. Once the contents have been radically transformed, getting rid of the superfluous facade becomes a formality.

4 The First Side Panel: Vitoria, the Jurists and the Natural Law

Vitoria In Vitoria’s works, the thomistic approach to natural law is not significantly altered and the perspective on human nature is essentially in line with thomistic ideals.¹² According to Vitoria, man is a paradoxical being who yearns for infinity, and yet is unable to obtain it on his own. Natural law is thus the guiding norm for human privation, and it must be taken into account within the confines of this anthropological perspective, in the light of the all-encompassing vision on human nature descending from divine revelation-inspired critical thinking.

Conclusio est affirmativa quia licet proprie in Deo sit lex et regula tamquam in regulante, notitia tamen quae derivatur ad nos tamquam effectus regulae divinae vocatur etiam regula et lex. Ex hoc articulo potestis habere quod iudicium quod habemus et notitia qua ego dicto

¹¹See Auer 1964, 253–254.

¹²See Todescan 2014c, 41–123.

hoc esse faciendum, non obligat de se, nisi inquantum derivatur a lege aeterna. Omnia alia sunt clare.¹³

As a matter of fact, Vitoria deals with natural law in the genuinely thomistic context of the *exitus-reditus*, that is to say the idea that man is created by God and given a place in the universe, while remaining congenitally propelled to return to the House of the Lord.¹⁴ Vitoria's musings on natural law are conducted from the perspective of the divine, reflecting on what it means to be human, and the mysterious role man is called upon to play in the universe by providential design: according to this view, God does not call man to him extrinsically, but rather by providing him with an inclination that drives him to the realisation of his divine goals as a beatification-oriented return. The link that Vitoria establishes between natural law and blessedness attests to the intimate nature of man, which is seen as dynamic and filled with purpose, and to the measure by which man was conceived. Therefore, natural law must be interpreted in the light of man's inclination towards the evolution of human nature, and not as a blind endeavour, but rather as the aspiration to realise God's plan with God's help.

Natural law and natura rationalis: Vázquez Gabriel Vázquez's theory is especially relevant because of the new interpretation it attributes to the thomistic doctrine of natural law, an interpretation that sets it apart from the School of Salamanca.¹⁵ As a matter of fact, while both Vitoria and Soto had recognised that moral values had an objective standing, they had never gone so far as attempting to separate natural law from divine reason, nor had they drawn any radical conclusions. Divine law remained the lynchpin of the doctrine established by the School of Salamanca, expressing God's providential and mysterious design for the universe. On the contrary, Vázquez concentrates his efforts on natural law as a distinct and autonomous concept: the ontological foundation of law is a rule based directly on nature, and not on anyone's will.

Cumque omne bonum vel malum per ordinem ad regulam aliquam dicatur bonum vel malum, justum vel injustum, consequens fit ut ante omne imperium, ante omnem voluntatem, imo ante omne iudicium sit regula quaedam harum actionum, quae suapte natura constet, sicut res omnes suapte natura contradictionem non implicant: haec autem non potest alia esse, quam ipsamet rationalis natura ex se non implicans contradictionem [...] Prima igitur lex naturalis in creatura rationali est ipsamet natura, quatenus rationalis, quia haec est prima regula boni et mali.¹⁶

¹³de Vitoria 2010a (1533–1534), q. 91, a. 2 (p. 163). “Aquinas replies in the affirmative, because although the rules of law are in God as in the thing which is the rule, the knowledge of them which is channelled into us as an effect of the divine rule is also called a rule and measure. From this article you may deduce that our judgment and knowledge, which I rely upon when I dictate that such and such is to be done, does not oblige per se, but only insofar as it derives from eternal law. All the rest is clear”.

¹⁴See in parallel Mongillo 1970, 103–123.

¹⁵See Todescan 2014a, 240–251.

¹⁶Vázquez 1605, d. 150, c. 3, n. 23. “Whenever each good or bad action—according to some rule—is judged good or bad, just or unjust, it happens that, as a consequence, before any order,

Some actions are so intrinsically evil that their malicious nature cannot be dependent on anyone’s will, not even God’s will; in fact, they precede divine judgement. Moreover, given that every action is qualified as good or bad in accordance with a rule, it follows that said rule, which is identified as rational nature (*natura rationalis*) and is informed by the principle of non-contradiction, comes before any command or judgement.

Natural law and ratio naturalis: Suárez In Suárez’s works, nature is taken into consideration from two distinct points of view: on the one hand, it is regarded as pure nature, reachable through the employment of the natural reason; on the other hand, it is described as nature resulting from the infusion of God’s grace within man, to the awareness of which faith lights the way.¹⁷

Circa legem naturalem docet Theologia, hominem secundum duplicem naturam et duplex rationis lumen considerari posse. Primo secundum puram naturam, seu substantiam animae rationalis, et consequenter secundum rationis lumen illi connaturale; secundo juxta naturam gratiae desuper homini infusae, et secundum divinum, ac supernaturale lumen fidei, per quod pro statu viae regitur et gubernatur [...] Et juxta haec duo principia distinguit duplicem legem naturalem: aliam simpliciter naturalem respectu hominis; aliam, quae licet supernaturalis sit respectu hominis (quia totus ordo gratiae illi supernaturalis est) nihilominus naturalis dici potest respectu gratiae, quia etiam gratia habet suam propriam essentiam et naturam, cui connaturale est lumen infusum [...] Sic ergo lex naturalis duplex distingui potest, una pure naturalis, alia simpliciter supernaturalis, naturalis autem respectu, per comparationem ad gratiam.¹⁸

Nature stands in relation to divine grace as reason stands in relation to faith from a theoretical viewpoint. An obvious consequence of this distinction is that all values pertaining to the relationship between man and God are considered as separate from a “purely natural” set of values, and while the two sets of values are not in conflict with each other, the idea of separateness prevails and Saint Thomas’s unitary perspective disappears, despite Soto’s attempt to maintain it (and not without

(Footnote 16 continued)

before any will, and even before any judgment, there is a certain rule for such actions, so that it naturally follows that no action is in contradiction with itself: this, however, happens on account of its very rational nature, which cannot be opposed to itself [...] In short, the first natural law in a rational creature is its very nature, as rational, because this is the first rule of good and evil”.

¹⁷See Todescan 2014a, 251–269.

¹⁸Suárez 1612, 1. I, c. 3, n. 11. “As regards the natural law, Theology teaches us that man can be considered according to a dual nature and according to a dual light of reason. Firstly, according to a pure nature, that is, the substance of a rational soul and, consequently, in accordance with the light of reason that is innate in him. Secondly, according to the nature of the Grace infused from above into man, and conforming to the divine and supernatural light of Faith, through which—also on the basis of his state of life—he is guided and governed. Alongside these two principles [Theology] distinguishes a twofold natural law, namely: a simply natural one, related to man, as opposed to the other, supernatural with regard to man (since all the order of Grace is, for him, supernatural), which, however, can be considered natural according to Grace, for Grace too has its own essence and nature, to which is connatural an infused light [...] So the natural law can be considered of a dual nature, of which one being purely natural, and the other simply supernatural, or even natural, through a comparison with Grace”.

difficulties, we might add). By suppressing the hypothesis of a divine order, nature retains its autonomous existence, as is suggested by Suárez's postulation of intrinsic bounty or maliciousness of human actions (*intrinseca honestas vel malitia actuum*).

At this point, every argument is consistent with a dual logic. Every notion encapsulates diverging paths: there is a law for mankind in its "pure nature" status (*lex pura naturalis*); there is a law that is "natural" with respect to divine grace, albeit supernatural in relation to mankind, as its mission is to direct men towards eternal salvation by doing away with the obscure and error-prone "pure" natural law (*lex connaturalis gratiae*).

According to Suárez, natural law is hypothetically self-supporting and enclosed within the pure nature order; it is thus possible to smoothly redirect mankind's yearning for the Absolute towards theological speculation with no bearing on philosophy, that is to say extrinsically superordinate divine grace, while preserving "purely" natural law as a distinct topic of study—the *Doctor Eximius*'s preferred topic.

Grotius and the etiamsi daremus The young Grotius's main concern in the *De jure praedae* was *jus gentium*. As Peter Haggemacher observed, the sources of law in Chapter II serve as reference for *jus gentium primum*. In this chapter, Grotius defined a series of sources of law by identifying the rule to which each source owed its existence and validity. The creation process itself is always the same: it starts and ends with a single will that forms an intricate pattern and fashions itself "comme les cascades d'une fontaine baroque". The primary source is represented by God's will, from which natural law, the universal law of all creation, is derived. Through the collective will of men, who are perceived as rational beings, secondary natural law (or *jus gentium primum*) is established, as well as a series of subordinate hybrid norms pertaining both to *jus civile* and *jus gentium* and, even lower in this hierarchy, *jus gentium secundarium*, stemming from the will of all secular states. Finally, there are contracts, which are derived from the will of single individuals and which, through a peculiar contract, i.e. the "social contract" that holds civil society and the State together, allow the latter, together with its judicial institutions, to establish civil law.

However, Grotius is recognised as the forefather of modern natural law because of his "*etiamsi daremus*" secular theorisation, which is contained in the masterpiece from his later years, *De jure belli ac pacis*. The traditional view is that the Dutch author founded secular natural law because he held that natural law would suffer no alteration even if it were not derived from God (literally, if God did not exist, *etiamsi daremus non esse Deum*). However, it is our view that the autonomous existence of natural law was not affirmed so abruptly, but rather in relation to Grotius's "system" of laws, and therefore, it makes no sense to isolate the famous phrase without explaining the systemic context surrounding it.¹⁹

- (a) *Lex humana* Grotius went to great lengths to explain the notion of human law, and he afforded an extensive degree of autonomy to the product of the

¹⁹See Todescan 2014b, 91–139.

legislator’s will, which was apparent where this law clashed with natural law. Grotius believed that there were instances of conducts that were allowed under human law, yet forbidden by natural law, just as there were conducts forbidden by human law and allowed by natural law; a conflict between the two legal orders was thus a real possibility. However, there was a way out of this conundrum, and it required always choosing the negative rule: if one conformed to the natural law forbidding a conduct allowed by a human law or vice versa, neither of the legal orders in question was breached. Nevertheless, if natural law explicitly prescribed a conduct that was forbidden by human law or vice versa, natural law had to prevail every time.

- (b) *Lex divina* Natural law and divine law are supraordinate in relation to human law. However, Grotius’s view of divine law was also based on will, in this case the will of God, and it distanced itself from those of Luther and Calvin, which sought to link natural law with divine law, in that it described divine law as a mechanism through which conducts were qualified as bad or good, not because of their intrinsic nature—that would have been natural law, but rather because of the very fact that they were forbidden or prescribed. He also noted that the Old Testament was exclusively applicable to the Jewish people of ancient times, just as the New Testament required the kind of spiritual generosity that could only be expected of Christians. At this point, Grotius cannot be defined as a “rationalist”, given that his stances are still quite close to the views expressed in the *De jure praedae*.
- (c) *Lex naturalis* What of the “*etiamsi daremus*” passage, then? First and foremost, Grotius seemed determined to break natural law free from the aura of sacredness that medieval theology had enshrined it in by forcing a connection with divine law. In Grotius’s theoretical system, natural law shrugs off any residual trace of voluntarism and thus the affirmation of its validity *etiamsi daremus non esse Deum*.

Et haec quidem quae jam diximus, locum “aliquem” haberent etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curari a beo negotia humana.²⁰

It is because of this conviction, expressed in a hardly “secular” context, that Grotius is widely regarded as he who “secularised” the natural law. In particular, as we pointed out elsewhere, for Grotius, a man who lived within the historical context of Humanism and the Reform, faith is not superimposed on nature, it is isolated from it: the truths of faith belong exclusively to divine law, and it is not for the science of natural law to discuss them. It would not be accurate to hold that Grotius believed that secular natural law was opposed to Christian natural law; however, in accordance with the Reform, he did perceive them to be radically separate and independent. This separation operates on two distinct but important levels: firstly, a secularisation by which the sacred world of the New Testament is preserved in its

²⁰Grotius 1925 (1625), Prolegomena, § 11. “What we have been saying would have a degree of validity even if we should concede, that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him”.

pure state; secondly, a “profane” secularisation, guaranteeing the autonomy and perceptibility of the natural world and, conversely, of natural law.

- (d) *Lex aeterna* Despite the fact that divine law was the traditional closing element of this system, in the *De iure belli ac pacis* there is no trace of it. Is this pure coincidence? Probably not, as one of the major philosophers of the eighteenth century—Leibniz—noted: *Meo iudicio recte Grotius doctrinam Scholasticorum de Lege Dei aeterna cum principio socialitatis coniunxit.*²¹ Divine law was omitted for a theoretical reason: since in Grotius’s theory the rational principle and the voluntary principle coexist, the system as a whole is set and comprehensible, as the “algebraic sum” of what *voluntas* (divine law) and *ratio* (natural law) prescribe. Consequently, there is no need for an ulterior law, like the mysterious and problematic law theorised in the thomistic system.

Pufendorf and the perseitas’s critique In the *De jure naturae et gentium*, Pufendorf embarked on a critique of the perseity doctrine exemplified by Vázquez (²²): that the thesis according to which theft, adultery, murder and so on are evil in themselves represented a baseless statement, devoid of any proof whatsoever, masked as rational intuition.

But to make the knowledge of the law of nature, of which we are not treating, and which includes all moral and civil doctrines that are genuine and solid, to make the knowledge, we say, fully come up to the measure and perfection of science, we do not think it necessary to assert, with some writers, that there are several things honest or dishonest of themselves (*per se*), and antecedent to all imposition, and so to make these things the object of our natural and perpetual law, in opposition to positive law, where matters are right or wrong, just as the lawgiver was pleas’d to make than either. For, since honesty (or moral necessity) and turpitude are affections of human deeds, arising from their agreeableness or disagreeableness to a rule, or a law, and since a law is the command of a superior, it does not appear how we can conceive any goodness or turpitude before all law and without the imposition of a superior.

Ad hoc tamen, ut disciplina juris naturae, circa quam occupamur, et quae genuinam ac solidam doctrinam moralem et civilem absolvit, verae scientiae mensuram implere possit, haudquidquam necessarium arbitramur cum nonnullis statuere, quaedam per se citra omnem impositionem esse honesta aut turpia: et haec facere objectum juris naturalis et perpetui; cum illa, quae ideo honesta aut turpia sunt, quia legislator voluit, sub legum positivarum censum veniant. Cum enim honestas sive necessitas moralis et turpitudine sint affectiones actionum humanarum ortae ex convenientia aut disconvenientia a norma seu lege; lex vero sit jussum superioris; non apparet, quomodo honestas aut turpitudine intelligi possit ante legem, et citra superioris impositionem.²³

²¹“In my judgement, Grotius was right in connecting the Scholastic doctrine of the eternal Law of God with the principle of sociability”.

²²See Todescan 2014b, 295–319.

²³Pufendorf 1727 (1672), I. I, c. 2, n. 6 (p. 17). “But to make the knowledge of the law of nature, of which we are now treating, and which includes all moral and civil doctrines that are genuine and

The real struggle for philosophers of law was to investigate the reasons why some conducts are good or bad, but the supporters of perseity believed they were excused from providing evidence and were satisfied with what was commonly asserted. However, Pufendorf held that there was no such thing as intrinsically good or intrinsically bad, but rather good or bad with reference to a given law presiding over human nature. His adversaries objected that human nature was an eternal idea, and thus, its consequences also had to be regarded as eternal truths. Pufendorf argued that human nature was not unchangeable, but rather the product of a contingent exertion of divine will: since God willed the creation of a rational and sociable being, all actions consistent with said nature were just, but not insofar as they represented a logical necessity, given that they were the product of divine will.

5 The Second Side Panel: Vitoria, the Philosophers and the Natural Rights

The question of the state of nature The state of nature is usually treated as a new theoretical element associated with the *Natural Law School*. Influential scholars²⁴ have reasoned that the modern doctrine of natural law is a methodology that can be broken down into three distinct phases, in spite of its heterogeneous ideologies and contents: *state of nature*, *social contract* and *political state*. Therefore, the foundation of the political state occurs as a result of overcoming the state of nature through a social contract. Among the many issues relating to the theorisation of the state of nature, there are two in particular that we would like to focus on: the first concerns how the very notion of the state of nature came to be; the second, whether it is considered as having existed in history or as an abstract, logical hypothesis.²⁵ With regard to the first issue, it ought to be noted that the state of nature does not constitute a novelty, but rather the prosecution of a question that had been raised both in ancient and in medieval times, and was given a rather original answer in the sixteenth century by the second scholastics. Our view is that the modern doctrine of natural law represents a secularised version of the statuses’ theory propounded by

(Footnote 23 continued)

solid, to make this knowledge, we say, fully come up to the measure and perfection of Science, we do not think it necessary to assert, with some writers, that there are several things honest or dishonest of themselves (per se) and antecedent to all imposition, and so to make these things the object of our natural and perpetual law, in opposition to positive law, where matters are right or wrong, just as the law-giver was pleased to make them either. For, since honesty (or moral necessity) and turpitude are affections of human deeds, arising from their agreeableness or disagreeableness to a rule, or a law, and since a law is the law command of a superior, it does not appear how we can conceive any goodness or turpitude before all law, and without the imposition of a superior”.

²⁴Opocher 1993, 101 ff.

²⁵See Todescan 2001, 139–148.

Christian theologians ever since Patristic Theology, according to which the history of salvation (*historia salutis*) is comprised of three phases: *status naturae integrae*, *status naturae lapsae* and *status gratiae*. The first represents Adam and Eve's predicament from creation to original sin; the second concerns their descendants; and the third deals with humanity redeemed by the death and resurrection of Christ. However, it ought to be noted that while the *status naturae lapsae* follows the previous status diachronically, the *status gratiae* happens simultaneously with the former, because while grace can be attained through the sacraments, all men are born stained by original sin, which can only be erased by baptism. It has been noted, particularly by Henri de Lubac,²⁶ that fifteenth century scholastic theology brought about an innovation, more or less from Cajetan onwards. In the debate concerning *appetitus beatitudinis*—i.e. the yearning for maximum happiness *naturalis quoad appetitionem, supernaturalis vero quoad adsecutionem*,²⁷ to quote the traditional scholastic theology—Cajetan substituted the active natural *appetitus* for the supernatural with the passive *potentia oboedientialis*, and he then proceeded to modify the traditional theory of the three statuses by introducing a fourth status that was regarded as preceding the other three, the *status purae naturae*. Both second scholasticism and the contemporary critiques of the Lutheran and Baianist heresies are relevant to this modification.

Vitoria Evidently, Cajetan's doctrine concerning man's ultimate goal set itself so far apart from the thomistic anthropology that it could not pass unnoticed, nor avoid some form of opposition among the *Summa* commentators. Major resistance, accompanied by a systematic attempt to reaffirm the traditional theorisation, could be found at the University of Salamanca, where Vitoria had chosen to commentate Thomas Aquinas's *Summa theologiae* instead of the usual *Librum sententiarum*, as a result of his Paris-based education under Juan Fenario and Petrus Crockaert.

Vitoria's theory is not devoid of originality, and it brings about a certain measure of progress in the treatment of the supernatural. The natural yearning for the *visio Dei* that he supported in opposition to Cajetan does not share the same features as Soto's theorisation. According to the *Doctor Subtilis*, this yearning was essentially a *pondus naturae*, devised for the achievement of good *in particulari* and incapable of going beyond consciousness; on the contrary, Vitoria believed that this *appetitus* was prescribed by nature itself (*exercitatus ab ipsa natura*), but it was also comprised of conscious manifestations, for instance a patent yearning for good *in generali* or a constant dissatisfaction with earthly goods. This *appetitus* was not expected to find its own resolution, and yet it was not exerted in vain, since the natural aspiration was in itself sufficient, as was the possibility of achieving its goal either in the natural or in supernatural world.

²⁶de Lubac 1978, 263 ff.

²⁷"Natural with regard to the appetite, but supernatural with regard to the thing which is to be achieved".

Vitoria’s theological teachings represent an important connection between this issue and human rights.²⁸ Striking such a balance was tricky at first: perfecting a notion of state that properly included independence, sovereignty and individual rights while setting the foundation for the establishment of a community of states was no small task. The dangers implicit in individualistic and voluntaristic theories had to be avoided by setting up a *jus gentium* that would allow sovereign states to go beyond their contractual ties and form an organic community that would come together naturally. This is, after all, what Vitoria, the “founder” of international law, is commonly praised for, and contemporary historiography has mostly focused on this “glaring” aspect of his work. Take, for example, this crucial passage regarding the rights and dignity of Native Americans:

Creaturae irrationales non possunt habere dominium. Patet, quia dominium est jus, ut fatetur etiam Conradus. Sed creaturae irrationales non possunt habere jus. Ergo nec dominium. Probatur minor, quia non possunt pati iniuriam; ergo non habent jus [...] Et confirmatur propositio auctoritate S. Thomae: Sola creatura rationalis habet dominium sui actus, quia, ut ipse etiam dicit, per hoc aliquis est dominus suorum actuum, qua potest hoc vel illud eligere; unde etiam, ut ibidem dicit, appetitus circa ultimam finem non sumus domini. [...] Non enim dicimus aliquem esse dominum, nisi eius quod situm est in sua facultate. Ita enim loquimur: non est in mea facultate, non est in mea potestate, quando non sum dominus. Bruta autem cum non moveant se, sed potius moveantur, ut S. Thomas ait, eadem ratione nec habent dominium.²⁹

Three themes emerge from reading between the lines: (a) property (*dominium*), (b) freedom (*libertas*) and (c) yearning for the ultimate return (*appetitus beatitudinis*).

(a) *Property* The corrosive albeit stimulating cultural climate at the beginning of the sixteenth century strongly influenced Vitoria’s formative years in Paris and informed the entire vision that the second scholastics had with regard to the relationship between man and property. The Parisian period is significant from a historical point of view, because the studies Vitoria conducted then had an

²⁸See Todescan 2015, 71–110.

²⁹de Vitoria 2010b (1538–1539), I, 20 (pp. 247–248). “Irrational creatures clearly cannot have any dominion, for dominion is a legal right (*dominium est ius*), as Conrad Summenhart himself admits. Irrational creatures cannot have legal rights; therefore, they cannot have any dominion. The minor premiss is proved by the fact that irrational creatures cannot be victims of an injustice (*iniuria*), and therefore cannot have legal rights [...] This argument is confirmed by Aquinas: only rational creatures have mastery over their own actions (*dominium sui actus*), as Aquinas also shows in ST I. 82. 1 ad 3. [A person is master of his own actions insofar as he is able to make choices and another; hence, as Aquinas says in the same passage, we are not masters as regards our appetite for our own destiny, for example] [...] We do not speak of anyone being ‘the owner’ of a thing (*dominum esse*) unless that thing lies within his control. We often say, for example: ‘It is not in my control, it is not in my power’, meaning I am not master or owner (*dominus*) of it. By this argument brutes, which do not move by their own will but are moved by some other, as Aquinas says, cannot have any dominion (*dominium*)”.

impact in Spain, allowing young theology scholars to confront this cultural experience with a renewed interest in the thomistic doctrines.³⁰

Vitoria often consulted Konrad Summenhart's *Tractatus septipartitus de contractibus*, where the latter, who had been educated in the same circumstances as the former, translated the general premises expressed by voluntaristic currents. He did so in order to construct his own autonomous system, and he found that the cultural world of the *recentiores* was congenial to his being a *homo novus*, a true man of his time, and the inventor of a theoretical system consistent with the contemporary world, rather than the theorist of a bygone age.

The Vitorian interpretation of *in rem* rights progressively translated into a dualistic vision of the world of individuals and phenomena, resulting in an attempt to construct a metaphysical theory that would allow property to be viewed through the lens of the individual as a projection of the latter's sovereignty. Because of the metaphysical detachment from property, the individual could be identified as *dominus*, and the legal order was considered as the sum of instances of dominance; *dominium*, regarded in strictly rigorous legal terms, became the interpretative mainstay of the whole system.

- (b) *Freedom* Free will was regarded as the underlying premise of *dominium*, given that it was in itself *dominium*. Freedom and property were thus conceived as interchangeable. The individual's freedom coincided with their agency over themselves; their very existence as a free agent consisted of all expressions of dominance. The use of a strictly legal term to describe a psychological attitude may seem inappropriate, especially since in everyday language said attitude is described as "self-assuredness". However, there is nothing generic or psychological about the notion of *dominium sui*. Dominion over oneself and one's actions had a theological and legal significance; it was given by God to every rational being created in his likeness, and it was not that different from dominion over an object, which is why the *de dominio* treatise is a rigorously unitary block, and dominion over one's actions is discussed in the first chapter.
- (c) *Imago Dei and appetitus beatitudinis* The foundation of the property principle lies with the notion of *imago Dei*, and it unites legal reasoning with theology.

Hoc patet, quia [pueri] possunt pati iniuriam; ergo habent jus rerum; ergo est illis dominium, quod nihil aliud est quam jus. Item bona pupillorum non sunt in bonis tutorum, et habent dominos, et non alios; ergo pupillos. Item pupilli sunt heredes. Sed heres succedit in jus defuncti et est dominus hereditatis. Item diximus quod fundamentum domini est imago Dei, quae adhuc est in pueris, et Apostolum eodem loco: Quanto tempore heres parvulus est, nihil differt a servo, cum sit dominus omnium.³¹

³⁰See Grossi 1973, 121 ff.

³¹de Vitoria 2010b (1538–1539), I, 21 (p. 249). "Children before the age of reason can be masters. This is self-evident, first because a child can be the victim of an injustice (*iniuria*); therefore a child can have legal rights, therefore it can have a right of ownership (*dominium rerum*), which is a legal right. Again, the possessions of an orphan minor in guardianship are not the property of the guardians, and yet they must be the property of one of the two parties; a fortiori they are the

This train of thought refers to “younglings” and perhaps also to the mentally challenged. However, natives are far from mentally incapacitated; they simply make use of reason differently. It is apparent that they have their own legal order and institutional framework, including the institution of marriage, magistrates, lords, laws, industry, trade, all manifest exertions of reason. It follows that the same motivations apply to them.

Sola creatura rationalis habet dominium sui actus, quia, ut ipse etiam dicit, per hoc aliquis est dominus suorum actuum, qua potest hoc vel illud eligere; unde etiam, ut ibidem dicit, appetitus circa ultimum finem non sumus domini. [...] Non enim dicimus aliquem esse dominum, nisi eius quod situm est in sua facultate. Ita enim loquimur: non est in mea facultate, non est in mea potestate, quando non sum dominus. Bruta autem cum non moveant se, sed potius moveantur, ut S. Thomas ait, eadem ratione nec habent dominium.³²

And so the third theme—i.e. *appetitus*, a strong yearning—emerges. It is the desire for grace, the *appetitus beatitudinis* previously theorised by Saint Augustine in the confessions (*Fecisti nos ad Te, Domine, et inquietum est cor nostrum donec requiescat in Te*).³³ Saint Augustine argued that man was a paradoxical being, insofar as man was the only being that craved absolute grace (*beatitudo*), and thus, it was because the yearning for the Absolute lay within human nature that only the Absolute could satisfy it. Therefore, man was constitutionally projected outwardly, propelled by the desire to reach a goal *naturalis quoad appetitionem, supernaturalis vero quoad asecutionem*,³⁴ to quote the scholastic formula. Hence, the importance of divine grace for human salvation according to Saint Agostine, as was apparent in his works arguing against the Pelagians.

Molina After Cajetan, one of the first authors who dealt specifically and systematically with the *status purae naturae* was the Jesuit Luis de Molina, author of the famous *Concordia liberi arbitrii* (1588), whose theories on the relationship between nature and grace were at the centre of the great *de auxiliis* debate that troubled early seventeenth century catholic theology. In the *Concordia* Molina states:

Primus est status naturae humanae in puris naturalibus, sine peccato et sine gratia ac sine ullo alio dono supernaturali. Hunc statum nunquam homo habuit, neque unquam habebit:

(Footnote 31 continued)

property of the minor. Again, a child in guardianship may legally inherit property; but an heir is defined in law as the person who succeeds to the inheritance of the deceased, hence the child is the owner of the inheritance. Furthermore, we said earlier that the foundation of dominion is the fact that we are formed in the image of God (*imago Dei*); and the child is already formed in the image of God. The Apostle goes on to say, in the passage of Galatians quoted, ‘the heir, as long as he is a child, differeth nothing from a slave, though he be lord of all’ (Gal 4, 1)”.

³²de Vitoria 2010b (1538–1539), I, 20 (p. 248). “A person is master of his own actions insofar as he is able to make choices and another; hence, as Aquinas says in the same passage, we are not masters as regards our appetite for our own destiny, for example”.

³³“O Lord, You made us for You and our heart will be restless until it can rest in You”.

³⁴“...natural with regard to the appetite, but supernatural with regard to the thing which is to be achieved”.

Philosophi tamen naturales in eo crediderunt hominem fuisse conditum, neque aliud sine lumine divinae revelationis intelligere potuerunt [...] Secundus status est, in quo re ipsa primus parens ante peccatum fuit constitutus, qui innocentiae status appellatur.³⁵

In Molina's *Concordia*, the idea of pure nature (*status purae naturae*) was introduced and it precedes the traditional Scholastic tripartite formula (*status naturae integrae, status naturae lapsae, status gratiae*). This hypothesis brings about the intrinsic conclusion that it is possible for humanity to be altogether encompassed in a worldly dimension (*in puris naturalibus*). A similar train of thought can be found with regard to the manner in which different kinds of law are listed in Molina's *De justitia et jure*: after divine law is mentioned, natural law follows suit pursuant to the natural end of moral and theoretical fulfilment within humanity, and the law governing the state of innocence, which involves a complex and dynamic interaction between nature and the supernatural, only comes in third, despite being the first to appear in human history, according to the biblical perspective.

Consequently, a parallel between natural law and Molina's status doctrine surfaces: just like pure nature, an abstract and hypothetical notion introduced in the *Concordia* inaugurates the enumeration of the various stages in the "history of salvation", thus introducing the idea of humanity as enclosed in space and time; the notion of *lex naturalis* contained in the *De justitia et jure* is at the forefront of the enumeration of the laws that are perceived as having guided mankind throughout history and through the various statuses, as if it were a structural and narrative necessity, therefore allowing for its theoretical distinctiveness.

The objection according to which natural law is derived from God as *naturae auctor*, as Molina expressly and thoroughly stated, was to no avail, since if it was to be believed that the supernatural was only extrinsically superimposed on nature, then it followed that any kind of subordination also had to be regarded as extrinsic.

Also Suárez in his *De divina gratia* treatise stated:

Cajetanus et moderniores Theologi tertium considerarunt statum, quem pure naturalium appellarunt, qui licet de facto non fuerit, ut suppono [...] cogitari tamen potest, ut possibilis, et illius consideratio ad aliorum intelligentiam necessaria est, quia revera hic status est veluti aliorum fundamentum.³⁶

A few observations ought to be made with regard to the passages cited above. First and foremost, the state of pure nature is imagined as the human condition devoid of sin and grace, that is to say what was added historically according to

³⁵de Molina 1588, q. 14, a. 13, d. 3. "A first condition of the human nature consists of a natural state, without sin, without Grace, and without any other supernatural gift. Man, however, never had that condition, nor will he never have it. Naturalist philosophers, however, believed that man was placed in that condition, as they could not understand otherwise without the light of the divine revelation. [...] There is, however, a second condition, which consists in that our first progenitor was created before sin, and therefore called state of innocence".

³⁶Suárez 1619, Proleg. IV, c. 1, n. 2. "Cajetan and the most modern theologians considered a third state, which they saw as purely natural, which in fact did not exist, although we can think of it [...] as being possible, and this consideration is crucial to comprehend the other states, as in fact this state underlies all the others, being their foundation".

Christian theology, whether in a negative or positive sense: on the one hand, sin is not innate, and it occurs after a certain period of time; on the other hand, grace, as its etymology suggests, is by nature a gift (the other gifts which are alluded to are the so-called preternatural gifts: exemption from pain, physical death, ignorance and so on). This status was clearly theorised by Molina and Suárez as being hypothetical; in fact, the very expression “*hunc statum nunquam homo habuit, neque unquam habebit*” (man has never been, nor will he ever be in, such a state) vaguely recalls Jean-Jaques Rousseau’s famous words on the state of nature as a state that never existed and perhaps never would. As far as its hypothetical nature is concerned, the two Jesuit scholars vigorously asserted it, but in spite of this, about a century and a half later, Jansenius, the Bishop of Ypres, mounted a violent attack against both Pelagius and his followers and the molinist Jesuits in his work *Augustinus*, the former because of the assertion concerning the intrinsic goodness of human nature even after the original sin and the latter, whom Jansenius likened to the less famous heresy of the semi-Pelagians, because of the assertion concerning the (hypothetical) state of nature. Suárez, who fully agreed with Molina about the state of nature being hypothetical, was well aware of the novelty of the theory and that was why he mentioned *Cajetanus et moderniores theologi*³⁷ rather than the Fathers of the Church or the medieval scholastics. Nevertheless, the theoretical importance of this hypothesis is proven by its logical necessity with regard to the understanding of those who came thereafter.

Hobbes In the *Leviathan*, Hobbes stated:

It may peradventure be thought, there was never such a time, nor condition of war as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of America, except the government of small families. The concord whereof dependent on natural lust, haven no government at all; and live at this day in that brutish manner, as I said before.³⁸

It is well-known that Hobbes theorised a status of perfect equality among all men, by which everyone had a right to everything (*jus in omnia*), and thus, everyone was at war against everybody else (*bellum omnium contra omnes*). This state of total belligerence made the state of nature unliveable, thus making the social contract and the creation of an absolute state a necessity. We could argue that Hobbes’s state of nature is purely hypothetical because it is unliveable and thus cannot be posited, both psychologically and existentially, but Hobbes’s observations are not clear-cut and retain a certain historical and theoretical ambiguity. For example, stating the impossibility of arguing the state of nature as a general principle does not exclude the possibility that it might exist in a more limited setting. A conformation of this view can be found elsewhere, even though the historical argument is moved away from England and other known countries, all the way to the fabled Americas, on the basis of more or less romanticised tales from travellers and literates. Therefore, the historical element of Hobbes’s theory is set against a

³⁷“Cajetan and the most modern theologians”.

³⁸Hobbes 1651, ch. XIII.

backdrop that is more fantastical than real, and the result is thus uncertain and has shaky foundations.

Locke In Locke's theory, the state of nature is a state of reasonableness, as it reflects the reasonable nature of the individuals that are a part of it and, more to the point, finds its intrinsic limit in the law of nature.

To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man.³⁹

Whereas Hobbes only recognised the existence of *jus in omnia* in the state of nature, Locke acknowledged the existence of fundamental rights, also "primary", and other natural rights, also "secondary". The three primary rights are as follows: the right to life, the right to freedom, and the right to property (note the similarity to Vitoria in this last instance). As a matter of fact, if we were to give a literal interpretation of Locke's words, these fundamental rights would be bound up in the right to property. Locke states that by nature man is endowed with the right to property in respect of life, freedom and material possessions. Therein lies the difference between Locke and Hobbes: the acknowledgement of human reasonableness and inalienable rights under the term "property". The three fundamental rights are exercised within the state of nature, and the law of nature contains within itself the limit that Hobbes attributed to the establishment of civil laws, thus making Locke's state of nature historically feasible.

At this point, one could argue that Locke had the medieval, or even classical outlook in mind, and one could imagine a link between the Aristotelian and Lockean societies. However, two arguments can be raised to the contrary: (a) the first is that Aristotelian sociability comes before the individual, whereas Locke had a contractualist attitude and viewed the contract among individuals as the origin of social life, quite the opposite of Aristotle and (b) the second is that to Locke the limit was an isolating element that allowed for a more functional social life among human beings by reducing the chances of intersection; to medieval scholars, it was inherent to human nature, almost as if it were a transcendental condition for tight-knit sociability among men.

A few clarifications are in order: firstly, the state of nature does not represent a "golden age", a perfect state, or else men would not need to abandon it and stipulate a social contract. At this point, the secondary natural rights, i.e. the right to make one's own justice and the right to punish, become extremely significant. These represent the logical product of Locke's theorisation of the state of nature: this is essentially individualistic, made up of social atoms—i.e. individuals—each with their own primary natural rights, and all individuals are equal. It follows that, in the event that another individual violates an individual's rights, the latter, and only the latter, may punish the transgressor and restore balance. In the state of nature, there

³⁹Locke 1690, Second Treatise, ch. II, § 4.

is no superior authority to defer to. It is the very dialectic between primary and secondary rights that propels mankind out of the state of nature.

There is a certain degree of uncertainty in Locke’s state of nature, which justifies overcoming it. Locke’s outlook on the state of nature is certainly more optimistic than Hobbes’s: it is not a feral, belligerent state, but rather a state, the weakness, which is intrinsic in its optimistically conceived structure. It is a condition as fragile as complex machinery that runs the risk of being jammed by a grain of dust. It is a rational status susceptible of being rendered insufferable by a grain of dust, that is to say the possibility of someone not respecting another’s rights. This is enough to put the state of nature in upheaval. The violation of a right may cause a chain reaction because, on the one hand, it is not a given that the empirically weaker individual will be able to obtain justice and, on the other hand, the punishment the victim inflicts may be fuelled by revenge, and thus be disproportionate to the offence. And then confusion, or even war, ensues. Therefore, while Locke’s state of nature is not radically unbearable, it seems so weak, so fragile, that man feels the need to overcome it in order to stabilise, rather than radically change, the situation (as in Hobbes).

Interestingly enough, Locke stated:

It is often asked as a mighty objection, where are, or ever were, there any men in such a state of Nature? To which it may suffice as an answer at present, that since all princes and rulers of “independent” governments all through the world are in a state of Nature, it is plain the world never was, nor never will be, without numbers of men in that state.⁴⁰

By comparing Hobbes and Locke’s theories, we can observe that both authors discussed the state of nature at great length, unlike Grotius. The difference between the two is that while Hobbes offered an ambiguous solution to say the least, Locke was seemingly straightforward, as he deemed the state of nature as existing synchronically only among sovereigns, and not as a past golden age, nor a state of total belligerence followed by social contract that established the civil state. Nevertheless, a precise analysis cannot ignore the statement that Hobbes made in the previously mentioned chapter XIII of the *Leviathan*:

But though there had never been any time, wherein particular men were in a condition of war one against another, yet in all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another.⁴¹

There is another similarity between the two English philosophers. In the Second Treaty Locke stated:

The promises and bargains for truck, etc., between the two men in the desert island, mentioned by Garcilaso de la Vega, in his history of Peru, or between a Swiss and an Indian, in the woods of America, are binding to them, though they are perfectly in a state of

⁴⁰Locke 1690, Second Treatise, ch. II, § 14.

⁴¹Hobbes 1651, ch. XIII.

Nature in reference to one another for truth and keeping of faith belongs to men as men, and not as members of society.⁴²

The stereotype of America as a pseudo-historical place (we could say “a non-place”), existing more as a fantasy than a reality, returns. They are flashes of a “hypothetical history”, an oxymoron by which a situation that is defined as historical is set before a hypothetical backdrop.

Rousseau's “good savage” The starting point of Rousseau's philosophy is also represented by the state of nature: according to the philosopher, it is the only scenario from which it is possible to interpret history in action. The first ambiguity of Rousseau's theory lies in the state of nature: in his theorisation of the state of nature, there are indicators of the fact that Illuminism was fading. According to illuminist views, nature was an object that reason had to explain, whereas Rousseau saw nature as a reality to be comprehended and loved through sentiment before it could be dissected by reason. This re-evaluation of sentiment over reason, as well as the desire for a return to nature, clearly represented a preromantic motif, and it would be reprised in countless nuances. Rousseau's state of nature was apparently conceived as optimistic, but it was not inspired by the notion of man as a rational being as in Locke's theory, but rather by the circumstance that, initially, in the state of nature man lives isolated from others, and is thus insusceptible of giving or receiving offence. It is an ambiguous, purely negative kind of bounty, that of abstaining from wrongdoing, rather than the assertive, positive nature of actively pursuing good: thus the myth of the good savage emerges, i.e. the individual who lives isolated and happy in a state of isolation. The individualistic motif that had already appeared both in Hobbes and Locke's works went the furthest in Rousseau's theory. According to Rousseau, the state of nature was destined to unravel inasmuch as the state of isolation came to an end and social relationships came into being. Society came into being as the result of an unfair pact: man was good as long as he was alone; after he came into contact with other men, he became less good. It is one of the recurring themes in *Emile's* pedagogy. At one point, the unravelling in question receives a sort of formal consecration: when men approach their kin, they move away from the state of nature, but they are definitively ripped away once property is introduced. As Rousseau described it, history began to worsen on the day a man planted a pole in the ground and identified something as his, and other men were so naïf as not to remove the pole or point out that there was no such thing as “mine” or “yours”.

Rousseau was conscious of the fact that the state of nature had been dissolved but, at the same time, he felt that it had to be taken into account when interpreting history. Mindful of the well-known debate on the topic, one might question whether Rousseau's state of nature was conceived as a historical event or as a logical hypothesis, but the philosopher made it clear that it was essentially the latter: a state that has never existed, and perhaps never will, but without which history cannot be interpreted.

⁴²Locke 1690, Second Treatise, ch. II, § 14.

6 Final Observations: Towards the Establishment of the Doctrine of Natural Law in the Eighteenth Century

The doctrine of natural law developed within late scholasticism raises important questions. One might ask whether this doctrine has managed to separate the natural from the supernatural, mankind from the God, and whether the autonomy recognised in favour of natural law resulted in a tendency towards absolute independence, despite the hefty limitations imposed upon it, which in turn was influenced by the secularisation brought about by Humanism and anticipated by Averroist movements. It is also a moot point as to whether this onset of dualism is merely hypothetical or whether the notion of pure nature, i.e. a status held together by commutative justice rather than charity and submission to the God, concedes too much to the pursuit of reason once it is employed to tackle practical legal and political issues.

Grotius shifted from a “sacred” notion of secularisation to a “profane” one, albeit gradually and moderately, in keeping with his peculiar temperament and works. At the beginning of the eighteenth century, he made a decisive contribution to the gradual detachment of the study of law from theology, a change that had been partially anticipated by the late scholasticism. The detachment in question was aided by the exacerbation of religious conflicts and by the rise of secular intellectual inclinations promoted by the humanist movement in the Renaissance, as well as by an accentuated naturalism and rationalism expressed through neo-stoicism and a revaluation of Aristotle’s philosophy. Nevertheless, a bond still existed between Grotius’s basic notions of metaphysics and natural law and the theological perspective.⁴³

Pufendorf held that knowledge could take the form of natural law or theology. These two forms are distinguished by their originating source: the former stems from reason and the latter from revelation; the former perceives man as absolute, by taking into consideration his status in the natural world and the goals he pursues, whereas the latter speaks to the believer, guiding him to the realisation of a lifestyle that is meant to ensure his eternal salvation; the former regulates exterior conducts and the relationships that are formed between men, and the latter focuses on the dialogue between the individual and the individual’s own conscience. Natural law is a human, worldly science, and in order to free it from the constraints of theology, Pufendorf (more than Hobbes and Locke) combined his ultimate beliefs with his methodology by resolving to promote natural law to the status of an autonomous scientific field exclusively dependent on human rationality, thus attempting to define natural *ratio*, material acts and sociability. The study of natural law was not meant to serve revealed truths, nor to contradict the dogma of revelation; it simply chose to disregard it. By refusing to allow the dogma of revelation to enter the

⁴³See Todescan 2014b, 132 ff. and 319 ff.

narration of the founding arguments of natural law, and by solely giving importance to the light of reason (*ratio sibi relicta*), Pufendorf stressed the latter's crucial significance in building the system. Reason reveals the rules of natural law, and it identifies divine will as the source of obligation.

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