It has already been suggested that, in the history of the concept of
the natural law since the thirteenth century, the rationalist natural
law of the seventeenth and eighteenth centuries presents an
important turning-point. For a number of reasons, not least
because it is closer to our time, the natural law of the Age of
Reason has usurped the attention of historians of thought and has
tended to obscure their vision of the natural law of the scholastic
revival of the sixteenth and seventeenth centuries and, possibly
even more so, their vision of the natural law of the High Scholastic-
ticism of the thirteenth century. More serious still, the rationalist
natural law proved extremely vulnerable to criticism, particularly
from the historical schools of the nineteenth century; and the
impression is sometimes conveyed that refutations of this natural
law amount to disposing of the concept purely and simply.
Nothing could be further from the truth. To see that such is the
case, we must briefly examine the rationalists' natural law.

A. HUGO GROTIIUS AND THE 'IMPIOUS HYPOTHESIS'

Hugo Grotius (Huig de Groot, 1538–1645) published in 1625 his
epoch-making *De jure belli et pacis*. It may be described as a
watershed in the history of ideas, ushering in the secularization of
the natural law.¹ In the *Prolegomena* to his work (n. 11) Grotius
emitted the celebrated hypothesis:

What we have been saying (viz. about the natural law) would have a
degree of validity even if we should concede that which cannot be

¹The phrase may be due to Otto von Gierke cf. *Natural Law and the Theory
of Society*, 1500–1800, translated by E. Barker, I. p. 36: "It was a definite epoch
in the history of thought when Grotius proceeded to elaborate a purely secular
philosophy of law..." Whether in fact this was Grotius's intention or was
rather an interpretation fostered by his successors is not easily decided.
conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him.²

Was this ‘impious hypothesis’ as it has been called a device to take the natural law out of the theological controversies of the age? This was the century of the Thirty Years’ War (1618–1648); and Grotius himself had suffered greatly from the religious intolerance of the time. Furthermore, current conceptions of the natural law were divided more or less according to the religious differences between Protestant and Catholic. It is not implausible to think of Grotius as wishing a plague on both their houses. The reality, as might have been anticipated, is more complex.

To begin with, Grotius was and remained a theologian. He had no intention of divorcing the natural law from theology, still less of constructing an atheistic or agnostic ethic. To establish this, one need look no further than the very next section in the Prolegomena (n. 12):

Herein, then, is another source of law besides the source in nature, that is, the free will of God, to which beyond all cavil our reason tells us we must render obedience.

And, in the body of the work, Grotius defines the natural law in entirely traditional terms:

Natural law is the dictate of right reason indicating that an act, according as it conforms to or is in disagreement with nature, individual and social, is either morally wicked or morally necessary and in consequence such an act is commanded or forbidden by God, the author of nature.³

Grotius’s other writings leave no doubt about the matter.⁴ But if

² "... etiamis darem, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana." The translation in the text is that of Francis W. Kelsey in Hugo Grotius Prolegomena to the Law of War and Peace (reprinted from the edition in the Carnegie Endowment for Peace series ‘Classics in International Law’), p. 9. H. von Cocceji (1644–1719), follower of Pufendorf and professor at Heidelberg, writes of the Etiamis darem, ‘‘Pugnat haec sententia cum pietate, quod hominem subiecti alii causae quam Deo’’; Hugonis Grotii De Jure Belli et Pacis, Lausanne, 1751, cited by J. St. Leger, The Etiamis Darem of Hugo Grotius, p. 44 and note. ³ De Jure Belli et Pacis, I, c. 1, n. 10: ‘‘Ius naturale est dictamen rectae rationis indicium alicui actui, ex eius convenientia aut discontentia cum ipsa natura naturali ac sociali inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut praecipi aut vetari.’’


the hypothesis was not intended to remove the natural law from all theological contamination, the question remains whether or not it is more than a rhetorical flourish. Herein lies the relevance of the background to Grotius’s work, not merely the immediate background of post-Reformation controversy about the natural law but, more particularly, the wider background of the nominalistic controversies, stemming from Scotus and Ockham.

It has already been argued that the sources of Grotius’s hypothesis are likely to be found among the representatives of scholasticism. But there is something of paradox in the fact that, while Grotius’s Etiamis has all the looks of an intellectualist proclamation, his models seem to have been in the main voluntarist; and the hypothesis was exploited by successors like Pufendorf, who were also mostly voluntarist. Grotius could not, of course, have foreseen these subsequent developments; but he may have had some misgivings about his sources. It is interesting to note that in his earlier writings he was voluntarist – in the De jure praedae, for instance, written 1604–1606 – whereas by the time of the publication of the De jure bellorum et pacis in 1625 he had adopted an extreme intellectualist position.⁵ There is some circumstantial evidence of a direct influence of Suarez here. Briefly, a passage inserted by Grotius at some stage in the composition of the De jure praedae seems to show a remarkable familiarity with Suarez’s De legibus ac Deo legislatore;⁶ it adopts Suarez’s understanding of the jure gentium, which understanding Grotius reiterates in the De jure bellorum et pacis twenty years later. Suarez, as we have seen, was not an intellectualist in philosophy of law; but he had also rejected extreme voluntarism. If one were to characterize his position one would say that it was an attempt to harmonize the competing views.⁷ A reading of the De legibus might well have influenced Grotius towards intellectualism. Nor would Grotius necessarily have stated his debt, if debt there was; his


⁷ Cf. T. E. Davitt, The Nature of Law, pp. 86–108, 219–299. Davitt notes (p. 87, note 2; pp. 92–93, note 19) that Suarez, too, changed his mind on this matter; in his early works he was intellectualist and in the later De legibus took the voluntarist view of the essence of law.
reticence in this regard with reference to Suarez has been remarked.8

The extent and the detail of such debts cannot always be ascertained, above all when it is a matter of views which had become a commonplace of legal philosophy.9 The divergence of views in Grotius's commentators is interesting. Already, in the generations following him, in early commentators and popularizers like Pufendorf, Barbyrac, Heineke and others, there was criticism of Grotius for his excessive dependence upon the scholastics. There is less agreement, however, on the identification of the scholastics suggested as the origin of the *Etiamsi daremus*. Pufendorf, who condemned the hypothesis as absurd, attributes it to the scholastics Zentgravius, Suarez, Vazquez and Durandus and holds Vazquez particularly responsible. Of more recent scholars, Otto Gierke attributed it to Hugh of St. Victor, Gabriel Biel and Almain - names, he says, found in Suarez's *De legibus* (II, 6, 3) where all the older opinions are reviewed.10 Johann Sauter, who characterizes the hypothesis as an expression of *Wertobjectivismus*, sees it in a line of descent from Vazquez—who depends upon Gregory of Valentia (sic) and Hugh of St. Victor—to Arriaga, Grotius, Christian Wolff and down to Nicolai Hartmann in the twentieth century.11 A.H. Chroust mentions not merely Gregory of Valentia (sic), Vazquez and Arriaga (relying

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upon Sauter), but also Molina and even St. Thomas.12 H. Rommen mentions Vazquez's doctrine of the *lex indicans* (as opposed to the *lex praecipiens*).13 Giorgio Del Vecchio cites Suarez and points out that the passage from Gabriel Biel adduced by Gierke is actually attributed by Biel to Gregory of Rimini; Del Vecchio also draws attention to a passage in which John Duns Scotus, almost four centuries before, appears to have anticipated Grotius's hypothesis.14 In the course of a lengthy discussion of Grotius's sources Guido Fassò, although he regards the question of verbal dependence as of secondary importance, adds some interesting suggestions.15 Formule implying the hypothesis of God's non-existence are certainly found in scholasticism and, more generally, in the tradition of rationalism in morals. Thus not only Gregory of Rimini and Gabriel Vazquez but other scholastics, from the fourteenth to the seventeenth century might have been the source of Grotius's *Etiamsi daremus*. Robert Bellarmine, for one, emits a very similar hypothesis in the *Controversies*:

*If (per impossibile) law did not come from God, it would still bind under pain of fault; just as if (per impossibile) there existed a man not created by God, he would still be rational.*16

12 “Hugo Grotius and the Scholastic Natural Law Tradition” in *The New Scholasticism*, 17 (1943), pp. 111–116. The confusion of Gregory of Rimini (+1358) with Gregory of Valencia (1549?-1603) is in Sauter. G. Fassò remarks upon another confusion, between Gabriel Vazquez (1551–1604) and Fernando Vazquez de Menchaca (1512–1569) a jurist much-quoted by Grotius; cf. *La legge della ragione*, p. 149. Arriaga appears to have published his *Disputationes theologicae* in 1644, almost twenty years after Grotius's *De jure belli et pacis*.


15 *La legge della ragione*, pp. 128–160: "La questione dei precedenti dell'ipotesi atestica groziana non ha sostanzialmente grande importanza" (p. 134).... "La ricerca, o, come qualcuno l'ha chiamato, la 'caccia' ai precedenti dell'atteggiamento di Grozio può apparire oziosa..." (p. 146).

16 *De membris Ecclesiae militantis*, III, 11 cited by Fassò, *op. cit.*, p. 135n: "Si (per impossibile) esser lex non a Deo, adhuc obligaret ad culpam, sicut si (per impossibile) homo existeret non factus a Deo, adhuc esset rationalis."
Again, Gabriel Biel, to whom in this matter Gierke called attention in the last century, repeats almost word for word the text of Gregory of Rimini. 17 But why confine the search to the scholastic tradition? The entire Stoic-Ciceronian tradition, developed by the Church Fathers and the scholastics, can provide models. In this tradition one must place St. Thomas Aquinas, no less than Melanchthon, and such various authorities as St. John Chrysostom, Pelagius, Rufinus, Peter Abelard. 18 Of particular interest is the passage from the Meditations of Marcus Aurelius (VI, 44) because, not alone in his hypothesis about the non-existence of God but also in his definition of the natural law, Grotius seems to use the very phraseology of the Stoic Emperor. 19 Finally, with regard to possible sources within the Protestant tradition, Fassò argues that the writers usually mentioned—Johannes Oldendorp, Nicholas Hemming and Benedikt Winkler—derive, not from the Ockhamist Luther nor from the voluntarist Calvin, but from the one who has been called the 'Protestant scholastic,' Melanchthon. 20

17 In II Sent., d. 35, q. unica, a. 1: “... si per impossibile Deus non esset qui est ratio divina, aut ratio illa divina esset errans, adhuc si quis ageret contra rectam rationem angelicam vel humanam, aut aliam aliquam, si qua esset, peccaret. Et si nulla penitus esset recta ratio: adhuc si quis ageret contra id, quod dictaret recta, si aliqua esset, peccaret. Haec Gregorius (viz. of Rimini), dist. XXXIV, art. II” (Text in G. Fassò, La legge della ragione, Appendice, pp. 283–284).
19 Pufendorf had already noted the resemblance in his De jure naturae et gentium, II, c. 3, n. 19 (Oxford, 1934, photographic reproduction of edition of Amsterdam, 1688): “Neque enim adstupliari possunt Grotii, qui in Prolegomenis autem jura naturae, fide locum aliquam habitura etiamsi daremus, quod sine summo sceleri dari nequit, non esse Deum aut non curari ab eo negotia humana. Nam si vel maxime quis impiam istam ac absurdum hypothesin fingat, ac genus humanum ex se silecit ortum conciperet vita tamen rationis dictata, tunc nullo modo possent habere vim legis, quippe quae esse necessario superiorem ponit, ... Videatur autem Grotii sententia expressa ex illa M. Antonini I. I, n. 44: Si nulla re nostra consilia Dii ineunt, quod tamen idem esse ac quod condetur, quidnigomet consultam? Mihi autem deliberatio competet de eo quod condetur, mihi. Conducit vero unicoque quod est constitutionis et naturae ipsius conscientiam. Foro mora mea rationalis et civilis est...” The text of Marcus Aurelius appears to have been first translated from Greek into Latin by Guilielmus Xylander in 1558. It is a text not easily come by today. It would be interesting to know if this is the version quoted by Pufendorf who, in any event “in the matter of quotations from other works... often took considerable liberties with the text” (Translators' Preface to the above-named edition, p. 63a).

Perhaps history has accorded more importance to Grotius's hypothesis of God's non-existence than he did himself. Be that as it may, the influence of the voluminous De jure bellorum et pacis, far the greatest part of it taken up with international law (or, as it was then known, jus gentium), was enormous. If the legal philosophy behind Grotius's discussion of the burning juridical problems of his day is pithily expressed in the Etiamsi daremus with which he begins, it was taken up enthusiastically by his successors. And it is scarcely too much to say that, in those followers, the hypothesis with its implications became a kind of standard of rationalism in law and morals.

Grotius's most influential follower was Samuel Pufendorf (1632–1694); through him may be traced Grotius's influence upon Locke, Rousseau, Thomasius, Wolff, Barbevry, Burlamaqui, Blackstone and Montesquieu—a list whose variety is a tribute to Grotius's universality and Pufendorf's versatility. 21 These writers, however, are in varying degrees voluntarist; and Pufendorf expressly rejects the Etiamsi daremus as an absurd hypothesis of the scholastics. 22 How, then, one might well ask, has Grotius maintained his reputation as the father of the school of natural law? This question raises very wide issues indeed which cannot be explored here. Two points, nevertheless, may be made.

Firstly, even if it were clear that, by this hypothesis of God's non-existence, Grotius meant to withdraw the field of natural law from theology—and we have seen that this is, at the very least, debatable—it would not follow that his system stood or fell with the validity of the hypothesis. What is true of Suarez is true, mutatis mutandis, of Grotius, namely that great parts of his system of political theory and jurisprudence can be detached from his theology—or philosophy of moral obligation—without serious mutilation. 23 Otto Gierke, in the last century, made a suggestion along these lines, which deserves fuller development today. Having referred to the realist-nominalist controversy about the origin of the jus naturale, whether in the will or the being of God,

23 The remark is made about Suarez and theology by G.H. Sabine, History of Political Theory, p. 354.
he remarks:

The appeal to Divine Authority in order to secure a legal validity for the Law of Nature resulted in little more than the provision of a formal basis for it; and those who never introduced the name of God at all were able to secure the same result almost equally well (by contenting themselves with human reason as the formal basis of natural law).

And in a footnote to this passage he writes:

When as in Grotius ... and his precursors ... the assumption was made that there would be a Natural Law even if God did not exist, or if He were unjust, the logical consequence of that assumption was the abandoning of any idea that it was derived from the nature or will of God; and this is what we find in Thomasius. ... After Locke in England and Rousseau and his successors in France had contented themselves with merely invoking 'the order of nature,' the connexion of Natural Law with the idea of God tended also to disappear among German thinkers.24

Pufendorf's natural law theory depended upon a notion of socialitas25 and this is adumbrated in Grotius's definition of the natural law as "the dictate of right reason indicating that an act, according as it conforms to or is in disagreement with nature, individual and social, is either morally wicked or morally necessary. ..."26 It is seen, then, that the question of the foundation of the natural law in the intellect or the will of God can become a marginal one and disagreement between Grotius and his successors becomes, on this point, unimportant.

Secondly it may be recalled that the Age of Natural Law was also the Age of Reason and that, once preoccupations about realism and voluntarism had been, so to speak, placed between parentheses, the widely-accepted framework for the exposition of legal and philosophical ideas was one into which Grotius's hypothesis fitted easily. Grotius's suggestion that there would still be a natural law even if there were no God was acceptable to thinkers whose methodology was open to the seduction of mathematical models. Mathematics, after all, does not in any readily acceptable sense depend upon the will of God; and if mathematical reasoning is the ideal, even in the moral and legal sciences, then a point of departure that stresses the independence enjoyed by basic principles must be an advantage.

The ideal of mathematical certainty exercised a great attraction over the writers and thinkers of the seventeenth and eighteenth centuries. Aristotle's warning, in the Nicomachean Ethics,27 that in any study we should look only for the kind of certainty that the subject-matter admits, was largely ignored. Perhaps it was to have been expected in thinkers like Descartes, Spinoza and Leibniz, who were mathematicians. Spinoza wrote an Ethica more geometrico demonstrata. The teacher of Leibniz and of Pufendorf, Erhard Weigel (1625–1699) was the author of Ethica Euclidea and Idea Matheseos Universae. Leibniz believed that political problems were amenable to mathematical methods of proof—in 1617 he published a work purporting to demonstrate to Louis XIV that that monarch should despatch his armies from the Low Countries to Egypt to break the power of the Turk; and in 1699 he published his Specimen demonstrationum politicarum pro eligendo rege Polonorum. His efforts to construct a scientia universalis are well-known. His 'logic of life' implied that all ideas could be represented by symbols and that consequently if controversies were to arise there would be no more need of dispute between two philosophers than between two accountants. For it would suffice for them to sit down to their slates and to say to each other (with a friend to witness if they like): 'Let us calculate.'28

Pufendorf, also under the influence of Weigel, speaks of the possibility of a certain science of 'moral beings.'29 The same ambition of finding a certain method in moral matters is expressed by Pufendorf's contemporary, John Locke—although Locke does enter a caveat very like Aristotle's in the first chapter of his Essay Concerning the Human Understanding.30 Similarly David

26 De Jure Belli et Pacis, I, c. 1, n. 10.
29 About which M. Villey remarks "je ne vois pas que dans la mise en oeuvre il garde longtemps l'illusion d'arriver, par cette méthode, à des conclusions substantielles." Cf. "Les fondateurs de l'école de droit naturel moderne" in Archives de philosophie du droit, 6 (1961), p. 88.
30 Book I, ch. 2, n. 1; Book III, ch. II, n. 16; Book IV, ch. 3, nn. 18–18; ch. 4, nn. 7–9; ch. 12, n. 8. The warning against expecting too much from mathematical methods is in Book I, ch. I. See also the passage from Locke's Journal cited in P. Laslett, Locke's Two Treatises, pp. 84–85.
Hume, who like Locke represents the English empirical development as opposed to the Continental rationalism issuing from Descartes, makes a bow in the direction of mathematical reasoning. His great work, the *Treatise of Human Nature* carries the sub-title "An Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects." Less than twenty years before, another moralist, Francis Hutcheson, described his *Enquiry into the Origin of our Ideas of Beauty and Virtue* (1725) as including an effort to "introduce a mathematical calculation into subjects of morality." 31

The medievals, too, hankered after this ignis fatuus. Oxford, in particular had its philosophers and theologians who also distinguished themselves in mathematics. P. Vignaux refers to the "immense fecundity of this discipline as a principle of universal explanation and a way to certitude" and instances Adam Marsh and Robert Grosseteste. And Roger Bacon summed it up by saying that only in mathematics could agreement be found: *excluso mathematicae beneficio, tot sint dubitationes, tot opiniones, tot errores.* 32

The difference between these medieval aspirants after mathematical certitude in other fields and their seventeenth and eighteenth century successors was that the latter had before their eyes the palpable results of the application of mathematical methods. Isaac Newton's *Naturalis Philosophiae Principia Mathematica* — the title is significant — epitomized the spirit of the age; it was published in 1687. 33 The laicization of the natural law, believed to flow from Grotius's hypothesis, fitted comfortably with that Zeitgeist. 34 It was a Zeitgeist that Pufendorf caught when he said:

It seemed worth making the effort to prove that what is handed down on this matter does by no means rest upon vacillating opinions, but flows, clearly enough from fixed and first principles.

Now, the knowledge which considers what is upright and what is base in human actions, the principal portion of which we have undertaken to present, rests entirely upon grounds so secure, that from it can be deduced genuine demonstrations which are capable of producing a solid science. So certainly can its conclusions be derived from distinct principles, that no further ground is left for doubt. 35

Here we can place a finger upon the cause of aberrations like the suggestions that the constitution of the Holy Roman Empire and the postal system belonged to the natural law, as did the jury system (with a definite number of jurors). K.D.A. Roeder cites as elementary contraventions of the law of nature: to enter unbidden, to make journeys troublesome and the stiff leather stocks worn by soldiers. The concept of nature giving rise to a comprehensive system of legal rules stretching to the minutest detail was, indeed, absurd. And it was the source of further absurdities such as the case of the disturbed New Engander, recounted in Carl Van Doren's *The Great Rehearsal*, who objected to the two-year senatorial term, proposed by the Constitutional Convention, on the ground that a one-year term was a "dictate of the law of nature; spring comes once a year, and so should a batch of new senators." 36

It is easy to single out such absurdities. But, needless to say, there was a great deal more to the seventeenth and eighteenth century rationalist systems of natural law. The treatises *De jure naturae et gentium* that proliferated in the generations succeeding Pufendorf were grandiose philosophical and juridical monuments. And, while the natural law philosophy in them was totally destroyed by the historical criticism of the nineteenth century, he would be a confident historian who easily permits himself a smile at their expense. For we may reject the concept of human nature typical of the Age of Reason; but how are we to know that what we put in its place is not equally limited, the limitations this time being those of our own age? That is a matter to which we shall

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31 Which prompted Laurence Sterne's remark that Hutcheson "plus's and minus's you to heaven or hell by algebraic quotations—so that none but an expert mathematician can ever be able to settle his accounts with St. Peter, except perhaps St. Matthew, who had been an officer in the customs, must be called in to audit them." Cf. W.R. Scott, *Francis Hutcheson*, p. 32 note.


33 In 1699 John Craig published a *Theologiae Christianae Principia Mathematica*.

34 L.I. Bredvold, *op. cit.*, p. 175: "The Utopianism of the age might be defined as the aspiration of every radical thinker to be the Newton of Ethics or the Newton of Politics."


have to return in the final chapter. Meanwhile we may draw attention once again to the fact that the grounds for rejecting the rationalist natural law are not, and should not be taken as, grounds for the abandonment of the natural law as such.

C. ANOTHER FACE OF NATURAL LAW: HUMAN RIGHTS

There is another side to natural law thinking in the seventeenth and eighteenth centuries and one that our present age finds much more congenial. While being dismissive of the rationalist systems of natural law, one speaks appreciatively of the age of human rights, associated with the names of John Locke (1632–1704) and of Jean-Jacques Rousseau (1712–1778), to whom so much of the contemporary insistence on the rights of man can be traced. It should not, however, be thought that these rights are a modern discovery. They are as old as the natural law itself; they have simply been given a new emphasis. To put the matter in a nutshell, rights, no less than the duties whose correlative they are, depend upon law; civic rights upon civil law and natural rights upon natural law. Rights and duties might be called the obverse and the reverse of the moral coinage. To use a metaphor attributed to Lamennais, they are “like two palm-trees, which fructify only if planted one beside the other.”37

Expressed more technically, right and duty are the two termini of the relation created by law. Perhaps it is only human that men should be vastly more interested in rights than in duties. Yet rights could not survive without duties. My right to life or liberty or property, if it is to mean anything, must mean that others have a duty to refrain from molesting me in these matters. If children have the right to nurture, support and education, then someone, parent or guardian, must have a duty to provide these things. Or, again, my right to life goes with my duty or preserving my life; my right of property is correlated with my duty of using my goods well. These are commonplaces of the philosophy and theology of rights—and the principle that rights are correlated with duties is a useful corrective of the more exaggerated insistence on human rights in the Rousseauistic literature of the eighteenth century.

This kind of analysis may appear irrelevant. For one may ask what those realities of the moral order, rights and duties, have to do with the Rights of Man before which modern democratic man stands in such awe. Edmund Burke, speaking of the French

37 "Le droit et le devoir sont comme deux palmiers qui ne portent fruit s'ils ne croissent à côté l'un de l'autre."