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DISCONTINUITY IN THE NATURAL LAW TRADITION

As we have seen, the contract law of the late scholastics depended on a series of Aristotelian ideas. The binding force of contract, and consequently the requirements for contract formation, were explained by Aristotelian virtues of promise-keeping, liberality, and justice. Contractual consent was explained by an Aristotelian theory of choice in which, in order to act *qua* human being, one had to understand the essence of one's action. The consequences of a contract were thought to follow from its essence, either because they were included in its definition or because they were means to the end in terms of which the contract was defined.

In the seventeenth century, the entire edifice was threatened by philosophers such as Descartes, Hobbes, and Locke. They attacked the most fundamental principles of Aristotelian metaphysics, for example the idea that an object has a substantial form and a final cause or end. They themselves were aware that, if those metaphysical principles were false, so also was Aristotle's account of morality, choice, and knowledge. There could be no virtues in the sense of acquired faculties by which one moved towards one's end. There could be no essences in the sense of concepts through which one grasped the substantial form of a thing or an action. Choice could not depend on knowing the essence of one's action. Knowledge could not be acquired by capturing an essence in a definition and then drawing out its consequences.

It would seem that, if the philosophical attack on Aristotle succeeded, the legal doctrines of the late scholastics would have to be rebuilt on new foundations. Paradoxically, the attack on Aristotle did succeed in the eyes of most educated people, and yet, as we have seen, for a long time contract doctrine remained much the same. When Grotius wrote, Aristotelian philosophy dominated the universities of the Protestant north as well as the Catholic south. In the mid-seventeenth century, Hobbes complained that 'the Philosophy-schooles, through all the Universities of Christendome'

followed Aristotle.[1] When the century ended, Aristotle was losing his hold over curricula. Educated people were coming to agree with Dryden:

> Longer tyranny ne'er swayed
> Than that wherein our ancestors betrayed
> Their freeborn reason to the Stagyrite
> And made his torch their universal light.

Nevertheless, jurists such as Pufendorf and Barbeyrac, who agreed with Dryden, preserved the doctrines of the late scholastics, and, indeed, disseminated them ever more widely at the very time the authority of Aristotle was crumbling. Aristotelian concepts and principles began to blur and, in the writings of Wolff, to drop out. Yet there is far more continuity than one would expect. To understand the paradox, we must first examine the philosophical challenge to Aristotle.

THE CHALLENGE OF THE NEW PHILOSOPHERS

One reason the seventeenth- and eighteenth-century philosophers distrusted Aristotle's metaphysics was that they were impressed by the physical discoveries of Galileo and, later, of Newton. The reason these discoveries aroused distrust was not merely that they revealed phenomena of which Aristotle had been ignorant, such as the position of the sun in the heavens; people already thought Aristotle had been ignorant of many important things, for example the fitness of non-Greek peoples for constitutional government and the redemption of the world by Christ. Nor did the distrust arise simply because these discoveries were made by a method that stressed experimental observation and mathematics. It took people a long time to see the difference between this method and one that stresses definition. The fundamental problem was that the new science described the motions of objects without regard to their substantial form or end. It described them by mathematical rules to which, for no discernible reason, the motions conformed. It seemed as though objects did not have substantial forms or ends.

Though impressed by these discoveries, the new philosophers put their critique of Aristotle on a different basis. They returned to an epistemological problem that had been noted, but not pushed to its logical conclusions, by the medieval nominalists. In Aristotelian philosophy, substances exist, such as men and pear trees, and yet we know of their existence by perceiving their accidents, such as their

[1] T. Hobbes, *Leviathan* (Cambridge, 1935), I. i at 2.

colour and shape. On the basis of what we perceive, we form a concept in our mind, the essence, which corresponds to the substantial form of the man or the pear tree. As the medieval nominalists pointed out, however, one cannot logically demonstrate that the substance exists from the fact that the accidents are perceived.[2] Descartes made the same point by asking how he could prove to himself that the objects around him really existed. He might be dreaming or the victim of illusions created by an evil demon.[3]

Descartes tried to demonstrate the existence of the outside world by proving first his own existence, and then that of God. God, he argued, would not permit the outside world to be a mere illusion.[4] According to this solution, however, one could prove nothing about the outside world on the basis of one's perceptions alone. Indeed, it was not clear how one's perceptions were related to the outside world. Descartes seemed to be asking God to guarantee the truth of assertions about the outside world that went beyond any evidence one had to support them.

Philosophers such as Hobbes and Locke concluded that one ought not make assertions about the outside world that went beyond one's experience. This experience, Locke explained, could be the kind we associate with the presence of external objects: we see colours and shapes, we feel heat or cold, and so forth. Alternatively, it could be the experience of what is going on inside us, of 'operations of the mind', such as thinking, reasoning, feeling satisfied, or feeling uneasy. To be meaningful, the words we used should refer to an experience or a combination of experiences.[5]

Therefore, according to Hobbes and Locke, the fundamental terms of Aristotelian metaphysics such as substantial form, nature, essence, and final cause or end were meaningless, or, as Locke put it, not 'significant'. To speak of the 'substantial form' or 'end' of a man or a pear tree was to describe neither its colour nor its shape, nor any experience or combination of experiences one could have of it. Such terms described neither one's experience nor anything one could infer from one's experience.[6] Locke regarded the use of such terms as a great source of philosophical error. The prime offenders,

[2] e.g. William of Ockham, *Scriptum in librum primum sententiarum ordinatio*, lib. I, prologus, q. I, in *Opera theologica* (St Bonaventure, NY, 1970), i. 38–9.

[3] R. Descartes, *Méditations* méd. 1, in *Oeuvres* (Paris, 1967), ii. 404–13.

[4] Ibid., méd. 6, in *Oeuvres*, ii. 480–505.

[5] J. Locke, *Essay on Human Understanding*, II. i. 2, in *The Works of John Locke* (London, 1823), i. 82–3. See T. Hobbes, *Leviathan* (Cambridge, 1935), I. i at 1; I. iv at 18–20.

[6] Locke, *supra* n. 5, II. xiii. 19, in *Works*, i. 166–7; II. xxiii. 1–2, in *Works*, ii. 1–5.

'the great mint-masters of this kind of terms', were the disciples of Aristotle, the 'Schoolmen and Metaphysicians'.[7]

Human thought would therefore have to be explained without using the concept of essence, and morality without using the concept of the end of man. According to Hobbes and Locke, human thought proceeds not by abstracting the essence of an object, but by grouping experiences together.[8] Locke called the experiences themselves 'simple ideas'.[9] We combine them to make 'complex ideas'.[10] Sometimes we combine them because we observe that a number of simple ideas 'go constantly together'.[11] For example, having observed certain colours, lines, and shapes together, we combine them to make the complex idea we call 'pear tree'. Sometimes we combine simple ideas 'very arbitrarily, . . . without patterns, or reference to any real existence'.[12] Mathematicians do so when they make complex ideas such as 'triangle' by combining simple ideas such as straight, side, figure, and three. Since we make these complex ideas ourselves, their meaning is exactly fixed by the way we have defined them.[13] Therefore, our knowledge of them is 'infallibly certain'.[14]

Similarly, a new basis would have to be found for moral philosophy. One could no longer speak of activities that contribute to the end of man or the virtues that make such activities possible. According to Locke, 'the philosophers of old did in vain inquire whether the *summum bonum* consisted in riches, or bodily delights, or virtue or contemplation; and they might have as reasonably disputed, whether the best relish were to be found in apples, plums or nuts'.[15] One could only say that a person felt certain experiences to be agreeable and others disagreeable. Hobbes spokes of these feelings as 'appetite' and 'aversion', which he described physically as 'small beginnings of Motion, within the body of Man', towards or away from something.[16] Locke spoke of the pursuit of pleasure and the avoidance of pain, pleasure meaning whatever one found agreeable and pain whatever one found disagreeable. He redefined good, happiness, and obligation in terms of the pursuit of pleasure. 'What has an aptness to produce pleasure in us is that we call good, and what is

[7] Ibid. III. x. 2, in *Works*, ii. 269. Similarly, see Hobbes, *supra* n. 5, I. i at 2; I. iv at 19–20.

[8] Ibid. I. i at 1; I. iv at 18–20; I. v at 21–2.

[9] Locke, *supra* n. 5, II. ii. 1, in *Works*, i. 99–100.

[10] Ibid. xii. 1, in *Works*, i. 153–4.

[11] Ibid. xxiii. 1, in *Works*, ii, 1.

[12] Ibid. III. v. 3, in *Works*, ii. 196.

[13] Ibid. ii. 15–16, in *Works*, iii. 297–9.

[14] Ibid. IV. iv. 5, in *Works*, ii. 386.

[15] Ibid. II. xxi. 55, in *Works*, i. 273.

[16] Hobbes, *supra* n. 5, I. vi at 28–9.

apt to produce pain in us we call evil'.[17] For one person, study might be good, for another hawking, for another 'luxury and debauchery'.[18] 'Happiness' is 'utmost pleasure'.[19] We have a 'duty' and 'obligation' to pursue it.[20]

If that were so, it might seem one could have no 'obligation' except to pursue pleasure and avoid pain in any way one could. To avoid this conclusion, Hobbes and Locke turned to the idea of contract. Contract seemed to transmute self-interest into a limitation on the pursuit of self-interest. Each party to a contract gives up something in order to obtain an advantage for himself. Hobbes and Locke explained society as a contract in which each person limits the ways he pursues pleasure and avoids pain in order to benefit from the limitations assumed by others.[21]

Contract, then, was supposed to explain how there could be obligations in a world in which the critical terms of Aristotelian philosophy were not 'significant'. For this explanation to work, however, contract itself would have had to be explained by principles entirely different than those of the late scholastics. For the late scholastics, contract law, like other branches of law, presupposed Aristotelian concepts such as virtue and essence that Hobbes and Locke were trying to do without. Contracts were binding because of a virtue of fidelity. Each type of contract had an essence a person must understand in order to consent. Certain terms followed from the essence of a contract, so that a person would be bound by these terms even if he had not considered them.

It was not clear how contract law could be explained without these concepts. For Hobbes and Locke, there were no virtues in the Aristotelian sense. Indeed, there was no ultimate standard of conduct beyond the conflicting interests of the parties. Yet, supposedly, people were obligated by a contract even when they could get away with violating it. There were no essences. Yet, supposedly, complex phenomena such as government could be understood through a simple formula, the social contract, from which a variety of consequences followed.

The explanation of Hobbes and Locke seems to have been that one could formulate definitions even in a world without essences, and from these definitions one could extract all the consequences necessary to their theory. People were bound by a contract, according

[17] Locke, *supra* n. 5, II. xxi. 42, in *Works*, i. 263. Similarly, see Hobbes, *supra* n. 5, I. vi at 30.

[18] Locke, *supra* n. 5, II. xxi. 54, in *Works*, i. 273.

[19] Ibid. 42, in *Works*, i. 262.

[20] Ibid. 52, in *Works*, i. 271.

[21] J. Locke, *Two Treatises of Government*, II. viii. 95, in *The Works of John Locke* (London, 1823), v. 394; Hobbes, *supra* n. 5, II. xvii at 119.

to Hobbes and Locke, because a contract by definition was binding. As Hobbes said, a 'mutuall transferring of Right, is that which men call CONTRACT'.[22] As Locke said, in his *Second Treatise of Government*,

Every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society, to submit to the determination of the majority and to be concluded by it; or else this original compact, whereby he with others incorporate into one society, would signifie nothing, and be no compact, if he be left free, and under no other ties, than he was before in the state of nature.[23]

The obligations of those who entered into the social contract were supposed to follow from its definition by deductive logic. Hobbes claimed to have proven that the people had a duty to obey a sovereign in almost everything.[24] In his *Second Treatise of Government*, Locke claimed to have shown that the people had a duty to obey the majority; that the majority had a right to delegate power to 'oligarchs' or to a 'monarch'; that the government must rule 'by promulgated standing laws' enforced by 'authorized known judges'; that the government could not 'destroy, enslave or designedly impoverish the subjects' or 'take from any man any part of his Property without his own consent' except by proportional taxation.[25]

Argument from a definition, however, was no longer possible in the same way as in the world of Thomas. In that world, the essence of a moral action had been defined by an end that was itself a means to man's ultimate end. For that reason, one could move from the definition to a large number of consequences. Now, definitions would have to be formulated and consequences extracted in some other way.

Locke tried to explain how one could formulate definitions in his *Essay on Human Understanding*. Definitions were 'complex ideas' which were made by combining simple ideas. The simple ideas were combined either because they were observed to 'go constantly together', or 'very arbitrarily, . . . without patterns, or reference to any real existence'. Definitions of moral ideas such as 'government' and 'contract' were not made in the first way. One did not define government to entail a social contract, because one frequently observed that people subject to governments had made social contracts. One did not define contract to entail an obligation

[22] Ibid. I. xiv at 89.

[23] Locke, *supra* n. 21, II. viii. 97, in *Works*, v. 395.

[24] Hobbes, *supra* n. 5, II. xviii at 120–8.

[25] Locke, *supra* n. 21, II. viii. 97, in *Works*, v. 395; II. ix. 132, in *Works*, v. 415; II. xi. 136, in *Works*, v. 419; II. xi. 135, in *Works*, v. 418; II. xi. 138, in *Works*, v. 421.

because one frequently observed that the persons who made contracts also happened to be bound by obligations. Therefore, definitions of moral ideas were made by combining simple ideas arbitrarily. If that were so, however, it would seem that the conclusions drawn from these definitions must be equally arbitrary. As Locke himself asked, if 'moral knowledge be placed in the contemplation of our own moral ideas' and these 'be of our own making', will there not be 'a confusion of virtues and vices, if everyone may make what ideas of them he pleases'?[26]

One answer Locke gave is that the definer is arbitrary only in choosing a name for a given combination of simple ideas. There would be

> no confusion or disorder in the things themselves, nor the reasonings about them; no more than [in mathematics] there would be a disturbance in the demonstration, or a change in the properties of figures, and their relations one to another, if a man should make a triangle with four corners, or a trapezium with four right angles: that is, in plain English, change the names of the figures, and call that by one name, which mathematicians call ordinarily by another. For, let a man make to himself the idea of a figure with three angles, whereof one is a right one, and call it, if he please, equilaterum or trapezium or anything else; the properties of, and demonstrations about that idea will be the same as if he called it a rectangular triangle.[27]

The philosopher David Hume recognized that this answer was not satisfactory. He therefore denied the very possibility of grounding moral obligations on reason. Locke's answer presupposed that simple ideas were related in some way that did not depend on the arbitrary choice of the definer. Mathematical demonstrations were possible because the definer could not 'make to himself' the idea of a plane figure with any number of right angles. Indeed, if definitions were entirely a matter of arbitrary choice, demonstrations would tell us nothing except which arbitrary choices the definer had made. For example, Locke's demonstrations would be impossible if one could define government either to require or not to require a social contract; if one could define contract either to be binding or not to be binding; if one could define the social contract either to require or not to require obedience to the majority, and so forth.

According to Hume, the 'simple ideas' composing a definition could be related in precisely four ways, none of which had anything to do with law or morals. They might be related by resemblance (like similar shapes or similar emotions); in quantity (like lines of

[26] Locke, *supra* n. 5, IV. iv. 9, in *Works*, ii. 388.
[27] Ibid.

different length); in the degree to which they possess a common quality (like shades of a colour); or by contrariety, that is, one might necessarily exclude the other. In those four cases, although the ideas are given by experience, one can speak of a relationship among them that must hold whenever they are experienced: for example that one shade of colour is redder than another, or that the hypotenuse of a right triangle is longer than its side. Moral reasoning was not demonstrative because it was not concerned with any of these four relationships:

> If you assert, that virtue and vice consist in relations susceptible of certainty and demonstration, you must confine yourself to those *four* relations, which alone admit of that degree of evidence; and in that case you will run into absurdities, from which you will never be able to extricate yourself.[28]

Perhaps glimpsing these difficulties, Locke had given another answer as well:

> complex ideas . . . depend on the mind and are made by it with great liberty, yet they are not made at random, and jumbled together without any reason at all. Though these complex ideas be not always copied from nature, yet they are always suited to the end for which abstract ideas are made.[29]

To whose 'end', however, are some definitions more suited than others? One could no longer speak of an ultimate end of man but only of the different and conflicting ends of individuals. Moreover, in Locke's world, unlike that of Aristotle or Thomas Aquinas, definitions are made not by an act of abstraction, but by grouping simple ideas together. If the simple ideas really have no relationship to each other before the definer groups them together, it is hard to see how one such arbitrary combination could be of more use than another.

Hume was willing to face the intellectual consequences. He concluded that morality could not rest on reason. 'Reason is the discovery of truth or falsehood.' Truth or falsehood depended either on 'real relations of ideas' of the four kinds just mentioned or on 'real existence and matter of fact', that is, on the relations among simple ideas that had actually been experienced. Therefore, statements about morality were statements about feelings for which no reasons could be given.[30] 'So that when you pronounce any action or character to be vicious, you mean nothing, but that from the

[28] D. Hume, *A Treatise of Human Nature* (London, 1886), bk. 3, pt. 1, sect. 1 at ii. 240.
[29] Locke, *supra* n. 5, III. v. 7, in *Works*, ii. 199.
[30] Hume, *supra* n. 28, bk. 3, pt. 1, sect. 1, at ii. 236.

constitution of your nature you have a feeling or sentiment of blame from the contemplation of it.'[31]

Hume tried to free his own discussion of contract law of a virtue of fidelity however disguised. There is no reason why a contract should be binding. The problem is to explain why people feel bound anyway. The feeling cannot be instinctive since ideas such as contract are 'infinitely complicated', and 'to define them exactly, a hundred volumes of laws, and a thousand volumes of commentators, have not been found sufficient'.[32] Therefore, this feeling must have first developed in societies so small that contracts would be kept out of self-interest alone, since, if a person violated his contract, others would immediately lose their motive for co-operating with him. When society became larger, people were already accustomed to seeing contracts kept, and so they felt displeasure at seeing them violated even when they were not the ones to suffer.[33] As Charles Fried noted, Hume's explanation gives a person no reason whatever to abide by a contract, and indeed, by showing him there is no such reason, can encourage him to break it.[34]

Nor did Hume believe that the rules contained in the 'hundred volumes of laws, and . . . thousand volumes of commentators' could be extracted from a definition of the 'infinitely complicated' idea of contract. Sometimes, one could arrive at these rules by considering the 'public interest', which Hume conceived as an aggregate of the interests of individuals. Often, one could not. Then the rules must be made arbitrarily or on the basis of psychological associations, 'fancy', and 'imagination'. 'The slightest analogies are laid hold of, in order to prevent that indifference and ambiguity, which would be the source of perpetual dissension. . . . Many of the reasonings of lawyers are of this analogical nature, and depend upon very slight connexions of the imagination.'[35] According to Hume, 'there are, no doubt, motives of public interest for most of the rules, which determine property; but still I suspect, that these rules are principally

[31] Hume, *supra* n. 28, bk. 1, pt. 1, sect. 1, at ii. 245.

[32] D. Hume, *An Enquiry Concerning the Principles of Morals*, sect. 3, pt. 2, in *Essays* (London, 1882), ii. 195.

[33] Hume, *supra* n. 28, bk. 3, pt. 2, sect. 2, at ii. 262–4, 270–2; bk. 3, pt. 2, sect. 4, at ii. 283–4; bk. 3, pt. 2, sect. 5, at ii. 284–93.

[34] C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass., 1981), 15.

[35] Hume, *supra* n. 32, sect. 3, pt. 2, in *Essays*, ii. 189–90. Thus, 'many of the reasonings of lawyers' are 'dependent on a kind of capricious analogy'. (Ibid., sect. 4, in *Essays*, ii. 201.) Hume noted the similarity between the reasoning of lawyers and that of the scholastics. The 'casuistical subtleties' of 'Jesuits' with their 'habit of scholastic refinement' and of 'metaphysical schoolm[e]n' 'may not be greater than the subtitles of lawyers, hinted at above'; but 'the former are *pernicious*, and the latter *innocent* and even *necessary*'. (Ibid., sect. 3, pt. 2, note, in *Essays*, ii. 193, n. 1.)

fix'd by the imagination, or the more frivolous properties of our thought and conception'.[36] Presumably, he held the same view of the rules of contract law.

Hobbes and Locke had claimed that by abandoning Aristotelian metaphysics and ethics one could have a new moral philosophy in which, Locke said, 'from self-evident propositions, by necessary consequences, as incontestable as those in mathematics, the measures of right and wrong might be made out'.[37] Hume exploded these claims. Reason could not measure right and wrong, moral science was impossible, and legal reasoning, even about positive law, was mostly arbitrary.

THE RESPONSE OF THE JURISTS

These philosophical developments seemed to cry out for a response by the jurists. Grotius wrote before they had taken place—indeed, just as Descartes launched the attack on Aristotle. One would have expected Pufendorf and Barbeyrac, however, either to defend Aristotle or to reject his principles and reformulate their contract doctrine along the lines suggested by Hobbes and Locke, or to succumb to scepticism as Hume was to do. Instead, Pufendorf and Barbeyrac preserved the doctrines of the late scholastics while rejecting Aristotle. They rejected Aristotle without genuinely embracing the philosophy of Hobbes or Locke or even coming to terms with the problems these philosophers were raising. Thus, although they claimed that their legal doctrines rested on higher philosophical principles, these doctrines lost their original moorings in Aristotelian philosophy without finding a new philosophical anchorage. Legal doctrine and moral philosophy began to drift apart.

Historians, however, have usually taken a quite different view of the work of Grotius, Pufendorf, and Barbeyrac. They have seen them as participants in the revolt of the philosophers. It is true that Grotius broke with the scholastic tradition of legal writing. Pufendorf and Barbeyrac imitated Grotius and saw, in the break he made with the past, the creation of a new legal science. It is misleading, however, to identify their rejection of the scholastic tradition with the new philosophers' rejection of scholastic and

[36] Hume, *supra* n. 28, bk. 3, pt. 2, sect. 3 n., at ii. 275, n. 1. 'I shall continue to explain these causes,' Hume said, 'leaving it to the reader's choice, whether he will prefer those deriv'd from publick utility, or those deriv'd from the imagination.' (Ibid.)

[37] Locke, *supra* n. 5, IV. iii. 18, in *Works*, ii. 368–9.

Aristotelian philosophy. The jurists were engaged in a different kind of revolt that had little relation to that of the philosophers.

Grotius was at home in an Aristotelian world and disinclined to question its assumptions. As scholars such as Chroust, Thieme, Feenstra, Wieacker, and Wolf have pointed out, the idea that Grotius rebelled against the scholastic philosophical tradition is a myth.[38] Historians have perpetuated this myth by characterizing his opinions in a way that makes them sound modern, or at least non-medieval, non-scholastic, or non-Aristotelian. Almost invariably, however, the opinions in question might have been held by a late scholastic or any other writer in the Aristotelian tradition.

For example, Grotius said that, because God created man with a rational and social nature, man was subject to a natural law, the first principles of which he could comprehend by an act of abstraction like that of a mathematician who abstracts figures from physical bodies. Since the natural law followed from man's nature, once God created that nature, He could no more abrogate that law than He could ordain that two times two is unequal to four. Indeed, although atheism is 'utmost wickedness', there would be natural law even if there were no God.

All of these statements, including the hypothetical one about the non-existence of God, were made by medieval authors, indeed, by authors in the Thomistic and Aristotelian tradition.[39] Yet they have been used as evidence, and usually as the only evidence, that Grotius broke with that tradition. Because Grotius believed in principles of natural law grounded in human nature and valid if there were no God, he has been called a 'stoic'.[40] For the same reason, and because he did not explain these principles in the course

[38] Chroust, 'Hugo Grotius and the Scholastic Natural Law Tradition', *The New Scholasticism*, 17 (1943), 101; Thieme, 'Qu'est ce-que nous, les juristes, devons à la seconde scolastique espagnole?' in *La seconda scolastica nella formazione del diritto privato moderno* (Florence, 16–19 October 1972), ed. P. Grossi (Milan, 1973), 9–10; Feenstra, 'L'influence de la pensée juridique de Grotius', *XVIIe Siècle*, 35 (1983), 487 at 493; K. Wieacker, *Privatrechtsgeschichte der Neuzeit under besonderer Berücksichtigung der deutschen Entwicklung*, 2nd edn. (Göttingen, 1967), 270, 291, 299; Wieacker, '*Contractus* und *Obligatio* im Naturrecht zwischen Spätscholastik und Aufklärung', in *La seconda scolastica*, *supra* n. 38, 223–5, 238; E. Wolf, *Grosse Rechtsdenker der deutschen Geistesgeschichte*, 3rd edn. (Tubingen, 1951), 256–60.

[39] On the hypothetical statement see Chroust, *supra* n. 38, pp. 114–16; M. Villey, *La Formation de la pensée juridique moderne*, 4th edn. (Paris, 1975), 346–7, 611–13.

[40] M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen*, Forschungen zur neueren Privatrechtsgeschichte, 6 (Cologne, 1959), 40; Villey, *supra* n. 39, pp. 613–16; E. Cassirer, *The Myth of the State* (New Haven, Conn., 1946), 172. Wieacker notes that, while Stoicism may have influenced Grotius, his work is 'essentially bound to the classical tradition of Aristotelian and Thomistic thought'. (Wieacker, '*Contractus*', *supra* n. 38, p. 224.)

of a treatise on moral theology, he is said to have developed a secular, non-theological theory.[41] Because he said jurists abstract in a way similar to mathematicians and denied that God could will either violations of natural law or mathematical contradictions, he has been called a 'rationalist'.[42] He has been compared to Hobbes and even Galileo because, like them, he wished to base his system on nature.[43]

Similarly, the fact that Grotius was not a Catholic (did not believe in an 'independent ecclesiastical authority') has been cited as evidence that, unlike the scholastics, he regarded reason as 'a function of the individual mind'.[44] His comparatively minor disagreements with Aristotle have been characterized as 'an open attack on the basis of Aristotelian ethics'.[45] He has been called an 'individualist' because

[41] A. P. d'Entrèves, *Natural Law: An Introduction to Legal Philosophy*, 2nd edn. (London, 1970), 54–5; C. J. Friedrich, *Inevitable Peace* (Cambridge, Mass., 1948), 120–1; R. Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979), 76; Nutkiewicz, 'Samuel Pufendorf: Obligation as the Basis of the State', *Journal of the History of Philosophy*, 21 (1983), 15 at 18; Hofmann, 'Hugo Grotius', in *Staatsdenker im 17. und 18. Jahrhundert*, ed. M. Stolleis (Frankfurt-on-Main, 1977), 51 at 74; F. Todescan, *Le radici teologiche del giusnaturalismo laico*, i. *Il problem della secolarizzazione nel pensiero giuridico di Ugo Grozio* (Milan, 1983), 96–7, 100, 106. It is, of course, important that Grotius wrote a book about law that was not also about moral theology, and one can call that development, in Wieacker's words, the emergence of 'an independent legal theory from general moral doctrine'. (Wieacker, 'Contractus', *supra* n. 38, p. 237.) The view that Grotius secularized legal theory, however, has been criticized by Wieacker himself (*Privatrechtsgeschichte*, *supra* n. 38, pp. 266, 270–1, 301) as well as by Villey (*supra* n. 39, pp. 611–13), Feenstra ('La Pensée juridique de Grotius', *supra* n. 38, p. 493), and G. Ambrosetti (*Diritto naturale cristiano Lineamenti storici* (Rome, 1964), 152.)

[42] d'Entrèves, *supra* n. 41, pp. 55–6. See Todescan, *supra* n. 41, p. 101. Similar ideas seem to underlie Krause's claim that Grotius thought an entire system of law could be grounded on reason, whereas the late scholastics believed natural law was an invisible 'Rahmenrecht' that 'only made its appearance when positive law contradicted it'. (O. W. Krause, *Naturrechtler des sechzehnten Jahrhunderts: Ihre Bedeutung für die Entwicklung eines natürlichen Privatrechts* (Frankfurt-on-Main, 1982), 147. As Wieacker has pointed out, however, Grotius was not a rationalist. He reached conclusions not by deduction from axioms but by citation of theological and humanistic authorities. (Wieacker, *Privatrechtsgeschichte*, *supra* n. 38, p. 270.) His appeal to self-evident principles was characteristic of pre-Cartesian thinkers in the Platonic and Thomistic traditions. (Ibid., 270, 291.)

[43] Cassirer, *supra* n. 40, p. 165.

[44] Friedrich, *supra* n. 41, p. 117.

[45] According to Tuck (*supra* n. 41, p. 74), 'Grotius made the non-Aristotelian character of his theory of justice clear in a more technical way in his discussion of the meaning of *ius* in Book I.' Tuck quotes *De iure belli ac pacis*, 1. i. 4–8, in which Grotius identifies a 'perfect right' or 'faculty' with Aristotle's commutative justice, and an 'imperfect right' or 'aptitude' with Aristotle's distributive justice. Grotius's point is that persons who are entitled to something as a matter of commutative justice must be given that to which they have a right. In contrast, persons who are entitled to be considered for an office, or something else they are to receive as a matter of distributive justice, merely have a right to fair consideration. Grotius also says Aristotle was wrong to define distributive justice as justice that follows a geometrical proportion since the same proportion is followed in the law of partnership. Tuck then

of theories of government he shared with the late scholastics,[46] or on the basis of no evidence at all except a supposed 'shifting of accent on these commonplaces of natural law theory'.[47] He has been called a 'voluntarist' or 'consensualist' on account of beliefs he shared with the late scholastics about natural law, the binding force of promises, and the effect of error on consent.[48]

says: 'Grotius' open attack on the basis of Aristotelian Ethics immediately aroused his Protestant contemporaries.' It is hard to see in this passage an 'open attack' on Aristotle. To prove that it antagonized Protestant Aristotelians, Tuck quotes a criticism of Grotius by Johannes Feldman. The criticism, however, was not that Grotius attacked Aristotle but that he imitated 'the ineptitudes of the scholastics' and ignored the 'Civilians'. (Ibid. 75.)

According to Augé, one can see the individualism of Grotius in his reference to man's desire for society (*appetitus societatis*), 'an idea that is Ciceronian rather than Aristotelian'. (Augé, 'Le Contrat et l'évolution du consensualisme chez Grotius', *Archives de philosophie du droit*, 13 (1968), 99 at 111.) As Grotius himself said, this idea was familiar to the Stoics. Nevertheless, it is hard to see why Grotius's use of that idea is supposed to be a sign of 'individualism'. However, as Chroust observed, it is also hard to see any break with the Aristotelian tradition. (See Chroust, *supra* n. 38, at 131–2.) Grotius used the idea to argue that man, by nature, aims not merely at his own advantage, but desires 'life in a community' and 'not any life, but one that is peaceful and organized to suit the measure of his intelligence, with persons of his own kind'. ('Prolegomena' §6.) He could have made the same point by quoting Aristotle's view that 'man is a political animal'.

[46] For example, Augé asks: 'l'idée même d'une analyse contractualiste de l Etat n'est-elle pas un critère de individualisme?' (Augé, *supra* n. 45, p. 111.) Historians of political thought, however, have traced this idea back through Grotius to the late scholastics and thence to the conciliarists of the 15th c. (See Q. Skinner, *The Foundations of Modern Political Thought* (Cambridge, 1978), ii. 135–73; Salmon, 'An Alternative Theory of Popular Resistance: Buchanan, Rossaeus, and Locke', in J. H. M. Salmon, *Renaissance and Revolt: Essays in the Intellectual and Social History of Early Modern France* (Cambridge, 1987), 136 at 136–8.) According to Salmon, since the time of the Council of Constance, 'the theorists of resistance held that political authority was created by the consent of the entire community and that, if it were exercised in a way contrary to the welfare of the community, it could be withdrawn'. 'The mainstream of resistance theory', however, 'considered the community as a self-sufficing Aristotelian entity, and lacked the individualist premises to speculate about a state of nature and a social contract prior to the contract of government.' The break with the past was made not by Grotius, but by Locke. Although Grotius 'commented upon' these ideas, 'little or nothing along the highroad from Constance to 1688 . . . suggested the sudden emergence of Locke's individualistic presuppositions'. (Ibid. 136–7.)

[47] d'Entrèves, *supra* n. 41, p. 58.

[48] Diesselhorst, *supra* n. 40, pp. 34–5, 40, 50–1, 97–9; Augé, *supra* n. 45, pp. 100–1, 104, 111–12; M. Lipp, *Die Bedeutung des Naturrechts für die Ausbildung der Allgemeinen Lehren des deutschen Privatrechts* (Berlin, 1980), 133–41. Diesselhorst (pp. 50–1), Lipp (pp. 140–1), and Augé (p. 104) point to Grotius's observation that a perfect promise is binding because the promisor alienates either a thing or a portion of his liberty. (H. Grotius, *De iure belli ac pacum libri tres* (Leiden, 1939), II. xi. 4; H. Grotius, *Inleiding* . . . (Oxford, 1926), II. i. 1. But one has to read a lot into that statement before it becomes more 'voluntarist' or 'consensualist' than those of Molina and Lessius, who said that the promisor transfers a right to the promisee to require performance. Moreover, Molina drew a similar analogy between a promise and a conveyance of property. (L. Molina, *De iustitia et iure tractatus* (Venice, 1614), disp. 262; L. Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (Paris, 1628), lib. 1, cap. 18, dub. 8. See Wieacker, *supra* n. 38, pp. 228–30.) Augé (p. 112) claims that Grotius's 'new dichotomy of promise and contract' indicates 'a more and more pronounced repudiation of the Roman rules'. Feenstra seems to agree. (Feenstra, *supra* n. 38, pp. 496–7.) As we have seen, however, Grotius's distinction between promise and contract is like that of the late scholastics between promising and the acts of liberality and commutative justice one can perform by promising. He explains the binding force of promises and the types of contracts and their obligations in much the same way as the late scholastics. And, like the late scholastics, he regarded the Roman rules as matters of Roman positive law rather than natural law.

The fact that Grotius's works have been mined so carefully for modern views with so little result is excellent evidence that he did not hold such views.

In contrast, Pufendorf and Barbeyrac borrowed ideas freely from the new philosophers. Pufendorf was sympathetic to Descartes, and, indeed, was the pupil of a Cartesian. Barbeyrac admired Locke. They both asserted their independence of Aristotle and their dislike of scholasticism. Nevertheless, the revolt against Aristotle had a different significance to them than it did to philosophers such as Descartes, Hobbes, and Locke. These philosophers disagreed with Aristotle over the most basic principles of metaphysics and ethics. Pufendorf and Barbeyrac did not present their differences with Aristotle and the scholastics as a disagreement over philosophical principles.

Their attack on Aristotle sounded more like Dryden. The problem is not so much that Aristotle was wrong but that for centuries people thought he was invariably right. Thus, Pufendorf mocked those who regarded Aristotelian philosophy as a summit beyond which the mind could not go.[49] Nevertheless, he cited Aristotle frequently and quite often with approval. Similarly, Barbeyrac's primary concern was to show that Aristotle too could make mistakes, and, indeed, had made many. He had been overly influenced by the Greek forms of government, he had treated some matters too lightly or too obscurely, had not had ideas 'bien nettes' about human equality, and, indeed, had 'expressed himself in a manner that allows one to think that some men are natural slaves'. Moreover, in permitting abortion, 'this great natural genius, this philosopher for whom so many have such a great veneration, grossly ignored and trampled under foot without scruple one of the most evident principles of natural law'.[50] Unlike contemporary philosophers, however, Barbeyrac's point was that Aristotle had often been wrong, not that his fundamental principles were wrong.

[49] S. Pufendorf, *De iure naturae et gentium libri octo* (Amsterdam, 1688), I. ii. 1.

[50] Barbeyrac on Pufendorf, 'Préface du traducteur', §24, p. lxxxviii.

Similarly, though Pufendorf and Barbeyrac detested the scholastics, they did not quarrel with them over philosophical principles. Pufendorf described them as self-interested, misguided ecclesiastics.[51] He would not cite them. Barbeyrac criticized their 'barbarous language and ridiculous subtleties'.[52] He said that Aristotelian philosophy had engendered the 'barbarity' of scholasticism, a 'patchwork', a 'confused collection without any rule or fixed principles' that had 'spread itself all over Europe'.[53] The main criticism, then, was not that the scholastics had the wrong principles. Nor could it have been that they had the wrong legal doctrines, since, as we have seen, those of Pufendorf and Barbeyrac were the same, although expressed in a language which, while possibly less barbarous, was certainly less precise.[54]

Moreover, Pufendorf and Barbeyrac were never genuinely committed to any definite set of modern philosophical principles. Pufendorf made several great philosophical departures from the Aristotelian tradition, but in each instance with enough qualifications to bring him almost back to the point from which he had departed. Like the new philosophers, Pufendorf separated the physical and moral world in a way alien to the Aristotelian tradition. He distinguished 'physical entities' from 'moral entities'. The latter exist by the 'imposition' of human or divine will.[55] Thus, moral obligation exists only through the will of a superior, a position

[51] Pufendorf, *supra* n. 49, I. iii. 4; I. iii. 5.

[52] Barbeyrac on Pufendorf, 'Préface du traducteur', §30, p. cvi.

[53] Ibid., §28, p. civ.

[54] Nevertheless, according to Nanz, Pufendorf's new philosophical principles led him to 'some of the most important elements of the modern concept of contract'. Among them are: (1) that the parties stand in a relationship of equality to each other; (2) that each party enjoys 'freedom of contract', both as to whether to enter into a contract and as to the contractual terms ('Abschluß- und Inhaltsfreiheit'); (3) that a contractual relationship is created by consent; and (4) that the parties are bound by 'the natural law command of fidelity' ('Vertragstreue'). (K. Nanz, *Die Entstehung des allgemeinen Vertragsbegriff im 16. bis 18. Jahrhundert*, Beiträge zur neueren Privatrechtsgeschichte, 9 (Munich, 1985), 151–2. As we have seen, however, for Pufendorf, as for Grotius and the late scholastics, contracts were formed by consent, were binding on account of fidelity, and required equality in their terms. Consequently, it is hard to see (1) that Pufendorf's philosophical observations about equality produced any change in contract doctrine, if, indeed, they were an innovation in philosophy: (2) that the 'Abschluß- und Inhaltsfreiheit' of his parties was any more extensive; or (3) and (4) that the consent of these parties was any more necessary or was necessary on any different principle. Again, Nanz sees an anticipation of the 19th c. in Pufendorf's conclusion that a contract arose from 'two independent consents'. Yet a similar conclusion had been drawn by many of the late scholastics.

[55] Pufendorf, *supra* n. 49, I. i. 1–4. See L. Krieger, *The Politics of Discretion: Pufendorf and the Acceptance of Natural Law* (Chicago, 1965), 57–8, 74; H. Welzel, *Die Naturrechtslehre Samuel Pufendorfs Ein Beitrag zur Ideengeschichte des 17. und 18. Jahrhunderts* (Berlin, 1958), 19–30; Wolf, *supra* n. 38, pp. 338–40.

which, Pufendorf admitted, approached that of Hobbes.[56] Nevertheless, Pufendorf explained, having created man with a certain nature, God imposes those obligations appropriate to that nature.[57] Similarly, to impose an obligation, a human authority requires not mere force, but just reasons, reasons that again depend on man's nature.[58] In the end, Pufendorf's moral law depends on a concept of human nature that bridges the moral and the physical world.

Similarly, Pufendorf gave an account of how 'sociability' develops out of more primitive human inclinations that owed a debt to Hobbes and, indeed, anticipated Hume.[59] Pufendorf's early men, however, unlike those of Hobbes and Hume, have an inclination to observe a natural law that is proportioned to their nature and conducive to their own good.[60] Instead of explaining moral law by human inclination, Pufendorf, in the end, explained human inclination by moral law.

Again, like Hobbes, Pufendorf claimed that moral reasoning must proceed by demonstrations from first principles like those of mathematics.[61] Indeed, despite the opinions of Aristotle and Grotius, he said that the moral conclusions thus derived are unchangeable rather than subject to correction in the light of new circumstances.[62] Consequently, Wieacker concluded that Pufendorf's innovation was his use of such a method. Indeed, Wieacker divided the natural law school into an early phase to which Grotius belonged and a second phase founded by Pufendorf which he calls 'systematic' or 'mathematical'.[63]

[56] Pufendorf, *supra*, n. 49, I. iv, 1; I. iv. 5.

[57] Ibid. II. iii. 5. Thus, Barbeyrac explains that Pufendorf's term 'institution' will be misunderstood if we fail to recognize that, according to Pufendorf, 'there are two kinds of institution, one purely arbitrary, and the other founded on the thing itself and a necessary consequence of what one has already freely decided'. Thus, God was free to create or not to create 'man, that is, a rational and sociable animal', but having done so He 'could only impose on him the obligations that are necessarily appropriate to the constitution of such a creature'. (Barbeyrac on Pufendorf, n. 4 to I. i. 4.)

[58] Pufendorf, *supra* n. 49, I. vi. 9; I. vi. 18. See Krieger, *supra* n. 55, pp. 85–6.

[59] Pufendorf, *supra* n. 49, II. iii. 14–15. See Welzel, *supra* n. 55, pp. 41–50; Wolf, *supra* n. 38, pp. 345–6.

[60] Pufendorf, *supra* n. 49, II. iii. 16.

[61] Ibid. I. ii. 2. Indeed, he gives moral science a rationalist programme. The proper programme of metaphysics is to 'place accurately in classes all the beginnings of which one can form an idea, and then to develop, by sound general definitions, the nature and constitution of each kind of being that belongs to these classes'. He wishes to follow a similar programme in describing 'moral entities'. (Ibid. I. i. 1.)

[62] Ibid. I. ii. 1.

[63] Wieacker, *Privatrechtsgeschichte*, *supra* n. 38, pp. 270–1, 301, 307–8. Similarly, Denzer has said that Pufendorf's goal was a closed system based on reason. (Denzer, 'Samuel Pufendorfs Naturrecht im Wissenschaftssystem seiner Zeit', in *Samuel von Pufendorf 1632–1982*, Ein rättshistoriskt symposium i Lund, 15–16 January 1982 (Lund, 1986), 17 at 19.

There is no reason, however, to take Pufendorf's statements about method any more seriously than his other borrowings from the new philosophers. He wrote a book in his youth on *Elements of Universal Jurisprudence* in which he really did try to present the natural law in a series of axioms and quasi-mathematical proofs. Nevertheless, in his main work, *De iure naturae et gentium*, he imitated the method of Grotius. He quoted classical poets, Roman law, scripture, and ancient and modern philosophers. He did not distinguish sharply between axioms and propositions that are proved from axioms. He did not dress up his arguments to make them look like mathematical proofs. Indeed, had Pufendorf not announced that he was producing a complete system of moral law based on strict deductions from principles, no one would have suspected him of attempting an innovation in method. His announcement is one more instance in which he made a bold claim inspired by contemporary philosophers and then ignored its implications.

While Pufendorf borrowed from the new philosophers, then, he defaulted on every intellectual debt he incurred. His biographer, Leonard Krieger, put the matter in a more kindly spirit:

> Pufendorf possessed, as a secondary thinker, a great comparative advantage over his mentors. He was an occasional philosopher—that is, he worked up philosophical analyses only on those occasions in which his more mundane concerns required footing—and the scope of the analysis was defined by the occasion which it served. His occasional philosophy sufficed to keep the intellectual faith of his age continuously relevant, albeit at the cost of its logical integration. What had been a rigorous system became with him a plastic set of assumptions, which were thereby rendered separable and susceptible to autonomous development subject to the more flexible limits of psychological rather than logical coherence.[64]

Similarly, although Barbeyrac believed that a great break had been made with the past, he did not think of it primarily as the rejection of an old philosophy in favour of a new one. He thought that Grotius first 'broke the ice' and raised the science of morality from the dead.[65] He praised Grotius, however, not for the discovery of new principles, but for his 'extraordinary *netteté d'esprit*, exquisite discernment, profound thought, universal erudition, prodigious reading, . . . and a sincere love of the truth'.[66] He credited Grotius with having grasped 'the true fundamental principle of the natural law'. Nevertheless, Barbeyrac did not identify this principle, and it

[64] Krieger, *supra* n. 55, p. 50.
[65] Barbeyrac on Pufendorf, 'Préface du traducteur', §28, p. civ; §29, p. civ.
[66] Ibid., §29, p. civ.

is doubtful that he had any definite discovery in mind.[67] He praised Pufendorf, who more fully 'disengaged himself from the prejudices of the School [the scholastics]'[68] and 'established and developed the fundamental maxims of natural law distinctly'.[69] Again, however, Barbeyrac did not seem to have in mind particular philosophical discoveries. When he explained why Pufendorf's work was superior to that of Grotius, he mentioned not Pufendorf's principles, but his more popular style, the 'order and disposition' of his work, and the fact that it was a 'complete system'.[70] Indeed, Barbeyrac praised Pufendorf for having 'followed the spirit and method of Grotius'.[71] When he mentioned the debt Pufendorf owed to 'the new philosophy' (that of Descartes), he spoke not of Cartesian principles, but of how this study enabled Pufendorf 'to perfect his natural talents and to render him capable of so great a work'.[72] Barbeyrac himself was attracted to Locke, but he did not think Locke's discoveries required that law be rebuilt on new foundations. If he had, he would not have devoted himself to writing translations and commentaries on Grotius and Pufendorf.

There is no doubt that Pufendorf and Barbeyrac believed they were engaged in an intellectual revolt begun by Grotius against the scholastic tradition. Oddly enough, however, it seems to have been a revolt without principle. Pufendorf and Barbeyrac were not committed to any new philosophical principles. Grotius had not broken with those of Aristotle and the scholastics.

Such a revolt is not the contradiction in terms it might appear. We have already seen examples of intellectual continuity despite a change in philosophical principle, and of great change despite continuity in principle. What matters is not only the principles but the project or task to which the principles are applied. Post-Glossators such as Bartolus and Baldus believed in Aristotelian principles unknown to the Glossators, yet little change took place. The project remained the same: to fix the meaning of each Roman legal text in the light of all the others. The late scholastics believed in the same Aristotelian principles as Bartolus and Baldus. Nevertheless, their project was different. They wished to synthesize Aristotle and Thomas with Roman law. The result was a massive intellectual change.

Grotius, Pufendorf, and Barbeyrac broke with the past by engaging in a different project from that of the late scholastics. That is why

[67] Ibid., §31, p. cx. In any case, Barbeyrac notes that Grotius made little use of this principle. He merely mentioned it in the introduction to his book. (Ibid.)
[68] Ibid., §31, pp. cx–xci.
[69] Ibid., p. cxi.
[70] Ibid., p. cx.
[71] Ibid., §30, p. cvii.
[72] Ibid., p. cvii.

they broke with the scholastics without joining the revolt of the new philosophers. Their project was to bring legal science within the domain of *belles-lettres.* Law and moral philosophy were to be the affair not of technically trained specialists, but of liberally educated, intelligent men. By making moral knowledge more accessible, they expected to raise the moral level of human conduct.

This project demanded a change in the way law books were written. Indeed, the most obvious break these jurists made with the scholastics was in their methods of presentation. Grotius invented a style of legal writing which could reach the non-specialist. Unlike the scholastics, he did not try to present every argument for or against a conclusion or to trace each concept and doctrine back to its ultimate philosophical foundation. His book was elegant and simple. It was ornamented with quotations from classical literature attractive to the educated readers of his day. It avoided technicalities. It was written so that gentlemen with no formal philosophical or legal training could understand it. This style was imitated by Pufendorf, Barbeyrac, Domat, and Pothier, and it eventually inspired the simple and elegant texts of the French Civil Code.

The jurists did not think they were engaged in a merely literary endeavour. They thought that to express the truth elegantly and simply was almost the same as to discover it. Like the scholastics themselves, they believed that true moral philosophy consisted of simple principles and clear demonstrations. They meant, however, that the meaning of principles and the force of demonstrations had to be easy to grasp, whereas the scholastics had sought simplicity and clarity in technical terminology and complicated arguments, in what Barbeyrac called 'barbarous language and ridiculous subtleties'. Thus, it was not hypocritical of these jurists to denounce the scholastics and then present scholastic conclusions as their own discoveries. They were the first to express these conclusions in a manner that was easy to grasp. Indeed, because Pufendorf and Barbeyrac identified readily intelligible arguments with clear and valid arguments, they sincerely believed that Pufendorf had, in Barbeyrac's words, 'established and developed distinctly the fundamental maxims of the natural law, and deduced from them, by a fairly exact chain of consequences, the principal duties of man and of the citizen'.[73]

By expressing moral truth simply, they hoped they would enable this truth to influence human conduct. As Grotius explained in the introduction to his book, everywhere people were disregarding the

[73] Barbeyrac on Pufendorf, 'Préface du traducteur', §31, p. cxi.

most elementary principles of justice, most of all when they went to war. The scholar's contribution to ending injustice, limited as it might be, was to place before mankind a law founded on nature and reason.

According to Pufendorf, the people's knowledge of the natural law depended on the scholar. While 'the natural law is known to all men who have the use of reason', only some were 'capable of methodically demonstrating its maxims'. Nevertheless,

> the more mediocre spirits can at least comprehend these demonstrations when they are proposed to them, and recognize the truth of them clearly by comparing them to their natural condition. Even the vulgar, who are acquainted with the law of nature from popular sources and general custom, could be sufficiently assured of its truth by the authority of their superiors . . ., by the impossibility of finding any apparent reason that can destroy or shake their certainty, and by the manifest utility which one sees in them all the time.[74]

Barbeyrac praised Pufendorf for contributing to this diffusion of knowledge. Although Grotius wrote with 'purity and exactness', with 'marvellous elegance and facility', he was 'too concise'. 'He assumes matters that demand rather great study so his work is for few beyond the savants, in contrast to that of Pufendorf which is within the reach of all.'[75] Barbeyrac intended to make the law of nature more accessible still. He intended his translation of Pufendorf for 'young men who are aiming at political and ecclesiastical careers'. These men often have 'no inkling of the most general principles of a science so universally necessary', as well as a knowledge of Latin too poor to attempt Pufendorf in the original. Barbeyrac also wished to reach, if not the 'peasant' or the 'day labourer', at least moderately educated 'common people or people without letters', for among them 'there reigns such a great ignorance' of these same principles. They would find the book comprehensible and free from 'the subtleties of the bar'.[76]

The sense of mission is also reflected in the people the new moral scientists regarded as their enemies. Rarely do they treat anyone as an enemy, even Aristotle, simply because he reached a sound moral conclusion from the wrong principles or by an invalid argument. Enemies are those who interfere with the moral education of mankind. The scholastics did so by making moral truth obscure and inaccessible. The still greater enemy, however, is the moral sceptic, the person who, as Barbeyrac describes him, doubts for the sake of

[74] Pufendorf, *supra* n. 49, II. iii. 13.
[75] Barbeyrac on Pufendorf, 'Préface du traducteur', §31, p. cx.
[76] Ibid., §32, pp. cxii–cxiii.

doubting and so calls all moral truth into question.[77] Grotius attacked him in an imaginary debate with the ancient sceptic Carneades,[78] Pufendorf in a series of skirmishes with Hobbes.

In one sense, this project succeeded. Knowledge of legal principles came to be recognized as indispensable to a liberal education. Law books and legal ideas were disseminated among multitudes of non-lawyers. Lawyers who were not philosophers were encouraged to think in terms of general legal principles rather than technical professional solutions.[79]

A special case of this dissemination of natural law doctrine will be considered in the next chapter. Anglo-American lawyers, after neglecting theory and system for centuries, began to incorporate this doctrine into the common law, drawing on the works of Grotius, Pufendorf, Barbeyrac, Domat, and Pothier. While the Anglo-Americans might have sought after more general legal principles anyway, the natural lawyers encouraged them by placing such principles within easy reach.

Offsetting the gain in accessibility, however, was a loss in philosophical depth and in rigour of argument. As we have seen, the truly fundamental philosophical problems of the age were sidestepped. Concepts and principles were stated in elegant language, but so imprecisely that often one cannot be sure of their meaning. The links between philosophical principles and the legal doctrines supposedly founded on them were left obscure.

This lack of rigour camouflaged the difficulties of preserving late scholastic legal doctrines while repudiating the Aristotelian principles on which they had been founded. Pufendorf and Barbeyrac could speak about the virtue of fidelity or about the essence, substance, or nature of a contract without considering closely what these terms could mean in the non-Aristotelian world they thought they were inhabiting.

Wolff broke with the tradition Grotius had founded. It seemed to have led to unsound principles obscurely linked to still more obscure doctrines. He tried to found a moral science in which, as Hobbes and Locke desired, doctrines could be strictly deduced from first principles by arguments as rigorous as those of mathematics. He

[77] Barbeyrac on Pufendorf, 'Préface du traducteur', §3, p. xiv.

[78] H. Grotius, *De iure belli ac pacis*, *supra* n. 48, 'Prolegomena'.

[79] On the popularity of Grotius's *De iure belli ac pacis*, see Feenstra, *supra* n. 38, pp. 493–4. On the dissemination of the works of Pufendorf and Barbeyrac, see S. Othmer, *Berlin und die Verbreitung des Naturrechts in Europa Kultur- und sozialgeschichtliche Studien zu Jean Barbeyracs Pufendorf-Übersetzungen und eine Analyse seiner Leserschaft* (Berlin, 1970); Luig, 'Zur Verbreitung des Naturrechts in Europa', *Tijdschrift voor Rechtsgeschiedenis*, 40 (1972), 539.

wrote like a mathematician in a series of numbered propositions and deductive arguments. The first principles, however, were not those of Hobbes and Locke. They were a rationalist version of Aristotle. The law of nature is 'to be demonstrated from the essence and nature of man himself'.[80] 'Virtue' is the 'habit of directing one's actions in conformity with the law of nature'.[81] One must follow the law of nature to reach 'happiness', the 'summum bonum', and 'perfection'.[82]

Yet paradoxically, as we have seen, in the writings of Wolff, late scholastic doctrines, preserved by Pufendorf and Barbeyrac, start to disappear. Indeed, as we shall see, some of his conclusions anticipate those of the nineteenth-century jurists. The reason, I believe, is that, as has often been pointed out, Wolff really did not understand the Aristotelian tradition he was attempting to modernize and revive. Consequently, he did not understand the Aristotelian doctrinal formulations that Pufendorf and Barbeyrac had preserved. Unlike them, he aimed at a rigorous system in which all doctrines were precise. Consequently, he eliminated the doctrines he did not understand. As we will see, the nineteenth-century jurists were to proceed in the same way, reformulating the doctrines of Grotius, Pufendorf, Barbeyrac, Domat, and Pothier, by eliminating Aristotelian formulations that no longer seemed meaningful. It is not surprising, then, that some of their reformulated doctrines resemble those of Wolff.

The difference is that Wolff thought that the marriage of moral philosophy and legal doctrine that had existed since the time of the late scholastics could be preserved. Jurists such as Pufendorf and Barbeyrac had allowed philosophical principle and legal doctrine to drift apart. The solution was to be a rigorous deduction of legal conclusions from a modernized version of Aristotelian principles. The difficulties are clearer in retrospect than they were at the time. After the Aristotelian tradition had been in disfavour for a century, merely understanding it required an historical effort that Wolff was not equipped to make. To defend it against the attack of the new philosophers was a task of which few, if any, were capable, and Wolff certainly was not. Indeed, by the end of the century it was clear that his doctrinal conclusions were only flimsily tied to the philosophical principles from which they were supposed to be derived.

In the nineteenth century, the marriage of philosophy and legal doctrine that Wolff had tried to preserve ended in divorce.

[80] C. Wolff, *Ius naturae modo scientifica pertractum* (Frankfurt-on-Main, 1764), 'Prolegomena', §2.

[81] Ibid. §6

[82] Ibid. [illegible]

6
THE ANGLO-AMERICAN RECEPTION

AS ONE nineteenth-century common lawyer observed, at the time of Blackstone 'the science of law in all that relates to contracts was left almost without cultivation'.[1] The first treatise on contract law was published by Powell in 1790. Before that time, as Simpson has noted, there was scarcely any common law literature on contracts beyond a few pages in Blackstone and the reports of decided cases.[2] The law of contract did not have a theory or a systematic doctrinal structure. It was organized not by definitions, doctrines, and principles, but in the common law courts by writs such as covenant and assumpsit, and in the courts of equity by a series of vaguely conceived grounds for relief.

Beginning with Powell, the treatise writers gave the law of contract a systematic doctrinal structure it had previously lacked. They did so, as we will see in this chapter, by borrowing doctrines from natural lawyers such as Grotius and Pufendorf and from jurists influenced by them such as the French jurists Domat and Pothier. The doctrines they borrowed were then borrowed in turn by common law judges. We will be concerned with the work of the judges only to the extent necessary to show its dependence on that of the treatise writers.

The treatise writers were thus borrowing doctrines which the natural lawyers themselves had taken from the late scholastics who had founded them on the philosophy of Aristotle and Thomas Aquinas. This philosophy was almost unintelligible to nineteenth-century jurists. Consequently, the treatise writers often borrowed superficially, repeating the phrases of the natural lawyers with little understanding of their original meaning. They often borrowed selectively, neglecting doctrines that seemed alien and repugnant.

As time went on, the common lawyers looked for substitutes for the phrases they borrowed but did not understand. They also bent

[1] Carey, 'A Course of Lectures on the Law of Contract: Lecture I', *The Law Times*, 4 (1845), 463 at 463.

[2] Simpson, 'Innovation in Nineteenth Century Contract Law', *Law Quarterly Review*, 91 (1975), 247 at 250–1.