IDEAS IN CONTEXT

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ROMAN LAW IN THE STATE OF NATURE

The Classical Foundations of Hugo Grotius’ Natural Law

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The influence of classical rhetoric on Grotius' method

Aristotle that human beings are a zoon hemeron phusis. But according to Aristotle, what is natural had to be observed in the things that acted according to nature, not in those that were corrupted - a further argument for limiting the source base to Greco-Roman antiquity. Aside from this, these statements provide an important indication of the intention behind the use of historical testimonies. The goal was to gain knowledge about human nature from the exempla and iudicia of antiquity. The rhetorically inspired explanation that all of Greco-Roman antiquity was decisive in this should not conceal the fact that Grotius, as we will see in the rest of this book, first and foremost used arguments - as he had already in De iure praedae - that had been developed in or adapted to a specifically Roman context.

147 Ibid.
148 This distinction between an empirical, potentially corrupted human nature and a normatively charged concept of (human) nature corresponds to the distinction drawn by Julia Annas in her work on Aristotle between "mere nature," which is "merely consistent with what matters for ethical development; it is what we must impose on, not what guides our improvement": Annas 1993, 140-158, at 144.

CHAPTER 4

Social instinct or self-preservation?

Carneades had justified his skepticism concerning justice and natural law empirically - the various laws of humankind were different everywhere, "in different Countries, according to the Diversity of their Manners," as well as "in the same Country, according to the Times." Grotius wished to counter Carneades' arguments empirically as well - though not exclusively - in order to dispute the alleged relativist evidence for skepticism, according to which no consensus could be found in the sphere of morality and law. As we have seen above, Grotius sought to do this through historical exempla and iudicia and thus force the skeptic to acknowledge natural norms. This approach, essentially owed to classical rhetoric, had in his opinion been left untried by his scholastic and late-scholastic predecessors and had thus left them vulnerable to the Carneadean argument. For Grotius, the methodological consequence of this was to prove his natural law system, according to the requirements of rhetoric, with normative statements that could be taken from classical antiquity.

Rhetorical skepticism of the Carneadean type starts with the empirically perceivable as the sphere from which proofs, or concrete exempla or iudicia, could be gleaned, and then proceeds by drawing conclusions from this. In the areas of natural law and morality, in particular, Carneades, with his speech against natural justice, was one of the people who see in moral judgments mere arbitrary acts of will that can only be perceived empirically, but have nothing natural, and therefore necessary, about them. This is why Grotius sought a persuasive rhetorical refutation of Carneades' position that took its exempla and iudicia also from this empirical sphere. For although Grotius, in Knud Haakonsen's view, was one of those thinkers who conceive "morality as inherent in the structure of the world and
conception of natural law, as Richard Cumberland and, most influentially, Jean Barbeyrac maintained, who in his history of moral philosophy credits Grotius with being the first to have emancipated ethics from scholasticism. It seems reasonably clear that what Grotius seeks to advance, first and foremost, is an epistemological point of view; being rational, human beings are in a position to discover through reason the rules of natural law, what it is that natural law requires from them. So far, this seems consistent not only with Grotius’ Stoic sources, but also with a Thomist framework. Furthermore, Grotius’ natural law is also natural due to the fact that its content makes it suitable to humans by virtue of the kind of beings they happen to be; natural law is the “Rule and Dictate of Right Reason [recta ratio], shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature ...”.

The nature in question is thus human nature, and certain objective facts about human nature provide standards for natural law. It can therefore be said that Grotius’ conception of natural law seeks to address both the epistemological question of how to identify natural law — through right reason — and doubts regarding the objectivity of the natural legal norms — through reference to natural facts which are independent of arbitrary conventions.

As we shall see in this and the following chapter, however, there is a crucial departure from the Aristotelian tradition (as well as from the earlier Greek Stoic tradition) to be found in Grotius’ work, in that the principles underlying Grotius’ natural law are not, as they are in Aristotle and the Stoas, justified by an eudaimonist account of the final human good — that is to say that Grotius’ natural law is a practical ethics couched in legal terminology that is (to deploy anachronistic language) not of a teleological, but of a deontological nature. Although the norms of natural law for Grotius do “suit” or “fit” human nature, they oblige us by their moral necessity rather than simply motivating us through reference to the final end that is eudaimonia. A further essential feature of Grotius’ naturalism lies in his rules having validity in a pre-political or extra-political state of nature. Grotius’ is thus a natural law in the sense that it holds outside of...
established policies; in the sense that we can discover it by virtue of having right reason qua human beings (recta ratio - notice the built-in normative tendency); and in the sense that we can plausibly be motivated to follow it by our antecedently given natural social instinct, our *appetitus societatis*.  

In an illuminating and characteristically fine-grained and balanced discussion, Tertence Irwin has pondered whether or not Grotius deserves to be called, with Barbeyrac, a pioneer. Drawing on Henry Sidgwick's fruitful distinction between "a more ancient view of Ethics" as an "inquiry into the nature of the Good, the intrinsically preferable and desirable, the true end of action," on the one hand, and the more modern view of ethics as "an investigation of the Right, the true rules of conduct, Duty, the Moral Law, &c." Irwin concludes that Grotius' natural law doctrine still very closely related to scholastic naturalism, albeit with some non-scholastic features. These features, in Irwin's view, are that Grotius' exposition of natural law is "not embedded in the moral and metaphysical context of Aquinas' Treatise on Law." Irwin cautions that this does not amount to a pioneering role, since Grotius holds on to a scholastic naturalism in that "he takes morality to consist in observance of what is naturally right" and in that Grotius, in his reply to Carneades' skepticism, "does not reduce justice to utility, but sticks to a Stoic and Peripatetic naturalist conception." This, according to Irwin, amounts to a rejection of what Sidgwick had called the "jural" or "quasi-jural" outlook of the "modern view of ethics" and thus refutes Barbeyrac's claim that Grotius was a pioneer. However, my sense is that Sidgwick, whose interpretation of the history of ethics is indeed very helpful in this context, would have agreed with Barbeyrac. It seems to me that Sidgwick's view of the modern, "jural" or rather "quasi-jural" conception of ethics does not imply, pace Irwin, a view of moral principles as legislated, prescriptive laws which derive their validity from their source; rather, a quasi-jural conception of moral rules is also consistent with a view of moral principles as indicative laws independent of will, deriving their validity from their content rather than their source. The distinction vis-à-vis the "non-jural," ancient Greek view lies rather in the fact that the jural conception formulates moral principles as rules rather than virtues; rules that have to be followed by virtue of their inherent (natural) rightness, not by virtue of their fulfilling human nature and being the final good for human beings. It is in this sense, then, that Grotius, albeit indeed a naturalist, seems to part company with Aquinas and Suárez - and it is these features of his doctrine which would have made it rather difficult for him to embed his exposition of natural law in a Thomist metaphysical framework. Grotius should thus indeed be seen as one of the thinkers who provoked the "great separation" between natural law and Aristotelian metaphysics.  

It is therefore important to note that the thoroughgoing rationality of the natural law norms guarantees Grotius' confidence in their content, but that the content of these norms does not tell us anything about the highest good for humans, or about the ends they should pursue - Grotius' natural law is thus stripped of its Aristotelian and Thomist metaphysical framework and may, from a systematic point of view, best be described as a proto-ideal theory, where the right is prior to the good and where the requirements of natural law do not ultimately depend on a teleological account of human nature. This might be so, I suggest, because Grotius lacks the confidence of both his immediate Stoic sources and his Aristotelian predecessors of extending rational evaluation from the sphere of justice and natural law to the sphere of ethics broadly understood, to the *sumnum bonum*. His is thus not an eudaimonist doctrine, and he seems agnostic when it comes to choices made in this regard; his natural law does not provide criteria to give content to the ultimate end or happiness, any more than it seeks to differentiate between constitutional arrangements - it is all subject to freedom of contract:  

But as there are several Ways of Living, some better than others, and every one may choose which he pleases of all those Sorts; so a People may choose what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers Opinions, but by the Extent of the Will of those who conferred it upon him.  

The necessary fit between justice and nature, then, does not intrude into the sphere of ethics understood as the discipline to do with our final or ultimate end. It only extends to rules to do with justice, narrowly understood as corrective justice, and does not aim at the sort of Aristotelian virtue education which is the true aim of Peripatetic political science. The reason for Grotius' appeal to a natural social instinct, the *appetitus societatis*  

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9 Sidgwick 1874, 93.  
10 Ibid., 2-3.  
11 Ibid., 88.  
12 Ibid., 70-75.  
13 KWP 1:384; 1BP 1:382.  
14 At least not in his natural law treatises. It may indeed be the case, as Tobias Schaffner maintains, that Grotius exhibits a more eudaimonist view in *De vera et falsa religione christiana* and in the *Mehelen*; if so, this was certainly not Grotius' most influential legacy. See Schaffner 2010, esp. 254.  
15 See Scherzer 1998, 175.  
16 *RWP* 1:561; 1BP 1:382.
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(see below), lies in his attempt to show that there is a natural motivational basis for cooperation and adherence to a pre-political set of norms in the state of nature — that is to say that it is possible for human beings to be motivated to follow the natural legal norms accessible to them through their reason. This does not mean that humans necessarily are so motivated, simply that it is not implausible, given their nature, that they can be. Conversely, it is apt to shed doubt on a Hobbesian account of motivation framed exclusively in terms of self-interest.

For Grotius, the necessity of fit between justice and nature would arise from the a priori character of the method. However, the nature with which justice, in the case of a valid proof of natural law, must necessarily be compatible was not without conditions: Grotius had already established them more concretely, so that he was no longer dealing with “nature” per se, but with the rational, social nature of humanity — an anthropology whose second part, which saw human nature as social, would hardly have been accepted by Carneades.

Carneades' significance for Grotius' anthropological justification of natural law

By offering an alternative to the anthropology presented by Carneades, Grotius attempted to refute the conventionality of all normative rules that was claimed by natural-law skeptics. For this undertaking, he had to consistently take human nature, as constituted by his anthropology, as the source of his natural law, as this differentiation of sources of law was all that permitted a distinction between universal, necessary natural law on the one hand and the conventional, contingent law of nations on the other. In order to withstand the Carneadean argument, empirical evidence of a consensus on normative rules had to be supplemented by a priori statements about human nature,77 from which a second methodological consequence emerged for Grotius: the development of a specific anthropology.

As will be shown below, Grotius gleaned this anthropology essentially from the debate with his classical sources, specifically the Roman-influenced Stoic doctrine as he encountered it in Cicero’s works.78 In De iure praediae, Grotius had already made use of an originally Stoic doctrine of natural law, adapted to Roman conditions by Cicero; and not unlike

Cicero, he used it to defend the Netherlands’ colonial expansion into Southeast Asia. This Ciceronian background — rather than a general wish to refute moral skepticism — was in fact the reason he would, twenty years later, in De iure belli ac pacis, turn Carneades into the primary adversary of a doctrine of just war based on natural law. In De iure belli ac pacis, the anthropological prerequisites for this doctrine were developed more clearly, which can be explained not least by Grotius’ improved knowledge of the classical philosophical texts and his great interest in the theoretical prerequisites of natural law.

Carneades’ arguments, as they found their way into Cicero’s De re publica, were already familiar from the sophists, especially the speech of Glaucion in the second book of Plato’s Republic. The originality and controversial character of these arguments in De re publica lay in their application to Roman world domination,79 the practice of which Carneades aligned with piracy and thus made morally as well as legally questionable. Cicero met the attack on Roman imperialism with a natural law doctrine taken from Stoic texts, which provided the urgently needed criteria for distinguishing between just and unjust wars. Cicero’s defense, which he had his Stoic protagonist C. Laelius present in the form of a reply to Carneades in De re publica, utilized the Stoic concept of universal natural law in order to lend legal legitimacy to Roman expansion. Cicero’s sequel to De re publica, the dialogue De legibus, begins at the point where Laelius’ speech in De re publica had ended, with the Stoic doctrine of natural law and justice.

This was the tradition that Grotius claimed as the basis of his natural law and his doctrine of just war. Cicero’s answer to Carneades’ critique of the Roman doctrine of just war maintained the existence of a natural law formulated along Stoic lines, and thus represented an attractive philosophical justification for Grotius’ own doctrine of natural law, which originated in the legal legitimation of Dutch expansion into Southeast Asia. Grotius countered the skeptical notion that nature drives living beings to secure their advantage and self-interest with an anthropological doctrine that held that human beings by nature crave community. Carneades had not shaped his doctrine of utility as the only natural principle as an anthropology; for him, all living things, not just humans, were driven by nature “to seek their own particular Advantage” (ad utilitates suas).80 It was no accident that Grotius therefore drew a sharp distinction between human beings and

77 Because the a posteriori derivation of natural law could never claim more than probability; see IBP 1.1.12.1.
78 Pace Schneewind 1998, 175.
79 See Ottemann 2001/02 II/1, 107.
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other living things at the head of his refutation of Carneades' arguments. He followed his repetition of the Carneadean argument with a verse by the Epicurean Horace according to which nature cannot distinguish between right and wrong (nec natura potest iusto secernere iniquum). According to Grotius, neither this verse nor the Carneadean arguments needed to be admitted, for

Man is indeed an Animal, but one of a very high Order, and that excels all the other Species of Animals much more than they differ from one another; as the many Actions proper only to Mankind sufficiently demonstrate. Now amongst the Things peculiar to Man, is his Desire of Society (appetitus societatis), that is, a certain Inclination to live with those of his own Kind, not in any Manner whatever, but peaceably, and in a Community regulated according to the best of his Understanding; which Disposition the Stoics termed Оκειοθυμία. Therefore the Saying, that every Creature is led by Nature to seek its own private Advantage [αλλα παρά δια ταυτάρατα], expressed thus universally, must not be granted. The specific difference that distinguishes humans from other beings thus consists of appetitus societatis. The reference to the primum that distinguishes humans from all other animals is crucial to the success of his defense against the arguments presented by Carneades, together with Horace, according to which law does not have sources in nature; by reducing the concept of nature relevant to justice to human nature, Grotius could recognize the validity of the Carneadean doctrine of some beings that naturally obey utilitarian principles, without giving up the idea of natural justice universally applicable to human beings. Grotius thus finds himself in a classical context, which he illustrates by identifying his appetitus societatis with Stoic οἰκειοθυμία.

The concept of appetitus societatis, which Grotius might have taken from the works of the Spanish jurist Fernando Vázquez, is found infrequently in De iure belli ac pacis. It is used most prominently in the passage cited above, where it is also introduced. It is characterized as one of many specifically human traits that testify to the fundamental difference between human beings and all other living beings. The positing of this essentially human instinct as an anthropological premise serves to refute the Carneadean claim that all animals strive only for their own advantage. A sharp distinction between people and animals is thus central to Grotius. This is also the reason why he must reject the Roman law definition of natural law, which did not distinguish between human beings and animals. Grotius gave no indication regarding the sources of Roman law to which he was referring; it is clear, however, that this must involve Ulpian's definitions of natural law and ius gentium in the Digest.

According to Grotius, there was no law common to all living things, a view that led him to reject Ulpian's definition of natural law. He thus found himself in the company of the Stoics, whose attitude towards necessities, et naturalis appetitus societatis (est enim homo secundum Philosophum animal sociabile) peperit hominum vitam societem et politiam . . . "This pace Winkil 2000, 395ff, who situates the origin of the term in classical antiquity. For the context in Vásquez' thought, see Breet 1997, 173–77. See also Vásquez 1971, 224–6, who thinks it unlikely that Adam Smith could have interpreted the term as Stoic, Grotius' example notwithstanding.

33 IBP, 7.1.7.4. In his standard work on the Stoas writes: "Grotius geht in De iure bell i ac pacis ausdrücklich von dem Gegensatz zu Kameades aus und stellt diesen der appetitus societatis cum ille qui sint societatis, quam oikeiote eis Stoic appellandam emerge ... um datum das ius naturae absoluitam". Breet 1997, 2.2.39.

34 RWP, 1.157: "But that Distinction, which we find in the Books of the Roman Laws, of immutable Right into such as is a common to Men with Beasts, which they call in a strict Sense the Law of Nature; and that which is peculiar to Men, which they often style the Law of Nations, is of so little a difference that it is easie to distinguish, although there be many things common, which are not included in the appellation of natural, allia hominum pronomium, quod saepe ius gentium nuncupatur, usum sibique habetur.

35 Ulp. Dig., 2.1.5–4: "Ius naturale is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals—land animals, sea animals, and the birds as well... so we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law. Ius gentium, the law of nations, is that which all human peoples observe. That it is not as extensive with natural law can be grasped easily, since this latter is common to all animals whereas ius gentium is common only to human beings among themselves. (Ius naturale est quod naturae omnium animalium doctrina, nam hoc fuit non humani genere proprium sed omnium animalium quia in terra quae in mari securitatem animarum commune est ... videmus eum esse humanitatem omnium, quae est via iuris urbis peritius censor. Ius gentium est, quod gentes humanae omnium. Quod a naturae recedere facile intelligere licet, quia illud omnium animalium, hoc est humanitatem inter se communem sit.) This text is often viewed as an Interpolatio; see Vonder Waerdt 1956, 489–92. For a survey of the two definitions, see Winkel 1985, 173 who assumes for the definition of ius naturale a Peripatetic and for the definition of ius gentium a Stoic background. See also Winkel 1993, where the passage from Ulpian is viewed as syncretic and contrasted with Gal. Inst. 1.1, whose definition of ius gentium is attributed to the Stoic tradition.

36 On the humanist predecessors of this argument against Ulpian, especially François Cornan, see Breet 2001, 68–69.
the relationship between people and animals he knew from Cicero’s De finibus: 59

But though they hold that there is a code of law [ius naturale] which binds humans together, the Stoics do not consider that any such code exists between humans and other animals. Chrysippus made the famous remark that all other things were created for the sake of humans and gods, but that humans and gods were created for the sake of their own community and society; and so humans can use animals for their own benefit without wrongdoing. He added that human nature is such that a kind of civil code [ius civile suo] mediates the individual and the human race; whoever abides by this code will be just, whoever breaches it unjust 30.

There is a legal community of the entire human species, while a sharp distinction is made between human beings and animals. In further explaining his appetitus societatis, Grotius slightly retracted this sharp distinction – by extending the drive for community, which he had just portrayed as specifically human, at least in part to the sphere of animals and eventually also to children. The Carneadean claim that all living beings are driven merely by their own advantage and self-interest is thus undermined even with regard to animals and children:

For even of the other Animals there are some that forget a little the Care of their own Interest [utilitates suae], in favour either of their young ones, or those of their own Kind. Which, in my Opinion, proceeds from some extrinsic intelligent Principle, because they do not shew the same Dispositions in other Matters, that are not more difficult than these. The same may be said of Infants, in whom is to be seen a Propensity to do Good to others, before they are capable of Instruction, as Plutarch well observes; and Compassion likewise discovers itself upon every Occasion in that tender Age. 31

In consideration in part for their own offspring and in part for other members of the same species, other living things besides humans could somewhat control their instincts for their own advantage. This partial leveling of the distinction between human and animal 32 could be reconciled with the quotation from John Chrysostom offered by Grotius in a comment on his identification of the appetitus societatis with Stoic oikeiosis. 33 We human beings, according to Chrysostom, have a natural oikeiosis vis-à-vis other human beings, which wild animals also possess vis-à-vis other wild animals. Grotius translated this into Latin to read that we human beings naturally have a societas with one another – something that wild animals also have. 34

Not only did the strict distinction between humans and animals seem to be eliminated with this comment, but there was also a shift in accent with regard to the identification of oikeiosis. While this Stoic concept was still promoted as a valid description of appetitus societatis, oikeiosis was translated as societas by Grotius. An appetitus societatis, or a natural oikeiosis, could be perceived in both animals and children as well as in adults, and in all cases leads to formation of society, of which they are naturally a part.

Grotius thus did not dispute the presence of a drive toward one’s own advantage (utilitatem suum stadium) on the level of animals; however, this drive was moderated by the opposing drive towards society. This must have its origin in an extrinsic intelligent principle, since no similar intelligence is visible in animals regarding other behaviors that are no more difficult. The same was also true of children, who also exhibited spontaneously altruistic tendencies. The appetitus societatis now had to be additionally distinguished as a property of human beings, as the drive in itself could also be shown in animals. Grotius undertook this distinction in the next section:

But it must be owned that a Man grown up, being capable of acting in the same Manner with respect to Things that are alike, has, besides an exquisite

59 Grotius cites the Cicero passage in the context of the origin of private property, see IBP 2.2.2.1.
60 Cic. Fin. 3.67. Sed quod modo hominibus inter hominibus turi esse vinula patuis, ut homini nihil turi esse bene vivi, prorsus eadem exipr Chrysippus, cetera nata est hominum causae. in istum enim hominem us sit ut ad utilitatem sui positis sine uiuo, quoniamque ea natura non hominum, ut eorum genere homo quae civile sui interdixerit, qui id conservaret, eum iurium, qui migraret, ius matrimonii. See Wright 1995, 99–102.
31 KPW, 1:23–4. IBP prol. 7: “Nam et caeretarum animantium quaedam utilitatem suam studiosa, partim fecundam, partim aliquam intimam, quae aliquid sequantur temporum quod in illis quiadem procedere credimus, ex principio aliqua intelligenter extrinsecus, qua circa actus alios inipsis nequidquam difficillima per intelligentiam illa non apparat. idemque de inferius dicendum, in quibus ante omnem disciplinam orientat, ad bene alias faciendum prorsus quaedam, prudentes a Plutarchio observavi sit et in ea parte misericordia sponte praeprost.”
32 See also Cic. Nat. D. 1.2:89 and Cic. Fin. 3.65: “asque eum in beatiss vi naturae perpetue posset, quadrum in finem et in educandum laborum cum corrigentibus, naturae quasque suaei vi pius audire audiret. Olot Gigon argues that Cicero’s adorning of the behavior of animals is owed to a Peripatetic revision of the text; see his commentary on De finibus in the Tusculan series (Munich, 1988), 505. Peripatetic influence is now argued in detail by Schmitz 2014. Such use of the behavior of animals can, however, according to Plut. Stoic. Rsp. 298b already be found in Chrysippus (see also Dioch. Laert. 7.83 for oikeiosis and animals) and can thus probably be attributed to Stoic orthodoxy; see Long and Sedley 1987, 532; the passage is also contained in the SVT. Schofield 1993, 395 describes Cic. Fin. 5.62–63 as a passage which appears to derive from a standard Stoic dogma.” See also Wright 1995, 174, who considers this description of the behavior of animals and children “the best approach to investigating primary instincts in what is natural.”
33 IBP prol. 6.
34 IBP prol. 6, 7:44. John Chrysostom, Rom. Hom. 51, v. 31. See Winkel 1988, 675, who takes this reference to indicate that Grotius was not particularly well acquainted with Stoicism. This might be true if we take Stoicism to include only the orthodox Stoas, not the later Stoic thought as it appears in the Roman sources.
Social instinct and Stoic oikeiosis

What Grotius called \textit{appetitus societas} in the first edition of \textit{De iure bello ac pace} in 1625, and later identified with the Stoic \textit{oikeiosis}, is essentially identical to the Stoic idea of \textit{oikeiosis} as portrayed by Cicero. Regardless of

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(\textit{oratio}) unite men “in a kind of natural fellowship” (\textit{naturalis societas}), which “most distances us from the nature of other animals,” who have “no share in reason and speech.”

Thus reason and speech are necessary conditions for \textit{iustitia}, and most strongly distinguish humans from animals\textsuperscript{41} - a thought also found in Cicero, in \textit{De legibus}.\textsuperscript{42} In Cicero’s terminology, the relationship between reason, linguistic ability, and human nature is clear; \textit{ratio et oratio} together express the Stoic \textit{logos},\textsuperscript{52} in which all human beings take part and which links all human beings in a kind of natural community. Animals are excluded from this natural community; they share with humans at most the virtue of courage (\textit{fortitudo}),\textsuperscript{54} but because they have no part in \textit{ratio et oratio}, they know no justice, the awareness of which is thus made dependent, among other things, on the ability to form concepts and general principles. This view was already common among the older Stoas. Animals were ascribed “general empirical concepts,” but they were unable to form concepts, with “the concepts of good and evil being most foreign to them.”

We have seen that Grotius used the notion of \textit{appetitus societas} as an anthropological argument against Carneades’ views. Both his own reference that the \textit{appetitus societas} was identical with the Stoics’ \textit{oikeiosis} as well as the nature of his arguments revealed the Stoic background to this concept. In the next sections, we will examine the function of the “social instinct” in his words and the relationship between this idea and \textit{oikeiosis}.

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\textsuperscript{38} \textit{RWP} I.84-85; \textit{IBP} proo. 7: “Hominis vero perfectae actatis cum circa simul similiter agere non sit, cum societas appetitus excellent, est subtilissimis rationibus inter animatras quosdam instrumentis habet similem, simili ergo facili discernendum, pati sint intellectus quoque convenit etiam nomen quem aliquid humanum societas naturae congruit.”

\textsuperscript{39} Miller 2004, 157-8; \textit{IBP} proo. 6. 11 distinguishes between “content” theories of innate ideas, where “individual instances of knowledge or belief or concepts or behaviior” are taken to be innate, and “dispositional” theories. According to Miller (165-66), Grotius is thus a “dispositional” theory, where the soul’s faculty consists in a natural tendency to form knowledge.

\textsuperscript{40} \textit{IBP} I.1.11.11: “Instinctum cum aliis animantibus communitate aut proprium hominibus non facere aliam iuris spectum.” The quotation from \textit{De officiis} was added to the editions from 1641 onward.

\textsuperscript{41} \textit{IBP} I.1.11.11.1: “In equis, in leonibus hurmuis non dicimus, in quibus Cicero de Officiis prince.”

\textsuperscript{42} \textit{Cic. Off.} 1.50: \textit{Se dixitque principiis suis communicari et societatis humanae, regendam videtur altius. Ex omnibus quod condemna in unius consensu humani societatis. Eius recte vinctum est ratio et oratio, quae etiam, idiscendam, communicandam, docendam, indicandum constat inter omnes qui homines conduntur societate, utique ab hominum animaturius a natura fuisse, in quibus lineae fortitudinem sapere dicimus, ut in equis, in leonibus, in tigibus, in ovis, utique, utique, etiam, utique, quae non dicimus; non eum ratiorem et orientem operatio.”

\textsuperscript{43} According to the “Schenk der Stoeiker” (\textit{ibid.} the Grenze zwischen Mensch und Tier scharf zu ziehen”); see for the contrast with Epicurean views, Polibius 1970 II 46, 84.

\textsuperscript{44} \textit{Cic. Leg.} I.2.2: Sine namque et omnibus animantibus, quae non societatis naturae participe rationi et cogitationi, quomodo quis societas operatur. See, on the relationship of this passage with \textit{IBP} proo. 6, Grotius in his commentary; \textit{IBP} Gronovius, \textit{IV}.

\textsuperscript{45} See Dely 1996, 90-91, 165.

\textsuperscript{46} That animals had \textit{fortitudo} was broadly accepted in classical antiquity - see, e.g., \textit{Pl. Leg.} 11.936. See on this Sorabj 1993, 10-11.

\textsuperscript{47} Polibius 1970 II.25.
whether Grotius was aware of the orthodox Stoic background of this doctrine or not, Cicero’s description must be considered the decisive influence on Grotius and the model for his doctrine of * appetitus societatis*, which served as the basis for natural law and the legality or justice of waging war in *De jure bello ac pacis*.

Scholars of the history of ideas have devoted considerable attention to the doctrine of *oikeiosis* in antiquity. The general consensus is that this doctrine originated with the Stoics, even though there is still no agreement regarding the significance and precise function of the doctrine in Stoic ethics. There is agreement, however, that there is no single conception of *oikeiosis* in the documents we have. Two main concepts of *oikeiosis*, which can be translated as “recognition and appreciation of something as belonging to one,” can be discerned. For one, *oikeiosis* is the recognition and appreciation of oneself, as part of oneself, which can be seen in every living thing and is expressed as the instinct for self-preservation. For another, *oikeiosis* is described as human recognition and appreciation of the human species as being akin to the individual human being. The historian of philosophy Gisela Striker has pointed out that these two differing views correspond to two distinct functions of *oikeiosis* in Stoic philosophy. The first is to support the Stoic concept of the final end (telos), while the second provides the justification for justice as part of the Stoic doctrine of virtue, though this latter function is to some extent dependent on the teleological use.

At first glance, Grotius’ * appetitus societatis* contains elements of both uses: the term * appetitus* encompasses the aspect of instinct from the first, teleological use, while * societas*, as the object of this instinct, refers more to *oikeiosis* in the sense of recognition and appreciation of natural human fellowship and the * societas humanae generis* than to being part of individual humans. In his influential portrayal of Grotius' system of natural law, Richard Tuck emphasized the importance of the instinct for self-preservation as the basis of this system and considered the refutation of Carneades’ Skepticism using the principle of self-preservation to be “Grotius’ most powerful and original idea.” Grotius’ supposed originality and his role as a pioneer was based on a view that had already been advocated by Jean Barbeyrac in the early eighteenth century in a historical study of the development of moral philosophy. Barbeyrac had claimed that neither in antiquity nor in the Middle Ages had arguments against Carneades or his skepticism been developed: “According to Barbeyrac, the writers of antiquity and the Middle Ages all failed to produce an adequate scientific ethics; the Stoics and Cicero... came nearest, but even they were deficient in a number of crucial aspects.” Tuck himself follows Barbeyrac’s view: not only does he see the Grotian natural law system as a humanist refutation of Academic skepticism based ultimately in the principle of self-preservation, he also agrees with Barbeyrac in viewing this refutation as a revolutionary, specifically modern argument first introduced by Grotius.

Tuck emphasizes, in my view with good reason, the humanist character of Grotius’ work. He contrasts this humanist trait however with the late scholastics of Salamancas, a contrast Grotius himself would have hardly noticed, who presented the late scholastics Covarruvias and Vázquez together with the humanists Bodin and Hotman as representatives of that category of scholars of Roman law who joined humanist scholarship with the study of law. Tuck’s claim that the humanist Grotius was the first to have reacted to humanist skepticism à la Montaigne or Charron by using Carneades as the “principal spokesman” of such skepticism stands in need of qualification as well. In 1534 Carneades had already been perceived by Theodore Beza, in a theological context, as a potential enemy of Calvinism, and the dialogue between Laelius and Philus from Cicero’s *De re publica* was subsequently referenced in the Spanish jurist Ayala’s work in an international legal context. Ayala mentioned the Carneadean debate in his * Proaepatia de jure Belli* (1582), arguing that Laelius had been utterly persuasive in his defense of justice against Carneades. The whole structure of Alverico Gentilis’s (1552–1608) polemical work *The Wars of the Romans* (1599) should be interpreted as being based on Carneades’ challenge (to which the first book corresponds), and on Laelius’ answer to it as formulated in Cicero’s *De re publica* (corresponding to the second book of *The Wars of the Romans*). The Carneadean debate, in short, was very much a topos of sixteenth-century natural-law writing.

In what follows I will argue that Grotius’ natural law refutation of Carneades should not be interpreted as a refutation of general moral skepticism based on the principle of self-preservation. Just as, on the
Cicero's two-stage description of Stoic oikeiosis

In the third book of De finibus, Cicero has the Stoic Marcus Porcius Cato explain the entire ethical system of the Stoics (vita Zenois Stoicorumque sententiae). Cato begins by explaining oikeiosis—that is, by explaining human development, beginning with birth— with the aim of showing the natural development of the human being towards the telos, as understood by the Stoics. The doctrine of oikeiosis thus served to support the Stoic doctrine of the final end (telos) and to assist in the search for what is done only for its own sake—the summum bonum. This search for the ultimate goal of human endeavor, however, required a clarification of the natural human instincts, an approach that seemed unavoidable after Epicurus and needed to refute the Epicurean telos-formula, as presented in the first book of De finibus by

methodological level, Grotius used Quintilian's rhetoric for his so-called proof of natural law, he also accepted and made use of the arguments brought by Cicero against Carneades' criticism of natural justice. The main reason Cicero's arguments for natural law resonated with Grotius is that in the fact that both Cicero and Grotius had originally developed their natural law doctrines as part of a legal and moral defense of imperialist expansion. In Cicero's De re publica—and its continuation, De legibus—Stoic natural law had served as the main argument against Carneades' criticism of Roman imperialism and the Roman doctrine of just war, not as an argument against general moral skepticism.

In De iure praedae, Grotius had already drawn upon this Ciceronian tradition to defend the military expansion of the United Provinces in East India using natural-law arguments—not to refute the skepticism of early modern moral relativists such as Michel Montaigne and Pierre Charron, as Tuck holds. Furthermore, Cicero's natural law arguments were not based on the principle of self-preservation, nor had Grotius limited these arguments to self-preservation and self-interest; rather, his arguments began with the Stoic idea of oikeiosis, which had originally been the basis for the Stoic ethics of virtue. For Cicero, and later for Grotius, this ethics of virtue was further developed in the direction of natural law, which could be formulated in terms of universal norms and rules of behavior and was no longer limited merely to descriptions of virtues. I will begin with this description of oikeiosis in Cicero, the main source from which Grotius developed his concept of appetitus societatis.

the Epicurean Lucius Manlius Torquatus. Starting from the moment of birth, Manlius had equated the summum bonum with pleasure (voluptas). Birth served as the starting point to guarantee the natural character of the drive for pleasure; living beings observed at later stages in their development might already be corrupted, and could no longer serve to exemplify the workings of nature. Cato's portrayal of the Stoic concept of oikeiosis also begins at the moment of birth:

Those whose theory I accept have the following view. Every animal, as soon as it is born (this is where one should start), develops self-love (ipsam sibi conciliari), and commits to self-preservation (commendari ad se conservandum). It favours its constitution and whatever preserves its constitution, whereas it recoils from its destruction and whatever appears to promote its destruction.

At the moment of birth, he argues, every living thing is familiarized with and commended to itself. This serves the purpose of self-preservation. To the older Sto, the instinct for self-preservation was an expression of the self-love inherent in every living thing, which goes hand in hand, from birth on, with joint perception (sunaitheia) of the self. From this self-awareness arises the first impulse (horme), that is, the first movement of the soul (prote pachis kinesis) towards an object, in this case towards one's own being, which is perceived as part of itself (oikeion). This orientation towards one's own being is oikeiosis. Cicero translated the Stoic oikeiasthai as conciliari and commendari, and correspondingly used the nouns conciliatio and commendatio in presenting oikeiosis. As opposed to the Epicureans, the Stoics believed the instinct for self-preservation was expressed in newborns, before pleasure (voluptas) even affected them, so that pleasure can no longer be considered the first object of natural impulse. In De finibus,
Cicero had the Stoic Cato illustrate this argument using the example of a newborn.65

In the Stoics’ view, then, the object to which the first impulse resulting from self-love is addressed is not pleasure but the preservation of one’s health, one’s body, and, in addition, one’s perceptive and cognitive faculties. These are the objects that living things pursue by nature. In regard to human beings, however, these things are not merely objects that are in accordance with nature (ta kate phusin). They are the primary objects in accordance with nature (ta prota kate phusin) – the principia naturales that are the first to be striven for (re, quae primae appetuntur). Grotius was well aware of this Stoic distinction between primary and secondary objects of impulse66 – a distinction that, once again, served to distinguish animals and children, on the one hand, from older human beings on the other. This distinction made it possible to differently characterize the natural objects pursued by more mature people.67 Cato the Stoic had undertaken to demonstrate that virtue alone was the summum bonum and that, therefore, the wise man needed to select from among the things that were in accordance with nature. It was therefore necessary for him to show plausibly that a shift from the first stage, the prota kate phusin, aimed at self-preservation, to the second stage, the true Stoic telos of the morally right (bonestum), was possible. In this process, as Striker rightly comments, a change takes place: consideration of a “normal development” towards use of increasingly rational capacities (in line with the increasing development of speech) gives way to consideration of moral development.68

After the section of De finibus described above, Cato goes on to describe the process by which the object of oikeiosis shifts from the primary natural things, and from self-preservation, to the Stoic ultimate end. Formally, based on the criteria established by Aristotelian ethics69 and in accordance with the other Hellenistic schools, the Stoic tradition understood the ultimate end to be that which is done for its own sake, and for which everything else is done.68 When it came to the content of the term, however, the Stoics understood telos to be “life in accordance with nature.”70 It was this life in accordance with nature that was the sole object of oikeiosis in Stoic ethics, as opposed to the other schools of philosophy. In the development described in De finibus, Gisela Striker sees the explanation of why this shift from self-preservation to a life in accordance with nature, as the exclusive object of oikeiosis, can be regarded as plausible: “What seems to be needed is an argument to show that man’s interest should at a certain point in life shift from self-preservation or even self-perfection to an exclusive interest in observing and following nature.”70

Cato’s argument can be outlined as follows: The initial human oikeiosis (conclusio) is directed towards things that are in accordance with nature (ea, quae sunt secundum naturam). However, as soon as human beings gain insight and understanding (emonia, notio) and are able to recognize the order and harmony of things and actions, they give clear preference to harmony (concordia). By applying their perception and reason (ratio), they ultimately realize that this harmony – because it is the Stoic homologia (translated by Cicero as conveniencia) – is in fact the supreme human good (summum bonum), to be praised and sought for its own sake. It is in the Stoic homologia that this good (bonum) – virtue (honestum) itself, the only component of good to which everything else must be related – is to be found. Although virtue does not develop until a later stage, it is the only quality worth pursuing for its own sake. The primary things in accordance with nature (qua sunt prima naturae) are not part of the supreme human good.71

Here we see Cato providing an explanation of the way in which the object of oikeiosis shifts, through the use of reason, from the first stage, self-preservation, to the second stage, virtue. Scholars differ on whether this paraphrased passage represents an argument in favor of the Stoic thesis that life in accordance with nature is the summum bonum for humankind, or whether the text merely attempts to make plausible the shift in the object of oikeiosis during the course of human development.72 It is clear,

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65 Cic. Fin. 1.46-17; de finibus probavit, quod autem quae velatam aut deorum appetitis, nullius appetentis
poros apertim oppidaneo contrariis, quod non fuit, nis solum, solum aliquem, interius interius, solum
nisi autem non potui ut appeterem aliud, nisi sensum have ren seque se aliquid, ut quae intelligi
debet principium ducere ex se ducere, in principiis autem naturalibus plerique Stoici nos poterunt
velabantur esse potestis.

66 See below, 103-7.

67 See SVF 1.140-46; 381, on things in accordance with nature. According to Polheim 1970, 2.66, Zeno
created the term in prokata phusin as an addition to the existing doctrine on things kata phusin.
See also Polheim 1940, 13.


70 Cic. Fin. 1.21.

71 See Engberg-Pedersen 1990, 81-97; for the view that Cicero’s De finibus 3.42 represents an argument
in favour of the Stoic idea. Engberg-Pedersen discusses the arguments of Striker 1981, 289-93, where
she maintains that in Fin. 3.42 Cicero simply assumes that Eth in accordance with nature is the

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however, that the Stoic notion of oikeiosis – as presented to us in the third book of Cicero’s De finibus – has been extended beyond the idea of self-preservation to encompass what is just or morally right, and moreover, that this extension is somehow attributable to ratio. Grotius adopted this model of a two-stage oikeiosis from Cicero.

yardstick for human action. However, even Striker admits that the "vague phrase" o cognitione et ratione collatis is a slight indication – at least – that there may be an argument here.

7) See Wright 1995, 176-77.

CHAPTER 5

Justice for the state of nature
From Aristotle to the Corpus juris

If the socialitas of human nature... is Pufendorf’s first principle, then he ought to know first of all that it is not the fruit of his own talent, but that Cicero in his De officiis and others... sought to extract all the precepts of law and duty from this source.1

Grotius’ use of Cicero and the move away from self-preservation

Referring explicitly to the third book of Cicero’s De finibus2 and its Stoic sources, Grotius adopted the idea of a transition from the self-preservation impulse – as the first object of oikeiosis – to virtue and the morally right (honestum) as the superior good, preferable to mere self-preservation. He did so, however, in a context more similar to Cicero’s De re publica or De officiis3 – specifically at the start of the second chapter of the second book of De iure beli et pacis, which sought to demonstrate that war did not in itself contradict natural law. One might say that Grotius sought to prove the natural-law nature of certain wars, with the help of a more detailed understanding of the Stoic bases of natural law than Cicero himself; the latter, in his attempts to portray wars as just, clung to a version of fateful law dressed up as Stoic natural law, without more closely investigating oikeiosis as the basis of this natural law.4 The doctrine of oikeiosis was portrayed by Cicero as part of his account of Stoic ethics, while Grotius consulted it and used it to justify his natural-law doctrine of just war:

Cicero learnedly proves, both in the third Book of De finibus, and in other Places, from the Writings of the Stoics, that there are two Sorts of natural


2 Cic. Fin. 3.21. On Cicero’s theory see also Wright 1995.

3 Which may account for Zarlu’s confusion between De finibus and De officiis in Zarlu 1999:2000, 38.

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Principles; some that go before, and are called by the Grecians τὸ πρῶτον κατὰ φύσιν, The first Impressions of Nature [prima naturae]; and others that come after, but ought to be the Rule of our Actions, preferably to the former. After discussing Caton’s explanation in De finibus, which begins with birth, the doctrine of oikeiosis, and the primary things in accordance with nature, Grotius turns to the role of bonestum, using the Stoic’s two-stage oikeiosis model familiar to him from Cicero. Ratio is given an important role, but one that differs slightly from the corresponding passage in De finibus, making evident the use Grotius made also of Cicero’s De legibus.

After that follows, (according to the same Author) the Knowledge of the Conformity of Things with Reason [convenientia rerum cum ipa ratione], which is a Faculty more excellent than the Body; and this Conformity, in which virtue [bonestum] consists, ought (says he [Cicero]) to be preferred to those Things, which mere natural Desire at first prompts us to; because, tho’ the first Impressions of Nature [prima naturae] recommend us to Right Reason [recta ratio]; yet Right Reason should still be dearer to us than that natural Instinct. Since those Things are undoubtedly true, and easily allowed by Men of solid Judgment, without any farther Demonstration, we must then, in examining the Law of Nature, first consider whether the Point in Question be conformable to the first Impressions of Nature, and afterwards, whether it agrees with the other natural Principle, which, tho’ posterior, is more excellent, and ought not only to be embraced when it presents itself, but also by all Means to be sought after.

Grotius’ use of Cicero and the move away from self-preservation

This presentation is obviously based on the explanation paraphrased above, which Caton provided in the third book of De finibus (3.21) to explain the shift in the object of oikeiosis away from the primary things in accordance with nature and from self-preservation and towards the Stoic telos, and which also saw the use of reason as the crucial element. Grotius clearly took this passage as his source when justifying the hierarchical relationship between self-preservation and the superior quality of bonestum. The latter was a product of human reason and the insight derived through the use of this faculty. However, in the quoted passage Grotius differed from Caton in applying the two stages of the Stoic doctrine of oikeiosis to his discussion of natural law. By contrast, Cicero’s Caton did not discuss bona naturae since, although he maintained that there was a link between virtue (bonestum) and the Stoic summum bonum, he was unable to show that virtue fulfilled the criteria required for the Stoic summum bonum. In other words, he could not demonstrate that virtue and virtuous conduct corresponded to human nature or were demanded by it. An additional, connected difference between this and the cited passage from Grotius’ work consists in the different function of ratio suggested above. While in De finibus the purpose of reason was to recognize the summum bonum and to identify it with life in accordance with nature, Grotius, in the passage cited, had already integrated the metaphysical aspects of of the Stoic concept of reason, passed down mainly in Cicero’s De legibus. This allowed him to create a link between bonestum and justice, on the one hand, and human nature, on the other, via recta ratio.

Virtue (bonestum) is seen when things comply (convenientia) with reason, which is superior to the body, said Grotius; and this compliance should be valued more highly than those things to which instinct draws people (by which he means the instinct of self-preservation). The primary things in accordance with nature (prima naturae) are leading us toward right reason (recta ratio), which in turn becomes more valuable to us than the primary
conventionally as good or bad, but do not correspond to the Stoic concept of good, which was reduced to moral goodness. They are thus irrelevant in regard to the Stoic _sumnum bonum_, which can only be found in virtue. Nevertheless, Stoic orthodoxy had developed criteria that would make it possible to give some of these indifferent things preference over others, without abandoning the basic position that these preferable indifferent things (adiaphora proregmenta) could not in any way be constitutive of the good. In contrast to the good, which had the specific characteristic of being necessarily advantageous, the indifferent things are neither beneficial nor harmful; however, they are more or less natural, and can therefore—based on the merit ascribed to natural things—be described as preferable by nature (thus, for example, health is preferable to sickness by nature, in the interests of the instinct for self-preservation). This merit is dependent, however, on circumstance, in contrast to the absolute merit specific to virtue (thus it can be correct, for the sake of the good, to risk the objective, natural merit of health in certain situations).

Grotius did not adopt the orthodox Stoic description of the morally right and just (bonestum) as the only good. He gives up on the fundamental distinction between virtue as the only good, on the one hand, and preferable indifferent things on the other. However, he does not seem to sacrifice the Stoic hierarchy between bonestum and preferable indifferent things to which the _prima naturae_ and the instinct for self-preservation belong. This gives rise to a puzzle: justice, no longer understood as a virtue but expressed through rules, overrules self-preservation and the "first things according to nature." At the same time, justice itself for Grotius consists crucially in respect for property rights, making what the Greek Stoics would have labeled a preferable indifferent, private property, into the primary criterion of justice. This puts him squarely into a tradition beginning with Cicero and leading through Locke and some of the proponents of the Scottish Enlightenment to Robert Nozick's "entitlement theory" of justice, but it sits rather uncomfortably with the Greek Stoics' concern with virtue as the sole and sufficient guarantee for happiness.

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15 Such as self-preservation, health, or wealth; see LS 158A.
16 See Minas 1999, 171, who describes a concept of subjective right already to the orthodox Stoics, not with regard to indifferent objects: "Thus, any defense of rights attached to such things as health, life, or wealth is similarly liable to come to naught..."
17 According to Plutarch, Chrysippus had to concede that the preferred indifferent objects were identical with those things conventionally called "good"; see Plut. _Stoic. Rep._ 1056A (= LS 158E). See on this Aristo's position, which amounted to criticism within Stoicism, denying any differentiation between preferred and non-preferred things; see LS 158E.
18 Long 1997, 24–25 ascribes the moral defense of private property implausibly already to the Greek Stoic Chrysippus. In contrast, see Minas 1999, 171–72. See also below, 175–88.
Justice for the state of nature

Neither Cicero nor Grotius could avoid granting the *adiaphora* a prominent status; both, after all, crucially defined justice by way of private property. Private property rights assume thus a fundamental status in both Cicero's and Grotius' conception of justice. They are the most prominent among the rights "strict justice" obligates us to refrain from violating. This view, however, leads Grotius much closer to Cicero's outlook than to the view of any of the earlier Greek Stoics. Looking forward, both the rule-based character of justice as well as the role of property as its fundamental criterion had an important impact on the Scottish Enlightenment. Notwithstanding the artificial rather than natural character of justice in Hume's account, there are many parallels even here, and there is every reason to assume a certain similarity between, on the one hand, Hume's artificial notion of justice and respect of property, the rules of which may according to him nonetheless be called "laws of nature," and the intermediate character of private property in Grotius' doctrine on the other, where property is not private by nature, but still pre-political and protected by natural law.

In orthodox Stoic ethics, the state was the only person capable of arriving at the ultimate end, the *telos*, and achieving happiness (*eudaimonia*) in harmony with nature. He was the only person capable of living a virtuous life and attaining the ultimate end by acting in a morally correct fashion. Unlike the normal human being — the *insipient* — the Stoic *sapiens* was capable of carrying out *appropriate actions* (*kathokonta*) — in other words, actions that could be justified through reason, and aimed at achieving the preferable indifferent things, such as self-preservation. Moreover, the Stoic wise man performed *perfectly appropriate actions* (*kathokonta*) because they pursued the good, were morally right, and were based not merely on reason (*ratiocinio*), as are the appropriate actions of other human beings, but on "right reason," *recta ratio* (*orto logos*), which the wise man shared with the gods. In early Stoic philosophy, this *recta ratio* of the wise man was considered identical to natural law, which dictated perfectly appropriate or right actions (*kathokonta*). The wise man, *per definitionem*, was the only human capable of these. In the early Stoic political philosophy of Zeno this resulted in an ideal society consisting solely of *sapiens* and gods.

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52 See Beery 1997, 129-31. 53 *THN* 1.141. 55 See below, 173-88. 56 Minn 1994, 492-43-34. The view that, under the early Stoa, natural law prescribes *kathokonta* alone. This view is put forward by Vander Waerdt 1993, 485-46. However, Minn does admit that "only the wise man completely understands nature's injunctions and... can interpret the laws and act as a lawyerer. His reason and nature's law are isomorphic" (Minn 1994, 493-346).

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32 See below, 173-88. 35 See Minn 1994, 494-43. 36 Minn 1994, 494-49. 38 Note that the rule-based character of justice as well as the role of property as its fundamental criterion had an important impact on the Scottish Enlightenment. Notwithstanding the artificial rather than natural character of justice in Hume's account, there are many parallels even here, and there is every reason to assume a certain similarity between, on the one hand, Hume's artificial notion of justice and respect of property, the rules of which may according to him nonetheless be called "laws of nature," and the intermediate character of private property in Grotius' doctrine on the other, where property is not private by nature, but still pre-political and protected by natural law.

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52 Only one or two examples of a *sapiens* can be cited according to the Stoics: Alexander von Aegina, *De fato* 1993 4-11. 53 See the convincing argument presented in Vander Waerdt 1993. Plutarch describes Zeno's utopian society as a philosophical dream: *De Alexander magnis fortuna ad virtutem* 550-5 (set 45 1.67). 54 Paul Vander Waerdt identifies a transformation of this kind and sees — mainly based on Cic. Leg. 3.4-9.14 — *Digenes of Babylon* as the critical figure who codified the political philosophy of the early Stoics, adapting it to the rival Academic and Peripatetic political philosophies: see Vander Waerdt 1993, 203-10. However, Schofield 1991, 93-103, does not regard Zeno's "republicanism" as a theory of natural law, maintaining that Chrysippus was the first thinker to produce a theory of natural law by extending Zeno's society of sages to encompass a society of rational living beings. This view equates natural law with normative reason: see Schofield 1991, 67-74. These discussions do not touch on the question of what the actual substantive provisions of natural law might be. 55 See, on the differentiation of ethical systems based on virtue, on the one hand and rules on the other, the lucid explication by Toguri 1993, 1-42, 226-38. 56 See also the Roman examples of *kathokonta* kata peristasis in time of war in Cic. Off. 3.54-40. Academic and Peripatetic philosophical influence might also have played a role; see Vander Waerdt 1993, 204-1.
of competing rules — represents a clear barrier in the Stoic sense against actions that pursue merely the *prima nature*. The crucial break with the older Stoic, however, consists in the fact that, for both Cicero and Grotius, virtue is defined through certain preferable indifferent things — specifically through property. This makes it possible to give considerable moral and natural-law weight to primary things in accordance with nature, such as one’s own life and private property, and to interpret the Stoic *honestum* as a prohibition against the violation of the property rights of others. This is about as far removed from Stoic eudaimonist ethics as can be. However, this does not turn self-preservation into Grotius’ basic criterion of justice — not violating other people’s rights is the basic criterion.

A legalized ethics of rules and rights

Grotius’ treatment of justice and the instinct for self-preservation as criteria in *examinando iure naturae* is indeed strongly influenced by Cicero. A key example of this, and of the importance of the just or morally right (*honestum*) in this process, is his discussion of the extent to which war is in accordance with natural law at the beginning of the second chapter of the first book in *De iure bellii ac pactis*. The following analysis of this passage should clarify the exact relationship between *prima naturae* and *honestum* in Grotius’ thinking and thus help resolve the question of the precise status of the instinct for self-preservation in his theory of natural law.

When discussing the basic legality, or justice, of waging war — *an beliare unquam iustum sit*, an issue of fundamental importance for all his works — Grotius substantiates his argument by stating that war does not fundamentally contradict natural law. The first relevant criteria in a closer examination of this relationship are the primary things in accordance with nature. Grotius then takes an additional step, discussing the question of whether war contradicts the natural primary things (*prima naturae*), and concludes, on the evidence of poets and philosophers — Ovid, Horace,

37 Vander Waerde, for instance, notes a reorientation in the Stoic doctrine of natural law. He argues that the early Stoic did not believe that natural law or the sage’s *recta ratio* constituted any universal normative rules with substantive content, but rather dispositions relating to the intentions of the wise man. It was not until the time of the late Stoa that natural law consisted of general abstract norms established on the model of legal rules and furnished with substantive content. Natural law, he writes, is "constituted by the sage's rational dispositions, not by a code of rules or legislation." For this reason it is "less normative than the normative law": Vander Waerde 1994b, 287. Cf. also Vander Waerde 1994a, 484-45. This view is opposed by Philip Minis, in particular, who postulates universal rules following the model of legal norms even in the natural law ideas of the early Stoa. Based on the beginning of *Chrysipput* Petr Nistam, as passed down to us by the jurist Marcianus (*Inst.* 1: L 69 8), Minis 2003, 42, argues that "Chrysipput does not claim that natural law prescribes to animals whose nature is political how and how not they should perform activities or what sorts of inner attitudes. He maintains that natural law prescribes what they should and should not do." Cf. also Minis 1994, 485-45. Although Minis’ argument is convincing, it should be noted that we do not have any early Stoic sources corroborating the substantive content of these natural law norms; for this reason the precise content of Chrysipput’s norms will remain unclear. Not until the time of Cicero do we find statements relating to the content of natural law norms (for example, from Diogenes of Babylon, whose statements have been passed on by Cic., Off. 3:51-57). Vander Waerde 1994a, 485, appears to connect the Stoic origins and the natural law character of these statements (as well as the moral norms discussed by Seneca in Epistulae 94-95) when he states that "no Stoic account of the precepts of natural law has survived."

38 Contrary to Minis 1999. 39 Cic. Off. 2:21; IPC 3, vol. 7. 40 See Tuck 1987, 111-13, who, not paying sufficient attention to the Stoic background, overlooks the role of the *honestum*. 41 See Breusig 1990 on the status of the *insidiae* in Grotius’ work in general. 42 See Brooke 2001, 51; in Grotius’ use of Cicero ‘there is no claim that acting in accordance with practical reason is something to be done for its own sake, let alone a claim that this is the highest good, or the only good.” Cf. Schnebel 1958, 175. 43 Adam Smith, drawing out the consequences of this outlook, was to refer to justice as a ‘negative virtue’ because it ‘only hinders us from hurting our neighbour’. The man who thus abstains from violating his neighbour’s ‘tulsi. . . all the rules of that is peculiarly called justice.’ Smith concludes: ‘We may often find all the rules of justice by simply doing and doing nothing.” TMS 2:2, 2, 82.
Justice for the state of nature

Lucretius, Xenophon, Galen, and Aristotle — that, rather than contradicting war, the *prima naturae* actually support it:

Among the first impressions of Nature [*prima naturae*] there is nothing repugnant to War; nay, all Things rather favour it: For both the End of War (*being the Preservation of Life* [*conservatio vitae*] or Limbs, and either the securing or getting [*acquisitio*] of Things useful to Life) is very agreeable to those first Motions of Nature; and to make use of Force, in case of Necessity, is in no wise disagreeable thereunto; since Nature has given to every Animal Strength to defend and help itself. *All Sorts of Animals*, says Xenophon, *understand some Way of Fighting*, which they learn so where but from Nature.  

From this text it is clear that, like the Stoics, Grotius identifies the primary natural things with the instinct for self-preservation. According to Grotius, both the purpose of war — the preservation of life and limb — and the retention or acquisition of things useful for life are completely in accordance with the primary natural things. The need to use force did not run counter to the primary natural things, since this is the reason that all living beings had been endowed with sufficient physical strength to defend and help themselves. Clearly Grotius includes war among the Stoic "appropriate actions" (*kathekonta*) that pursue things in accordance with nature, such as health (for Grotius the *vitae membrorumque conservatio*), or, ranking somewhat lower, property (for Grotius the *rerum ad vitam utilium aut retentio aut acquisitio*). Although irrelevant with respect to the good, they are still preferable to other indifferent things (*progenhesi adiaphora*) and thus constitute "preferable indifferent*"s for the Stoics.

The inclusion of war among appropriate actions in the Stoic sense (*kathekonta*) is also supported by the authorities cited by Grotius. In his quotation from Xenophon's *Cyropaedia*, as in the quotations from Ovid, Horace, Lucretius, Galen, and Aristotle, human beings are compared to animals and equated with them when it comes to warlike actions. Since war pursues self-preservation and thus the *prima naturae of oikeioton* — in other words, objects that all living beings strive for by nature — it belongs

in the category of actions not only in accordance with the nature of human beings, but indeed of all living things: *cum animantibus singulis vires sint a natura attributae*. Grotius' idea of war as an action not limited merely to human beings, and in accordance with the nature of the living thing carrying out the action, corresponds perfectly to the criteria for the Stoic *kathekon*.  

Nevertheless, as a Stoic *kathekon*, war for Grotius does not contradict natural law; however, it does not contradict natural law because it does not belong to natural law in its proper sense. With respect to war as *kathekon*, Grotius states that certain things "not properly, but by way of Reduction" (*non proprium, sed reductio*) are said to belong to natural law merely because there is no contradiction between them and natural law.  

However, the only actions that are truly in accordance with natural law are those that correspond to the *bonestum*, which means, in turn, that they must be prohibited or prescribed by *recta ratio*. Initially, war as a *kathekon*, as a means of self-preservation, is irrelevant with respect to the *bonestum*, since *recta ratio*, in other words natural law in its real sense, says nothing about *adiaphora*, to which self-preservation undoubtedly belongs. This also corresponds precisely to the Stoic doctrine of the category of appropriate actions (*kathekonta*), which, if we consider the actions carried out only by human beings, includes those actions that, as perfectly appropriate or right actions (*kathorismata*), constitute a special class of *kathekonta*. These are morally right actions associated with virtue (*bonestum*), which can be performed only by the Stoic sage.

It is noteworthy that, in his analysis of war's compatibility with natural law, Grotius insists on the strict Stoic distinction between actions that are relevant with respect to virtue (*bonestum*) and thus with respect to natural law in its true sense, on the one hand, and morally irrelevant actions on the other. As regards natural law in its true sense, Grotius regards war quite simply to be irrelevant, to the extent that it pursues self-preservation, which is indifferent. This is evident in the following description of virtue and the relationship between the *bonestum* and natural law that results from this notion of virtue:

43 *RWP*, 1.182–83; *IBP* 1.2.1.4: "Inte prima naturae nihil est quod bello repugnat, iuxta omnia potius et factionem et quidam bellum, vita membrorumque conservatio et rerum ad vitam utilium aut retentio aut acquisitio illius principis naturae maxime consentit, et idae rem si opus sit ubi, nihil habet a prima naturae dissentientem, cum animantibus singulis teneat ideam situ: a natura attributae, ut ubi mendis insonantibus sufficiunt. Xenoph: omnia animantium generis pugnam nomen aliquum, quam non absinde quam natura dicere do: the reference to Xenophon was added to the edition from 1659 onward.

44 *Dél*. Lett. 7.10.1ff., *praelegmena adiaphora*.

45 *RWP*, 1.155; *IBP* 1.1.30.3: "Ad illius autem naturalis intellectum, normandum est, quasdem eius illius non proprii, sed usque in seque loquitur, reductivis, quibus illius naturae non repugnauit, sicu illius modo diximus appellati ea quae inuidiatae sunt." Actions in accordance with the merely conventional *ius gentium* would fit this characterization.

46 *IBP* 1.1.30.1.
This last Principle, which we call virtue (honestum), according to the Nature of the Things upon which it turns, sometimes consists (as I may say) in an indivisible Point; so that the least Deviation from it is a Vice. And sometimes it has a large Extent (spatium); so that if one follows it, he does something commendable, and yet, without being guilty of any Crime, he may not follow it, or may even act quite otherwise. Just as in contradictory Things, one passes immediately from one Extreme to the other; a Thing either is or is not, there is no Medium: But between Things that are opposed after another Manner, as between Black and White, there is a Medium, which either Partakes of both Extremes, or is equally removed from both. The last Sort of virtue is most commonly the Subject of Laws both Divine and Human, which by prescribing Things relating thereto, render them obligatory, whereas before they were only commendable. But the Matter in Question is concerning the first Sort of honestum. For, as we have said above, when we enquire into what belongs to the Law of Nature, we would know whether such or such a Thing may be done without Injustice; and by unjust we mean that which has a necessary Repugnance to a reasonable and sociable Nature (natura rationalis ac socialis).

Grotius presented various concepts of virtue (honestum). In some places, he argued that it consisted of a single point, as it were, with even the slightest deviation from this point resulting in wrong (vitium). In other places its scope was less restricted, and an action might be carried out in a praiseworthy manner, omitted without being unpraiseworthy, or carried out in some other manner. The rule of law subject to the will concerned itself with this second notion of virtue—honestum with its unlimited scope. This applies both to human laws and to laws imposed by God, which provided legal sanction for actions regarded as praiseworthy or virtuous in the second sense. Yet natural law, in its true sense, relates to the first, more narrow conception of virtue—in other words, honestum in the sense of a single "point," where there is no transition between virtue and wrong, as in the case of Stoic honestum.

With regard to war, this means that, if war is to correspond to the narrower conception of honestum and thus to natural law in its narrower sense, it must also, in a second step, meet the criteria of recta ratio. War that is compatible with natural law in this narrower sense cannot be an appropriate action (kathékon) alone, but must be based on one of the just causes of war, as presented by Grotius in the second book of De iure belii ac pacis. Only wars waged for just causes accord with natural law in the narrow sense and may qualify as kathóthumata; mere self-preservation is not sufficient.

Although Grotius superficially maintained the Stoic distinction between merely appropriate actions and the morally correct actions of the orthodox Stoic wise men, he ultimately undermined the substance of this distinction, as all his causes of just war (both in De iure praecedae and in De iure belii) are based on the protection of the primary natural things, such as life and property. This is the price paid by Grotius for abandoning an ethics of virtue for an ethics of rules, as Cicero had done before him; because of this, he was forced to name the norms that regulate behavior and could not fall back on describing the dispositions to act in a virtuous way (the dispositions exhibited by Stoic sages). The universalization of natural law and the formulation of natural-law rules had already led Cicero to emphasize the prima naturae, such as property. Grotius, like his Roman predecessor influenced by the norms of Roman law, built upon this Roman tradition.

Grotius took his concept of the social instinct from Cicero's description of the Stoic doctrine of oikeiosis in the philosophical works De legibus, De finibus, and De officiis. Grotius, it is true, rendered this doctrine by using the concept of the appetitus societatis and avoiding Cicero's translation conciliatio, and he did not identify the appetitus societatis with the technical Stoic concept of oikeiosis until the 1631 edition of De iure belii. However, there can be no doubt of the Ciceronian origins of the concept. For Grotius, as for Cicero, oikeiosis served to provide an anthropological basis for universal natural law that was no longer limited to the Stoic sage, as it was in orthodox Greek Stoic thought.

As we have seen, for Grotius, as for Cicero, individual development corresponded to a two-stage oikeiosis process. For both Cicero and Grotius, this meant that every adult was thought to be equipped with the recta or perfecta ratio that, in the older Stoa, was reserved for the sage. Although Cicero's definition went on to equate natural law with the recta ratio of the Stoic sage, he negated any generic differences among human beings: "Thus, whatever definition of a human being one adopts is equally

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48 See Besselein 2002, 94-95, where the importance of the prima naturae is not sufficiently emphasized.

49 See Cic. Leg. 1.8-19; 2.8.
valid for all humans. That, in turn, is a sufficient proof that there is no dissimilarity within the species. The addressees of natural law were thus all of humanity. They could act in accordance with right reason and thus with natural law, which continued to be described as the exercise of virtue; at least since Cicero, however, its content had been supplemented with an ethic of rules. As a morally relevant act was subject, for Cicero, to certain rules that permitted a distinction between just and unjust war. Grotius adopted these rules, oriented around the institution of private property, in De iure bello ac pacis, as he had in De iure praedae. These norms form natural law proper as we became acquainted with it in De iure praedae, where Grotius made private property, in the sense it was used in Cicero’s De officiis, the main criterion of natural justice. The description of natural law in the Prolegomena to De iure bello ac pacis sounds familiar:

This Sociability, which we have now described in general, or this Care of maintaining Society [societas custodi] in a Manner conformable to the Light of human Understanding, is the Fountain of Right, properly so called; to which belongs the Abstaining from that which is another’s [alieni absintinentia], and the Restitution [restitutio] of what we have of another’s, or of the Profit we have made by it, the Obligation [obligatio] of fulfilling Promises, the Reparation of a Damage done through our own Default, and the Merit of Punishment among Men.

Here, too, as in De iure praedae, violation of these norms allows subjective natural rights to emerge. The question whether war is in accordance with natural law in the narrower sense must be decided, according to Grotius, by using recta ratio as the standard; and recta ratio does not recognize the instinct for self-preservation, the first stage of oikeiosis, as a sufficient condition. Only the substantive criterion of justice was sufficient; it was no longer understood merely as a virtue—that is, a disposition to act in a certain way—as it was for the older Stoics, but as a system of norms, in accordance with Cicero. Self-preservation only accorded with natural law, in Grotius’s view, to the extent that it was just, which meant, in turn, to the extent that the norms of natural law grant the individual the right to self-preservation. Violence in the service of self-preservation that violates others’ rights cannot be just, and cannot reflect right reason. Grotius here

referred once again to the second stage of oikeiosis, and thus overcame the view that the principle of self-preservation is the only criterion:

But Right Reason [recta ratio], and the Nature of Society [natura societatis], which is to be examined in the second and chief Place, does not prohibit all Manner of Violence, but only that which is repugnant to Society, that is, which invades another’s Right [ius alienum]. As a result, “the Use of Force, which does not invade the Right [ius] of another, is not unjust.” The criterion for use of force that accords with natural law is thus justice, prescribed by right reason, and not the principle of self-preservation. However, Grotius reformulates justice, and thus Cicero’s Stoic honestum, and frames it in terms of subjective rights: just action is action that violates no one else’s rights. Grotius arrived at this conclusion through an equation of justice per se with corrective justice. As we shall see in the following section, this put in place the presuppositions for Grotius’s rich conception of the state of nature, which is based on a particular theory of justice. Rejecting what Aristotle had deemed the more important part of justice, namely distributive justice, in favor of an account of what Aristotle had called corrective justice implied a rejection of an Aristotelian, politics-based account of justice as an eudaimonist virtue, and made possible a theory of justice suited for a rule-governed state of nature. As we shall see in later chapters, from this theory of corrective justice flows both an account of the state of nature and a doctrine of subjective natural rights which are held to exist in such a natural state. A detailed discussion of the individual rights envisaged by Grotius follows in Chapters 7, 8, and 9.

Rejecting Aristotle’s “tyranny”: from distributive to corrective justice

Grotius’s lack of interest in the kind of justice that presupposes the context of an established political community is shown in the use he made of Aristotle’s theory of justice in the Nicomachean Ethics. In De iure praedae, Grotius adopted the Aristotelian dichotomy between distributive and corrective justice; but unlike Aristotle himself, he devoted his main attention

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53 Cic. Leg. 1,29–30; Quae quaestuomque est hominis definitio, sua in omnibus rebus. Quod argumenti satru et nullo distinctillum esse in genere. See Vander Waerdt 1954, 4872. "[N]atural law is now the prescription not strictly of right reason, which only the sage possesses, but of the rationality in which all human beings share."

54 RWP, 1,85–86; IBP, 8.

55 See Haakonssen 2005, 32.

56 KFP, 1,184; IBP I, 2,2,4. 57 KWP, 1,86; IBP I, 2.1.6. 58 This creates a moral obstacle to the more pursuit of self-preservation, which can thus——contrary to Tausch 1987, 113—not be taken to be the basic principle. See Haakonssen 2003, 52. Cf. also Besendik 2005, 191–95.

59 Acta, Ed. No. 5, 139b7f. Both types are in Aristotle, parts of particular justice, which is contrasted with universal justice. The latter, broad sense of justice is identical with the whole of virtue, when