CHAPTER 8

Natural rights and just wars

Of the four natural rights that may give rise to a just cause of war—the right to self-defense, to property, to collect debt, and to punish—the right to private property and the right to collect debt are the two rights that are most intrinsically tied to what has been acknowledged by liberals such as Constant as a driving force behind the modern concept of rights, that is to say commerce and free trade. Grotius' right to punish is a secondary right of sorts, derivative of the primary rights of self-defense, property, and collection of debt, and designed to prevent these rights from being violated; we shall treat it separately in Chapter 9.

The right to self-defense

The right to self-defense arises from the first so-called law, as Grotius formulated it in the second chapter of De iure praetae: "It shall be permissible to defend [one's own] life and to shun that which threatens to prove injurious." In the marginal notes, Grotius pointed to passages in Cicero's De officiis and De finibus as the sources of this law; it is in fact a paraphrase of these passages, in which the natural drive to self-preservation is presented in Stoic tradition as something common to all creatures. What is portrayed by Cicero as natural, and thus desirable, in the Stoic context

1 For Grotius' right to property, see Brandt 1974; Buckle 1991. For contractual rights, see Dieselhorse 1999.
2 See Constant 1888, 357: "The effect of commerce extend even further; not only does it emancipate individuals, but ... it places authority itself in a position of dependence."
3 CIC. 2.1: "VITAM TUERI ET DECLINARE NOCTURNA LICEAT."
4 Cic. Off. 1.11: Principe generi animantium omnis est a natura tributum, ut se, vitam corporisque tegetur, declines es, quae nocturna videatur, omnique, quae in re ad vires suae necessariae attinetur et partes, ut passim, ut latitudine, ut aliis generibus similis. Cic. Fin. 4.16: Omnis res naturae vel eae conservatoria vel ex sede sit in genere conservatorum. Cic. Fin. 5.4: Omnem animal vel ipsum diligat; ac simul eum est id agit et se conservet, quod hic ei primum ad omnem vitam tuam liber num et natura datur, ut se conservet utque te sit affectum se epite secundum naturam efficiendo esse posse.
5 On the Stoic background (aikheirioi) of Cic. Off. 1.11, see Dyrck 1996, 86ff.

is formulated by Grotius as a permissive norm of natural law. Additionally, in formulating the first law, Grotius again refers to Cicero's forensic speech Pro Milone, in which Cicero portrays self-preservation as a legal principle. In the seventh chapter, on the just causes of war, Grotius again made use of Pro Milone in formulating the right of self-defense. Every just war, according to Grotius, originated in one of the four just causes of war, and self-defense (sui defensio) was the first of these causes. For, as Cicero said in Pro Milone, self-defense was not merely just, but also necessary, when one defended oneself by force against the infliction of force? This right of self-defense applied, according to Grotius, both to individuals and to polities in the state of nature: "The examples afforded by all living creatures show that force privately exercised for the defence and safeguarding of one's own body is justly employed." Grotius provides further support for this with various passages from Roman law, including the following passage by Florentinus in the Digest, according to which the law of nations (ius gentium) grants the right "to repel violent injuries [vis atque iniuria]".

[1] It emerges from this law [ius gentium] that whatever a person does for his bodily security he can be held to have done rightfully; and since nature has established among us a relationship of sorts, it follows that it is a grave wrong for one human being to encompass the life of another.

Defense against an unlawful attack is, according to Roman law, a justification for interference with the rights of others. Grotius quoted yet another passage from the Digest that exempted the carrying of weapons for purposes of self-defense from the general prohibition on acquiring weapons, and declared it lawful. Grotius' self-defense as a just cause of war was obviously modeled on Cicero and the Digest; once more, the conditions in the declining Roman republic, which formed the context for the Pro Milone, served as a model for Grotius' state of nature, characterized by the absence of state judicial organs, but not by lawlessness.

6 Cic. Mil. 10.
7 IPC 7, fol. 29: "Bellum agitum omne quaerere causam ex aliqua ente insicue ex. Prima est sui defensio, ex lege prima. Nam ut Cicero inquit, illud est non modo librum, sed etiam necessarium, cum vi vis illa defendatur." The quotation is from Cic. Mil. 9.
8 CIC. 104: "Ad definitionem aliaque corporis sui privata via tua est omnium animantium exemplum."
9 Egal. Dig. 1.1.2: se est atque iniuria propriae: non tuum hoc hoc evitasi, ut quod quaque ab alio corpori sui fuerit, irreparato esse metuero, et cum inter nos cogitationem quandam natura constitut, consequens et hominum homini molestum nefas esse.
10 Dig. 48.6.51: Qui velim mutuae se habere statutu se hors gentium, non violenter hominis occidendi autem portione.
Natural rights and just wars

As in De iure praedae, in De iure belli ac pacis Grotius called upon Cicero for evidence that war was natural, especially war in self-defense. As we have seen, Grotius had already utilized Stoic doctrines from Cicero’s philosophical work De finibus for the a priori evidence of war’s accordance with natural law in principle.14 Now he hoped to show that war conformed to natural law through a consensus among scholars, in line with his rhetorical methodology as described in Chapter 3.32 The scholarly opinions that he presented were exclusively Roman, and came primarily from Cicero and the Digest. In addition to the passage cited in De iure praedae and quoted in greater detail in the later work,33 Grotius offered yet another passage from the forensic speech Pro Milnœ4 as evidence of the natural-law character of the right of self-defense and thus the essential natural-law nature of war in general. This was followed by two passages from the Digest that also supported self-defense’s conformity with natural law.15

The right of self-defense in De iure belli ac pacis does not differ in essence from the doctrine introduced in De iure praedae; however, defense of property against theft is viewed in the later work from the point of view of self-defense, thus expanding the right of self-defense. Grotius justified this using the structure of the Roman law of civil procedure. He distinguished between complaints under Roman law (actiones) for unlawful acts not yet committed (initiatae) and those for unlawful acts that had already been committed, and argued that defense of one’s own person, as well as of property, from the threat of theft was covered by complaints for unlawful acts not yet committed (actiones ob iniuriam non factam). Examples of such complaints ob iniuriam non factam were:

14 See above, 101–7.
15 IBP 1.2.1.3: “Probasur idem [I.e., ius naturale belli non repugnatum] quod dixi ne ante omni genitiun ac praecipue superiornm concussione.”
16 Ibid.: “De iure qua vita defendanda notus Cicericonis locutus ipse naturam resonatiasque perhibens: Est hanc non scripta sed nata lex, quam non didicimus, accipimus, legimus, venem ac natura ipsa arripimus, humilis, experationem ac quam non docti, sed facti, non instituti, sed instaurum sumus ut si vita nostra in aliquas modis, si in viam, in tela aut latrocinium, aut inimicorum incidisset, omnem honestae ratio exspectare solvit.” Grocius cites Cic. Mil. 30.
17 Ibid.: “Hoc et ratio docti, et necessarius barbarus, et nos generum, et feris natura ipsa praecripta, ut omnem jemiem vim, quamvis ope possent a capite, a capite, a viae propulsarem.”
18 Grocius cites Cic. Mil. 30.
19 Ibid.: “Causa iuriuricorum: adversus periculum naturalis ratio permitte se defendere.”
20 Grocius cites Dig. 5.1.4 (on the lex Aquillae). Grocius goes on to say, “Florentius iurisconsultus: iure hoc everti at quod quisque ob eum belam corporis sui fecerit, sine facie existimetur.”” — Florentius iurisconsultus: iure hoc everti at quod quisque ob eum belam corporis sui fecerit, sine facie existimetur.” — Grocius cites Dig. 5.1.3. This shows how Grocius reproaches the Roman jurists with a muddled use of the terms ius naturale and ius gentium — Florentius here refers to ius gentium, while Grocius is concerned with qualifying the right to self-defense as lawful under natural law; cf. also IBP 1.2.4.2.

Now in Law there are Actions for Injuries not yet done, or for those already committed. For the First, When Securities are demanded against a Person that has threatened an Injury (causio de non offendiendo), or for the indemnifying of a Loss that is apprehended (causio damni infecti); and other Things included in the Decrees of the superior Judge (interdicta), which prohibited any Violence.16

Securities (cautiones) in Roman law were promises of payments, and especially compensation payments, generally as formal, oral debt obligations in the form of stipulations (stipulatio).17 Certain legal actions (actiones) were used to enforce such stipulations. By interdicts or injunctions, Grotius meant Praetorian remedies by which the Praetor prohibited using force against a faultless possessor.18 Grotius equated these actions and interdicta from Roman private law with the subjective rights in his natural law; violations gave rise to just wars of self-defense, be they private or public. The analogy between the right of self-defense and the prohibitive injunctions are easy enough to understand; one’s own person and property are protected from unlawful force. But Grotius’ reference to securities (cautiones) is more difficult to understand. In Roman law, these securities could be enforced with in personam actions against those who had promised them. In Grotius’ analogy, anyone who has been attacked seems able, under natural law, to assume a priori, tacit promise of a security (causio) from every potential attacker or thief; this then permits the victim to initiate an action, or wage a war, due to violation of this tacit stipulation.

In any case, true to the general construction of his work, which was based on the structure of Roman remedies, the defense of property was now shifted to the sphere of self-defense. This Roman foundation was then supplemented, in typical Grotian form, in later editions of De iure belli ac pacis with additional quotes and paraphrases from all of Greco-Roman antiquity. Thus in editions after 1631, Grotius followed the systematization quoted above, which clearly followed the various Roman remedies, with a reference to Plato’s Laws. The fundamental structure, however, remained faithful to Roman civil procedure.

This was also expressed in the emphasis on corrective justice, which was used to separate natural law from various other types of law, and in which private property gained a prominence reminiscent of Cicero. Defense of
Natural rights and just wars

one's own property by killing a thief was not permitted under divine law, said Grotius, but it was allowed by natural law. In a section entitled “Murther in Defence of our Goods permitted by the Law of Nature” (Pro rebus defendendis interfectionem non esse illicitam iure naturali), he wrote:

We now proceed to those Injuries that affect our Estates or Possessions; and here, if we have Regard to expressive [i.e. corrective] Justice, I must own, that for the Preservation of our Goods it is lawful, if there be a Necessity for it, to kill him that would seize upon them. For the Inequality between the Goods of one Man and the Life of another is made up, by the Difference between the favourable Cause of the innocent Person, and the odious Cause of the Robber, as was before observed: From whence it follows, that if we have Regard only to this Right, I may shoot that Man who is making off with my Effects, if there's no other Method of my recovering them.

Neither the limit set by the Twelve Tables that a thief could be killed only if armed, nor the limit in Ulpian that only thieves in the night could be killed, was valid under natural law, according to Grotius. Here he used Roman law only to corroborate the view that the restrictions on the right to defend property in Mosaic law as well as in Solon's law had formulated only the conventional law of nations (ius gentium), rather than natural law.

The right of self-defense in De iure belli ac pacis is, however, also restricted and dealt with in more nuanced fashion compared with De iure praedae. In the latter work, Grotius distinguished between direct, immediate danger and mere fear of possible attack, and excludes the latter from the natural right of self-defense. “But here 'tis necessary that the Danger be present, and as it were, contained in a Point,” Grotius writes. Only if the attacker possesses the intent to kill could one anticipate the act. In the first book of De officiis, Cicero had correctly stated that “one frequently commits Injustice, by attempting to hurt another, in Order to avoid the Evil which he apprehends from him.”

Grotius explained that agreement prevailed in this regard among all ancient philosophical schools, and proved this claim with reference to Cicero's portrayal of the various ethical doctrines of Hellenism in De finibus. We have seen above how Grotius explained the origins of property, like Cicero, through long-lasting appropriation (vetus occupatio). In the second chapter of De iure praedae, Grotius had already stated that the use of certain things assumed the acquisition (apprehensio) and possession (possession) of these things, and that the ownership of private property (dominium) originated as a result. Grotius quoted a passage from the Roman jurist Paulus from the 41st book of the Digest, in which the origins of property were explained as arising from “natural ownership,” that is, first ownership of an unowned thing. The portrayal of private property as an institution that was not originally part of natural law, but, once constituted, was protected under natural law, corresponds precisely to the concept as presented by Cicero in De officiis.

Grotius saw in private property the result not of a sudden decision, but of a gradual change that began under the guidance of nature (monstrans a norm proficiendi, quin iis qui nocere alteri cognoscit timorem, ne nisi id fecerit, ipsi aliquo afficiam incommode). Grotius quotes Cic. Off. 1.2.4:

\[\text{CLP. 35, IPC 2, fol. 6: ADIUNGERE SIQUA AD VIVENDUM SUNT UTILIA Eaque RETINERE LICEAT.}\]

\[\text{IPC 2, fol. 6: "Hae enim de re et Stoicis et Epicureis et Peripateticis convenit, ne Academici quidem videtur dubium."}\]

\[\text{IPC 13, fol. 104v (i.e. MSL 2.5).}\]

\[\text{IPC 3, fol. 6-7, Dig. 42.1.2.1: Dominionum rerum ex naturali possessione coniuncta Nerva filiis ait eiqueque res statuas remanere in his, quae tenebant catalogum captivorum: nunc haec probata rerum finitas, qui primis possessionem rerum adprehendissent."}\]

\[\text{Cic. Off. 1.2.1. See Wood 1638, 111.}\]
Grotius here conveniently leaves out the context of Seneca’s passage, where common, rather than private, property is at issue. This is instructive: Seneca’s concern is with temporary use of one theater seat exclusively for viewing the spectacle, while the seats remain common property. As Phillip Mittis reminds us: “Seneca’s point is about the use of commonly shared property in a system of mutual benefit—something that the theater analogy neatly captures by explaining the kind of coordination of interests and the range of virtuous attitudes necessary for those who—like the wise of friends or citizens in the ideal Stoic polis—hold property in common.” As we shall see below, Grotius was to point to Chrysippus’ theater example again in De inure belli ac pacis, this time quoting from Cicero’s De finibus, where the context as well as Cicero’s own views on the subject of private property rights and the way they had originally arisen were more congenial to Grotius’ task. While it is hard to see how Chrysippus and indeed any of the earlier Greek Stoics could have used the example for anything but for “justifying and explaining the communal use of property,” it is perfectly obvious that for Grotius, no less than for Cicero, the point was to explain the genealogy of private property in the state of nature while at the same time justifying its existence and arguing for its protection under natural law. As we have already seen in the chapter on Grotius’ (corrective) conception of justice in the state of nature, this was crucial to Grotius, given the role private property rights play in his theory of justice.

In Grotius’ Defense, the defense of the fifth chapter of Mare liberum, in which he countered his Scottish critic William Welwood, Grotius describes the process of the origins of private property in a concise section dedicated to an interpretation of Cicero’s dictum from De officiis, privata nulla natura. Welwood, according to Grotius, wrongly ridiculed this statement by Cicero, which was absolutely true. By saying that nothing is private property by nature, Cicero had not meant to say that nature stands in contradiction to private property and, as it were, prohibits anything at all from becoming private property. Rather, Cicero believed that nature did not itself cause something to be privately owned:

38 Mittis 2005, 236.
39 Ibid., 235.
40 Ibid., pass the scholarly mainstream view (see, e.g., Anns 1984, Long 1997 and Schofield 1999, where it is held that Cic. Fin. 3.67 provides evidence for an early Stoic defense of private property rights.
41 DCC, 316: “Inter quae Cicero’s illud iudiceris maxime mirare, nihil esse privatum natura, cum sit aperissima varietas. Non enim hoc uel Cicero, repugnante naturam proprietatis et quasi venire ne quid omnis proprium sit, sed naturam per se non efficiens ut quicquam sit proprium...” Grotius’ interpretation of Cicero corresponds to what Wacht 1982, 35-38 says about Cicero.
The right to private property

The completed institution of private property that serves as the standard for a natural corrective justice in Cicero as well as in Grotius. Aside from the Roman law requirement that the thing in question be res nullius — that acquisition can only happen to a thing that belongs to no one, or no longer belongs to anyone — the origin and original distribution of property is simply not subject to any further normative criteria in either Cicero or Grotius. Once in existence, however, private property plays the role of the central criterion of natural justice. Of the existing property claims, Cicero says directly, in the passage quoted by Grotius: “If anyone else should seek any of it for himself [from the property of another], he will be violating the law of human fellowship.” Grotius refers to this statement of Cicero’s in formulating his fourth law, which should indeed be read as a paraphrase of Cicero: “Let no one seize possession of that which has been taken into the possession of another.” It may be assumed that Grotius, although he nowhere says this explicitly in De iure praedae, was writing with the example of Chrysippus in mind, passed down by Cicero in De officiis, and that Grotius here was subjecting the process of acquisition to the normative conditions that Chrysippus had taken from the rules of sports competitions:

- Among Chrysippus’ many neat remarks was the following: “When a man runs in the stadium he ought to struggle and strive with all his might to be victorious, but he ought not to strip his fellow-competitor or to push him over. Similarly in life: it is not unfair for anyone to seek whatever may be useful to him, but it is not just to steal from another.”

Neal Wood has observed an “economic individualism” in Cicero, and especially in De officiis, which he believes introduces a completely new element to the history of political thought, one alien to the thinking of Plato and Aristotle. Wood convincingly places Cicero’s views of the just original acquisition of property in a tradition leading to John Locke:

Although the normative criteria in Cicero are narrower, it is not justified to say, as does Annex 1989, 170, that there is “no criterion for deciding whether an entitlement is just.” Cic. Off. 1.2.2 mentions in addition: victory in war as an opportunity for acquiring property. Cicero leaves open whether this means victory in a just war. A just war would certainly be a further normative criterion. See the discussion of this passage in Dyck 1996, 120–1. Annex 1989, 170 n. 53 describes conquest as unjust acquisition, without addressing at all the possibility of acquisition in a just war.

Cic. Off. 1.21: et quo si quis ibi apparet, violabunt ibi homines pacis.

IPC 3, 56. 71: “NE QVIS OCCUPET ALTERI OCCUPATA. Hoc ex abundantiis . . .”

He first mentioned it in De iure belli ac pacis see ibid. 1.22.5. 166. See below, 186.

Cic. Off. 3.42: Sete Chrysippus, ut nulius, quid nondum inventum, currit, officium et contrahere deinde quem maximum poenas, ut vincat, super partes eam, quicum credit, ut mare, eaque nullus milli miles debeat, sit in vita sui quippe sese, qui fortunatam ab illis, nonque etiam eiusmodi bellum debebat, sic in vita sua quippe sese, qui fortunatam ab illis, nonque etiam eiusmodi bellum debebat, sic in vita sua quippe sese, qui fortunatam ab illis, nonque etiam eiusmodi bellum debebat, sic in vita sua quippe sese, qui fortunatam ab illis, nonque etiam eiusmodi bellum debebat, sic in vita sua quippe sese, qui fortunatam ab illis, nonque etiam eiusmodi bellum debebat, sic

Wood, 1988, 124. For a similar view, see Long 1993, 233, who sees in Cicero’s political thought an “intriguing precursor” to conservative liberalism.
Natural rights and just wars

"Cicero, like John Locke much later, sees no contradiction between the imperative of morality and the demand of self-advancement as long as the latter is accomplished in a reasonable fashion and not at the expense of others, although both have a rather broad interpretation of what this means."

Grotius obviously represents an important link in this tradition. The justice, or legitimacy under natural law, of the original distribution of property is demonstrated for Cicero, as well as for Grotius, not with a view to the justice of the results of the distribution, but exclusively by reference to the process by which the distribution comes about. Grotius made no attempt to argue normatively for this procedural "entitlement" theory of justice. He plainly took his theory of the origins of the institution of private property from the Roman law theory of the natural acquisition of property, without questioning it morally. This is not surprising, given the function of De iure praedae as a legal apologia for the VOC's military expansion in Southeast Asia; the property-law doctrine of Roman law permitted Grotius, without giving up the idea of natural acquisition of property, to apply it only to the land and to remove the sea — in conformity with the Digest — from those things subject to the ius occupandi. This turned the Portuguese claims to the sea routes to East Asia into unlawful attacks on something that was the common property of all human beings equally.

The fundamental analogy throughout De iure praedae between individual, private trading companies and legally constituted politics is reflected in Grotius' theory of property, which was transferred to the public-law realm. The process of original acquisition (occupatio) of entire countries was, according to Grotius, not fundamentally different from the acquisition of private property by individuals. There, too, he followed Cicero, from whose De officiis he quoted the following:

Cicero notes that the territory of Arpinum is said to belong to the people of Arpinum, and that of Tusculum to the Tusculans. To this he adds the following comment: "... and the apportionment of private property (privateae possessiones) is similar. Accordingly, since each individual's part of those things which nature gave as common property (communia) becomes his own (suum), let each person retain possession of that which has fallen to his lot."

As with private-law acquisition in the state of nature, the occupation of the territory of a state leads to possession, and ultimately to private property, or to sovereignty over a public area.

Grotius further derives from the right to property freedom of action, which forms the origin of every positive and thus fundamentally arbitrary law that deviates from the law of the state of nature. In Thes. LVI, Grotius calls this freedom of action, as we have seen, "the right to one's own actions" (ius in actiones suas), which can be alienated or disposed of through a voluntary act (indictum voluntatis). De iure praedae, the freedom of action is analogized with the Roman concept of property: freedom is to action as private property is to things — natural freedom consists of the ability to do what one wants to do, Grotius said, following a passage in the Institutes. In contrast to things that, according to De iure praedae, were not originally privately owned, freedom of action is, in both this work and in Thes. LVI, a natural institution in the narrow sense. However, both one's own actions and one's possessions, following the introduction of private property, have in common that they can be sold, which expands the free-trade-friendly aspect of property law to one's own actions and, in De iure bellii ac pacis at the latest, to one's own person.

Trade is the result of the emergence of private property. Referring to the 18th book of the Digest, which deals with sales contracts, Grotius explained the origins of trade as the necessary result of the elimination of common property, and considered exchange to be the natural, universal basis of contracts. Grotius concluded, referring to Aristotle's Politics, that free

57 CLP, 135; IPC 13, fol. 10a (= ML 5:72): "Hoc modo dicet Cicero agrum Arpinatum Arpinatui dicit; Tusculanum Tuscanumurum similique est inquit; privatum possessioeum describuit. Sed quod quisquam ejus agri quaestionem communia, quod quidque obtinet, quod uique teneat."
58 See Bentin and Straumann 2010.
59 IPC 2, fol. 9: "Quod enim est aliquid naturale illa libertas, quod id quod qualque librum est facieburi, sive quod libertas in actionibus librum est dominium in rebus."
60 See Bentin and Straumann 2010. And see, according to the passage from Fluminianus, tom. 1, ch. 1, which says, "Et libertas quaedam est, naturale, sui et sui cuique facere licet."
61 See Bentin and Straumann 2010.
62 IPC 2, fol. 10: "Quod enim est aliquid et naturale illa libertas, qua quid ad qualque librum est faciendo faciendi faciendi faciendi faciendi faciendi faciendi faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo faciendo facien
trade is a natural right and thus cannot be eliminated, or at most can only be eliminated with the consent of all nations. That sentence would be cited and used against him by the English delegation a short time later at the Colonial Conference in 1613.\textsuperscript{58}

In De iure belli ac pacis, Grotius, aligning his system of natural rights more explicitly with Roman civil procedure, considered that the enforcement of the right to property—"if ownership had been lost"—was covered by the Roman action for unlawful acts already committed (\textit{actions ob iniuriam factam}). He mentioned concretely the property-law action for recovery of property, the \textit{vindicatio}, which helped a non-possessing owner in obtaining things from a possessing non-owner, as well as the \textit{condictio} from the law of obligations, restitution actions that dealt with unjustified withholding of assets.\textsuperscript{59} These analogies are clear; the Roman action of \textit{rei vindicatio} involved surrender of a thing to the owner, while the remedy of \textit{condictio} involved cases in which the respondent had become owner without a legal basis. In \textit{De iure bellii ac pacis}, as in \textit{De iure praedae}, Grotius had a Roman law concept of property, and he aligned his right to private property with Roman legal actions and remedies.

Grotius gave a similar portrayal to that in his earlier work regarding the question of the historical emergence of the institution of private property and the original distribution of property, and he also referred to that work in this context. In \textit{De iure bellii ac pacis}, Grotius did not depart from the fundamental opposition between the propertyless state of nature and the subsequently introduced institution of private property—an institution that nevertheless was not part of the positive law of the political community, but, as in \textit{De iure praedae},\textsuperscript{60} originated before and outside of the state and was thus protected by natural law:

We must further observe, that this Natural Law does not only respect such Things as depend not upon Human Will [\textit{voluntas}], but also many Things which are consequent to some Act of that Will. Thus, Property for Instance, as now in use, was introduced by Man's Will, and being once admitted, this Law of Nature informs us, that it is a wicked Thing to take away from coopererent, sublati unique communi...necessarium facile commercium...Ipsa igniti ratio omnium contractuum universalis, \textit{et} \textit{contractus} in nature est..." Grotius refers to Dig. 18.1.1.14: \textit{Origo emendis vendendiumque a perpetuum contractibus coepit.}\textsuperscript{70}


}\textsuperscript{58} CC, Art. 38, 16; see below, 191.

}\textsuperscript{59} IP\textit{B} 2.1.1.1: "Quod repandendum venit, aut spectat \textit{id} quod nostrum est vel futur, unde \textit{vindicatio} et \textit{condictiones} quassatur..." See on the Roman actions \textit{Koer} 1771/72, § 295, I, § 299.

}\textsuperscript{60} Where it had belonged to the \textit{ius naturale} secondarium.

\textbf{The right to private property}

any Man, against his Will, what is properly his own. Wherefore Paulus the Civilian infers, that \textit{Theft is forbidden by the Law of Nature}.\textsuperscript{65}

According to Grotius, however, human beings had certain property-like rights even before the introduction of private property:

For the Design of Society [\textit{societatis}] is, that every one should quietly enjoy his own [\textit{suam cique}], with the Help, and by the united Force of the whole Community. It may be easily conceived, that the Necessity of having Recourse to violent Means for Self-Defence, might have taken Place, even tho' what we call Property [\textit{dominium}] had never been introduced. For our Lives [\textit{vivum}], Limbs [\textit{membrorum}], and Liberties [\textit{libertas}], had still been properly our own, and could not have been (without manifest Injustice [\textit{iniuriae}] invaded.\textsuperscript{65}

Grotius sought to emphasize this thought using Cicero's words, and he goes on to quote verbatim a paragraph from \textit{De officiis} to which he had already referred in the marginal notes in \textit{De iure praedae} to justify the right to property:\textsuperscript{65}

But since Property has been regulated, either by Law or Custom, this is more easily understood, which I shall express in the Words of Tully. \textit{If every Member of the Body was capable of Reflection, and did really think that it should enjoy a larger Share of Health, if it could attract to itself the Nourishment of the next Member, and should thereby do it, the whole Body would of necessity languish and decay. So if every Man were to seize on the Goods [\textit{commoda}] of another, and enrich himself by the Spoils of his Neighbour, human Society [\textit{societatem hominum}] and Commerce [\textit{commercia}] would necessarily be dissolved. Nature allows every Man to provide the Necessaries of Life, rather for himself than for another; but it does not suffer any one to add to his own Estate [\textit{facultates, copiae, opes}], by the Spoils and Plunders of another.}
centuries. Through discoveries and the progress of the arts, this situation was brought to an end; in his 1642 edition, Grotius called on his audience to read Seneca’s 90th letter to Lucilius, in which Seneca explained this process. Seneca believed that avarice (avaritia) and excess and luxury (lusuria) led to the introduction of private property, but also contributed to the development of morality, which was unknown in the state of nature. Morality was only introduced with the concept of private property. It certainly bears mentioning that the thrust of this developmental view had great influence on the Scottish Enlightenment’s views of the subject. For Adam Smith, alienable property was fully developed as a concept only in the last, commercial stage of his conjectural four-stage history of mankind, a stance which aligns itself perfectly with Grotius’ and Seneca’s insistence on the importance of luxury and with Grotius’ view of America’s “primitive Simplicity” giving way to progress of the arts and lusuria. This ties in with Hume’s point that “innocent” luxury, far from having a corrupting influence, produces ages of refinement which are “both the happiest and most virtuous”.

Grotius ultimately traced the introduction of private property to the desire for a “more commodious and more agreeable manner” in which to live, which led to division of common property and, by way of acquisition (occupatio), to private property. Thus far, the portrayal corresponds to the one in De iure praedae, where it was based on the Roman law criterion for the natural acquisition of ownership. In his later work, as in De iure praedae, Grotius accepted Cicero’s criterion under which acquisition through war was legal. Grotius made it clear that this required a just war. He added a further element to this account in De iure beli ac pacis, however, which proved to be extraordinarily influential: mutual agreement.

Thus also we see what was the Original of Property (proprietat), which was derived not from a mere Internal Act of the Mind (animus), since one could
Acquisition (occupatio) was now viewed simultaneously as tacit contractual agreement (pactum tacitum), which expressed agreement to the introduction of private property and its attendant special rights. The rule of natural law under which property could be obtained through acquisition (occupatio) was supplemented with everyone's hypothetical tacit agreement to the principle of acquisition. To the natural-law criterion of the justice of the original acquisition (occupatio) of property already found in De iure praedae — which Grotius had taken from the Digest — Grotius now added the element of tacit agreement.

The concept of a tacitly declared will that could be read into certain acts had already been developed in Roman ius honorarium (the law made in office expressed in the Praetor's edict), where it was used especially in connection with agreements (pacta) of various sorts. Grotius' originality in De iure bellii ac pacis consisted in combining the Roman-law doctrine of the natural acquisition of ownership, which he had applied in De iure praedae, with the Roman-law concept of tacit agreement. Although the institution of property gained an even more decidedly conventionalist touch in De iure bellii ac pacis due to the contractualist mentality it reflected, it is important to see that property, even in the later work, is a pre-political and extra-state institution that, once introduced, is sanctioned by natural law and does not require an established commonwealth. Pufendorf adopted and developed the theory of tacit agreement, Robert Filmer criticized it sarcastically, and in Locke remnants of it may be found as well, especially in his theory of tacit consent given to the laws by those who enjoy their protection. It is significant that David Hume, who had no sympathy whatsoever for the theory of tacit consent, was to ascribe — in the framework of his theory of justice, where property plays an equally pivotal role as in Grotius — original authorship of his "theory concerning the origin of property, and consequently of justice," to Grotius. "This theory . . . is, in the main, the same with that hinted at and adopted by Grotius." This is astonishing only at first sight; Hume's account of property and justice ties in with other accounts put forward by eighteenth-century Scottish writers, many of whom had espoused a similar view of property, aligned with their four-stage theory of the history of mankind. For Hume, notwithstanding his view of justice as an "artificial virtue," the basic rules of justice, including stability of possession and transfer of property by consent, may properly be called "laws of nature; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species." The theory of tacit agreement provided the rights of use granted to everyone ab initio in the state of nature with an additional characteristic that was otherwise only familiar where property was fully developed — the power of alienation. Simultaneously with the introduction of private property through tacit agreement, people in the state of nature disposed of their prior right to acquire, their ius occupandi, which each of them enjoyed ab initio. The occupants of the state of nature — the subjects of natural law — thus extended their sphere of natural freedom successively from their bodies and actions to this newly created private property, which — in accordance with the Roman-law concept of property — could now also be disposed of and traded, without ever leaving the state of nature.

71 *RWP*, 2:426–77; *IBP* 2.2.4. "Simul discimus quemodo res in proprietatem iunctae non animi actus solo sed neque enim scire aliis potest, qui ad easse etsi velles, ut et ab tetentem; et idem velut pluris pernitor sed pacto quodam aut expresso, ut per divisionem, aut tacito, ut per occupacionem, simulque enim communi dispensa. nec iuris est divisi, seni debet inter omnes conversionem, ut quod quisque occupaverat id proprie haberet. Concessum, tuquit Ciceror, sit ut quique mulch quod ad vitam usum pertinet quam alteri acquiri non repugnante natura." Grotius had used this passage from Cic. Off. 3.32 already in *IBP* 2.4.6 and cited the whole paragraph in *IBP* 2.1.4. See also 177, 383.

72 See *Kant* 1797/98, § 16, II.

73 Grotius does not seem to be entirely clear on this in *IBP* 2.1.5.4 property is described as a consequence of voluntary human actions, and in *IBP* 2.2.5 a distinction is drawn between mere will and tacit contract. Grotius was certainly perceived as a conventionalist by his critic Filmer; see Filmer 1951, 219.
Natural rights and just wars

Since the Establishment of Property, Men, who are Masters of their own Goods, have by the Law of Nature a Power of disposing of, or transferring, all or any Part of their Effects (dominium) to other Persons; for this is in the very Nature of Property; I mean of full and complete Property;\(^{41}\)

Private property and free trade did not require a policy, then, but were institutions in the state of nature. The same holds for Grotius' views on the institution of contract, as we shall see in the following section.

Let me conclude my discussion of Grotius' right to private property by noting certain structural features of his normative outlook. As already in De ture praedae, the legitimacy under natural law of the original distribution of property for Grotius lies, not in the justice of the results of the distribution, but exclusively in the process by which the distribution comes about. To put it anachronistically with Robert Nozick (who himself can legitimately lay claim to be a member of this Ciceronian–Grotian tradition of thought), it is not a "patterned" principle of distributive justice looking to a desirable end-result, but an "entitlement" principle specifying conditions under which property can justly be acquired and transferred, and where any resulting distribution must count as just.\(^{42}\) It is only the process by which the distribution comes about that must be legitimate under natural law in order to qualify the original distribution of property, and thus also the existing legal tides in rem derived from that original distribution, as lawful and just.\(^{43}\) Grotius made no attempt to argue normatively for this procedural "entitlement" theory of justice.\(^{44}\)

Contractual rights

Like breaches of property rights, breaches of contractual claims by a debtor could be just causes of war, which Grotius derives formally from his sixth law, "Good deeds must be recompensed,"\(^ {45}\) but in terms of substance from the fetal law condition of rerum repetitio for a just war. Grotius placed

\(^{41}\) RWP, 2:566; IBP 2.6.1:1: "Homines rerum dominii, ut dominium, aut rerum, aut ex parte transfere possint, turis est natura post introductum dominium: incept num hoc in ipso dominio, plenius salutis, natura." See Winckler 1967, 199.

\(^{42}\) See Nozick 1974, 149–81.

\(^{43}\) The similarity with Locke and Nozick is obvious. In The Second Treatise of Government (§ 27), however, Locke added as a criterion of acquisition his famous "labour-theory," that the future owner "[has] mixed his Labor" with the thing he wishes to acquire: Locke 1690, 287–88. For a thorough discussion of Locke's theory of property, see Waldron 1988, 157–52.

\(^{44}\) For an interesting critique of arguments that justify private property with theories of procedural justice in distribution, which play an especially prominent role for John Locke and Richard Nozick, see Waldron 1988, 217–81, where however Grotius is hardly mentioned.

\(^{45}\) CLP, 39; IPC 2, fol. 8: "BENEFICIA REPENSANDA."

\(^{46}\) CLP, 101; IPC 7, fol. 29r: "Terit, quae a plerique omnia est, ob debitum ex contractu, aut similitudine. Sed idque praeteritum hoc puto a normallis quia et quid nobis debetur nostrum dictur. Sed tamen exprimi satius fuit cum et iuris illa facialis formula non allo specie: Quis res nec dederant, nec solvunt, nec fuerunt, quas dari, fieri, solvi operavit." The quotation of the fetal formula is from Livy 3.12.5.

\(^{47}\) On Grotius' relationship to the commentators regarding this question, see Hagemann 1983a, 176–80.

\(^{48}\) See Hagemann 1983a, 178–80, who refers, for the distinction between property and personal rights, to the influence of the legal humanist Hugo Donellus and his Commentarius de turis civilis of 1589; see also Gidoni 2011; Hagemann 1997, 212; Coare 1965, 15–14. In 1684, Grotius had in his library Donellus' commentary on the Codex title De pactis et transactisibus; see Mathiessen 1943, no. 246. However, as is clear from his use of Roman law in IPC, Grotius developed his doctrine through direct confrontation with the Corpus iuris civilis and never became dependent on the humanist commentary.

\(^{49}\) IPC 7, fol. 30v: ". . . privata vis iusta est omnium nationum exemplum . . . ad consequendum id quid nobis debetur."

\(^{50}\) Dig. 42.8.i.16: Si debitorum nummum et compluvium creditorum consequentur cum fugaitem se quantum permissum est adhibereque et id quod debent deberebant, plures having necessitatem dissitent resolvi interesse, antiquorum in possessione bonorum eius creditorum militantes. hoc factum sit in posito si ante, casu in factum accidere, si postea, hoc locum faceret. Grotius does not address the distinction made
Natural rights and just wars

wage war corresponded to the Roman remedy for exacting debts arising from a contract. The Roman creditor could bring an actio in personam to enforce his right to collect a debt, which was aimed at the indebted person; in the same way, everyone in the state of nature had the opportunity to assert his contractual rights through just war – contracts too were, for Grotius, an institution of natural law, which arises from human beings’ natural freedom of action.\footnote{See Haakenbach 1999, 93; Diesendruck 1999 refers almost exclusively to IBP.}

The third and fourth classes (of just causes of war) give rise to personal actions [actio personales], namely, claims to restitution [condiciones], founded upon contract... \footnote{C. 2, f. 8, with reference to Aest. En. 4, 5, 1311a - B.}

These causes of war, corresponding to the contractual actions in personam of Roman law, are those Grotius would identify, in the second chapter of De jure praedae, with the voluntary (bekouste) legal transactions of corrective justice in Aristotle’s Nicomachean Ethics.\footnote{H. 203-6; IPC 3, f. 30c, et al. “Ex terro et quaere actiones personales, condiciones scilicet et contractu et maledifico.”}

However, the concept of contract was broadly understood and expanded beyond the limited number of the types of Roman contracts, as later in De jure belli ac pacis, to include promises (pacta nuda); here Grotius supported his views by referring to those passages in the Digest and in Cicero’s De afficiis that emphasized the element of a meeting of minds, in addition to the form of the contract.\footnote{H. 203-6; IPC 3, f. 30c, et al. “Ex terro et quaere actiones personales, conditions scilicet et contractu et maledifico.”}

Rights arising from contractual obligations and freedom of contract play an even more prominent role in De jure belli ac pacis. Contractual rights were covered, according to Grotius, by the Roman legal actions for unlawful acts already committed (actiones ob iniuriam factam). These were, concretely, actions concerning debts, that is to say “what is properly due, either by Contract, by Offence [maledificio], or by Law. To which also we may refer those Things which are said to be due by a Sort of Contract.”\footnote{C. 2, f. 8, with reference to Aest. En. 4, 5, 1311a - B.}

hereupon which the legality of use of force depends (as his argument is designed to work in the absence of a judge).}.

Unlike the in rem rights discussed in the previous section, these involved rights of obligation, protected by the Roman in personam actions. Grotius subsumed not merely delicts, but also violations of contractual obligations under these unlawful acts (iniuriae factae). In the remainder of this section we will consider violations of obligations as they are treated in De jure belli ac pacis, while delicts will be the subject of the chapter on the right to punish.\footnote{On the effect of Grotius’ doctrine of contracts on the history of private law, see Wicke 1967, 291-97.}

The greater emphasis that Grotius placed in De jure belli ac pacis on the doctrine of contracts, compared with De jure praedae, was already apparent in the doctrine of tacit agreement ( pactum) in the context of the formation of private property in the state of nature. This greater emphasis should be traced to the influence of English arguments brought against the Dutch delegation at the Anglo-Dutch colonial conferences of 1613 and 1615. Grotius, as leader of the Dutch delegation, had justified the quasi-monopolistic position of the VOC in Southeast Asia by placing stronger emphasis on his natural-law doctrine of contract, without giving up his support for free trade, and in line with the natural-law doctrine already formulated in De jure praedae and Mare liberum.\footnote{The arguments put forward by Grotius at the 1614 Colonial Conference in London (see especially CC, Ann. 20, 235), can be found in IBP 177-82; see Clarke 1991, 177-82; see Clarke 1991, 96-108, and ibid., 2006, 381-94, on the 1614 conference in The Hague.}

According to Grotius, the creditor had a natural right to use force against his debtor, “for naturally every Man has Power to compel his Debtor.”\footnote{KRP 1,206; IBP 1,177ff.}

A condition for this right is the existence of a legal transaction creating an obligation, which must also be natural; the contract, according to Grotius, represents such a natural legal transaction.\footnote{KRP 1,206; IBP 1,177ff.}

In his chapter on promises, De promissis, Grotius dealt with the basic principles of all legal transactions, turning against the Roman law tradition in which no actions could be brought against “naked contracts” (pacta nuda); that is, he for once denied the validity of this tradition under natural law, because Roman jurists had based it only on “the Roman Laws, which made a stipulation [stipulatio] in Form, an undoubted Sign of a deliberate Mind.”\footnote{On Grotius’ doctrine of contract Diesendruck 1999, passim and esp. IV.}

However, there were “naturally other Signs of a deliberate Mind [deliberates animis],”\footnote{KRP 1,206-7; IBP 1,171f. “Nam huiusconsiliorum dicta de pactis nudi acque repromissis id quod Romanum legibus est introducere, quae deliberavit animi signum certum constituerat stipulationem.”} other than the formalism of the Roman stipulation. It was this will that played a

\footnote{H. 203-6; IPC 3, f. 30c, et al. “Ex terro et quaere actiones personales, conditions scilicet et contractu et maledifico.”}
Natural rights and just wars

decisive role for Grotius, and that turned even the *pacta nuda* and promises (*promissia*) into transactions under natural law, about which suits could be brought or wars waged. Grotius here turned against the doctrine of the French humanist François Connaan, which stated that *pacta nuda* and promises alone created no obligations under natural law. Grotius argued as follows:

But this Opinion (of Connaan) taken so generally, as he expresses it, cannot be consistent. For, First, it would thence follow, that the Articles of Agreement (*pacta*) made between Kings and People of divers Nations, so long as there was nothing performed on either Side, were of no Force, especially in those Places where there are no set Forms of Treaties or Contracts. Nor indeed can any Reason be given, why the Laws (*leges*), which are, as it were, the common Covenant and Promise of the People (*quasi pactum commune populi*) (and so they are called by Aristotle and Demosthenes) should give such an obliging Force (*obligatio*) to Agreements (*pacta*).

Grotius clearly saw the undesirable consequences of a doctrine that denied the binding nature of promises and contracts entered into in the state of nature; it would nullify all extra-state or inter-state treaties. The second point Grotius is here making is also very important, especially in regard to his political theory. Here Grotius attributed the validity and legitimacy of the positive law that prevails in a political community to a type of contract, a "common contract of the people, as it were" — the social contract. Grotius had already expressed this idea in *De iure praedae*, when he argued that nature preserves the universe through a type of contract among all things, and that the human polity (*societas*) is thus also agreed upon a man's own Will (*voluntas*), endeavouring by all Means possible to oblige itself, cannot do the same Thing... Besides, since the Property of a Thing (*rei dominium*) may be transferred by the bare Will, sufficiently declared (*voluntas sufficienter significata*) (as we have said before), why may we not in the same Manner transfer to one the Right (*ius in personam*), either of requiring us to transfer to him the Property of a Thing (which is less than the actual Acquisition of the Right of Property itself) or of requiring us to do something in his Favour, since we have as much Power over our Actions as we have over our Goods?

Contractual rights

contractually (*contractus*) through consensus. He reiterated the natural-law, social-contract character of *stare pacta* in the Prolegomena to *De iure bellii ac pacis*, explaining that a type of mutual obligation must necessarily exist among human beings, and that no other natural type was conceivable. To Grotius, the contract, and thus the social contract, was not in opposition to the natural, as it was for Hobbes, but had itself a natural quality.

We will see below the consequences of Grotius' theory of the social and sovereign contract in regard to the validity of natural law in established political communities and a possible right of individual resistance to established political authority. First, however, he needed to show more clearly that promises and "naked contracts" were already binding in the state of nature, and that the rights arising out of them could be enforced, if necessary with force. Grotius did this by developing an analogy between property rights in *rem* and personal rights in *personam*. As property rights included the possibility of selling property, and as such selling of property created obligations under natural law, it was not clear why personal rights arising from promises and contracts were not also binding. It was not clear, then, why
Grotius supported this analogy with certain passages in the Corpus iuris civilis and by using Cicero's ethics. In interpreting the passages from the Corpus iuris, Grotius strongly emphasized the will as a criterion for transferring title to property - in opposition to the classic Roman law view that the actual act of handing something over constituted the legally relevant transfer (traditio) of title, not the voluntas. However, Grotius made use of the passages that permitted this interpretation and lent support to a general, abstract doctrine in Roman law that was not yet fully developed, under which the will to transfer property sufficed. Then, using the model of property transfer understood in this way, Grotius devised the transfer of the right to recover in personam:

And to this do wise Men agree; for as the Lawyers say, Nothing is more natural, than that the Will of the Proprietor [voluntas dominii], desiring to transfer his Title [rei] to another, should have its intended Effect. In like Manner it is said, that nothing is so agreeable to human Fidelity [fides humanae], as to observe whatsoever has been mutually agreed upon. So the [Praetor's] Edict for Payment of Money promised, quo there was no other [legal] Reason [causa] alleged why it should be due, but the free Consent of the Promiser, is said to be agreeable to natural Equity [naturali aequitate]. And Paulus, the Lawyer, says, that he does naturally become a Debtor, who by the Law of Nations is obliged to pay, because we relied upon his Credit. Among the passages quoted from the Digest, we note a particular passage from Ulpian from the work De pactis in which he quoted the classical jurist Sextus Pedius, who saw in every contract an element of meeting of minds, and emphasized this as the central element. In choosing his Roman legal sources, Grotius thus gave preference to a unified concept of contract that brought together all legal transactions based on a meeting of minds and, ignoring Roman formalism, made possible a concept of contract suitable for natural law. Grotius explained the prominent role of promise as a pactum nudum in his doctrine of contracts by pointing to Cicero, who had ascribed such great power to promises "that he described keeping one's word as the basis of justice." This led to a general attitude towards in personam rights, or contractual obligations, that largely accorded with the law of the Corpus iuris civilis. In discussing warranties for defects in sales contracts (empirio venditio), Grotius discussed the inner-Stoic debate, depicted by Cicero, between Diogenes of Babylon and his student Antipater. This debate illustrated the ethical question of the relationship between one's own self-interest (utilitas) and justice (honestas) through concrete problems involving sales contracts. Grotius took a slightly different position from Cicero's, one corresponding more to the Roman law of the Digest, which permitted actions ex bona fide against a fraudulent contract partner; Cicero may have seen this as only morally, but not legally, relevant. At the same time, these actions did not go nearly as far as Cicero, agreeing with Antipater, found morally desirable in De officiis.

(i) Contract of government and the scope of natural law

In a chapter titled "Of the Promises, Contracts, and Oaths of Those who have the Sovereign Power," true to his parallels between natural persons, legal persons, and policies armed with public authority, Grotius applied his doctrine of contract to the relationship between the sovereign and the private citizen in the domestic arena. Grotius thus developed a doctrine of the contract of government (or contract of submission, Herrschaftsvertrag) that represented a special case in his general

---

164 I.B. 2.11.1.4: "M. auret Tullius in officis tarnum promissis vitis tribuit, at fundamentum iurisprud. fidem afferit..." See Cic. Off. 1.23: "Fundamentum autem est iure positum, id est dicendum consulam se constitutam et veritatem. On the specifically Roman character of fides as the foundation of justice in De officiis see Aldo 1959, 279. See in Roman "international law", see Nör 1999.

165 See Cic. Off. 3.50–74. On the debate, see Ananias 1950.

166 Grotius adds the description of the actio empi venditio in Ulp.Dig. 19.1.11.

167 I.B. 2.12.9.1: "Ad praecedentes actus pertinent, quod est cum aliquo contracti vitia sita rei de qua agitur seignorial debit; quod non civilibus tantum legibus constituit soler, sed naturae quoque actus congruit, non inter contrahentes proprium quod erat soccusum quam quasi communium est honestum. Quaere hoc modo solutum quod diutius Deogenes Babylonius hoc tractaret argumentum..."

168 I.B. 2.12.9.3: "Non ergo genera generalum speciis adiuvant Cerinonii, etiam esse cum quod velas id ignorant armamentis maius quaerat eos qui interests secedentium sed cum domum id locum habere cum de ipsius quae rem subjiciat ipsum per se contingat..."

169 Grotius 1972, 2: "Generally it has nothing to do with the origin of society itself, but presupposing a society already formed, it purports to define the terms on which that society is to be governed: the people have made a contract with their ruler which determines their relations with him."

---
Natural rights and just wars

Contractual rights

importance to the conclusion that the state was "a perfect society of free men," reflected in the choice of the term civitas, which he probably preferred to Cicero's res publica because of its suggestion of the civis. However, individuals can dispose of their freedom by contract. Every person can place himself in private slavery if he so desires, said Grotius, referring among other things to the Roman rules concerning legal personhood of the Institutes. Why, he asked, should not a "People that are at their own Disposal [populus sui iuris]... deliver up themselves to any one or more Persons, and transfer the Right of governing them [regendi ius] upon them, without reserving any Share of that Right to themselves?" Grotius illustrated this with, among other things, the example of the Roman lex de imperio Vespasiani, the transfer of the powers of the Roman people to the emperor by the Roman people.

So after the chief Men of Rome began to assume [sumpserent] to themselves the Regal Power [imperium regiae], the People [populus] are said to have bestowed all their Dominion [imperium et potestas] upon them, and Power even over themselves. Original freedom can be disposed of by contract, even after the fact, as Grotius apparently assumed here in the case of the Roman lex regia. A "society of free men" thus seems only to be necessary at the time the contract is concluded, when entering into the social and governmental contract. After that, full freedom of contract prevails — a position criticized by Rousseau, who assumed that certain contracts were null and void. It

De rei. D. 5, 1, 19: "Ex igiis in populo est populi. populus nunc non autem hominum toccas quaque modo congregates, sed eis multitudinis iuris consensu et auctoritate communium sedantes. Grotius' description of the coetus as perfectus is due to Aristotle's influence; see Arist. Pol. 1.252b28.

Inst. 1, 5, 4: Serv. ... Syns. ... iure civili, cum homo liber maior viginti annis ad pretium participandum esse remunerandum passos eum.

RWP, 1, 260; HBP, 1, 3, 8, 2: "Quid inerc populi sui iuris liber est ut ei causam, aut pltrius in iure addicere, ut regendi sui iuris in eur plane transcribat, nulls eis iurius parte remissi?"

RWP, 1, 268; HBP, 1, 3, 8, 10: "Se postquam Romani principes imperium vere regnum usurpate oppugnauerint, dictator populos in eos sono sumum imperium et potestatem commissit, eum in ac..." Grotius adresses the lex regia Inst. 1, 2, 6, a passage in turn taken from Ulp. Digest 1, 4, 1: Sed et in sancte principi placent, legi habet ssemmas, cum legi regia, quae de imperio eius latus est, populos et ipsam et in eum omnem sumum imperium et potestatem conscendat."

According to Grotius, the emperors from Augustus to Vespasian are usurpers of the people's constitutional prerogatives.

In Ulp. Digest 1, 4, 1, Grotius describes the original contracting, assuming an important role for the majority principle (referring Viridiae). From the authority of decisions reach by the majority he excludes, however, fundamental norms (pacta ac leges), which seem to have the character of constitutional, more firmly entrenched norms: "quae naturaliter, secundum pacta ac legis qus formam transandis negotiis important, pars maior lus habet inseque." See Gough 1577, 80-81.

See on Rousseau's criticism Kevring 1894, 172-73. See also Haukisson 1895, 246, where Grotius' freedom of contract is not given sufficient weight; however, when contracting, all rights can,
Natural rights and just wars

was this freedom of contract that enabled Grotius to defend the Dutch monopoly in Southeast Asia against the English, without abandoning his general support for free trade or the norms advocated in Mare liberum.⁵⁸ Once the VOC’s indigenous trading partners had bound themselves by contract, the contracts had to be honored regardless of their content.

While instinct, appetitus societatis, provided the motivation for forming societies, the consequence of the doctrine of social and sovereign contract was to leave the question of the legitimacy of concrete state authority to historical research. Grotius did this in his historical work De antiquitate reipublicae Batavicae in 1610, where he made almost no use of natural law ideas, but instead—following François Hotman’s Francogallia—pursued historiography in the service of a political argument, and more precisely, an argument about constitutional history.⁵⁹ The tools of historical research would be used to study the historical governmental contract. Thus in De antiquitate, Grotius was able to show that the Habsburg emperor and Spanish king had exceeded the powers arising from the historical governmental contract, which permitted a sympathetic judgment of the legitimacy of the secession of the northern Netherlands from the Empire on the basis of historical findings.⁶⁰

It seems more than plausible that we can impute to Grotius a doctrine of state purpose that saw the “enjoyment of right” and the “common utility” in the protection and guarantee of private property by the state, as formulated by Cicero in De officiis:

For political communities and states (res publicae civilissitque) were constituted especially so that men could hold on to what was theirs. It may be true that nature first guided men to gather in groups; but it was in the hope of safeguarding their property (res) that they sought the protection of cities (urbes).⁶¹

accordingly to Grotius, potentially be given up—whether this has actually taken place is a matter for historical constitutional research to decide.

⁵⁸ See Borschberg 1999, 146–47.
⁵⁹ See on Hotman and his dependence on Jean Bodin’s Méthode ad faciendum historiarum cognitium Skinner 1998, 1,309ff. A natural-law argument in De Antiquitate can only be found in ARPB 2.1. See on the use of such historical constitutional arguments in seventeenth-century England the classic study by Pocock 1987.
⁶⁰ Grotius still used these arguments when he was in exile; in a letter from 1624, probably addressed to the French statesman and student of Guian Pierre Jeanin, Grotius offered a conditioned version of his argument from De antiquitate BCG, 1, no. 696.
⁶¹ Cio. Off. 2.73: Hanc enim ob causam maximum, ut sua securitate, res publicae civilissatique constitutae suae. Nam, est diece natura congrugenchantur homines, tenens se custodias rerum naturum urbis praesidiaque aequorum. See also Cio. Off. 2.78, where redistribution is treated harshly and the end of the state reiterated: Qui neque se populari voce solvet, sive deficiat fundamentum rei publicae, consequeritur priusdem... deteste acquistatem, quasi tollitur omnis, si huc omnes suum quecumque non liet. Id enim est proprium, ut sigma dicit, civilissatque urbis, ut sit libertas et non sultanitas inae rei civilissatque civitate.
state law as they do to the institution of private property; once the state has emerged, natural law prescribes respect for obligations entered into by contract. The state of nature and natural law continue to exist outside the state and, in specific cases, in the domestic arena as well:

Undoubtedly, the Liberty [licentia] allowed before is now much restrained, since the erecting of Tribunals [iudicia]: Yet there are some Cases wherein that Right still subsists; that is, when the Way to legal Justice [iudicium] is not open. For the Law which forbids a Man to pursue his Right [suum consequit] any other Way, ought to be understood with this equitable Restriction, that one finds Judges to whom he may apply. Now the Way to legal Justice may fail, either for some Time or absolutely. It fails for some Time only, when the Judge cannot be waited for without certain Danger or Damage. It fails absolutely, either by Right or Fact: By Right [jure], if a Man be in Places not inhabited [non occupat], as on the Seas, in Wilderness, in desert Islands; and any other Places where there is no Civil Government [nulla civitas]. By Fact [facto], if Subjects will not submit to the Judge, or the Judge refuse openly to take Cognizance of Matters in Dispute. 144

If no adjudication is available (cessas iudicium), either de jure or de facto, according to natural law the ban on use of force for private persons ceases: de jure on the seas, in the wild, on uninhabited islands, and in all places where no civitas exists; de facto where jurisprudence fails. Those not subject to positive law (leges civiles) must obey whatever right reason (ratio recta) prescribes as just (aequum). Grotius writes. This was also the case for those subject to positive law, as long as positive law did not grant or take away a right (ius), but only failed for some reason to assist natural law. 144 The positive law of a state could interfere with a citizen's rights, as could be shown using the example of property. Grotius presented two types of property rights: a subjective right to property in the private sphere, and a higher subjective right of the state to all private property under its sovereign control:

Right strictly taken [facultas] is again of two Sorts, either private and inferior, which tends to the particular Advantage of each Individual: Or eminent and

---

143
IBP. 1.2.1: "Certe quin restricta multum sit us que annis iudicium communis fuerat licentia, dubiatur non potest. Est tamet ubi locum non ubique habeat, minum ubi cesset iudicium: nam lex vetera sine iudicio suum consequit, intelligit commodum debet ubi copia es iudicii. Cessat autem iudicium momentaneum, aut continuo. Momentanea cessat, ubi expectanti iudicium non potest sine cerio periculo aut damno. Continua vero, ubi, aut facto, aut facie, si quis veerat in loco non occupato, ut mari, solitudine, incolta, urba, et si quae aliis locis in quibus nullae est civitas: facto, si subdicti iudicium non audivit, aut iudex aperer cognitio necesse est."

144
IBP. 1.2.2: "Et vero quia legislativus civilibus subiecti non sunt, id sequitur quod eodem esse ius priscum recto dicit: Ito et illi qui legislati subiecti sunt, quiestes quae eo quod sine plurisque est agunt: si modo leges non ius dant aut tolunt, sed tertiis diurnatis ob eundem caussa auxilium suum derivant."
Natural rights and just wars

(ii) The right of resistance

Grotius was widely criticized for his conservative attitude toward resistance to established authority. In De iure praedae, the question of a right to resistance played no major role, which can easily be explained by the international, or rather extra-state, context of the work; its main concern was the behavior of the subjects of natural law on the seas, understood as the state of nature. In De iure belli ac pacis, Grotius devoted an entire chapter, De bello subeditorum in superiores, to the question whether, after the creation of a state authority, there is also a natural right to resistance on the part of the subjects. Like all other subjective natural rights, the right to resistance arises from a just cause of war. The right of resistance was interpreted by Grotius as a right to wage a private war against the authorities.

At first it seems as though according to Grotius the natural right of resistance was the first right to fall victim to the creation of the polity and the superordinate rights of the state authorities:

Indeed all Men have naturally a Right to secure themselves from Injuries by Resistance [ius resistendi], as we said before. But civil Society [civiles societas] being instituted for the Preservation of Peace [tranquilitate], there immediately arises a superior Right [ius maius] in the State over us and ours, so far as is necessary for that End.

So far, so Hobbesian. However, Grotius permitted some exceptions to this rule — cases in which the natural right to resist had not disappeared even in the context of the established polity. In contrast to the Calvinist monarchomachs of the sixteenth century, who had rejected a right of resistance on the part of private individuals against state authority and developed a theory of resistance based on the Spartan model of ephors, which permitted a right of resistance only to lower-level magistrates (magistratus inferiores), Grotius fell back in exceptional cases on a natural-law right to resistance on the part of the private individual (privatis).

For Grotius, the right of resistance arose either from a breach of contract or an unlawful act by the ruler. Grotius distinguished between resistance to legal holders of power and resistance to those who had unlawfully acquired power. In the first case, Grotius thought of the right to resistance in Roman law terms, as the result of a breach of the ruler's contractual obligations. A possible right to resistance against legal holders of the ius imperandi was based on the original contract or promise in which the form of authority was determined. Because Grotius saw the sovereign contract as a promise to his subjects by the person holding the highest sovereign power, subjective rights could arise from such a promise. The Roman emperors Trajan and Hadrian had made such promises, Grotius writes, in order to explain the consequences that arose from it:

Yet I must confess, where such Promises are made, Sovereignty [imperium] is thereby somewhat confined, whether the Obligation only concerns the Exercise of the Power, or falls directly on the Power itself. In the former Case, whatever is done contrary to Promise, is unjust; because, as we shall shew elsewhere, every true Promise gives a Right [ius] to him to whom it is made. In the latter, the Act is unjust, and void [nullus] at the same Time, through the Defect of Power [defectu facultatis].

Sovereignty (summa imperium) could, according to Grotius, be divided at the time of the original establishment of the form of government: "So also it may happen, that the People in chusing a King, may reserve certain Acts of Sovereignty to themselves, and confer others on the King absolutely and without Restriction." A free people can "require certain Things of

---


158 Grotius explicitly denies lower-level magistrates a right to resist; see IBP 1:4-6.

159 IBP 1:3-6. In Grotius refers to Plin. Pan. 64:3 and SHA Hadri. 7. See Plin. Pan. 64:3-5; Imperator ergo et Caesar est Augustus potest maximus situs autem quidem cumulat, sedique consul privatus autem se sisae, et sedis usurpatum imperiat. Ei tamen, ut ius interius. Quin eorum sedes statui praeclara ius imperandi, ut illae inutiles epistulis exponantur, nullus autem caupinae esse domum sumit, ii scienter felicitat, doctorem iae conscribere. SHA Hadri. 7. 4: in senatu quaeque emittas quae facta esses timendi aut nunquam senatorem vii aut senatums sententiam suam ueritatem prorsum.

160 RWP 3:5.6.1-2; IBP 1:3.6.2. "Petrarcham tamen, id usi fit, auctus quaedammodo reddi imperium, sive obhiguis dominantia cadit in exercitatione actus, sive eum directe in ius capi faciat; si autem, in qua species actus contra promissionem factae esset intus, quod, quae promissio fuerat, et cui prosum mitti altera assumo specie est eam nullius defecit facultatis."
the King, whom they are chusing, by way of a perpetual Ordinance or can add something to the contract "whereby it is implied, that the King may be compelled or punished." Grotius proved this using an example from Plato's Laws: "For the Heracleidae . . . being settled at Argos, Messenia and Lacedaemon, their Kings were obliged to govern according to Laws prescribed to them." Such princes, subject, like the Spartan King Pausanias, to "the People, whether they at first were established on that Foot, or their Authority was thus rendered subordinate by a posterior Agreement," could be repelled by force or punished with death "if they offend against the Laws, and the State." Grotius also conceded a right to resistance in the case of a ruler who had gained his authority by election or heredity and then alienated his power. Such a ruler enjoyed sovereignty only by usufructus (usufructarius), and it was therefore not transferable. A ruler who, in opposition to the provisions of the Roman law on usufructus, transferred his power could thus be lawfully resisted, according to Grotius. In this context, the right to resistance apparently did not arise primarily from a breach of contract by the ruler; there was, instead, a violation of the norms of Roman property law on usufructus, which in Grotius' view formed the basis for certain forms of political power and were probably conceived of as natural-law norms that preceded any sovereign contract.

Finally, the natural right to resistance could, according to Grotius, be reserved by contract:

If in the conferring of the Crown [delatio imperii], it be expressly stipulated, that in some certain Case the King may be resisted, even though that Clause [pactum] does not imply any Division of the Sovereignty, yet certainly some Part of natural Liberty is reserved to the People, and exempted from the Power of the King.

While the right to resist a lawful ruler arose, as a rule, from a breach of the contractual agreement (pactum) upon which his authority was based, the right to resist an unlawful holder of authority arose from the absence

of a legal basis for that authority. Such an "invader of authority" (invasor imperii) could, under certain circumstances, be resisted; any private person could use force against someone who had gained his power through an unjust war. Finally, a general right of resistance had to be supposed for polities in which laws were in force that permitted tyrannicide. Anyone who usurped power over such a polity could, under the positive law of the state in question, be killed by any citizen without legal process. As an example, Grotius offered Athenian and Roman laws, with which he was familiar from Plutarch's parallel biographies of Solon and P. Valerius Publicola:

I think, with Plutarch, the same may be said of him, who has usurped the sovereign Authority in a State where there was already a Law [lex publica], empowering any Person to kill him, who should do such or such a Thing, visible and manifestly designed: as for example, if a private Man [privatus] should go with a Guard about him, should assault a Fort, or kill a Citizen uncondemned, or illegally condemned, or presume to create a Magistrate without being elected by legal Votes. Many such Laws [leges] were extant in the States of Greece, with whom it was reputed lawful to kill such Tyrants.

Such was Solon's Law at Athens, after the Return from the Piraeus, against such as should abolish popular Government, or after its being abolished, should exercise any publick Office. And such was the Valerian Law at Rome, if any one bore an Office without the Order of the People; and the Consular Law, after the Decemviral Government, that no Man should create a Magistrate without an Appeal; and he that did it might lawfully be killed.

Grotius conceded a right of resistance in the case of a free people that had explicitly agreed upon it in their social contract. The status enjoyed by the Roman popular assembly in Grotius' examples is noteworthy. Like Bodin, Grotius interpreted the Roman republic as a democracy. He thus saw, in the election of magistrates by the Comitia and the right of appeal (ius provocacionis), the criteria for the maintenance of the republican order. The circumvention of these central institutions by a tyrant was, for Grotius, a just cause of war, which gave every citizen of such a free republic a right to resistance under the positive laws of his polity.

According to Grotius, therefore, the natural right of resistance was revived in cases of breach of contract or violation of natural-law norms by a ruler; the latter existed when someone usurped authority through an
Natural rights and just wars

unjust war. Failure to observe the norms of ususfructus on the part of princes, as discussed above, which could also give cause for lawful resistance, represented such a violation of natural law. The case of breach of contract was a special case of natural rights, which Grotius considered to result from contractual obligations, while violations of natural law were seen as analogous to violations of Roman property law, in which usurpation was viewed as unlawful expropriation of others' property or as violation of the provisions for ususfruct. Grotius, analyzing constitutional arrangements in Roman law terms, is not willing to make any substantive normative commitment to a particular kind of constitutional setup— he cannot be described as an author in the civic tradition of republicanism in this regard, let alone as a proponent of "exclusive republicanism." This is so because if the prince holds sovereignty by ususfruct, this will be perfectly compatible with popular liberty; surely a "significant departure from one of the longstanding assumptions of early modern republicanism, that popular liberty requires popular government."[68]


CHAPTER 9

Enforcing natural law

The right to punish

Grotius' motivation to establish a natural right to punish which precedes the establishment of a commonwealth and which can be brought to bear against violations of natural law even in the state of nature can be explained by looking to the arguments with which his legal brief De iure praedae was originally concerned. Freedom of trade with the East Indies and its necessary prerequisite, freedom of the sea, were the issues on which the legal debate over the legitimacy of Dutch privateering turned. If the seizure of the Santa Catarina could be shown to be part of a just war fought against the illegitimate Spanish and Portuguese claims to a monopoly of trade with the East Indies, then the capture itself would be justified. To this end, Grotius in De iure praedae adopted a two-pronged strategy, aiming to show, on the one hand, that the VOC's forerunner could be understood as the agent of a sovereign state engaged in a just war against Spain and Portugal, and that, on the other hand, the capture of the ship was justified under the law of nature even if the trading company had been acting on its own behalf as a private actor. It is this latter aspect of Grotius' strategy that made him develop a doctrine of a natural right to punish: the Portuguese, he argued, by monopolizing the high sea, had violated the law of nature, giving rise to the VOC's natural right to punish and providing the trading company with a just cause for war.

The right to punish arises out of an unlawful act. Because, however, such an unlawful act can, true to Grotius' Roman law terminology, consist of either a simple private-law defect or criminally relevant behavior, the question arose for Grotius whether the right due to everyone in the state of nature was merely a right of enforcement arising from a private delict, or whether it constituted a right to execute a punishment, arising from a

1 See Happenmacher 1997, 88–89, who recognizes the dual character of the unlawful act, without addressing the Roman background.