

## Cynicism, Scepticism and Stoicism: a Stoic Distinction in Grotius' Concept of Law

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It is a risky enterprise to speak in general terms about 'Stoicism' or of something being 'Stoic'. Old, middle, late and neo-Stoics (Zeno, Cleanthes, Chrysippus, Panaetius, Poseidonius, Marcus Antonius, Seneca and then elements in Christian and early modern authors going up to the 17<sup>th</sup> century) somehow seem to merge into one indistinct stream of thought. The fragmentary nature of what we know about the ancient Stoics contributes to this. However, it is somehow unavoidable to speak in shorthand, particularly when we discuss an author from within a humanist tradition like Grotius.

In this paper I focus on an issue which is considered to be typically 'Stoic'. It is the distinction in Stoic ethics between the good and the evil, and of the other things which in the perspective of absolute good and evil are indifferent, such as health or sickness and wealth or poverty. This characteristic distinction is in its full details and consequences, itself the object of a considerable amount of uncertainty. This is mainly due to the distinction within the category of indifferent things between certain things which are "preferred" and other things which are to be "rejected" (and some truly indifferent things), according to the value they have. The precise relation between "preferred" things and "good" things has been an object of some controversy.<sup>1</sup> To mention one source contributing to confusion, according to Diogenes Laertius (7, 103), Posidonius is supposed to have held that health and wealth are among the goods and not merely among the things which are of value. This is a most important issue, for it highlights the crucial relation between the moral good and the preferred things within the category of indifferent things.

Here it suffices to have traced this 'Stoic' distinction in order to be able to see it recurring in Grotius' work, mainly in his distinctions within the concept of law, or rather the concepts of law, *ius*. In particular, I wish to draw attention to the issue of "intermediate things" and the related concept of "middle justice" in this context, which are the terms which Grotius, building on Ciceronian language, employs for the group of indifferent things, the *adiaphora* of the Stoics.<sup>2</sup>

An assessment of this issue in Grotius' work, may contribute to a clarification of the extent to which he can be considered a (neo-)stoic, or must rather be associated with a refined neo-scepticism, as Richard Tuck suggested. Tuck suggests that, after a great fascination with Scepticism in his youth, in later works Grotius was able to transcend the sceptical position by bringing about a radical division of law into a 'minimalist' natural law, which concerns points on which everyone can agree, and a volitional law under which all points of difference in things human and divine are brought. He takes Grotius' refutation of Carneades in the Prolegomena to *De iure belli ac pacis* as the prime instance of this stance. In fact, Grotius did indeed consider the distinction between natural and volitional law to be "iuris optima partitio" (*De iure belli* I, I, ix, 2). And authors who take an interest in Grotius' legal work, have also stressed the slightness of what Grotius had to say on the natural law in a strict sense, thus - to the distress of some - restricting natural law to the preliminary remarks of *De iure belli* and hence relegating it to the very margins of the legal discourse. Of course, these scholars have noted that Grotius greatly acknowledges the existence of a kind of "natural law", which is "natural"

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<sup>1</sup> For an analysis, see among others M. Reesor, *The Indifferents in the Old and Middle Stoa*, *Transactions and Proceedings of the Philological Association*, lxxxii (1951), 102-110; J.M. Rist, *Stoic Philosophy*, 1969, 1-21; I.G. Kidd, *Stoic Intermediates and the End for Man*, in: A.A. Long, *Stoic Problems*, London 1971, 150-172.

<sup>2</sup> On the distortion of Stoic ethics which may result from conceiving of the *adiaphora* as intermediate between good and evil, particularly in Cicero, see Rist, *Stoic Philosophy*, Cambridge 1969, 97-111.

in an improper sense. This concerns the things which are “permitted”. But this in reality turns out to be for Grotius the realm of volitional law. Grotius, once styled the 'Father of Natural Law', should then be considered as really much more interested in volitional than in natural law. On closer inspection, though, this volitional law is not quite as separate a category from natural law after all, at least in some respects.

### *The meanings of law*

In *De iure belli*, Grotius distinguishes between three meanings of *ius*:

- a set of normative rules (*leges*);
- a set of rights pertaining to persons;
- that which is right, or in Grotius' words “that which is not unjust”.

Grotius was quite aware of the relationships between these three senses of law. What is right in the first sense, must also be right in the second and third senses. But this is not so the other way round. For Grotius, that which is right in the third sense is not necessarily anybody's right in the second sense. Thus for instance it is right that a child be supported by its parents, yet in as much as the parents do not have an obligation in the strict sense - as Grotius points out - to support their children, the latter shall not have a perfect moral right (*facultas*) to support.<sup>3</sup> Nor is that which is right in the second sense necessarily right in the first sense, e.g. in as much as one may have a right to do something (i.e. have the *facultas* or *aptitudo*) which is not forbidden nor commanded by a norm of any rule or norm of natural (or for that matter volitional) law. Grotius had set this out for the *iniuria* already in *De iure praedae*. In this regard the distinction of three kinds of *ius* in *De iure belli* was no new elaboration of the problem.<sup>4</sup>

All this is not a futile logical exercise. In Grotius' treatment, it is a manner to delimit the reach of natural law in the sense of a set of norms. What can be a right thing in factual circumstances, can only be so if natural law does not oppose it.

This latter manner of speaking of something which is not opposed to the law of nature, is present throughout both the politico-theological tracts and in the juridical works of Grotius. He does so in a manner which consciously refers to the Scholastic distinction of the norms which are in a proper sense natural from the norms which are improperly said to belong to natural law. One major

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<sup>3</sup> *De iure belli* II, VII, iv, 1: “Disputant Iurisconsulti an alimenta a parentibus liberis debeantur. Nam quidam sentiunt esse quidem naturali rationi satis consentaneum, ut a parentibus alantur liberi, debitum tamen non esse. Nos omnino distinguendum arbitramur in voce debiti, quod stricte interdum sumitur pro ea obligatione, quam inducit ius expletorium; interdum laxius, ut significet id quod nisi inhoneste omitti non potest, etiamsi honesta illa non ex iustitia expletrice, sed ex alio fonte proficiscatur. Est autem id de quo agimus (nisi lex aliqua humana accedat) debitum illo sensu laxiore.”

<sup>4</sup> *De iure praedae*, pp. 71-75: “Injuria igitur illa quae juri opponitur tres habet significationes, quas Graeci totidem vocabulis distinguunt. [...] Primum est to adikon, secundum adikema, cujus sunt species hybris kai zemia, tertium adikia. Hierax Philosophus [...] commode haec discernit cum dicit primum esse apotelesma, secundum praxin, tertium hexin, hoc est, opus, actionem, affectionem, quomodo differunt pictura, pictio et ars pingendi. Ex primo adikon ti prattontes, ex secundo adikontes, ex tertio adikoi dicimur. Omnis autem adikia secum habet adikema et adikema omne to adikon: sed non retro. [...] Et forte non errabimus si dicamus ton adikon ti prattonta - facere injuriam, ton adikounta - facere injuria, ton adikon - facere injuriose. Quibus respondent dikaion ti prattein, dikaiopragein kai dikaios prattein, facere jus, facere jure, facere juste.” Haggemacher, Grotius et la doctrine de la guerre juste, Paris 1983, p. 525, remarked: “[A]u lieu de l'exposé synthétique d'autrefois [De iure praedae], Grotius se borne à y présenter sur un mode purement analytique les trois acceptions majeures du terme ius. Ce faisant, il parvient à mettre en évidence et à dissocier ce qui était resté confondu dans le système du Mémoire [= De iure praedae]. Cela vaut tout spécialement pour la relation entre sources formelles du droit et normes matérielles censées en dériver: ce lien direct, si frappant autrefois, est dissout; il ne subsiste qu'une série de définitions formelles juxtaposées, sans véritable lien entre elles.”

difference between them is that the latter norms lack the cogency with which proper natural law considers certain things right or wrong. Thus Grotius writes in *De iure belli*,

"For an understanding of natural law it should be noted that some things are said to belong to natural law not properly but, as the scholastics like to say, by reduction, natural law not being in conflict with them; in the way we said above that things are called just which lack injustice. But sometimes things which reason indicates to be honourable or to be better than their opposites, but not obligatory, are inappropriately [*per abusio[n]em*] said to be part of natural law."<sup>5</sup>

Similarly there is the following passage in the *De Satisfactione*:

"As in physical matters, so in moral matters, something is said to be natural either properly or less properly. In physical matters something is natural properly which belongs to the essence of things necessarily, such as feeling in an animate being, but less properly that which is in accordance with and, as it were, accommodated to the nature of something, such as the use of the right hand. Thus in moral affairs some things are natural properly that necessarily follow from the relations of the things themselves to rational nature, such as the unlawfulness of perjury, and other some things are natural improperly, such as the son's succession to his father."<sup>6</sup>

The point of these passages is not so much a disqualification of that natural law which is 'improperly' called so at all. This follows from the context from which we took the quotation from *De Satisfactione*, which refers back to the various senses of injustice:

"We must know that injustice does not follow from any negation of justice, not even under the same circumstances; for, as it does not follow that, if a king is to be called generous because he has given someone a thousand talents, he would therefore be ungenerous if he had not done so, so it is not an invariable truth that something that may be done with justice cannot be omitted without injustice."<sup>7</sup>

Of course Grotius could be scornful of scholastics who took great pains to show that certain things belonged to natural law, such as monogamy, concubinage and divorce. Grotius' words are unsparing when he speaks of those who claim that such norms pertain to natural law:

"How amazing it is to see how those who think differently sweat to prove that what the Gospel forbids is by natural law illicit, such as concubinage, divorce, matrimony with several

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<sup>5</sup> *De iure belli* I, I, x, 3: "Ad iuris autem naturalis intellectum, notandum est quaedam dici eius iuris non proprie, sed ut scholae loqui amant, reductive, quibus ius naturale non repugnat, sicut iusta modo diximus appellari ea quae iniustitia carent. interdum etiam per abusiosem ea quae ratio honesta aut oppositis meliora esse indicat, etsi non debita, solent dici iuris naturalis."

<sup>6</sup> *De Satisfactione* (ed. Rabbie 1990), 3, 9: "Naturale autem aliquid, ut in physicis, ita in moralibus aut proprie aut minus proprie dicitur. Naturale in physicis proprie est, quod rei cuiusque essentiae necessario cohaeret, ut animanti sentire, minus proprie vero, quod alicui naturae conveniens et quasi accommodatum est, ut homini dextra uti. Sic ergo in moralibus sunt quaedam proprie naturalia, quae necessario sequuntur ex rerum ipsarum relatione ad naturas rationales, ut perjurium esse illicitum, quaedam vero improprie, ut filium patri succedere."

<sup>7</sup> *Ibidem*: "Ut huic obiectoni respondeatur, sciendum est non sequi iniustum ex quavis negatione iusti etiam positus iisdem circumstantiis; quemadmodum enim non sequitur, si liberalis rex dicendus est qui alicui mille talenta dederit, ideo si non dederit, illiberalem fore, ita non est perpetuum ut id quod iuste fiat, non nisi iniuste omittatur."

women."<sup>8</sup>

A moment's reflection must lead us to the conclusion that the latter quotation actually shows that saying that certain norms do not belong to natural law does not disqualify them at all - unless Grotius wished to disqualify the law of the Gospel, which he surely did not. That the divine norms of the Gospel are not disqualified by saying that they are improperly counted as norms of natural law, implies that also other volitional norms are not disqualified when Grotius says they are improperly considered part of natural law.

### *Two kinds of permission*

The distinction on the various forms of *ius* touches on a similar distinction between "full and less plenary permission", *permissio plena aut minor plena*, with which Grotius deals in this context in *De iure belli* (I, I, iv).

These two kinds of permission Grotius introduces when he states that no precept of Jewish law contains anything which conflicts with natural law.<sup>9</sup> This absence of conflict between Jewish law and natural law is stipulated for precepts, but with regard to permission granted by law, Grotius distinguishes between "full permission", which grants the right to do something entirely licitly, and the permission which is less plenary because it merely grants impunity amongst men and the right that no other person may licitly obstruct the permitted course of action. The "full permission" granted by Jewish law is - just as the precepts of Jewish law - not contrary to natural law, but with the less plenary permission, so Grotius says, "the case is different".

Full permission grants a freedom which as it were carries the full approbation of natural law; it does not in any way conflict therewith, while the freedom from punishment and interference by men may not have the same legitimacy. It is in fact implied in the manner in which Grotius speaks of the latter kind of permission, that it is in some way at variance with natural law, although obviously there is no natural prohibition. This means that for Grotius there must be some natural consideration dissuading from the permitted course of action without forbidding it. That such natural considerations can be said to be at least in some sense part of natural law follows from Grotius' statement that it is more appropriate to argue from natural law in order to establish with what kind of permission we are dealing, than to argue from the permission to natural law.<sup>10</sup>

Within the context of *De iure belli* this is a major distinction. It is at the basis of the distinction between the justice of things which are entirely and in all respects right (*ius*) and the *iustitia externa* of things which though not forbidden only have the external effect of law, in the sense that those things are obligatory if prescribed by volitional law or are done merely with impunity if allowed by volitional law.<sup>11</sup> Thus it becomes possible to say that according to the law of nations in a war many

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<sup>8</sup> Id., I, II, vi, 2: "Illud libens agnosco, nihil nobis in Euangelio praecipitur quod non naturalem habeat honestatem: sed non ulterius nos obligari legibus Christi quam ad ea ad quae ius naturae per se obligat, cur concedam non video. Et qui aliter sentiunt mirum quam sudent ut probent quae Euangelio vetantur ipso iure naturae esse illicita, ut concubinatum, divortium, matrimonium cum pluribus feminis."

<sup>9</sup> *De iure belli*, I, I, xvii.

<sup>10</sup> *De iure belli* I, I, xvii, 2: "Primum ergo ostendit lex Hebraea, id quod ea lege praecipitur non esse contra ius naturae. [...] De praecipitis loquor, nam de permissis distinctius agendum est. permissio enim quae lege fit [...] aut plena est, quae ius dat ad aliquid omnino licite agendum; aut minor plena, quae tantum impunitatem dat apud homines et ius ne quis alius impedire licite possit. Ex prioris generis permissione non minus quam ex praeepto sequitur id de quo lex agit contra ius naturae non esse. De posteriori genere aliter se res habet. Sed raro locum habet haec collectio: quia cum permittentia verba sint ambigua, magis ex iure naturae interpretari nos convenit utrius generis sit permissio, quam ex permissionis modo ad ius naturae argumentando procedere."

<sup>11</sup> Cf. id., prolog., paragraph 41: "Itaque haec duo [sc. ius naturae et gentium] non minus inter se quam a iure civili discernere semper unice laboravi: imo et in gentium iure discrevi id quod vere et ex omni parte ius est, et id quod

things may be done with impunity which are better omitted; hence Grotius' celebrated *monita* and *temperamenta*.<sup>12</sup>

#### *Commendable and objectionable things*

Parallel to this distinction between full or less full permission, there are the commendable things and the objectionable things, which again exist within this field of things which are called natural in the larger sense.

An example of this is the duty for parents to support their children, which Grotius gives in *De iure belli* II, VII, iv. Unless there is a volitional human law which intervenes, there is no perfect moral duty for parents to support their children, and hence no real 'right' for children to such support. This is so because natural law does not contain any command to this effect. Yet, for Grotius it is right for parents to support their children. And he brings forward a whole range of arguments in support of this. A law of inheritance which leaves nothing to children born out of wedlock is therefore not invalid, because it is not in conflict with a natural *lex* in the strict sense of a forbidding or commanding precept; yet it is a rigid law, which rightly is corrected - so Grotius argued - by Christian canons that teach that what is necessary for support is rightly left to all children whatever (at any rate when there is a need for it).

#### *The middle things*

The class of things which are neither commanded nor forbidden by the law of nature *stricto sensu*, is fairly large. The norm which a legislator sets with regard to this class of things do perhaps not lack every tie with natural justice, but it would be wrong to consider this body of volitional law to be really part of the objective natural law ('*lex naturalis*').

Grotius is willing to go quite far in his acceptance of the consequences of the latter assertion, as can be inferred from a note to a passage in *De iure belli*. In the relevant passage Grotius gives a comment on Pomponius' choice of words when he said it is "by nature permissible", *naturaliter licere*, to cheat with the price when buying or selling. Grotius remarks that 'permissible' here means that there is no legal remedy against this kind of cheating, while 'by nature' refers to a "widely accepted custom, in the same manner as the apostle Paul has said that nature teaches that it is wicked for a man to let his hair grow long, although this is not against nature and has been common in many nations"<sup>13</sup>. In the note we are interested in, Grotius adds another attribution to nature of what in reality is not nature but custom:

"Similarly Gellius says of the conjugal act: 'It is a thing to be done in private by the law of nature'<sup>14</sup>.

The implication of this is that, according to Grotius, it is not *per se* natural to have sexual

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duntaxat effectum quendam externum ad instar illius primitivi iuris parit, nempe ne vi resistere liceat, aut etiam ut ubique vi publica, utilitatis alicuius causa, vel ut incommoda gravia vitentur, defendi debeat: quae observatio quam sit necessaria ad res multas, in ipso operis contextu apparebit."

<sup>12</sup> *De iure belli* III, X - XVI. Cf. Haggemacher, 1983, pp. 568-88.

<sup>13</sup> *De iure belli* II, XII, xxvi, 1-2: "Hoc enim est quod ait Pomponius, in pretio venditionis et emtionis naturaliter licere se mutuo circumvenire: ubi licere est non quidem fas esse, sed ita permitti ut nullum contra proditum sit remedium in eum qui se pacto velit defendere. Naturaliter autem eo in loco, ut et alibi interdum, positum est, pro eo quod recepti passim moris est, quomodo apud Apostolum Paulum ipsa natura docere dicitur viro turpe esse comam alere cum tamen id neque repugnet naturae, et multos apud populos usitatum sit."

<sup>14</sup> *Ibid.*: "Sic Gellius lib. ix, c 10, de actu coniugali: rem naturae lege operiendam"; cf. *Noctes atticae*, IX,10,1: "...Vergilii versus [...], quibus Vulcamum et Venerem iunctos mixtosque iure coniugii, rem lege naturae operiendam ..."

intercourse in private<sup>15</sup>. Up to this point Grotius goes along even with Crates the Cynic, who reportedly had the habit of having sexual intercourse with his companion Hipparchia in public.<sup>16</sup> But the charge of Cynicism would be unfounded. Grotius' position is classic in holding that that which does not belong to natural law in the strict sense is not therefore something to be pursued. Unlike what the Cynics held, Grotius considers it wrong rashly to presume that one can indulge in that which is not absolutely forbidden; some *ratio probabilis* can dissuade from doing what is not absolutely forbidden. Such a reason may well be that something is customarily not done, for offending the generally accepted mores may lead to a disruption of public order that in the end threatens the social life for which man has been born; "with regard to middle things, those things are to be preferred which is predominant in most places."<sup>17</sup>

This kind of argument, which occurs in several places in Grotius' works, though anti-Cynical, closely resembles the Sceptical attitude of attaining quietude by leading the undogmatic life of conformity to the prevalent laws and customs. But certainly one cannot call Grotius a Sceptic in an unqualified manner, because Grotius does endorse the view that there is one unchangeable natural law which is binding upon everyone.

#### *The nature of middle justice*

In order to appreciate Grotius' distance from the Sceptical position, it is necessary to see that the class of permissible things is conceived by him as something 'in between' good and evil, not as something outside or beyond good and evil. The permissible things are not per se commendable or to be rejected for they are not part of the *lex naturalis* in the strict sense; but depending on the nature of the circumstances they are things which sometimes ought to be done, and sometimes ought to be avoided. In any particular case they are in this sense to be placed somewhere in between good or evil; these things are 'intermediate' between those which by natural law are forbidden and those which are by nature commanded. The very intermediateness of this domain leads to what is at times an awkward balancing between the *perseitas* of natural justice and the natural contingency of the human situation - a balancing which tends now in this, now in that direction. It is this intermediateness which accounts for the fact that we do not find the same degree of certainty in moral affairs as we do in mathematics:

"This stems from the fact that mathematical science completely separates forms from

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<sup>15</sup> In *De veritate religionis christianae* I, vii Grotius mentions "pudency in love-making, rites of marriage and avoidance of incest" as customs which are not instituted by nature or evident rational conclusions from natural principles, but by uninterrupted tradition: "Tum vero instituta quaedam ita & hominibus communia, ut non tam naturae instinctui, aut evidenti rationis collectioni, quam perpetuae & vix paucis in locis per malitiam aut calamitatem interruptae traditioni, accepta ferri debeant: qualis olim fuit victimarum in sacris mactatio, & nunc quoque pudor circa res Veneris, nuptiarum solemnna, & incestorum fuga."

<sup>16</sup> Diogenes Laertius, vi, 96-97.

<sup>17</sup> Rivetani apologetici discussio, 745 a 21: "... in rebus mediis ea praeferenda, quae plurimis locis invalere"; idem, *Op. Th.* III, 743 a 24 ff.: "Canones Apostolici non sunt quidem ab Apostolis scripti, sed consuetudines continent, partim ab Apostolis introductas, partim paulo post eorum tempora, & harum alias ubique receptas, alias multis in locis. Quae ubique receptae sunt, non dubium christianis bonis & pacis amantibus, quin observari debeant. Quae non ubique, hanc certe auctoritatem habent, ut nemo eas, tanquam illicitas, damnare debeat". Cf. *Votum pro pace ecclesiastica*, in *Op. Th.* III, 660 b 15 ff. (on the veneration of the Host): "Invocari Christus ubique potest: honoris signis affici ubique: ubi autem justius quam ubi modo adeo singulari praesentiam sui exhibet? Dicam amplius, flexus corporis varios, ad honoris significationem olim usurpatos, non habere ex Lege Divina certum & definitum aliquid quod significant; sed in usu esse libero, nisi quatenus populorum mores huic vel illi significationi eum defigunt. itaque si Apostoli caput flexere, alii genua, in eo quod rem attinet, nihil plane interest. Sed voces istae laetrias, adorationes & similes, quia ambiguae sunt, egregie serviunt rixas quaerentibus."

matter, while the forms are mostly such that there is no intermediate, just as there is no mean between a straight and a curved line. But in moral affairs even trifling circumstances alter the matter, and the forms which we are dealing with usually have something intermediate, which is of such latitude that it approaches now more closely to this, now to that extreme. Thus there is between what ought to be done and what is evil to do the mean of that which is permissible, but which is sometimes closer to the latter and sometimes closer to the former. Hence there often arises ambiguity like in the twilight or when cold water slowly becomes warm."<sup>18</sup>

Similarly Grotius had remarked:

"What we call moral goodness for the diversity of the matter consists at times so to say in a point, so that the least departure from it is a turning towards evil; but at other times it occupies a wider space, so that something is praiseworthy if it is done but at the same time is without wickedness if it is omitted or done differently - just as usually the transition of being into not being is immediate, while with other contraries like white and black, some mean can be found which is a mixture of both or a reduction to either. It is with the latter kind of things that divine and human laws are wont to be concerned mostly, so that the action which *per se* was only praiseworthy begins to be obligatory."<sup>19</sup>

The distinction of the class of intermediate things and the distinction within this class of preferable things from those which are better omitted are moral concepts derived from Stoicism, and Grotius was well aware of this. Zeno is commended to the reader of *De iure belli* via a verse from Juvenal just before the passage quoted immediately above; Cicero's third book *De finibus*, in which the "officium medium quod neque in bonis ponatur neque in contrariis" is distinguished, is mentioned *passim* in all the contexts from which we have been quoting.<sup>20</sup> The use of these particular Stoic concepts are part and parcel of Grotius' refutation of contemporary sceptical views; and also perhaps nearly cynical views, in as far as *De iure praedae* is rightly considered to be directed against the objections of

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<sup>18</sup> De iure belli II, XXIII, i: "Dubitandi causae in moralibus unde] Verissimum est quod scripsit Aristoteles [N.E. 1094 b 20 ff.], in moralibus non aequae, ut in mathematicis disciplinis certitudinem inveniri: quod eo evenit, quia mathematicae disciplinae a materia omni formas separant, et quia formae ipsae tales plerumque sunt, ut nihil habeant interiectum, sicut inter rectum et curvum nihil est medii. At in moralibus circumstantiae etiam minimae variant materiam, et formae de quibus agitur solent habere interiectum aliquid, ea latitudine, ut modo ad hoc, modo ad illud extremum propius accedatur. Ita enim inter id quod fieri oportet, et inter id quod fieri nefas est, medium est quod licet, sed modo huic, modo illi parti propinquius: unde ambiguitas saepe incidit, ut in crepusculo, aut in aqua frigida calescente." Cf. Briefw. I, no. 417, 29 Aug. 1615, p. 407.

<sup>19</sup> De iure belli I, II, i, 3: "Hoc ipsum vero, quod honestum dicimus, pro materiae diversitate, modo (ut ita dicam) in puncto consistit, ut si vel minimum inde abeas, ad vitium deflectas; modo liberius habet spatium, ita ut et fieri laudabiliter, et sine turpitudine omitti aut aliter fieri possi, ferme quomodo ab hoc esse ad hoc non esse statim fit transitus; at inter aliter adversa, ut album et nigrum, reperire est aliquid interpositum, sive mixtum, sive reductum utrinque. Et in hoc posteriori genere maxime occupari solent leges tum divinae tum humanae, id agendo ut, quod per se laudabile tantum erat, etiam deberi incipiat." Cf. also Annotationes ad Luc. VI, 35: "Caeteros quod attinet, primum cavere debent ne usurarum nomine plus aequo exigant, quod quia non positum est en stigme, in puncto individuo, sed platos, latitudinem aliquam, aliquod habet pro regionum ac populorum diversitate, legibus Civilibus definiendum, est."

<sup>20</sup> De iure belli I, II, i, 2: "Iuvenalis Satyra XV: 'melius nos/ Zenonis praecepta movent: neque enim omnia, quaedam/ Pro vita facienda monent.'" Id. II, II, ii, 2: "Zenoni Cittiensis prudentia, scientia, bonorum, et malorum et mediorum. Est id apud Diogenem Laertium." Cf. Cicero, De finibus III, 58 and De officiis I, 7; Cicero had suggested in the *Academica Post. I*, 37 that the intermediate things are to be divided into "officia servata praetermissaque". J.M. Rist, *Stoic Philosophy*, Cambridge 1969, p. 97 considers Cicero's statement in the *Academica* "clearly a false version" of Stoic thought.

Mennonites, who as powerful shareholders in the East Indian Company had objected to the taking of prizes which Grotius in turn defended in *De iure praedae*.<sup>21</sup> Such sceptical views appear in the personification of Carneades the Academic at the opening of the prolegomena to *De iure belli*. The procedure of making Carneades the standard-bearer of the sceptical attack on justice has as logical consequence that Grotius takes on a line of defence quite similar to that of the later Stoics. Cicero (as transmitted via Lactantius and Augustine) had done the same in his *De republica*, where Carneades' attack on justice was described<sup>22</sup>. Already in *De iure praedae* Grotius had referred to 'middle justice' in precisely the same anti-sceptical context. There we find Grotius saying "how erroneously the Academics, those masters of ignorance, have argued against justice, that the kind derived from nature looks solely to personal utility, while civil justice is based not upon nature but merely upon opinion. For they omitted middle justice which is characteristic of mankind."<sup>23</sup>

### *Refuting the Sceptics*

The aim of overcoming scepticism as a motive in Grotius' works has been well recognized.<sup>24</sup> The fascination in Grotius' earlier works with the diversity of morals in different societies is exemplified in his *Parallelon Rerumpublicarum*. The starting point and purpose of the *Parallelon Rerumpublicarum* is, however, not merely to describe the variety and relativity of morals in different cultures and to show their equivalence, but quite to the contrary to show that, when set on a scale ranging from better to worse, one nation (the Dutch) is actually better than others (Rome and Athens). Even though many things are not absolutely good and evil, it remains possible to argue that some of them are better than others, and some worse. The same is true of the 'middle justice' which is not concerned with things which have no relation to good and evil at all; the group of things with which it is concerned with does in fact retain a connection with what is good and what is evil. We should not ignore the fact that according to Grotius, volitional law is particularly concerned with things the status of which is described as 'intermediate' between good and evil, as a 'mixture' of good and bad, and as something which can be 'reduced' to either one or the other.

Quite in line with this state of affairs, Grotius' refutation of Carneades in the prolegomena to *De iure belli* is not limited to a rejection of the validity of sceptical views with regard only to natural law properly speaking; Carneades' view is also rejected with regard to civil law. After stating in the prolegomena that there is in man a natural "*societatis custodia, humano intellectui conveniens*" which is source of natural law both in a strict sense and in a larger sense (paragraphs 6-10), Grotius goes on to say that *stare pactis* is the natural principle on which the *iura civilia* are based. Hence civil law is ultimately founded on nature:

"What is said not only by Carneades, but also by others, that 'utility is as it were the mother of what is just and fair', is not true if we speak accurately. For the mother of natural law is human nature itself, which even if we had no lack of anything would lead us to seek the mutual relations of society. But the mother of municipal law is that obligation which arises from mutual consent; and since this obligation derives its force from the law of nature, nature may be considered, so to say, the great-grandmother of municipal law."<sup>25</sup>

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<sup>21</sup> See Hamaker's preface to *De iure praedae* p. vii.

<sup>22</sup> Grotius refers several times to the third book of Cicero's *De republica* in which the disputation of Carneades is refuted, most significantly when Grotius gives a definition of natural law in *De iure belli* I, I, x, 1.

<sup>23</sup> *De iure praedae*, cap. II, p. 13: "Unde apparet quam non recte magistri ignorantiae Academici contra justitiam disputaverint, eam quae natura est ad utilitatem duntaxat suam ducere, civilem vero non ex natura esse, sed ex opinione. Hanc enim mediam justitiam, quae humano generi propria est, omittebant."

<sup>24</sup> R. Tuck, *Grotiana* IV, 43 ff., who speaks of "the anti-sceptical thrust of the Grotian enterprise".

<sup>25</sup> Prol. paragraphs 15-16: "Deinde vero cum iuris naturae sit stare pactis [...] ab hoc ipso fonte iura civilia fluxerunt.

In saying this, Grotius does not wish to deny that utility has a role to play in the civil context. But asserting the importance of *utilitas* does not do away with civil law's natural foundation. In fact Grotius considers this role of utility to be itself a natural part of the human condition:

"Natural law nevertheless has the reinforcement of expediency [*utilitas*]; for the author of nature has willed single persons to be infirm and lacking many things needed to lead an upright life, so that we might be more inclined to seek life in society."<sup>26</sup>

The polemic against Carneades ends only after Grotius has remarked that it is no folly to obey civil law or the law of nations even if that means foregoing a present interest. It is no folly because these kinds of law were instituted for some larger and longer lasting interest than a present and individual interest, viz. for the common good. And more than that, observing the laws is in itself a natural good:

"For even if there were no advantage in observing the law, it would still be wisdom, not folly, to be drawn to that which we feel our nature leads us to"<sup>27</sup>.

Grotius did not need to extend his refutation of Carneades also to civil law (and law of nations) if he had only wished to assert the existence of natural law in the strict sense quite separately from other kinds of law and if, for the rest, he granted the sceptics' thesis, as Tuck suggests. It is impossible to see why Grotius would go as far as he went in his rejection of scepticism if natural law in the strict sense were to him really so radically different and altogether separate from volitional law, and if, therefore, 'natural law' in its larger sense would be an entire misnomer for a phenomenon which has nothing to do with natural justice. The reason for going so far in his refutation of Carneades must be that Grotius wished to assert that there is not only an absolutely binding natural law, but also that, concerning the things which are not absolutely commanded or forbidden, a judgment as to their rightness can be made which is truly rational and based not merely on egotistic opinion. When we are dealing with the class of things which are the proper domain of volitional law, we deal with what

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[...] Quod ero dicitur non Carneadi tantum, sed et aliis, utilitas iusti prope mater et aequi, si accurate loquamur, verum non est: nam naturalis iuris mater est ipsa humana natura, quae nos etiamsi re nulla indigeremus ad societatem mutuum appetendam ferret: civilis vero iuris mater est ipsa ex consensu obligatio, quae cum ex naturali iure vim suam habeat, potest natura huius quoque iuris quasi proavia dici." The point that volitional law is founded on natural law is also clearly made in the introduction "Ad Principes Populosque Liberos Orbis Christiani" of *Mare liberum*, ed. Brown Scott/ Magoffin, Carnegie Foundation, New York 1916 (TMD 551), p. 2, where speaking of the laws which God has written "non in aere aut tabulis, sede in sensibus animisque singulorum", Grotius says: "Quin illa ipsa populorum atque urbium singularum iura ex illo fonte dimanare, inde sanctimoniam suam atque maiestatem accipere."

<sup>26</sup> Ibid. paragraph 16: "Sed naturali iuri utilitas accedit: voluit enim naturae auctor nos singulos et infirmos esse, et multarum rerum ad vitam recte ducendam egentes, quo magis ad colendam societatem raperemur." The naturalness of the rôle of *utilitas* led him to say in *De iure praedae* that because of the inborn primary natural law which aims at the selfpreservation of beings, "culpandum non est quod secutus Academicos Horatius utilitatem iusti et aequi prope matrem dixit", p. 9. In a note in *De iure belli*, prol. paragraph 16 to Horatius' verse, Grotius explains "Ad quem locum Acron, aut quisquis est vetus Horatii interpres: repugnat praeceptis Stoicorum. ostendere vult iustitiam non esse naturalem, sed natam ex utilitate. contra hanc sententiam vide quae disputat Augustinus de Doctrina Christiana libro III, c. xvi."

<sup>27</sup> Ibid. paragraph 18: "Male autem a Carneade stultitiae nomine iustitia traducitur. [...] Nam sicut civis qui ius civile perumpit utilitatis praesentis causa, id convellit quo ipsius posteritatisque suae perpetuae utilitates continentur; sic et populus iura naturae gentiumque violans suae quoque tranquillitatis in posterum rescindit munimenta. Tum vero etiamsi ex iuris observatione nulla spectaretur utilitas, sapientiae, non stultitiae esset eo ferri, ad quod a natura nostra nos duci sentimus."

Grotius, harking back to a term associated with Stoicism, referred to as 'middle justice' - that is, with things which are not per se just, but still partake of justice.

*The Fall of Man and the human condition*

The importance of middle justice in Grotius' work is very closely linked with the refutation of Scepticism. Much more than just an 'ideological' opting for Stoicism, however, Grotius considers the dominance of middle justice characteristic for the human condition because it is a direct consequence of the Fall.

Before the Fall, Grotius says, there was no knowledge of vice and man's life was devoted to the worship of God and the contemplation of Him and his Creation, which is symbolized by the tree of life. After the Fall, man's life is characterized by his "mind being turned to all kinds of arts of which the symbol is the tree of knowledge of good and evil, i.e. of the things which may be used sometimes for good or sometimes for evil; this Philo called *phrónesin mesen*".<sup>28</sup>

In his Annotations to the New Testament, Grotius deems it significant that the description of life in paradise as we find in the Apocalypse, the tree of life appears twice but no mention is made of the symbol of 'middle knowledge', *mediae scientiae*, the tree of knowledge of good and evil. Grotius considers this an indication that the distractions and worries associated with this knowledge, which is "the prudence occupied with the things of this life", will have ceased in the afterlife.<sup>29</sup>

Thus middle things are inextricably wound up with the very nature of man's fallen state. In this sense middle things are natural to man. But this fallen state is not one in which all man's habits, customs and laws are but arbitrary vanities of petty importance, to which the best approach is either one of total rejection or otherwise one of resignation in order to achieve quietude. The Cynic's option of total rejection could clearly be traced in some of the radical protestant movements such as

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<sup>28</sup> De iure belli II, II, ii, 1-2: "Simplicitatis in qua primi homines sunt conditi argumentum praebuit nuditas. Erat in illis ignoratio magis vitiorum quam cognitio virtutis [...] Negotium erat illis unicum Dei cultus, cuius symbolum arbor vitae, ut Hebraei veteres explicant, assentiente Apocalypsi [...] Verum in vita hac simplice et innocente non perstiterunt homines, sed animum applicuerunt ad artes varias, quarum symbolum erat arbor scientiae boni et mali, id est earum rerum quibus tum bene tum male uti licet: phrónesin mésen vocat Philo." Cf. Annot. ad V. T., Gen. II, 9, Op. Th. I, 2 b 29-60; for a description of the life of contemplative worship which man led before the Fall, see Adamus Exul, 2nd Act. Todescan, Franco Todescan, *Le radici teologiche del giusnaturalismo laico: I. Il problema della secolarizzazione nel pensiero giuridico di Ugo Grozio*, Milano, 1983, pp. 54-71, argues that the *status naturae lapsae* is turned by Grotius into an immanentist state of nature. He interprets Grotius' conception of history in *De iure belli* as a secularized version of the three stages of the *historia salutis*. The *status naturae integrae* and *status naturae lapsae* are a mere epiphenomenon of the secularized history of the respective stages of community of goods, the introduction of property and finally the contractual establishment of the state as guarantee of peace after the division of properties (parallel to the *status gratiae*), property virtually taking over the role of sin. Such a parallelism between the sacred history of salvation and the secular history of property, however, does not fit the text of *De iure belli* II, II, ii very well. The origins and development of property are placed in a much wider perspective of biblical history, encompassing Fall, Flood and Babel. The original community of goods is not exclusively associated with prelapsarian simplicity, but - says Grotius - still is found among those who live in conditions of "simplicitas eximia", such as American tribes. Moreover it can exist "ex caritate"; this community of goods "exhibuerunt olim Esseni, deinde Christiani qui Hierosolymis primi exstiterunt, ac nunc quoque non pauci qui vitam degunt asceticam" (D.i.b. II, ii, 1).

<sup>29</sup> Annotations ad N.T., Lucam xxiii, 43, Op. Th. II-I, 461 b 11-26: "Ne hoc quidem notatu indignum bis in Apocalypsi nominari vitae arborem, nusquam vero arborem scientiae boni & mali, quia arbor scientia boni & mali symbolum erat, Philone explicante, tes meses phroneseos [mediae scientiae], ejus scilicet prudentiae quae circa res hujus aevi occupata est, qua uti quidem licet, ut per gustum & olfactum significatur; at vesci, id est, frui, non licet: nam animus ei studio deditus pietati quantum satis est vacare non potest: quod nobis Adami peccato sub figura ostenditur, explicante Solomone Ecclesiastae VII, 29: 'Hoc observavi quod Deus hominem fecerit rectum, & ipse se miscuerit infinitis quaestionibus'. Hae curae atque avocamenta pietatis plane cessabunt en to paradeiso ton noeton [in Paradiso intelligibili]."

the radical Lutheran Flacians, who were the opponents of Grotius' great example Melanchton<sup>30</sup>, and the anabaptist Mennonites. Sceptical resignation was the approach adopted by many humanist intellectuals tired of religious quibbles, struggles and wars.<sup>31</sup> Elements of both the Cynical and the Sceptical approaches were at the basis of (at least the older) Stoa<sup>32</sup>, and perhaps that contributed to Grotius' objection against some of the Stoa's rigid theses, notably that of God's subjection to *fatum*, through which Grotius associated Stoicism (deliberately or not) with the rigid predestinarian doctrines of the Counter-remonstrants.<sup>33</sup> Hence, Stoicism could never be an 'ideological' alternative to Grotius, even though the Stoics provided him with part of the conceptual framework for the refutation of Scepticism.

That Stoicism is not integrally adhered to with regard to morals may be illustrated by a passage from the Meletius where Grotius censures the Stoics' disparagement of certain things which must be considered *adiaphora* in relation to absolute virtue and vice:

"As to human affairs one theoretical dogma may suffice: except for true virtue, to wit religion, all other things are indifferent to man's ultimate end. Christians do not argue over words, and unlike the Stoics, they do not protest against calling life, health, learning, honour and wealth good things and death, illness, lack of education, shame and poverty bad. On the contrary, they feel that these words should keep their accepted meaning, the better to make man realize that for the former he has to be thankful to God, and that the latter, on the other hand, are either a penalty for his sins or a test of his endurance. For man to be thoroughly convinced of this, it is necessary both that he enjoys the former as being consistent with nature and deplore the latter as incompatible. But meanwhile we have to bear in mind that neither of the two categories has the power either to give or to take away the

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<sup>30</sup> H.J.M. Nellen, Hugo de Groot, p. 312, nt. 239 gives some references of Grotius' to Melanchton, and remarks that the latter has been to Grotius "more of an example than Erasmus, Arminius, Junius or whomever". On the polemics between Matthias Flacius Illyricus and Melanchton see C.L. Manschreck, 'The Rôle of Melanchton in the Adiaphora Controversy', *Archiv für Reformationsgeschichte* 1957, vol. 48, pp. 165-182.

<sup>31</sup> This is sketched with particular emphasis on Justus Lipsius in G.Oestreich, *Geist und Gestalt des frühmodernen Staates*, 1969; a good description of the climate of opinion in which Grotius found himself in Paris, R. Pintard, *Le libertinage érudit dans la première moitié du xviiiè siècle*, 1943.

<sup>32</sup> On the close connections between Cynicism and Stoicism, see Rist, 'Cynicism and Stoicism', in *Stoic Philosophy*, 1969, pp. 54-80.

<sup>33</sup> Meletius, 29: "Rectorem autem Deum cum dicimus, non tantum Epcureoru tollimus foruitos concursus, sed et Stoicorum vim fatalem, ex aequo nocentia pietati dogmata." Ibidem, 7: "Et ea ipsa voluntas [sc. Dei] debet esse libera nec impedita, quia et hoc ad perfectionem pertinet et per naturam fieri non potest ut suprema causa aliqua alia sit superior; quae ratio Stoicos refellit stultissima persuasione Deum sub fati necessitate ponentes." According G.H.M. Posthumus Meyes in his introduction to Meletius, p. 57, Grotius "could not help saying that if in his text he had made a stand against Stoics and Manichaeans, the adherents of the strict doctrine of predestination should not immediately take this as directed against themselves." Posthumus Meyes refers to Briefw. I, no. 221, 11 Jan. 1612 to Walaeus, reprinted in Posthumus Meyes' edition of the Meletius at pp. 177-179, who in a final comment to the Meletius had reproachfully suggested that Jacobus Arminius had perhaps not steered clear of the Charybdis of pelagianism: "Vicissim puto eos, qui praedestinationis decretum rigidius urgent, si quid a nobis adversum Stoicos aut Manichaeos necessario dicitur, non id continuo ut in se gravius interpretaturos..." The remarks about the Stoics would have been entirely superfluous if it would not have some parallel in one of the divides in Christianity. So the very denial of the identification of the doctrine of strict predestination with Stoicism actually suggests such a possible identification. Grotius tries hard to save the irenical intent of his Meletius, but the response to Walaeus quoted, sounds just too much like "it takes one to know one". That thus the Meletius might very easily tlineinstead of a contribution to the peace of the Churches become fuel for further dissension Grotius seems to have realized himself, for he continues: "Sed [...] non est tanti quaecumque hoc opusculum, ut propterea quisquam, praecipue autem eae ecclesiae, quas ego omnium purissimas profiteor, offendi debeant, quare, si id aliter vitari non potest, prematur hic foetus, neque certa damna subeamus in spem fructus incertam".

supreme and ultimate good, but that they can become the subject-matter of virtues or vices, depending on whether we use them rightly or wrongly."<sup>34</sup>

This passage affords us a good insight into the importance of the middle things in relation to the ultimate things. From the perspective of the ultimate good, formulated by Grotius as "Deo frui, sive beatitudo"<sup>35</sup>, all other goods, when viewed in themselves, cannot but be indifferent goods. Yet these other goods, just because they are goods, can be related to the ultimate good.

The structure of this relationship between the ultimate end and other ends, is precisely that which we find with regard to justice: whatever is not part of 'objective' natural law is neither commanded, nor forbidden; yet, a permissible thing can (and ought to be) viewed from the perspective of what is right to be done, and is thus related to the requirements of justice that it is sometimes better done and sometimes better avoided. Hence, in the legal works Grotius avoids calling the middle things 'indifferent' things. And what is not part of natural law in the strict sense, but part of natural law in the larger sense or part of volitional law is no indifferent matter for Grotius.

The structural identity of these relations highlights the centrality in Grotius' works of the meaning and importance of intermediate things. Once their importance is understood, the consistency of theory, law and politics becomes perspicuous.

### *Conclusion*

A number of significant connections emerge from what we have seen so far. The remarkable interest Grotius showed in the things which are naturally just in the broad sense of not being in conflict with natural law, is to be explained by his interest in middle justice - typically a concern of Stoic origin. Far from being indifferent, the things which are the domain of volitional law are, from the point of view of their rightness, to be considered as intermediate between being commanded and being forbidden. This is the theoretical basis on which Grotius was able not just to transcend but actually to refute Cynicism, Scepticism and a number of the theses of some of the Stoics, with which he was very well acquainted through his own translation of Stobaeus. The refutation of these schools of thought at the same time determined Grotius' position in the controversy on predestination between the Remonstrants (who adhered to the doctrine of conditional predestination) and Counter-Remonstrants (adhering to the doctrine of strict predestination), for it meant a rejection of the possible implications and consequences of the latter. The importance of the rejection of strict predestination in Grotius' personal and political biography is easy enough to establish. It broke off the brilliant career which would have led to the highest political office. It led to his being sentenced to life imprisonment, which, after his escape, was followed by an unhappy exile for life.

However this may be, to Grotius the status of intermediate things was part of the nature of things; just as some acts are necessarily good and therefore commanded while others are necessarily evil and therefore forbidden, so there are also things which by their very nature are sometimes good (and then better done), and sometimes wicked (and then better avoided). The intermediateness which

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<sup>34</sup> Meletius, paragraph 58: "Haec sunt de homine ipso decreta. De rebus humanis hoc unum satis est: praeter veram virtutem, hoc est religionem, caetera esse ad summum hominis finem adiaphora. Non litigant Christiani de verbis nec intercedunt, ut Stoici, quo minus vita, sanitas, eruditio, honos, divitiae, bona dicantur; mors, morbi, apaideusia (eruditionis penuria), ignominia, paupertas, mala. Imo putant utile esse, ut ista verba, ut usu recepta sunt, ita maneant, quo magis homo et pro illis gratias se Deo sciat debere et haec contra norit aut peccatorum esse poenas aut patientiae experimenta. Id enim ut serio sentiatur, necesse est et illis gaudere hominem, ut naturae congruentibus, et his indolere ut contrariis. Hoc interim tenendum est neutra istorum boni supremi atque ultimi aut dandi aut auferendi ius habere, sed posse fieri aut virtutum aut vitiorum materiam, prout utrisque aut recte aut secus utimur."

<sup>35</sup> Meletius, paragraph 13.

many things have and the dominance of these things in human life, is interpreted by Grotius as closely connected to the *status naturae lapsae*.

This is not the only sense in which there is something 'natural' about intermediate things. For although the partition of norms into natural and volitional might seem to suggest otherwise, we have seen that considerations of natural justice remain important for determining the rectitude of a certain course of action in the sphere of middle things. Those considerations are no longer of an absolute and exclusive nature, because justice becomes related to the contingency of the human condition; the sheer variety of circumstances begins to exert its influence in judging the morality of a certain course of action. Nevertheless, this judgment remains wedded to justice and is not entirely arbitrary - though it does not have the precise status of natural law in the strict sense. In the framework of dogmatic exposition of the different *leges* Grotius still considers it an improper usage of the term 'natural law' for it to include intermediate things. But that he does not altogether deny the role of natural justice with regard to intermediate things is evident when he speaks of those things being in accordance with natural law suavely or of *ius naturale convenientiae*; the existence of this vocabulary in Grotius' work clearly expresses the role which natural justice has outside the *lex naturalis* in the strict sense. After all, Grotius attributed great importance to intermediate things. They constitute the object not only of the human but also the divine volitional laws.<sup>36</sup>

All in all we must conclude that between natural and volitional law there are two different relations. The first is established by the fact that volitional law finds its primary task within the sphere set by the boundaries of natural law in the strict sense. The second relation is that natural considerations do play a role when volitional law further determines the appropriateness or otherwise of that which natural law in the strict sense has left permissible.

In a way, this position does not seem too far away from an approach which later Stoics took with regard to the objects of ethics, whatever the niceties of their various approaches. Of course there are great differences, particularly because we analyzed Grotius' concept of law, which does not really fit in easily with the Stoic philosophy, the relevant parts of which are concerned with ethics and not with law. It would require another investigation to go into the role which the Stoics attributed to precepts, and relate that to Grotius' views on legal norms and other precepts. Also, we saw that Grotius unremittingly took a Christian view of anthropology which is strange to the classical Stoics. All this highlights the fact that speaking of Stoicism in relation to early modern thinkers - even in an historical sense - is necessarily an exercise in constructing ideologies, rather than a true philosophical enquiry.

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<sup>36</sup> Thus Grotius says in *De iure belli* I, II, 1, 3 of the intermediate things that "in hoc posteriori genere maxime occupari solent leges tum divinae tum humanae".