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Morality before the Enlightenment: an interpretation of Viscount Stair's natural law theory, c. 1681

This study provides an examination of Stair's moral theory and suggests that it could be characterised as a form of natural jurisprudence. Stair is not often considered to be a moral philosopher on his own terms, albeit both Alasdair MacIntyre and Neil MacCormick have shown great appreciation for Stair as a legal philosopher.[1] But he could be considered more generally as a moral philosopher, and particularly as someone who developed an early form of natural jurisprudence. Perhaps, however, because his moral theory is submerged within his legal treatise, and maybe because theories of natural law are somewhat foreign to a modern mindset, we have disregarded writers like Stair as moral theorists.[2] The sharp distinction made in contemporary theory between positive law and morality makes it too easy to discount a seventeenth century legal treatise as an example of an embedded moral theory.[3] Hence, it can be difficult to appreciate how much Stair's theory integrates together law, justice and morality given the fragmentation of the natural law tradition. Yet once we begin to see things from a unified perspective, we start to understand that a moral theory for Stair did not mean metaphysics and epistemology alone, but also, vitally, a legal theory.[4] A more holistic approach allows us to draw upon Stair's rarely used theological treatise to enrichen our understanding of Stair's legal writing.[5] The outcome of this, I argue, is a moral theory. On this basis, we can interpret Stair as a moral theorist, albeit one whose primary objective was to account for a specific aspect of morality: the law.

An interpretation

There are some challenges to this, however. Stair's proposed tract on morality was never published, possibly never completed.[6] We do know that in addition to his *Institutions of the Law of Scotland,*[7] which was first published in 1681, he promised a further treatise in four tracts, covering human knowledge, natural theology, morality, and physiology.[8] His exile to

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[1] Neil MacCormick: 'The Rational Discipline of Law', 1981 *Juridical Review* 146-160; *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1984) 60-83; 'Stair as Analytical Jurist' in D M Walker (ed), Stair Tercentenary Studies, Stair Society vol 33 (1981), 187-99; N MacCormick, 'Stair and the Natural Law Tradition: Still Relevant?' in H MacQueen (ed), *Miscellany VI* (Edinburgh: Stair Society (2009) 1-11; see also, Hector MacQueen, 'A Post-Positivist Outlook from the Thistle' in Neil Walker (ed), *MacCormick's Scotland* (Edinburgh: Edinburgh University Press, 2012) 3-24. Also see Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988) 209-240 and 260-267. Also see, Alexander Broadie,

[2] Gordon M Hutton, 'Stair's Philosophical Precursors' in David Walker (ed), *Stair Tercentenary Studies* (Edinburgh: Stair Society, 1981) 87-103.

[3] Philip Soper, 'Some Natural Misunderstandings about Natural Law' (1992) 90 *Michigan Law Review* 2393–2423.

[4] John Finnis, 'The "Natural Law Tradition"' (1986) 36 (4) *Journal of Legal Education* 492-495.

[5] See, however, Laurent Jaffro, 'James Dalrymple, 1st Viscount of Stair, on Legal Normativity' in Alexander Broadie (ed), *Scottish Philosophy in the Seventeenth Century* (Oxford: Oxford University Press, 2020) 140-157. Also see, Stephen Bogle, *Contract before the Enlightenment: the ideas of James Dalrymple, Viscount Stair* (Oxford: Oxford University Press, 2023).

[6] A J G Mackay, *Memoir of Sir James Dalrymple, first Viscount Stair* (Edinburgh, Edmonston and Douglas, 1873) 151.

[7] James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (Edinburgh: Andrew Anderson, 1681), the second edition was published in 1693. References hereafter are to the 1693 edition.

[8] Ibid, 173-74.

Leiden in September 1681 most probably meant he was never to deliver on this promise.[9] However, he did prioritise his theological writing. In 1695 he published (anonymously) his theological treatise, *A Vindication of the Divine Perfections*,[10] which unlike his *Institutions* has fallen into obscurity. Nevertheless, if we read Stair contextually, considering the importance of the *Westminster Confession of Faith* amongst other things, and appreciate that natural law is an integrated approach to metaphysics, epistemology, and, importantly, the application of human law we become more comfortable with the notion that Stair is a moral philosopher. This investigation therefore offers a way into Stair's moral theory and allows us to consider if this theory could be classified as an early example of natural jurisprudence in Scotland. Of course, stitching together the context, as well as Stair's separate treatises, involves an element of interpretation; there is some things Stair did not explicitly discuss or make clear, but which are implicit, or which can be reconstructed to present his theory in the most coherent manner. There are risks to this, of course. However, if we are to make progress in our assessment of the early intellectual context of the Scottish Enlightenment, we need to be resourceful in some instances in how we construct the material available to us.

Defining natural jurisprudence

There are different ways to define natural jurisprudence,[11] but here we use Haakonssen's definition, which is particularly apposite for theories associated with professors of moral philosophy in seventeenth- and eighteenth-century Scotland. He describes it as 'a social and political ethics that arranged moral life into broad sets of duties imposed by a basic law of nature: the duties to God, to ourselves, and to others.'[12] It was part of an integrated system of teaching moral philosophy, which included natural theology, a form of metaethics, and natural jurisprudence. The latter was 'the practical part of moral teaching and considered moral relations as individuals, as members of a family, and as members of political society.'[13] Unlike other systems of moral philosophy, the essential concept of natural jurisprudence is duty. For natural jurisprudence, the sense given by Cicero in the *De Officiis* captures its central meaning; that is, to hold an office, status or fixed role with embedded rights and obligations adhering to it. Morality is therefore divided, organised, and explained in a deontic fashion. One of the primary tasks for natural jurisprudence was then to offer a taxonomy or system by which these duties could be arranged and realised in a harmonious way.

Rights are important, yet the distinctive feature of natural jurisprudence is its taxonomical arrangement of natural law around duties, first and foremost. Interestingly, Haakonssen says that lawyers in Scotland preferred a rights-based analysis of the law of nature

[9] John M Graham (ed), *Annals and correspondence of the Viscount and the First and Second Earls of Stair* (Edinburgh, William Blackwood and Sons, 1875), vol 1, 63-71.

[10] James Dalrymple, Viscount Stair, *A Vindication of the Divine Perfections illustrating the glory of God in them, by reason and revelation* (London: Brabazon Aylmer, 1695). It was initially published anonymously in Leiden but there is very little doubt as to its authorship. In 1695, Brabazon Aylmer a London-based publisher publicised the *Divine Perfections* as 'By the Right Honourable the Lord President'. (J Tilloston, *Sermons concerning the Divinity and Incarnation of our Blessed Saviour* (London, Aylmer, 1695) 305. Further the Scots jurist, William Forbes, due to the patronage of Stair's son, completed a short biography of Stair, which included reference to the *Divine Perfections* of Stair. (William Forbes, *A Journal of the Session* (Edinburgh, 1714) xI).

[11] Dugald Stewart's (1753-1828) *Progress of Metaphysical, Ethical, and Political Philosophy* in W Hamilton (ed), *The Collected Works of Dugald Stewart* (Edinburgh, Hamilton, Adams, & Co, 1854), vol 1, vii. Also see, John G Pocock, 'Cambridge paradigms and Scotch philosophy: a study of the relations between the civic humanist and the civil jurisprudential interpretation of eighteenth-century social thought' in Istvan Hont and Michael Ignatieff (eds), *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1983) 235-252.

[12] Knud Haakonssen, 'Natural jurisprudence and the identity of the Scottish Enlightenment' in Ruth Savage (ed), *Philosophy and Religion in Enlightenment Britain* (2012) 258-276 at 271.

[13] Haakonssen, 'Natural jurisprudence' (n 11) 271.

not necessarily because they doubted the underlying deontological structure of natural law, but because rights were far more amenable to specification and precision which suited the needs of legal arguments, focused on the particulars of litigation.[14] Duties are far harder to define in the exactness required by a judge asked to make a definite decision and order a precise remedy. Rights are best suited to expressing the consequences of duties, but duties remained for natural jurisprudence the unifying concept which captured how natural law interacted with humanity.

However, the key to understanding Scottish natural jurisprudence as a moral theory is that it was not an exclusive metaethical nor metaphysical project. It was a broad and flexible genre of moral writing which could encompass both objective and subjective causal accounts of moral value. It would still be underpinned by a foundational moral theory, but the nature of that theory could vary. In other words, its systematic objectives could be realised by both realists, like Thomas Reid and non-realists, like David Hume. Lastly, Haakonssen has said that within natural jurisprudence, 'justice was primarily a personal virtue.'[15] By this we mean a tendency to act in a certain way and to appreciate that act in others. Part of the task for moral philosophers following this style of natural law theory was 'to explain why justice was distinguished from the rest of the virtues by being the subject of the institutions of justice, namely adjudication, law and legislation.'[16] As a system of moral philosophy, it has the practical and political aim of understanding how personal justice came to be institutionalised. If we accept this definition, then the foregoing analysis gives us good reason to style Stair as one of the first proponents of this approach in Scotland.

Inbred principles

Before considering Stair's practical application of morality to human affairs, it is necessary to explain how we come by moral knowledge. Throughout the *Divine Perfections* and the opening sections of the *Institutions*, Stair refers to inclinations, instincts, axiomatical moral principles innately known by mankind, and inbred principles. In the *Institutions*, he expresses this more conventionally, saying 'Divine law is that mainly which is written in man's heart.'[17] Theories of innate knowledge were conventional in the early modern period, but a key point to stress is Stair's universalism. Regardless of whether there has been contact, communication, or connection between communities they will, according to Stair, know basic principles of natural law as it is written on their hearts. It is not because of the common experience of life. We have not derived morality from the faculty of reason, nor has it been passed on through generations.[18] It is due to our shared humanity, which is derived directly from God. Stair uses a quotation from Cicero's defence of Milone to illustrate his understanding. In making the argument that the killing of Cloduis was legitimate self-defence, Cicero says, of which Stair approves:[19]

> There does exist therefore, gentlemen, a law which is a law not of the statute-book, but of nature, a law which we possess not by instruction, tradition, or reading, but which we have caught, imbibed, and sucked in at Nature's own breast; a law which comes to use not be education but by constitution, not by training but by intuition…

[14] John W Cairns, 'The First Edinburgh Chair in Law: Grotius and the Scottish Enlightenment' in John W Cairns (ed), *Law, Lawyers, and Humanism: Selections Essays on the History of Scots Law, vol 1* (Edinburgh: Edinburgh University Press, 2017) 82-110.
[15] Haakonssen, 'Natural jurisprudence' (n 11) 205.
[16] Haakonssen, 'Natural jurisprudence' (n 11) 206.
[17] James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (2nd edn, Edinburgh: Andrew Anderson, 1693) 1.3.
[18] Stair, *Institutions* (n 7) 1.1.2.
[19] H M Hubbell & G L Hendrickson (trans), *Cicero, Brutus, Orator* (London: Harvard University Press, 1962) 307.

This underscores a central point for Stair from both a theological but also practical perspective. In theory, morality is known to humans without the Bible – and before the Fall, without Grace. We are made in God's image, and regardless of the Fall there remains basic moral instincts.[20] It is part of God's cosmetic structure, which applies to all humans regardless of their knowledge of the ten commandments or revelation. In this way, natural law is separated in Stair's account from the positive law of God, which applies to spiritual matters, church discipline and is documented throughout the Scripture. He discusses this in the *Institutions*, making clear that there is a distinction between the laws which God gave directly to the people of Israel as described the 'Old Testament' and the natural law which applies to human affairs.[21]

Unsurprisingly, these principles are expressed in the language of duty or obligation: 'God is to be obeyed, parents honoured, ourselves defended, violence repulsed, children to be loved…'[22] Other principles are discussed in the *Institutions* and the *Divine Perfections*, which relate to third-party obligations (i.e., non-family members, etc), but these first principles are what we feel with more immediacy, particularly family relations and our own welfare. In the opening passages of the *Divine Perfections,* he explains how these principles operate in practice by organising our experience of them into a hierarchy – we place ourselves first, followed by the family, and then others. He encourages his reader to notice 'that every Man feels in himself an earnest and steadfast Inclination to promote his own Well-being to his full Satisfaction' which could otherwise be called, 'happiness.'[23] He describes it as a 'perpetual Monitor to put him in mind to consider what things may be for his Good, and in what way he may retain or attain them…'[24] Although most people might say that happiness is the 'increase of Corn and Wine, and the Joy arising from the Accommodations of an animal Life, expressed by Corn and Wine…'[25] True happiness, is 'the shining of God's Countenance' which will only come when man is in a state which 'is pleasing and acceptable to God…'[26] Of course, this is not how things operate in practice due to sin – hence why we place ourselves and family first before God - but the hierarchical organisation demonstrates how things should work.

Stair explains in the *Divine Perfections* that due to sin men 'either wholly exclude the Love of God and of Mankind, or do exceedingly abate them, and subordinate them to Self-love.'[27] He says that the prioritisation of God or mankind more generally only comes when there is the perception of proper objects by the human mind. Thus, if it were not for sin, the 'natural conscience' would instruct us towards our primary obligations that are owed to God and the additional duties we have for the general interest of mankind. When operating correctly self-love should generate a strong dislike of objects which distract our affections from our duty to love God and mankind, as well as our self and our family. Of course, this cannot come about in a postlapsarian state without the Grace of God. Yet in the absence of God's Grace, the affections are bent towards the 'Love of a Family, of a Society, of a Country' and fail to see the common interest of mankind.[28] And as we will see, Stair draws upon this perspective in the *Institutions* to justify the need for human law. But before exploring this, something needs to be said about our other-regarding duties or what Stair thinks we owe to third-parties.

In addition to basic principles imprinted on our heart, God has supplemented humans with additional principles which incline us towards things that are not essential but are

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[20] For further explanation, see Bogle, *Contract before the Enlightenment* (n 5) 135 ff.
[21] Stair, *Institutions* (n 7) 1.1.9.
[22] Stair, *Institutions* (n 7) 1.1.4.
[23] Stair, *Divine Perfections* (n 10) 1.
[24] Stair, *Divine Perfections* (n 10) 2.
[25] Stair, *Divine Perfections* (n 10) 2.
[26] Stair, *Divine Perfections* (n 10) 3.
[27] Stair, *Divine Perfections* (n 10) 3.
[28] Stair, *Divine Perfections* (n 10) 161.

'superadded by the Divine Benignity'.[29] Stair lists the virtues of temperance, sobriety, modesty, meekness, sincerity, constancy, courage, and beauty. Unlike our natural propensity to care for children, Stair remarks that we experience these additional duties more by a feeling of aversion to their absence than as a reaction to their presence. Where they are lacking, we judge such persons as 'vicious and vile' yet those who are vicious and vile detested in the presence of such virtues in others.[30] Stair suggests that such persons do so because they want to 'abolish their own Shame, by making their Vice more common, or that they require the Concourse of others to practise them.'[31] As discussed below, Stair's approach to virtues is not entirely clear in the *Divine Perfections*. Yet the division between essential and superadded virtues is critical for present purposes as it demonstrates Stair's organisation of morality into different types of duty, which is commonplace within theory of natural jurisprudence.

There is an even more evident division for Stair between our experience of what we owe to ourselves, and what we owe to others. How we come to realise our obligations to those we have no familial tie is arguably explained by Stair in the *Institutions*. Although it is written on the heart of man, Stair says that it is reason which eventually determines this for us: [32]

> 'the conveniency of his Nature and State, [humans are] to be humble, penitent, careful and diligent for the preservation of himself and his kind; and therefore to be sociable, and helpful, and to do only that which were convenient for Mankind to be done, by everyone in the same condition, whereof the Rule in the Gospel is an excellent Test, '*Quod tibi fieri non vis, alteri ne feceris*.'

Hence, reason can mediate where our experience of these obligations is less immediate. As will be explained later, Stair develops this point far more to explain why we need human law but for now it is enough to note that reason rather than instinct bridges the gap when determining what we owe to others. In the *Divine Perfections*, therefore, Stair tells his reader that some principles do require 'Attention and Ratiocination' in comparison to those principles which are almost basic automatic responses, such self-defence or childcare. At this point, he lists the principles which act like instincts and thus need less reflection or reasoning. From what Stair says, it could be said that the power of these instincts dimmish as we move from our own individual happiness towards our instincts regarding what we owe to others; arguably, this operates in a way that is reflective of degrees of closeness to the agent. [33]

Although it is not explicit, it may appear from this that reason is able to assist us when we wish to determine what we owe to strangers or members of our community who we otherwise have no immediate relationship with, whereas our more immediate and automatic impulses inform us more directly as to what we owe to those with whom we have more of an intimate relationship. Yet, of course, for Stair our ability to reason is also greatly hindered by sin rendering our deliberations liable to error. This is another reason, therefore, why we need human law. It is instructive to return to justice at this point. It is vital to grasp how Stair used justice to demonstrate what we owe to each other but also how we come about the practical application such duties.

Justice defined

Justice operates in a different manner to those principles – our obligations – which we feel strongly. It is given a separate chapter in the *Divine Perfections* and is exhaustively worked out

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[29] Stair, *Divine Perfections* (n 10) 162.
[30] Stair, *Divine Perfections* (n 10) 162.
[31] Stair, *Divine Perfections* (n 10) 162.
[32] Stair, *Institutions* (n 7) 1.1.
[33] Stair, *Divine Perfections* (n 10) 162-63.

in practical terms throughout the *Institutions*. First, in human affairs, justice has a very specific and narrow domain compared to the justice of God. For although justice is known to man by 'the Light of Nature, from an inbred Principle of the natural Conscience, shewing me that I ought to be just' it is something which through its practical application, in a temporal society, needs to be adjusted, altered, and repurposed given the limitations of mankind. In the *Institutions*, Stair explains what could be called the moral psychology of justice, including how it relates to the creation of human law, which is firmly rooted in justice. Second, although human law could be described as a weak realisation of divine law it is, nevertheless, in the terrestrial plane, an essential guide both practically and morally to individuals, setting out their basic moral entitlements which can be claimed of each other. Stair's articulation of justice is therefore non-idealistic, and far from abstract. Thirdly, at a psychological level, Stair describes our respect of justice in terms of an internal drive or movement within the intuitions of individuals but on an institutional level he describes human law as a rational determination of the practical moral requirements of natural law within the terrestrial world. That is, individuals' moral psychology has an innate motivation towards just outcomes, but the human law guides us, rationally, towards its realisation.

Stair's gives the classical definition of justice in the *Institutions*. That is, he says, in a corresponding relation, reason and the will of man determine action towards the realisation of a just act. He says, reason determines what is 'congruous and convenient for [a Rational Being's] Nature and Condition'[34] while there is 'an inclination in the Will to observe and follow these Dictates' of reason.[35] For Stair, justice is the result of this interaction, so long, that is, that the moral faculties are not undermined by the pull of sin. He goes on, to describe human's inclination towards justice as '*constans & perpetua voluntas suum cuique tribuendi*' (justice is the constant and perpetual will to render to everyone his due). This is not, he clarifies, the mental capacity to know what justice is through reason rather it is a feeling or proclivity towards justice by which he means right action.

It is useful to draw on the *Divine Perfections* at this point. In his theological account of justice, Stair acknowledges that it can have several meanings. He comments that justice can refer to acts, i.e., justice can be used as a synonym for what is right or correct to do according to law, known as 'universal justice'.[36] Stair confirms that this kind of justice is known innately without any prior direction and refers to doing the right thing or acting in accordance with the law.[37] Yet Stair speaks of three other senses of justice in the *Divine Perfections*: distributive, attributive and judicial justice. These are like sub-categories of justice, in comparison to universal justice which is an evaluation of the action itself or the outcome.

Judicial justice is the act of giving judgment justly, according to Stair,[38] which for present purposes is not of primary concern but speaks of, *inter alia*, the influence of Calvin's definition of a civil magistrate upon Stair's conceptualisation of civil order.[39] Of note is that Stair's conception of a civil magistrate is arguably distinctive, sometimes meaning a judge or the judicial function of a sovereign rather than a supreme ruler.[40] Conventionally, in the early modern period it would refer to the nobility or princes, but in the seventeenth century there are

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[34] Stair, *Institutions* (n 7) 1.1.
[35] Stair, *Institutions* (n 7) 1.2.
[36] Stair, *Divine Perfections* (n 10) 182.
[37] Stair, *Divine Perfections* (n 10) 182.
[38] Stair, *Divine Perfections* (n 10) 185-86.
[39] Mary Lane Potter, 'The "Whole Office of the Law" in the Theology of John Calvin' (1985) 3 (1) *Journal of Law and Religion* 117-139; Irena Backus, 'Calvin's Concept of Natural and Roman Law' (2003) 38 Calvin Theological Review 6-26; and Michael J DeBoer, 'John Calvin, the Civil Magistrate, Law, and the Natural Law: Exploring Calvin's Understanding' (2008) 2 (3) *Liberty University Law Review* 649-684.
[40] Stair, *Institutions* (n 7) 1.3.4; 1.5.11; 1.9.1-2.

some notable changes in the use of this term, and Stair is a most notable example.[41] This gives Stair's preference of the judge over the legislator a theological as well as practical meaning.[42] No doubt Stair's inclination for court-based litigation as a means by which to develop the human law of Scotland was philosophical too,[43] favouring rational argument over a ruler's will. And, indeed, importantly, this prioritisation of judges over legislators is something which later generations of moral philosophers in Scotland also favoured but for different reasons.[44] However, an examination of this aspect of Stair civil philosophy is beyond the scope of this present study, which aims to reconstruct his moral theory.[45]

In the *Institutions*, Stair only identifies two types of justice, distributive and commutative. His definition of commutative justice is conventional but refined and renamed, 'attributive justice' in the *Divine Perfections*.[46] It is 'giving to every rational Being that which is their own, but allowing them to enjoy whatsoever they have that is their own, by giving them that which is their own…'[47] It should, he argues be called attributive justice as it covers more than just doing and exchanging but also 'allowing others to enjoy their own without molestation, which is properly expressed by innocence',[48] such as doing no harm, physically or in the performance of promises or in the restoration of goods. In making this point, Stair is emphasising the passive nature of this form of justice but equally noting that it is an act in of itself to respect persons, property, and promises. Of course, this is a categorisation which emerges in later iterations of natural jurisprudence, including Adam Smith's account of negative justice.[49]

In the *Institutions*, Stair confirms that his entire reporting of human law in the *Institutions* is confined to the materialisation of attributive justice. He notes that in Scotland the administration of distributive justice has been almost completely devolved, by God, to the public authorities.[50] Taken as a whole, this demonstrates that for Stair attributive or commutative justice is very much concerned with temporal interpersonal acts, which contribute to the functioning of society. In that sense, attributive justice is well-designed to provide a peaceful community, and on that view has a purpose which is immediately profitable to individuals. Of course, this is for Stair a consequence of God's divine order and not man's sociability alone. But it must also be remarked that this idea is also found in theories of natural jurisprudence; they structure political and civil order around the realisation of justice at an interpersonal level, defining it as a personal virtue, but describing how it is enforced institutionally by civil government.[51] Primarily, therefore, it could be said that natural

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[41] E.g., Alexander Shields, *A hind let loose* (Edinburgh: 1687).

[42] Keith M Brown, 'In Search of the Godly Magistrate in Reformation Scotland' (1989) 40 (4) *Journal of Ecclesiastical History* 553-581.

[43] John W Cairns, 'Natural Law, National Laws, Parliaments, and Multiple Monarchies: 1707 and Beyond' in John W Cairns (ed), *Law, Lawyers, and Humanism: Selections Essays on the History of Scots Law, vol 1* (Edinburgh: Edinburgh University Press, 2017) 115-143.

[44] John W Cairns, 'Ethics and the Science of Legislation: Legislators, Philosophers, and Courts in Eighteenth-Century Scotland' in John Cairns (ed), *Enlightenment, Legal Education, and Critique Selected Essays on the History of Scots Law, vol 2* (Edinburgh: Edinburgh University Press, 2017) 341–363.

[45] For further discussion of the political purpose of Stair's support for the judiciary and the Court of Sess, see John D Ford, Law and Opinion during Seventeenth Century Scotland (Oxford: Hart, 2007) 473-572; John D Ford, 'Protestations to Parliament for Remeid of Law' (2009) 88 *Scottish Historical Review* 57-107 Bogle, *Contract before the Enlightenment* (n 5) 58-66.

[46] Stair, *Divine Perfections* (n 10) 184.

[47] Stair, *Divine Perfections* (n 10) 184.

[48] Stair, *Divine Perfections* (n 10) 184.

[49] Neil MacCormick, 'Adam Smith on Law' (1981) 15 *Valparaiso University Law Review* 243-241.

[50] Stair, *Institutions* (n 7) 1.3.

[51] Knud Haakonnsen, 'Natural jurisprudence and the Theory of Justice' in Alexander Broadie and Craig Smith (eds), *The Cambridge Companion to the Scottish Enlightenment* (2nd edition, Cambridge: Cambridge University Press, 2019) 195-212.

jurisprudence, like Stair's *Institutions*, is concerned with commutative justice, albeit Smith could be said to have had a wider vision.[52]

Stair, therefore, says very little about distributive justice in the *Institutions*. In the *Divine Perfections* he explains further how it is materialised. It is divided into two categories. One involves the distribution of rewards whereas the second concerns the administration of punishments. As noted, Stair places this within the domain of either God or in some instances, spiritual or temporal authorities, which have been given the authority by God to administer punishment on his behalf. Evidently cautious of the jurisdictional debates of the seventeenth century, Stair's account of distributive justice and the authority of temporal magistrates displays a light touch.[53] Although he offers some general comment upon the question of who determines the allocation of punishment and material wealth in society, he is more concerned with the conceptual division between distributive and attributive justice. For example, in terms of punishment, he says it is not only those injured who have an interest in its manifestation. Stair says ideally it is the duty of all men to see that distributive justice is done. Yet they are not always given either the authority in a temporal society or spiritual power. Therefore, they should give their consent to authorities who do have. Although distributive justice operates separately to attributive justice it can nonetheless overlap. Hence, if you injure someone then the reparation you offer to the victim may only satisfy the requirements of attributive justice, while distributive justice many also demand punishment. None of this is explicit when it comes to the specific realisation of this within seventeenth century Scotland. Yet what is noteworthy is this conceptual approach places a very firm divide between questions of distributive and attributive justice rendering Stair's account of law, justice, and morality to be heavily interpersonal and focused on attributive justice.

From the perspective of rewards or benefits, Stair introduces another fixed categorical division. He says that the expectations of benignity, such as grace, kindness and forgiveness, may be due to others, but their demands on the moral agent are not as serious as the needs of justice. Justice is strict, it demands certainty and exact proportions. The stringency of justice is emphasised by Stair when he says, 'Liberality in giving or forgiving that which is not due to the Party, is not so obliging even as to God, as his Justice.'[54] This, of course, invokes the Aristotelian virtue but in manner that would be foreign to Aristotle. Stair places other regarding duties such as generosity in a specific category. It is an act that is in one sense inferior or less necessary than justice. Arguably, also it pits the benevolence of Christian ethics against a more exacting understanding of what is morally required of individuals.

In the *Institutions*, Stair picks this issue up to explain that there are some ethical expectations that are too arduous for a legal system to enforce. They are too difficult for any temporal authority to broach. The performance of a contract, the respect of property, and the basic protection of bodily integrity are far more easily realised within human law, and therefore enforced, in comparison to things such as, kindness, benevolence, or charity.[55] It is challenging because our determination of the success of these things is done based on external things. God knows the heart of men and women, whereas a legal system can only know the acts of men and woman. Benignity is measured according to the internal motivations of individuals. The duty

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[52] Istvan Hont and Michael Ignatieff, 'Needs and justice in the Wealth of Nations: an introductory essay' in Istvan Hont and Michael Ignatieff (eds), *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1983) 1-44.
[53] Stair, *Divine Perfections* (n 10) 263-267; D John D Ford, 'Stair's title 'Of Liberty and Servitude'' in A D E Lewis & D J Ibbeston (eds), *The Roman Law Tradition* (Cambridge University Press: Cambridge, 1994) 135-158; Hector MacQueen and Stephen Bogle, 'Private Autonomy and the Protection of the Weaker Party: Historical' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart: Oxford, 2017) 269-296.
[54] Stair, *Divine Perfections* (n 10) 185.
[55] See Bogle, *Contract before the Enlightenment* (n 5) 190-202; and 220-222.

to perform such things, therefore, is owed directly to God and not the individual. In the *Divine Perfections*, Stair alludes to the jurisdiction of the Church of Scotland:[56]

> The Ecclesiastick Government is about the inward State of those of their Society, in so far as Man's Knowledg can reach, to promote Holiness, and internal and eternal Happiness, and about their outward Acts only, as they signify their inward Condition; and their Rewards and Punishments are only by application of the Divine Ordinances, in exciting Joy or Grief, Fear or Hope, as is conducible for the inward State, but without temporal Rewards, and forcible Punishments.
>
> But there is yet a more inward and secret Dominion of God, exercised by the Conscience, which is his Deputy, by which he distributes the most powerful and important Rewards and Punishments, not only in this Life, but chiefly after Death.

Stair is putting a great deal of other-regarding ethical imperatives, including care for the poor, magnanimity, altruism, and Christian beatitudes, beyond the boundaries of justice, as he defines it, and by consequence is creating a moral theory which has a central division between different types of moral duty. There are those duties which are public and those which are personal. That is, there are duties which the legal system is concerned with and those which it cannot regulate practically and spiritually. The human conscience is also important, as the above passage alludes to, acting as a final arbiter within man's moral psychology. For now, however, it is the taxonomical and jurisdictional classification of duties which is noteworthy.

This division is something, which as we have seen, Stair repeats in the *Divine Perfections* when he says that justice places a far stronger obligation upon men and woman in comparison any ethical expectations of kindness, etc. 'Natural Reason will teach us', he says, 'that though these do naturally oblige us, yet they in whose favours they are, cannot compel us'[57] for in these things God is the creditor, not man. The non-idealisation of justice in a temporal setting and the pragmatic division of obligations into those which are natural and non-legal and those that are civil and enforceable is a vital aspect of Stair's moral theory. It represents the intellectual framework Stair needed to provide a practical and workable description of how morality is materialised. It is also reminiscent of a central motif of most theories of natural jurisprudence: the distinction between perfect and imperfect rights.

Justice applied

In the legal system, justice operates through both '*in bono*' or '*utili*' and 'upon two legs doth Justice move, in giving every man his Right…'[58] If it were not for the fall of mankind, there would be no distinction made within the legal system between what is fair and good (*aequum et bonum*). Natural law would flow freely if man was not now 'depraved, and wanting Justice, or that willingness to give every man his Right' was 'not apt to fraud or force'.[59] Therefore, in a temporal society, justice requires that mankind gives up some of what it might otherwise be due according to natural law to avoid the 'use of compulsion and quarrelling in all things and to find out expedients and helps to make equity effectual.'[60] Human laws, therefore, need to be crafted by the legal system in such a way that the otherwise exacting demands of justice do not

[56] Stair, Divine Perfections (n 9) 266-267.
[57] Stair, *Institutions* (n 7) 1.2.5.
[58] Stair, *Institutions* (n 7) 1.17.
[59] Stair, *Institutions* (n 7) 1.17.
[60] Stair, *Institutions* (n 7) 1.17.

breach the peace of a temporal world and prevent the flourishing of the society. [61] Especially in instances of complexity where the application of the general principles of justice would be ambiguous, human law acts as a key determination of the appropriate solution providing a just solution. In a sense, therefore, human law operates as a corrective when an individual's moral apparatus fails. Because our moral psychology is not capable of unfailingly comprehending what justice requires in each situation, so our legal system is also incapable of manifesting it in its entirety but can, however, realise that which is efficient for the satisfaction of our basic needs, such as security, freedom, and mutual assistance. These are things which have a utility to them, and which justice protects and requires us to respect. More will be said on this later, but it is important to understand how this is contrasted by Stair with the justice of God.

In the *Divine Perfections*, Stair offers a fuller account of the nature of justice required by the law of nature. He starts by noting that mankind's knowledge of God's justice is known by the 'Light of Nature, from an inbred Principle of the natural Conscience, shewing me that I ought to be just.'[62] He remarks, 'Nothing is more evident to Man than Justice, that is of so universal use to Man: His earliest rational Thoughts are not to do Wrong, or to hurt any innocent Rational Creature; the opposite of which he accounteth Right, and Justice is called Righteousness.'[63] He adds that our knowledge of the nature of God's justice cannot be inferred from our own sense of justice. Rather justice is a proportion and not something that can be defined precisely. In the *Divine Perfections*, man has 'natural knowledge of Justice' for otherwise (?) 'he could neither know what he ought to give, nor what he ought to crave, what he should encourage, nor what he should discourage. But I bless God, that to the Twilight of Nature he hath given to his Church the Meridian Light of Revelation.'[64] Vitally, however, Stair stresses that there is a difference between God's justice and the justice of man. In the case of the first, it 'imports an exact Proportion of Rewards and Punishments to the Objects of them'[65] Whereas in the second instance, 'punishments are not to satisfy Justice, or to expiate Crimes past, but to prevent and suppress them for time to come; and therefore, they become unjust and cruel, by applying Arbitrary Punishments more than are needful to supress the Crimes…'[66] Punishment nevertheless has a utility and function, which if kept in check will operate as a just deterrent.

Of course, at this point Stair is discussing distributive justice rather than commutative justice, which he says does not apply to God. Unlike man, God does not owe anything to anyone and therefore communicative justice does not apply. Commutative or attributive justice is about interpersonal human relationships. In that sense, it is a wholly temporal affair, which is shaped by God but does not have the same demands or nature as distributive justice. This discussion of justice is illustrative of the same theme addressed in the *Institutions*; namely, due to the failings in man's moral resources, he is unable to realise justice in the way that God does. Justice is different for humans. There may be a strong sense, or inclination towards justice – i.e., an outcome that is just or to do that which is right - yet the inbred principles of moral law and the rational faculties of humans are incapable to determining matters to the same exactness as God. We want to do the just things but cannot know with confidence how to materialise it. Left to our own devices - without human law - there would be discontent and disputation about what we owe each other. Human law, and its courts, provides peaceful and certain resolution.

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[61] Compare with the Thomist notion that natural law is imprecise about the specifics of day-to-day social life Thomas Aquinas, *The Summa Theologiæ* (tr Fathers of the English Dominican Province, 2nd edn 1920, reproduced Kevin Knight) <https://www.newadvent.org/summa/> I-II, 91.3.
[62] Stair, *Divine Perfections* (n 10) 182.
[63] Stair, *Divine Perfections* (n 10) 183.
[64] Stair, *Divine Perfections* (n 10) 183.
[65] Stair, *Divine Perfections* (n 10) 196.
[66] Stair, *Divine Perfections* (n 10) 196.

The justice found within the legal system of Scotland is therefore as much goal-driven, concerned with the common good, and utility, as it is deontological, being concerned about the strict application of a natural law principle. It is through this process that legal rights are given to men as a means by which justice is realised, and it is informed by the needs and nature of humanity. Stair, however, as is becoming more evident, places a great deal of faith in the legal system, and indeed, civil judges, as a mode by which the otherwise failed moral faculties of man can be rectified or reminded of what the law of nature requires, particularly when it comes to multifaceted, abstruse moral questions.

Rational discipline

Deprived of properly functioning moral faculties, the legal system offers more than simple safety and protection of basic rights. For Stair, it helps determine 'matters of intricacy or difficulty',[67] offering an impartial rational resolution. After asserting that the 'Law of Scotland in its nearness to Equity…may well be parallel with the best Law in Christendom…' he argues that law – whether it is divine or human – is a rational discipline and not something merely determined by the will of the lawgiver or judge. Of course, this statement is embedded within the legacy of medieval debates about the ontological status of morality and its relationship to God's omnipotence, which Stair does address in the *Divine Perfections*.[68] Suffice to say, for Stair reason operates more as a process or the method in relation to the determination of what natural law requires.[69] It will assist in making judgements and respond to what the will presents to it.[70]

According to Stair, liberty is the habit of following the dictates of reason.[71] At the heart, of Stair's concept of rationality is the idea that it is an ability to freely determine action.[72] Reason does not provide the immutable substance of law regardless of the will of God. Yet to act rationally is to act in accordance with what natural law requires, and in doing so, one is acting with liberty – in contrast to when one automatically responds to sinful impulses.[73] For present purposes, it is worth noting that Stair explains that the law of nature imprints basic principles of morality in 'the Soul of man' and as we have seen, he says these 'arise in him without reasoning or debate, as naturally as Heat doth from the Fire, or the Light from the Sun' and determines what is reasonable for individuals to do.[74] From this Stair states that law is, therefore, the embodiment of reason in that it is logical, consistent, and apposite to divinely ordained nature of man. Hence, it will be rational in its application.

By consequence, the function of the law of Scotland is demonstrably rational and can be developed using reason, argument, and experience guided by deliberation. It can be universally recognised as so. Rationality implies for Stair a normativity, which is deontic. Expanding upon this, he says that 'God in his Goodness hath given man more radiant Rays of Reason, and preserved it more after his Fall, about his Rights…than any other Science or Knowledge…'[75] Other sciences which do not pertain to the rights of men are more 'dubious and conjectural, and attainable only with great pains' whereas the rights of man are known by 'a man of Reason'.[76] Regardless of education, and provided that such an individual is not completely overcome with self-interest, he or she 'would be able to discern right from

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[67] Stair, *Institutions* (n 7) 1.15.
[68] Stair, *Divine Perfections* (n 10) 16-19.
[69] See Neil MacCormick: 'The Rational Discipline of Law' (1981) *Juridical Review* 146-160.
[70] Stair, *Divine Perfections* (n 10) 89 and 113-115.
[71] Stair, *Divine Perfections* (n 10) 106-114
[72] Stair, *Divine Perfections* (n 10) 114.
[73] Stair, *Divine Perfections* (n 10) 153.
[74] Stair, *Institutions* (n 14)1.15.
[75] Stair, *Institutions* (n 7) 1.1.16.
[76] Stair, *Institutions* (n 7) 1.1.16.

wrong…'.[77] Yet in more complex matters, there is the requirement for judgement and long experience. For Stair, guidance in such situations comes from customary law, developed over time, and incrementally added to by the decisions of judges. In those instances, when judges are called upon to use their wisdom to interpret the justice and equity of any specific situation with reference to previous decisions. In following this approach, judges are slowly contributing to the uncovering of a principled approach to a complex moral question, which in time becomes customary law. One of the major consequences of this for Stair's moral theory is that he places great emphasis on judges as drivers of the principled application of law rather than legislators. Institutionally, this means that he gives pride of place to courts within his political theory.

If this is how Stair understands reason and law, it should be clarified that he approaches the concept of a 'right' differently from that of Hobbes or Grotius.[78] Although Stair incorporates the analytical idea of rights in the *Institutions*, saying that 'the formal and proper object of law' is the rights of men' he operates differently from a natural right.[79] Stair uses the language of rights because it is expedient and useful rather than because he endorses a more fundamental notion that individual rights are the foundation of natural law or that liberty is a right because of its normative value. Stair utilised and exploited the clarity of this system of rights to explain how the common principles of natural law were manifest in the positive law of Scotland without saying that man has natural rights in the state of nature. Importantly, as has been shown above, Stair starts from common principles of natural law and describes how they are embodied in the positive law of Scotland and expressed specifically in obligations laid upon individuals in Scotland.

Rights are used to explain the other side of the rope of an obligation and can be used to describe what an individual is entitled to according to the natural law which is filtered through the human law of Scotland. However, in comparison to Grotius, rights come later in Stair's analysis of natural law and human law - being the product of human law and only indirectly connected to natural law. Stair's use of rights is more to do with expedience and arrangement, rather than an expression of an underlying axiomatic order of rational natural law. In that sense, they could be called juristic rights rather than natural rights. Before assessing Stair's theory in relation to later generations, there are two additional points to note about his account of justice and moral reasoning. On this, he appears to share something in common with natural jurisprudence.

Law's utility

In the *Institutions*, Stair asks a fundamental question, which begins to reveal how he was able to bridge the gap between natural and human law. He asks, if morality is written on the heart on mankind and is known without reasoning, why is there a need for human law? He is certain that it is not 'dependent upon the will and pleasure of lawgivers, and introduced for utilities sake, and so frequently alterable….'[80] However, man knows by the law of nature within his 'soul' he is now 'depraved, and wanting justice, or that willingness to give every man his right, and apt to fraud or force…'[81] In such a state man, he is far more likely to see the advantage of human law, which rests on three principles: society, property and commerce. It is upon this basis, according to Stair, that man can use his rationality to deduce more specific rules of human law.[82] This is because they aim towards 'the maintenance, flourishing, and peace of

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[77] Stair, *Institutions* (n 7) 1.15.
[78] Richard Tuck, *Natural rights theories* (Cambridge: Cambridge University Press, 1979).
[79] Stair, *Institutions* (n 7) 1.1.22.
[80] Stair, *Institutions* (n 7) 1.1.17.
[81] Stair, *Institutions* (n 7) 1.1.17.
[82] Stair, *Institutions* (n 7) 1.1.15.

society, the security of property, and the freedom of commerce.'[83] And, crucially, Stair says with long experience and contemplation, we can see that these principles, that are evident within the human law, are in fact manifestations of the natural law which is written upon our hearts.[84] Stair's *Institutions* is thereafter a rather impressive demonstration of how these three basic principles of positive law relate to the entire law of Scotland as it applied in the mid- to late-seventeenth century.

A common agreement as to the utility of human law is at the core of Stair's account of its foundations. He offers five reasons as to why it is valuable to introduce human law in addition to the principles of natural law. First, it is hard for humans to agree on the application of the justice in complex situations: 'though equity be clear in its principles and *in thesi*, yet the deduction of reason further from the fountain, through the bias and corruption of interest, may make it much dubious *in hypothesi*, when it comes to the decision of particular cases…'[85] Second, it is essential that we understand our duties – whether they be to God, ourselves or others. Frequently, we need to know what is owed to us. We require certainty not just on what to do but who should enforce our duties and how they should do that. Pragmatically, some are beyond human law whereas others are not the concern of human institutions, particularly those relating to God.[86] Third, human law allows us to err on the side of caution and avoid the cynical exploitation of the fragility of the human condition. For example, an agreement is binding if both parties intend it to be so. But to prevent bad faith, human law may often require that such agreements be in writing. Fourth, human law can provide a more efficient materialisation of natural law given the limitations of mankind's condition. For example, Stair says that although the law of nature allows the right of succession to all the children, countries generally 'for the flourishing of families do otherwise' provide that the eldest son take the heritage leaving a natural obligation upon them to provide thereafter for the other children. Fifth, the character and proclivities of some communities or nations may give rise to harsher penalties or punishments, provided God has given them the latitude to do so.[87]

Westminster Confession

Before concluding it is useful to underline how the *Westminster Confession of Faith* informs Stair's moral theory. Doing this helps contextualize Stair's moral vision which is nascent in the *Institutions* and *Divine Perfections* and summarize his theory. The *Confession* was the foundational document of the Church of Scotland, and a thoroughly dogmatic statement of church doctrine which was greatly influenced by Calvinism. Its importance to the intellectual life of seventeenth century Scotland cannot be overestimated.

First, according to the *Confession* man is made in God's image. By consequence, there are basic foundational moral principles which are innate to mankind's moral psychology that are derived from the nature of God himself. For our purposes this is important: it explains why Stair placed an extensive discussion of mankind's moral capacities within a treatise nominally about the nature of God. It also sets Stair apart from later writers within the Protestant natural law tradition who placed a far greater emphasis on morality's foundation being in mankind's sociability and instincts of self-preservation. Stair does however account for sociability within his description of human law, and particularly regarding how we understand, apply, and satisfy the demands of justice. Yet on an ontological level, Stair's natural law explanation of mankind's morality was established in the nature of God, not man.

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83 Stair, *Institutions* (n 7) 1.1.17.
84 Stair, *Institutions* (n 7) 1.1.17
85 Stair, *Institutions* (n 7) 1.1.15.
86 Stair, *Institutions* (n 7) 1.1.15.
87 Stair, *Institutions* (n 7) 1.1.15.

Secondly, these principles, and the ten commandments which give Scriptural expression of morality, are deontic. They prescribe specific duties and preset relations. To obey and bring glory to God was the primary obligation placed upon mankind by morality. For him the law of nature expressed pre-existing moral *obligations* – parent-child, husband-wife, guardian-pupil, wrongdoer-victim, promisor-promisee – between persons within an overall divine scheme of interpersonal relationships.[88] Nonetheless, in a Reformed moral theory, such as Stair's, it is impossible for these deontic propositions to be realized without God's active participation through Grace. Stair's moral theory is therefore imbued with a theistic backbone. However, the primary concern of Stair's moral theory is not the realization of our duty to God, but the practical satisfaction of our interpersonal obligations in the temporal world. On that, therefore, the ten commandments need to be supplemented by a method and a rationalization which is practical. It should be said, Stair is less clear about how virtue and duty relate. It is not certain from the *Divine Perfections* whether virtue is the result of responding to a duty or if the habit of responding to duty creates virtue. It may well be the second, but further examination is required before offering an answer.

Thirdly, given that man's moral faculties are obstructed by sin, artificial political institutions and human law play a vital role in his moral theory. To ensure a peaceful temporal society and the satisfaction of moral obligations we need human laws and temporal authorities. Because there is an automatic resistance to moral obligations, Stair's theory is notable for its stress on the practical need for human law to ensure external compliance with morality. Yet is also fittingly Calvinist in its intimate concern with civil order.[89] In a very practical sense, human law played an educational or directional role providing, in some instances, guidance on specific moral dilemmas which his conscience was otherwise unsure. Of course, external conformity to the demands of law was not a morally virtuous action for Stair. To be compelled to obey the law through force was not to act morally. When it came to day-to-day questions about how to fulfil a moral obligation in a complex situation, human law, as a practical working out of natural law, could help. Human law could not, however, encroach on the spiritual question of how we abide in God, bring glory to him, or realize our primary obligation of obedience.

Fourthly, at the heart of his moral theory is a well-known paradox. For Stair, the impossibility of acting morally without God's assistance did not absolve man of moral responsibility. Humans continued to retain the capacity to choose otherwise. Of course, *prima facie*, this proposition along with the forementioned boundaries of Stair's moral theory render it vulnerable to the form of skepticism you later find in writers, such as David Hume but also contemporaries of Stair, such as Thomas Hobbes. For these propositions, without a theistic conviction, could be said to be based on assertion, inherited doctrine, and dogmatic texts.[90] Further, it could be said that as a moral theory Stair's approach is somewhat unremarkable, albeit a useful and underappreciated example of a Reformed natural law theory. Yet there are other aspects of Stair's moral theory, as this examination seeks to demonstrate, which are remarkable, particularly the extent to which, when viewed within the natural law tradition, his *Institutions of the Law of Scotland* is an example of a thoroughly practical ethical treatise.

Conclusion
Although almost nothing has been said of it here, the figure of Hugo Grotius looms large in this story; that is, if it were told from the perspective of intellectual history, it would start with

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[88] For further discussion, see Bogle, *Contract before the Enlightenment* (n 5) 133-139.
[89] Simon P Kennedy, Reforming the Law of Nature: The Secularisation of Political Thought, 1532–1689 (Edinburgh: Edinburgh University Press, 2022) 18-41.
[90] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988) 300-325.

Grotius.[91] Yet the approach taken has been to examine Stair's theory itself and ask how it relates to Scottish natural jurisprudence. There is no doubt that the relationship between Stair and later writers of the eighteenth century can be explained by reference to several common sources, but principally, Hugo Grotius's *The Rights of War and Peace*.[92] Mainly, however, the intention has been to give an account of Stair's moral theory, using the otherwise overlooked *Divine Perfections*. And having offered a reconstruction of his moral theory, we may be able to appreciate that Stair was primarily concerned with the same questions as those who wrote treaties on natural jurisprudence.[93] In Stair, morality is articulated in the language of duties or obligations, with rights playing a facilitative or ancillary role. There is a central focus on justice as key foundation of the civil legal order and that is placed within framework of interpersonal duties. Vitally, therefore, within this vision of civil order, justice is materialised without pushing towards an unrealistic idealised society or an abstract idea of God's justice. Human law is the result of a balance between the common good or utility of society and inbred principles. Stair was intensely concerned with these questions of justice, duty, and civil order. If our definition of natural jurisprudence includes these preoccupations and the description of Stair's moral theory a fair representation, we can say his *Institutions* is a very particular example of Scottish natural jurisprudence.[94] Lastly, although it has not been possible to fully examine other interpretations of Stair, this conclusion confirms that Neil MacCormick was right to suggest a meaningful relationship between Stair and eighteenth-century moral theories,[95] and that Alasdair MacIntyre's comparison with Hutcheson was profitable.[96] The next question might be, can we take the same resourceful, interweaving approach to other seventeenth century writers? If so, we might be able to shed further light on the intellectual life of the seventeenth century.

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[91] Eg. Archibald H Campbell, *The Structure of Stair's Institutions* (Jackson, Son & Co 1954); William M Gordon, 'Stair, Grotius and sources of Stair's *Institutions*' in William M Gordon (ed), *Roman Law, Scots Law and Legal History* (Edinburgh University Press 2007) 225–66; Adelyn LM Wilson, 'The sources and method of the *Institutions of the Law of Scotland* by Sir James Dalrymple, 1st Viscount Stair, with specific reference to the law of obligations' (PhD thesis, Edinburgh 2011).

[92] Hugo Grotius, *The Rights of War and Peace* (1625, reprinted 2005, Indianapolis: Liberty Fund). For an extensive examination of Stair's relationship to Grotius, see Bogle, *Contract before the Enlightenment* (n 5) 174-175; 194-202; 203-222.

[93] MacCormick made this point but did not go so far as to say that Stair's moral theory is an example of natural jurisprudence. See Neil MacCormick, 'Law and Enlightenment' in R H Campbell and Andrew S Skinner (eds), *The Origins and Nature of the Scottish Enlightenment* (Edinburgh, Donald, 1982) 150-164.

[94] For an analysis of Stair in comparison to Gershom Carmichael, see Bogle, *Contract before the Enlightenment* (n 5) 239-249.

[95] Neil MacCormick, 'Law and Enlightenment' in R H Campbell and Andrew S Skinner (eds), *The Origins and Nature of the Scottish Enlightenment* (Edinburgh, Donald, 1982) 150-164.

[96] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988) 209-240 and 260-267.