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# AN ECCENTRIC SEVENTEENTH-CENTURY WITNESS TO THE NATURAL LAW: JOHN SELDEN (1584-1654)

The great age of Spain's jurists and theologians — from Vitoria to Suarez — has claims to be called a Golden Age of the acceptance and development of natural law and international law. Dr. Johnson's celebrated remark, made in 1763, showed that the English-speaking world was not unaware of this: "I love the University of Salamanca," he said, "for when the Spaniards were in doubt as to the lawfulness of their conquering America, the University of Salamanca gave it as their opinion that it was not lawful."<sup>1</sup> But it cannot be said that the English-speaking world had any corresponding practical interest in the natural law at this time. The reverse, indeed, was the case. If England had been a citadel of the natural law in medieval Europe, because of the development of the common law at a time when absolutist conceptions from the Roman law were spreading on the continent of Europe, all that was changed by the rise of state absolutism and its correlative legal positivism in the sixteenth century. The turning point may be taken as the date of the execution of St. Thomas More, Chancellor of England, in 1535 for his refusal to accept the Act of Supremacy. Thereafter interest in the natural law declined; and the important English writers on the topic are few, like Richard Hooker (1553-1600), John Locke (1633-1704), or William Blackstone (1723-1780). Furthermore, in a writer like Locke the interest has shifted from natural law to natural rights.

In the circumstances, one does not expect to find much influence of the classical Spanish theologians and jurists on English writers. On the other hand, such influence cannot be excluded. The influence of Suarez on Locke has recently been adverted to by Wolfgang von Leyden in his fine edition of Locke's hitherto unknown Latin *Essays on the Law of Nature*. Von Leyden puts his finger on the great difficulty in this matter of tracing the provenance of ideas that formed the patrimony of the seventeenth century on questions of law; he takes the view that

To say . . . that any of the scholastic notions in the essays were derived by Locke from Suarez is to minimize the effect that other thinkers who borrowed from the late scholastics had on him.<sup>2</sup>

In his elucidation of Locke's sources for these youthful essays (Locke wrote them in his early thirties) von Leyden concentrates upon the English writers whom Locke followed. One of these English writers was the scholarly John Selden, Locke's elder contemporary.

Selden was not one of the greatest writers in the field of natural law or international law; but neither is he negligible. He was one of the most erudite men in an age of scholars; and in his voluminous writings in Latin and in English,

<sup>1</sup> JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 274 (Modern Library, New York, 1931).

<sup>2</sup> W. VON LEYDEN, *JOHN LOCKE: ESSAYS ON THE LAW OF NATURE* 37 (Oxford, 1954).

he is careful to cite his authorities. The influence upon him, therefore, of authors like Vitoria and Suarez should be discernible; and, at the same time, the difference between his viewpoint and theirs should be instructive. These are matters it is proposed to explore in a preliminary fashion in the present account.

*Selden's Life and Times.*—John Selden was born in Salvington, Sussex, England, in 1584; the house in which he was born was still standing in 1909 bearing an inscription, possibly of Selden's own composition. He studied at Chichester Grammar School and later at Oxford, which he left without a degree. In 1603 he was at Clifford's Inn and in 1604 at the Inner Temple in London, studying law. He became a barrister in 1612 and began to practice. His practice seems to have been mainly conveyancing, for he rarely appeared in court. He was involved in the important controversies of his time, particularly those concerned with the rights and privileges of Parliament against the Stuart kings. He was involved, even before he himself became a Member of Parliament, in the drawing up (in 1621) of a protestation on the rights and privileges of Parliament; for this he was imprisoned in the Tower of London. In 1629 he was again sent to the Tower, but was released on the intervention of Archbishop Laud. In his later years he appears to have become more reconciled to the Royalist point of view; indeed it is said that in 1642 the king thought of making him Lord Chancellor, but, in the event, did not offer him the Great Seal because of assurances by Selden's friends that he would refuse it. In 1645 he declined the Mastership of Trinity Hall, Cambridge. In 1647 he was awarded £5,000 for his efforts and his sufferings in the Parliamentary disputes; but it seems doubtful if he ever received the money. During the trial and execution of the king and the rise of Cromwell, Selden abstained from any expression of opinion saying: "The wisest way for a man in these times is to say nothing." He died in 1654.<sup>3</sup>

*Selden's Works.*—Selden's writings, no less than his actions, were controversial.<sup>4</sup> In fact it was because of his immense erudition that he was frequently drawn into controversy. It is a measure of the respect in which his impartiality was held that he was invited by the Commons to draft their protestation of their rights and by the Peers to draw up their list of privileges. Some of his works were controversial in their own right—above all, his great work, *The History of Tythes* (1618), which gave offense because of his rejection of the view that tithes to the clergy were owed *jure divino*. Selden was summoned before the Privy Council and had to retract something of his views. The reaction of the clergy was, of course, predictable; as was Selden's approach to the subject from

<sup>3</sup> For these and other biographical details see E. Fry, "Selden," in 17 *DICTIONARY OF NATIONAL BIOGRAPHY* 1150-62 (1909); 20 *ENCYCLOPAEDIA BRITANNICA* 296-97 (1960).

<sup>4</sup> The works were edited by David Wilkins: *JOANNIS SELDENI JURISCONSULTI OPERA OMNIA TAM EDITA QUAM INEDITA IN TRIBUS VOLUMINIBUS, COLLEGIT AC RECENSUIT; VITAM AUCTORIS, PRAEFATIONES & INDICES ADJECIT DAVID WILKINS* (London, 1726). The first and second volumes contain the Latin works; the third volume the English tracts. For a sketch of Wilkins' life see DAVID DOUGLAS, *ENGLISH SCHOLARS 1660-1730*, at 217-19 (London, 2nd ed., 1951).

a purely positive and Erastian point of view.<sup>5</sup> It was said of him that he was an essentially irreligious man; and he was the friend of Thomas Hobbes. His "secular cast of mind" is referred to by several authorities:

There was not even a vestige of the supernatural in Selden's historical thought; he treated the Church as a secular institution and Churchmen as no less subject to economic motivation than laymen.<sup>6</sup>

The year before the publication of *The History of Tythes* Selden had established his reputation as an orientalist with a work entitled *De diis Syriae*; and, in fact, his enormous fame as a scholar, with his contemporaries and since, largely rests upon his achievements in this field. This is a matter of importance, as we shall see, for his doctrine of natural law. Some of his legal works, like the *Uxor Hebraica* (1646), a study of divorce, or the *De synedrüs* in three books (1650, 1653, 1655) are more the works of a student of oriental languages (Hebrew, Arabic, Syriac, Greek) than of a jurist. And his work on the natural law is entitled: *De jure naturali et gentium juxta disciplinam Ebraeorum libri septem* (1640). The limitation expressed in the title is clearly of the utmost importance. Other works further indicate his versatility and scholarship. For example, there is his *Marmora Arundelliana*, a study of the Greek inscriptions in the collection of the Earl of Arundel, written in 1628. This work was mentioned by Hugo Grotius in 1630 when he wrote of Selden's release from prison:

Ex magna Britannia nihil habeo boni post *Marmora Arundelliana* nisi hoc unum: libero coelo frui virum optimum et civem fortissimum Seldenum, faventibus bonis omnibus.<sup>7</sup>

Let us turn, however, to the juristic works of Selden. He flourished, it must be remembered, in what has been called (by Maitland) "the heroic age of English legal scholarship."<sup>7a</sup> He and his contemporaries were mainly interested in the constitutional problems of legal history. And, although Selden's work in legal history was much smaller in bulk than his work in ecclesiastical and oriental studies, his "talents and industry were applied in accordance with the best and most modern standards of historical scholarship."<sup>8</sup> One must mention his work

<sup>5</sup> See the contemporary attack by RICHARD MONTAGUE, *DIATRIBE ON THE FIRST PART OF THE LATE HISTORY OF TYTHES* (1621), cited in F. SMITH FUSSNER, *THE HISTORICAL REVOLUTION; ENGLISH HISTORICAL WRITING AND THOUGHT 1580-1640*, at 294-95 (London, 1962).

<sup>6</sup> FUSSNER, *op. cit. supra* note 5, at 283-84; cf. LEVI FOX, *ENGLISH HISTORICAL SCHOLARSHIP IN THE 16TH AND 17TH CENTURIES* 65 (Oxford, 1956); H. ARNEKE, *KIRCHENGESCHICHTE UND RECHTSGESCHICHTE IN ENGLAND VON DER REFORMATION BIS ZUM FRÜHEN 18. JAHRHUNDERT* 261 (Halle, 1937).

<sup>7</sup> Cited in J. AIKEN, *LIVES OF JOHN SELDEN, ESQ. AND ARCHBISHOP USHER* 79 (London 1812).

<sup>7a</sup> *The Laws of the Anglo-Saxons*, in F. W. MAITLAND, 2 *COLLECTED PAPERS* 453 (Cambridge, 1911).

<sup>8</sup> Cf. FUSSNER, *op. cit. supra* note 5, at 189. Maitland is more enthusiastic still in an article written originally for *Encyclopaedia Britannica* (1902 ed.) and reprinted by Helen M. Cam in *SELECTED HISTORICAL ESSAYS OF F. W. MAITLAND* (Cambridge, 1957) at 113: "Selden (d. 1654) was in all Europe among the very first to write legal history as it should be written. His book about tithes is to this day a model and a masterpiece. When this accomplished scholar had declared that he had laboured to make himself worthy to be

on Fortescue's *De laudibus legum Angliae* (1616); his edition of one of the earliest known English legal texts, Eadmer's *Historia Novorum*, together with *Notae and Spicilegium* (1623); and his edition of the *Fleta* (1647), a legal text of the time of Edward I, said to have been written by a judge imprisoned in the Fleet.<sup>9</sup> It has been suggested that Selden's knowledge of pre-Conquest history was exaggerated by his admirers; but he undoubtedly showed a great interest in Anglo-Saxon institutions and tried to trace English law back to them. "To refer the original of our English laws to the [Norman] conquest," he remarked, "is a large mistake, for they are of far more distant date."<sup>10</sup> Selden, indeed, took the untenable view that the laws of England remained unchanged through five successive ages of Britons, Romans, Saxons, Danes, and Normans. On the other hand, in his notes on Fortescue's *De laudibus legum Angliae*, he criticizes Fortescue's view that there was a continuity of custom through the various conquests of England.<sup>11</sup>

More to our purpose are those works of Selden that brought him into controversy, particularly in the field of international law, namely the *Mare clausum* and the *De jure naturali et gentium juxta disciplinam Ebraeorum*.

The *Mare clausum* was Selden's contribution to one of the great controversies of his time; it was, as the title suggests, a reply to Grotius's *Mare liberum* published (anonymously) in 1608. Some Dutch vessels fishing in Greenland waters had had their catch of walrus and their gear confiscated on the ground that they had no commission to fish from the English king. The matter, as was to be expected, was disputed; and a conference was arranged in London in 1618. Grotius was one of the Dutch commissioners. The doubt of law was whether dominion could be exercised over the open seas. The Roman law position was that rivers could be owned by peoples or commonwealths but that the sea was by natural law the common property of all. However, with the rise of maritime commerce in the Middle Ages, claims were made to overlordship of the various seas — Venice claimed the Adriatic, Genoa the Ligurian Sea, England the Channel and the North Sea, Denmark and Sweden the Baltic Sea, etc. It was argued, indeed, that the Romans had, in effect, claimed suzerainty over the Mediterranean by patrolling it with their fleets. By the seventeenth century there was hardly any part of European seas free from proprietary claims, based on service rendered such as freeing them from pirates. Tolls were exacted and there were inevitably abuses of overlordship. Gradually the notion of the marginal sea gained support — sovereignty could only be exercised in the seas bordering upon held territory. But how far out to sea did sovereignty extend? A hundred miles? Sixty miles? The distance of a cannon-shot (i.e., three miles)?

On this issue the "battle of the books" was fought. Selden wrote his *Mare clausum* in 1617; but the king, James I, forbade publication for fear of offend-

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called a common lawyer, it could no longer be said that the common lawyers were *indoctissimum genus doctissimorum hominum*."

<sup>9</sup> Cf. ARNEKE, *op. cit. supra* note 6, at 258 note and *passim*.

<sup>10</sup> Cf. DOUGLAS, *op. cit. supra* note 4, at 53.

<sup>11</sup> Preface to *THE HISTORY OF TYTHES*, 3 WORKS 1069ff. (Wilkins ed., 1726); NOTES TO SIR JOHN FORTESCUE DE LAUDIBUS LEGUM ANGLIAE, *id.* at 1887; cf. FOX, *op. cit. supra* note 6, at 55-57.

ing the Danes. Only in 1635, by order of Charles I, was it published. But it takes its place with the replies and counterreplies that followed upon Grotius's *Mare liberum*. Writing almost a century later, when the controversy had subsided and Selden's view had been rejected, Cornelius van Bynkershoek, in *De Dominio Maris Dissertatio* (1702) refers to Selden many times, for his collecting evidence from sources like the Hebrew authorities and Greek inscriptions for domination of the seas and for the view that there is nothing in the *jus gentium* contrary to sovereignty over the sea. As for Selden's view that England has sovereignty over the British Ocean, van Bynkershoek says that his "arguments collected without any respect for order . . . will be answered in the same way."<sup>12</sup> Van Bynkershoek places his finger on the great defect of Selden — the accumulation in a rather disorderly way of immense erudition for a case that was not really a good one.

The *De jure naturali et gentium juxta disciplinam Ebraeorum* (1640) is more than twice as long as the *Mare clausum*. The title, apart from the restriction to the Jewish traditions, recalls the myriad treatises of the seventeenth and eighteenth centuries going under the title *De jure naturae et gentium*, works of Pufendorf, Thomasius, and a host of others. This prompted a famous remark:

Eight or more new systems of natural law made their appearance at every Leipzig booksellers' fair since 1780. Thus Jean Paul Richter's remark contained no exaggeration: Every war and every fair brings forth a new natural law.<sup>13</sup>

Grotius is generally supposed to have begun this development with his *De jure belli et pacis* (1625), one of the seminal texts of modern international law. The statement, however, that Selden's *De jure naturali et gentium juxta disciplinam Ebraeorum* was modelled on Grotius is one that cannot be accepted without serious qualifications. Selden does make considerable use of Grotius's works; but of 178 mentions of Grotius in the indexes to Wilkins's edition of the *Works of Selden* only 28 refer to the *De jure naturali et gentium juxta disciplinam Ebraeorum*. And, as Aiken points out,<sup>14</sup> the subject and method of Selden are so totally different from those of Grotius that it is difficult to accept that one was the model for the other. Finally, Selden himself claims that in this work he is an innovator. He prefixed to it a motto from Lucretius:

Loca nullius ante  
Trita solo. Juvat integros accedere fontes  
Atque haurire.<sup>15</sup>

And in his Preface, giving the ground plan of the entire work, he makes it clear that he and Grotius are speaking about different topics, or at least in a very different way about the same topics. To take the most striking difference: Grotius,

<sup>12</sup> C. VAN BYNKERSHOEK, *DE DOMINIO MARIS DISSERTATIO* c. 5 (ed. J. B. Scott, Carnegie Classics of International Law, n. 11), pp. 60-68 and *passim*.

<sup>13</sup> Cited in HEINRICH ROMMEN, *NATURAL LAW* 106 (St. Louis, 1947).

<sup>14</sup> AIKEN, *op. cit. supra* note 7, at 109.

<sup>15</sup> *DE RERUM NATURA*, I, 926-28.

in an age in which belief in God was more and more questioned, thought it best to save morality by so founding it upon nature that *etiamsi non daretur Deus* there would still be a distinction between right and wrong:

What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him.<sup>16</sup>

The followers of Grotius have, perhaps, made too much of this. But the approach is very different from Selden's. For Selden, despite the essentially secular cast of mind to which reference has already been made, professes to find the natural law in that revealed to the Jews and found in the documents of the Jewish tradition. Hence the phrase *juxta disciplinam Ebraeorum* of his title.

*Selden on the Natural Law.*—Before considering more closely Selden's views on the natural law, and particularly the intention and plan of his work *De jure naturali et gentium juxta disciplinam Ebraeorum*, one must note some of his well-known expressions of view. He is very forthright in the *Table Talk*, published after his death, and his pungent comments on the *jus divinum* and the law of nature — he seems to regard them both as chimerical — are still quoted to the exclusion of the rest of his work:

#### Jus Divinum

1. All things are held by *jus divinum*, either immediately or mediately.
2. Nothing has lost the pope so much in his supremacy, as not acknowledging what princes gave him. 'Tis a scorn upon the civil power, and an unthankfulness in the priest; but the church runs to *jus divinum*, lest if they should acknowledge what they have, they have by positive law, it might be as well taken from them, as given to them.<sup>17</sup>

With this may be compared a passage in the *Review* appended by Selden to his *History of Tythes*:

Human positive law. For many talk and write of that and tell us here of *jus ecclesiasticum* (at least if they fail in their arguments from the *jus divinum*) but whence that *jus ecclesiasticum* is, or where or when made, they little enough know. . . <sup>18</sup>

Again, in the *Table Talk* Selden refers to the

#### Law of Nature.

I cannot fancy to myself what the law of nature means, but the law of God. How should I know I ought not to steal, I ought not to commit adultery, unless somebody had told me so? Surely 'tis because I have been told so. 'Tis not because I think I ought not to do them, not because you think I ought not; if so, our minds might change. Whence then comes the restraint? From a higher power, nothing else can bind. I cannot bind myself, for I may un-

<sup>16</sup> DE JURE BELLI ET PACIS, Prolegomena n. 11: cf. J. ST. LEGER, THE "ETIAMS I DAREMUS" OF HUGO GROTIUS (Rome, 1962).

<sup>17</sup> 3 WORKS 2037.

<sup>18</sup> *Id.* 1299-1344; cf. FUSSNER, *op. cit. supra* note 5, at 287.

bind myself again; nor an equal cannot bind me, for we may untie one another. It must be a superior power, even God Almighty. If two of us make a bargain, why should either of us stand to it? What need you care what you say, or what need I care what I say? Certainly because there is something about me that tells me *fides est servanda*, and if we after alter our minds, and make a new bargain, there is *fides servanda* there too.<sup>19</sup>

One must, it is true, beware of laying too much stress on the informal pronouncements of the *Table Talk*; it is enough that their informality betrays an attitude of mind that we may expect to find underlying Selden's more scholarly references. Nor should it be forgotten that it is largely for the *Table Talk* that Selden is nowadays remembered.

Despite this skeptical attitude, Selden did accept a natural law in some sense; otherwise he would hardly have written such a voluminous work with *jus naturale* figuring in its title. The fact of the matter is that he identified the natural law with the precepts given to Noah (through Adam) — a theory which, one of his editors has suggested, is found also in the *Decretum Gratiani*.<sup>20</sup> Gratian had, indeed, defined the natural law as *quod in Lege et Evangelio continetur*, which was, at best, a confusion. But if one rejects the distinction between the *jus divinum* and the *jus naturale* or wishes to stress the divine origin of the *jus naturale*, then the definition seems less paradoxical although still very misleading. St. Thomas, for one, in his efforts to accommodate various definitions of the natural law, finds a tolerable meaning for this one, but only at the cost of considerable straining.<sup>21</sup>

In the *De jure naturali et gentium juxta disciplinam Ebraeorum* Selden, as we have seen, claims originality; and the originality was in the idea that the natural law was found in the Jewish tradition, in the law given by God (through Adam) to Noah. This "title," says Selden in his Preface, "is, as far as I know, completely new — as unheard of as untried until now."<sup>22</sup> He does not set out to study natural law as such but according to the discipline of the Jews. Many have studied the law of nature and of nations — moralists, political theorists, jurists, theologians — but with little success in discovering that law which is common to all men and written, as it is said, in the heart of everyone. And upon this law all others depend as the shoots depend upon the trunk of the tree. But there is little agreement about the matter:

Surely there are many dissenting opinions about what it is, of what sort and how many are its chapters, how far they may extend or be contracted, and where they may be sought.<sup>23</sup>

For natural law and the law of nations are sometimes identified — which is a mis-

<sup>19</sup> 3 WORKS 2041.

<sup>20</sup> DECRETUM GRATIANI, I, D.1. See S. H. REYNOLDS, JOHN SELDEN'S TABLE TALK 101 n. (Oxford, 1892).

<sup>21</sup> THOMAS AQUINAS, IN IV SENT. d.33, q.1, a.1. The confusion is removed in SUMMA THEOLOGIAE 1-2ae, q.94, a.4, ad 1.

<sup>22</sup> 1 WORKS 68: "Titulus quantum scio plane novus est, etiam hactenus tam inauditum quam incompertus."

<sup>23</sup> "De eo autem interea quod est, qualia et quot sint ac quousque extendantur contrahanturque juris istius capita, atque undenam petenda, dissensus est sane multiplex." *Ibid.*

take. Selden, however, proposes to take natural law in the universal sense: "The natural law thus signifies here what is the universal law or law of the world; the law of nations signifies what is particular to some nations."<sup>24</sup> His subject, then, is this natural law insofar as it was given to Noah through Adam for his posterity as the universal law for all nations and all periods of history. It comes under seven headings: idolatry, blasphemy, homicide, incest and unlawful sexual relations, theft, the use of animal flesh, and judgment and civil obedience. The *jus gentium* in the title is then confined to those matters regulated by an intervention of God, by pact or by custom in the Jewish and other peoples — regulations touching contracts, marriage, treaties, admission of proselytes, captives, tribute, etc. Selden devotes his vast scholarship to the study of all these matters in the Hebrew tradition and in the Talmudic and rabbinical literature.

This notion of the natural law is not confined to the major work Selden devoted to the subject. In the *De synedriis veterum Ebraeorum*, I, c.2, he discusses the six heads of natural law as given to our first parents: *De cultu extraneo*, *De blasphemia in Deum*, *De sanguinis effusione*, *De incestu seu turpitudinum revelatione*, *De raptu seu furtu*, *De judiciis*. This is clearly the same notion of natural law as in the *De jure naturali et gentium juxta disciplinam Ebraeorum*. And elsewhere in his more incidental references to the natural law Selden exhibits the same approach. When dealing with marriage, for instance, in the *Uxor Ebraica*, he speaks of the *jus Noachidarum seu naturale i.e. Ebraicis ante legem Mosaicam aliisque pariter gentibus seu humano generi imperativo*.<sup>25</sup> Again, in the *Mare clausum*, I, c.3, he examines the terminology of the discussion and distinguishes between the kinds of *jus naturale* affecting the entire human race, namely that which is known by the natural light of reason or the use of right reason and that which is committed to writing in the Sacred Scriptures. Neither of these kinds of *jus naturale* should be confused with the *positivum jus* which supplements right reason and, although it may be common to many peoples, is not universal or immutable. It cannot be said that Selden makes these distinctions clearly and unambiguously; and the uncertainty is not dispelled by his cumbrous Latin style.<sup>26</sup>

This meaning for natural law was congenial to a method which was historical rather than philosophical. Precepts of natural law confined to the Jewish books and to the Jewish tradition of the rabbis are amenable to a kind of investigation that is less appropriate for a natural law as a purely philosophical notion. This is the "method of contextualism and comparison." In his Preface to the *Titles of Honour* Selden enumerates at great length his sources and describes his method. The following extract is typical:

<sup>24</sup> "Jus naturale ita significat hic quod jus mundi seu universale; gentium jus, id quod gentibus aliquot peculiare." *Ibid.*

<sup>25</sup> II, c.18, 2 WORKS 641.

<sup>26</sup> *Id.* at 1193-94: "Utrumque autem hoc genus (juris), aut universum genus humanum, id est gentes universas, spectat, aut non universas. Quod universum spectat genus humanum, seu gentes universas, aut naturale est aut divinum; scilicet aut ex naturalis rationis lumine seu recto rationis usu manifestum, . . . aut divinis in eloquiis, scripto mandatis, praestitutum; quorum utrumque jus gentium universale seu omnium commune, recte appellandum . . ."

Those constitutions and customs of several states and ages, that is the laws of them, partly are had out of those authors of treatises and histories before spoken of, but principally out of volumes that purposely contain them. As out of Justinian's body of the laws, Theodosius his code, and the constitutions joined usually with either of them, the volumes of the imperial constitutions of the French and German empires, the *Codex legum antiquarum*, the Bullary of the See of Rome, the councils, rituals and ceremonials as well of the Eastern as of the Western church, the constitutions and customs of Naples and Sicily, and some other that belong to some states that are or have been in latter ages part of the Empire, out of the Partidas and the Recopilacions and the Pragmaticas of Castile, the ordinance of Portugal, Navarre and much more, the edicts ordinances and customier of France, the statutes of Scotland and Ireland, and the statutes and customs of England, besides divers decisions that more peculiarly and respectively belong to those nations . . .<sup>27</sup>

Equally, Selden was aware of the importance of getting at the right sources. In the Preface to *The History of Tythes* he sends the one who disbelieves in his thesis to the original documents:

I know not how otherwise to confirm these protestations than by sending him that believes me not here to the view of the whole. He may be there further satisfied, and shall then see that it is not of the pitch of the doctrine of the breviary, or within the compass of pocket-learning. Nor will it, I think, look like what were patched up out of postils, polyantheas, common place books or any of the rest of such excellent instruments for the advancement of ignorance and laziness . . .<sup>28</sup>

Again, in the Preface to *Illustrations on the first eighteen songs of Drayton's Polyolbion*:

My thirst always compelled me to seek the fountains and by that, if means grant it, judge the river's nature. Nor can any conversant in letters be ignorant of what error is oft-times fallen into by trusting authorities at second-hand, and rash collecting (as it were) from visual beams refracted through another's eye.<sup>29</sup>

It is clear that, despite appearances and protestations, little about the natural law in the classical philosophical sense can be expected from Selden, and little deference, despite verbal citation, to authorities like the scholastics Vitoria and Suarez. Most of what he has to say about the natural law as a philosophical or juridical notion, apart from the Hebrew tradition, is found in the first book of the *De jure naturali et gentium juxta disciplinam Ebraeorum*. He begins by referring to the universal principles of the natural law as the columns upon which all law is built, the wedges and pulleys that make possible the mechanics of moral and civic science—and the matter of the enormous disputes of philosophers, theologians and jurisconsults.<sup>30</sup> In the succeeding chapters of Book I he discusses

<sup>27</sup> 3 WORKS 103; cf. FUSSNER, *op. cit. supra* note 5, at 288.

<sup>28</sup> 3 WORKS 1069; cf. ARNEKE, *op. cit. supra* note 6, at 264.

<sup>29</sup> 3 WORKS 1731.

<sup>30</sup> 1 WORKS 73: ". . . Atque haec sane (prima naturae) sive velut columnae, cui in-  
nitantur caetera, robustissimae munus obediunt, sive qualem fere habet ad vectis, librae,

many of the points upon which there has been such acute disagreement. In I, c.4, Selden considers the various definitions of natural law that have been handed down in the literature, such as Ulpian's celebrated *Quod natura omnia animalia docuit*—this includes what brutes do for their offspring and the conservation of the species—the “republic of the bees,” the “marriage of doves,” *et id genus reliqua*. Many philosophers and juriconsults have accepted this definition in some way; the Hebrews, Selden says, reject it outright and have no place for a natural law common to men and animals; and he goes on to examine the notion of liberty proper to man (that liberty which is the subject of right) and to pursue the related ideas of punishment, etc., with all his usual complexity of learning and authorities.<sup>31</sup> The following chapter further pursues the issue of a natural law common to men and brutes. And in Ch. 6 he examines the definition of natural law as what natural reason establishes: *quod naturalis ratio inter omnes homines constituit*,<sup>32</sup> a kind of view for which he cites Aristotle, (*Rhet.* i, cc. 13-15), his commentator Alexander of Aphrodisias, and Cicero. In Ch. 7 Selden examines the function of human reason in the natural law according to the Hebrews; here he quotes Aristotle in the *Nicomachean Ethics* (V, 10) and commentators like Alexander and Michael of Ephesus.<sup>33</sup> Plato, Seneca, Plutarch and other philosophers, theologians and juriconsults are cited *qui jura naturalia ex recto rationis usu indicari seu ibi sedem habere velint; hinc scilicet nasci principia qualia practica et prima vocant in scholis atque dein consecraria e quibus jus confletur naturale*. These principles are like the definitions in geometry which give rise to evident principles which in turn give rise to conclusions. And St. Thomas (*Summa* 1-2ae, q.94, art. 2) is quoted on the function of first practical principles which, in practical matters, is similar to that of first logical principles in speculative reasonings. Selden, however, goes on to argue, that, because of the uncertainty of natural reason and the want of a superior imposing obligation, the dictate of natural reason is not an adequate expression of natural law. This takes him, in Ch. 8, to the main thesis of his work, that natural law is given by Revelation to the Hebrews.<sup>34</sup> This Selden establishes with copious abundance of authorities, many of whom—Cicero, Hesiod, Plato, Jerome, Chrysostom, Ambrose, Clement of Alexandria—seem to be used in a rather cavalier fashion. The passages like Cicero's well-known praise of the natural law in the *Republic* (cited by Lactantius). — *Est quidem vera lex, recta ratio naturae congruens . . .* —<sup>35</sup> hardly prove what Selden is trying to establish. The same might be said of a passage like that of St. Ambrose (in his *Commentary on the Epistle to Romans*) to the effect that the natural law has three parts dealing respectively with honor to God, modest living, and the communication of knowledge of God and the

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cunei, torchleae . . . rationem praestant juris naturalis nomen simul induere solita, atque in re civili et morali plane fiunt . . . universaliter prima . . . Tam de officiis illis quam de accessionibus quas diximus habentur passim disputationum ingentes a philosophis, theologis, juriconsultis, congestae moles . . .”

<sup>31</sup> *Id.* at 104-106.

<sup>32</sup> *Id.* at 127.

<sup>33</sup> *Id.* at 135-136.

<sup>34</sup> *Id.* at 141.

<sup>35</sup> *Id.* at 142-46.

example of good behavior to others; Selden quotes the passage<sup>36</sup> and puts it to work in his own way.

How, it may be asked, do the scholastics fare in the welter of authorities called upon by Selden? This is not the place for a detailed study. But some numerical indications may be given, by way of illustration, from the indexes to Wilkins's three-volume edition of Selden's *Works*. Taking St. Thomas Aquinas to represent the High Scholasticism of the thirteenth century and Vitoria and Suarez to represent the Silver Age Scholasticism of the sixteenth and seventeenth centuries, we discover no mention of any of these authors in Selden's English works (Wilkins, vol. III). In the Latin works (Wilkins, vols. I and II) there are some 42 express references to Aquinas (18 of them in the *De jure naturali et gentium juxta disciplinam Ebraeorum*); only 3 references to Vitoria (2 of them in the *Mare clausum*); and 14 references to Suarez (5 of them in the *De jure naturali et gentium juxta disciplinam Ebraeorum*). This, in view of Selden's proliferation of authorities, must be regarded as a poor tally; but it is scarcely surprising when one bears in mind the different outlook he brought to the natural law.

From this preliminary study it is difficult to conclude about the originality or the indebtedness of Selden to the scholastics. The matter—as in the case of John Locke<sup>37</sup>—is one that calls for more detailed study. The hazards of the enterprise may be gauged from the well-known difficulties in assessing the debt of Hugo Grotius to the scholastics. It was once accepted that he was a great innovator, the father of modern international law, and his debt to his scholastic forerunners tended to be forgotten or neglected. In the present century there has been an effort, particularly associated with the name of James Brown Scott, Secretary to the Carnegie Endowment for International Peace, to redress the balance of emphasis and to give credit to the Spaniards, particularly to Vitoria and Suarez. The series of Classics of International Law, published by the Carnegie Endowment (with the introductions and notes, much of them Scott's work), has played a leading part in the campaign.<sup>38</sup> The indebtedness is established; although precision in such a matter, where one is dealing with commonly held views that could be found in half a dozen authors, is difficult. That Grotius does not acknowledge the extent of his debt has puzzled students. Scott argues that Grotius was disinclined to acknowledge his debt to Suarez not because of an objection to Suarez's religious views (although this would be understandable) nor because of Grotius's desire to disengage international law from controversial theology, but because of some unacceptable political views of Suarez, notably on political sovereignty. This is urged by Scott in his discussion of the source of Grotius's *De jure praedae*: the text is clearly taken from Suarez,

<sup>36</sup> *Id.* at 158.

<sup>37</sup> VON LEYDEN, *op. cit. supra* note 2; M. B. CROWE, *Intellect and Will in John Locke's Conception of the Natural Law*, in 12 *ATTI DEL XII CONGRESSO INTERNAZIONALE DI FILOSOFIA* 1958, at 129-35.

<sup>38</sup> J. B. SCOTT, *THE SPANISH CONCEPTION OF INTERNATIONAL LAW AND OF SANCTIONS* (Washington, 1934); Part I, "F. de Vitoria's Modern Law of Nations and Its Municipal Sanctions," 1-48; Part II, "F. Suarez, His Philosophy of Law and of Sanctions," 51-130; *id.*, Introduction to *SELECTIONS FROM THE WORKS OF F. SUAREZ* 14a-16a (Oxford, 1944); G. A. FINCH, *THE SOURCES OF MODERN INTERNATIONAL LAW* (Washington, 1937).

yet Grotius contents himself with four casual references and acknowledgments.<sup>39</sup>

The contention of Grotius's indebtedness has been contested by some historians of international law, notably Arthur Nussbaum.<sup>40</sup> Nussbaum accuses Scott of inaccuracies, of uncritical enthusiasm, of failing to trace the work of Vitoria and Suarez to their medieval forerunners, thus giving them a wrong appearance of originality; more importantly he shows that Scott and his team of translators were guilty of mistranslation of technical terms, of failure to examine sufficiently the meaning of key words, like *civitas*, *respublica*, *communitas*, *gens*, *populus*, *natio*, etc., of translating *jus gentium* unjustifiably as "international law," and of naïveté in seeking parallels with institutions of modern international law in Vitoria and Suarez. It is a damaging case; and, even if it does no more than qualify the conclusion of Scott, it is a cautionary tale for those who would examine John Selden's scholastic sources. And there for the moment, the matter may be allowed to rest.

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<sup>39</sup> J. B. SCOTT, Introduction to SELECTIONS FROM SUAREZ 17a-20a (Oxford, 1944).

<sup>40</sup> A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 296-306 (rev. ed. New York, 1954): Appendix II, "J. B. Scott on the Superiority of the Scholastics over Hugo Grotius." Scott is supported (on Grotius's debt to Vitoria and Vazquez) by J. EPPSTEIN, THE CATHOLIC TRADITION OF THE LAW OF NATIONS 99 and 291 (London, 1935).