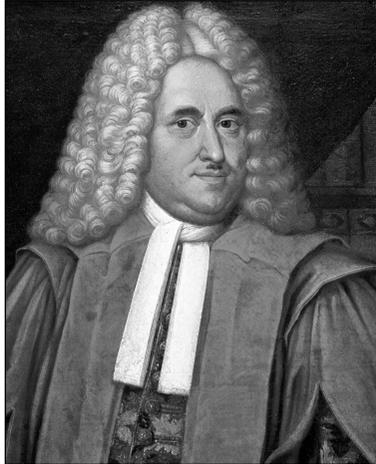


INSTITUTES OF DIVINE JURISPRUDENCE

NATURAL LAW AND  
ENLIGHTENMENT CLASSICS

Knud Haakonssen  
*General Editor*



Christian Thomasius

NATURAL LAW AND  
ENLIGHTENMENT CLASSICS

---

*Institutes of Divine  
Jurisprudence*

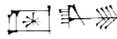
With Selections from  
*Foundations of the Law  
of Nature and Nations*

Christian Thomasius

---

Edited, Translated, and with an Introduction  
by Thomas Ahnert

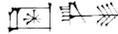
---



LIBERTY FUND

*Indianapolis*

This book is published by Liberty Fund, Inc., a foundation established to encourage study of the ideal of a society of free and responsible individuals.



The cuneiform inscription that serves as our logo and as the design motif for our endpapers is the earliest-known written appearance of the word “freedom” (*amagi*), or “liberty.” It is taken from a clay document written about 2300 B.C. in the Sumerian city-state of Lagash.

© 2011 by Liberty Fund, Inc.

All rights reserved

Printed in the United States of America

Frontispiece: Portrait of Christian Thomasius by Johann Christian Heinrich Sporleder (1754), oil. Reproduced courtesy of Bildarchiv der Zentralen Kustodie der Martin-Luther-Universität Halle-Wittenberg.

C 10 9 8 7 6 5 4 3 2 1  
P 10 9 8 7 6 5 4 3 2 1

*Library of Congress Cataloging-in-Publication Data*

Thomasius, Christian, 1655–1728:

[*Institutiones jurisprudentiae divinae & Fundamenta juris naturae et gentium*. English]

Institutes of divine jurisprudence with selections from foundations of the law of nature and nations/Christian Thomasius: edited, translated, and with an introduction by Thomas Ahnert.

p. cm.—(Natural law and enlightenment classics)

Includes bibliographical references and index.

ISBN 978-0-86597-518-7 (hc: alk. paper) ISBN 978-0-86597-519-4 (pbk.: alk. paper)

I. Law—Philosophy. 2. Natural law—Early works to 1800. 3. Religion and law. I. Ahnert, Thomas. II. Thomasius, Christian, 1655–1728.

Fundamenta juris naturae et gentium. III. Title.

KZ2344.A31567 2011

340'.112—dc22

2011013180

LIBERTY FUND, INC.

8335 Allison Pointe Trail, Suite 300

Indianapolis, Indiana 46250-1684

## CONTENTS

---

|                  |       |
|------------------|-------|
| Introduction     | xi    |
| Note on the Text | xxv   |
| Acknowledgments  | xxvii |

### INSTITUTES OF DIVINE JURISPRUDENCE

---

|   |   |
|---|---|
| Introductory Dissertation, Addressed to My Audience | I |
|---|---|

#### *Book I*

|  |     |
|--|-----|
| CHAPTER I: On Jurisprudence in General   | 61  |
| CHAPTER II: On Divine Jurisprudence  | 88  |
| CHAPTER III: On the Interpretation of Divine Laws in General and on Practical Principles   | 114 |
| CHAPTER IV: On the Interpretation of Divine Laws in Particular, That Is, on the First Principles of Natural Law and Positive Universal Law | 128 |
| CHAPTER V: On the Duties of Man Toward God   | 144 |

#### *Book II*

|   |     |
|---|-----|
| CHAPTER I: On the Duty of Man Toward Himself  | 153 |
| CHAPTER II: On the Duty of Man Toward Others, in Particular on Preserving Equality Among Humans | 178 |

|   |     |
|---|-----|
| CHAPTER III: On Avoiding Pride  | 183 |
| CHAPTER IV: On Not Harming Others and on<br>Compensating for Harm That Has Been Done              | 187 |
| CHAPTER V: On the Various Duties of Humanity  | 195 |
| CHAPTER VI: On the Duty of Persons Forming<br>an Agreement  | 205 |
| CHAPTER VII: On the Duty of Man Concerning<br>Speech  | 226 |
| CHAPTER VIII: On the Duty of Those Taking an Oath   | 241 |
| CHAPTER IX: On the Duty Concerning Things and<br>Their Ownership                                  | 259 |
| CHAPTER X: On the Duty Concerning the Prices<br>of Things   | 299 |
| CHAPTER XI: On the Interpretation of Divine and<br>Human Will Insofar as It Is Expressed in Words | 311 |

*Book III*

|  |     |
|--|-----|
| CHAPTER I: On the Duty of Man Toward Fellow<br>Humans in General           | 354 |
| CHAPTER II: On the Duty of Man with Regard to<br>Conjugal Society          | 367 |
| CHAPTER III: On the Positive Laws Concerning the<br>Duties of Marriage     | 412 |
| CHAPTER IV: On the Duties of Parents and Children                          | 461 |
| CHAPTER V: On the Duties of Lords and Servants                             | 475 |
| CHAPTER VI: On the Duties of Those Living in<br>a Commonwealth             | 480 |
| CHAPTER VII: On the Duties of Citizens in States<br>Concerning Punishments | 512 |

---

|   |     |
|---|-----|
| CHAPTER VIII: On the Duties of Confederates   | 539 |
| CHAPTER IX: On the Duties Toward Legates      | 544 |
| CHAPTER X: On the Duties Toward the Dead      | 560 |
| CHAPTER XI: On the Application of Divine Laws | 566 |

## Selections from

*Foundations of the Law of Nature and Nations*

|  |     |
|--|-----|
| INTRODUCTORY CHAPTER: The Reason for This Work | 571 |
|--|-----|

*Book I*

|   |     |
|---|-----|
| CHAPTER I: On the Moral Nature of Man       | 581 |
| CHAPTER V: On the Law of Nature and Nations | 607 |
| Bibliography                                | 623 |
| Index                                       | 635 |

## INTRODUCTION

---

The German jurist and philosopher Christian Thomasius (1655–1728) published two major treatises on natural law, the *Institutes of Divine Jurisprudence* in 1688 and the *Foundations of the Law of Nature and Nations* in 1705.<sup>1</sup> Thomasius's declared aim in both was to improve and develop the natural law theories of Hugo Grotius and Samuel Pufendorf.<sup>2</sup> Both works have much material in common, a lot of which is standard natural jurisprudential argument, yet Thomasius also used the *Foundations* to reformulate the central principles on which his natural jurisprudence was based. The passages from the *Foundations* in this volume have been chosen because they make clear the key changes in Thomasius's natural law theory that had taken place since the publication of the *Institutes* seventeen years before.

Thomasius was widely regarded as an innovative, even heterodox, thinker during his lifetime, a reputation that he often promoted very vigorously. He boasted, for example, that his decision in the mid-1680s to lecture at the University of Leipzig in German rather than in the traditional Latin had caused great consternation among the conservative professoriate,<sup>3</sup> and in subsequent years he often criticized “pedantry,” “dogmatism,” and “scholasticism” in university teaching. Thomasius continued to be regarded as an intellectual innovator after his death. In the mid-eighteenth century the historian of philosophy Johann Jacob Brucker

1. Christian Thomasius, *Institutiones jurisprudentiae divinae* (Leipzig, 1688), and Thomasius, *Fundamenta juris naturae et gentium* (Halle, 1705).

2. See, for example, Thomasius, *Foundations*, “Introductory Chapter,” §1.

3. See Rolf Lieberwirth, “Die französischen Kultureinflüsse auf den deutschen Frühaufklärer Christian Thomasius,” *Wissenschaftliche Zeitschrift der Universität Halle* 33 (1983): 63.

praised him as one in a long line of “eclectic” thinkers, who formed their ideas independently and refused to follow blindly the authority of others.<sup>4</sup> Toward the end of the eighteenth century the author Friedrich Gedike in Berlin presented Thomasius as one of the initiators of the Enlightenment in Germany, describing him as the person “to whom we owe a large part of our intellectual and material happiness.”<sup>5</sup> In recent years several studies have reaffirmed his status as a key figure in the intellectual history of the early Enlightenment.<sup>6</sup>

### Life of Thomasius

Christian Thomasius<sup>7</sup> was born in Leipzig in 1655, the son of Jacob Thomasius, a respected professor at the university, who taught the young Gottfried Wilhelm Leibniz in the early 1660s. Christian Thomasius entered the University of Leipzig in 1669. In 1672, the year in which Samuel Pufendorf’s *On the Law of Nature and Nations* was first published, he graduated with a master’s degree from Leipzig, moving to the University

4. Johann Jacob Brucker, *Historia critica philosophiae* (Leipzig, 1744), vol. IV, chap. 9.

5. “Wir alle verdanken ihm einen grossen Teil unserer intellektuellen und materiellen Glückseligkeit.” Quoted in Martin Pott, “Christian Thomasius and Gottfried Arnold,” in *Gottfried Arnold: 1666–1714*, ed. D. Blaufuss and F. Niewöhner (Wiesbaden: Harrasowitz, 1995, p. 247).

6. See, for example, Peter Schröder, *Christian Thomasius zur Einführung* (Hamburg: Junius, 1999); Tim Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 2000); Frank Grunert, *Normbegründung und politische Legitimität* (Tübingen: Max Niemeyer, 2000); Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge: Cambridge University Press, 2001); Thomas Ahnert, *Religion and the Origins of the German Enlightenment: Faith and the Reform of Learning in the Thought of Christian Thomasius* (Rochester, N.Y.: University of Rochester Press, 2006); Ian Hunter, *The Secularisation of the Confessional State: The Political Thought of Christian Thomasius* (Cambridge: Cambridge University Press, 2007). The foundational work on Thomasius’s moral philosophy is still Werner Schneiders, *Naturrecht und Liebesethik: Zur Geschichte der praktischen Philosophie im Hinblick auf Christian Thomasius* (Hildesheim and New York: G. Olms, 1971).

7. On Thomasius’s biography, see Rolf Lieberwirth, “Christian Thomasius (1655–1728),” in *Aufklärung und Erneuerung*, ed. G. Jerouschek and A. Sames (Hanau: Dau-sien, 1994), pp. 29–45.

of Frankfurt on the Oder in 1675, where he received a doctorate in law, before returning to Leipzig in 1679. After an unsuccessful attempt at a legal career, Thomasius began to lecture on natural jurisprudence to students at the University of Leipzig. Within a few years, he was involved in a number of controversies with the university, its theological faculty in particular. His disputation *On the Crime of Bigamy* (*De crimine bigamiae*) in 1685 appears to have led to disagreements with Valentin Alberti, a professor of theology and an opponent of Samuel Pufendorf. Thomasius, in his *Institutes of Divine Jurisprudence* of 1688, was also highly critical of Alberti's natural law theory<sup>8</sup> and defended the main principles of Pufendorf's system. In 1688 Thomasius began publishing a monthly journal, the *Monatsgespraeche* (*Monthly Conversations*), in which he often commented satirically on members of the university. In addition, he plunged into a dispute with the court preacher in Copenhagen, Hector Gottfried Masius, which led to a complaint by the Danish king to Thomasius's prince, the Elector of Saxony.<sup>9</sup> At the same time, Thomasius was associating himself with a quasi-Puritan reform movement within the Lutheran church in Leipzig, the so-called Pietists, who were opposed by the theological faculty at the university. While some clergymen and professors appear to have been sympathetic to the Pietists' general aims, their concern seems to have been that some of the leading Pietists were not qualified theologians and therefore likely to mislead their followers on matters that were essential to salvation.<sup>10</sup> Eventually, pressure from the Lutheran church in Saxony and the Elector forced most of the prominent Pietists to leave the country. Several moved to the lands of the Calvinist Elector of Brandenburg, who

8. For Valentin Alberti's theory of natural law, see his *Compendium juris naturae orthodoxae theologiae conformatum et in duas partes distributum* (Leipzig, 1678), and his reply to Pufendorf, the *Eros Lipsicus, quo Eris Scandica Samuelis Pufendorfi cum convitiis et erroribus suis masculine, modeste tamen repellitur* (Leipzig, 1687). Here the second edition of Alberti's *Compendium*, published in Leipzig in 1696, has been used.

9. Frank Grunert, "Zur aufgeklärten Kritik am theokratischen Absolutismus: Der Streit zwischen Hector Gottfried Masius und Christian Thomasius über Ursprung und Begründung der summa potestas," in *Christian Thomasius (1655–1728): Neue Forschungen im Kontext der Frühaufklärung*, ed. Friedrich Vollhardt (Tübingen: Max Niemeyer, 1997), pp. 51–77.

10. See Ahnert, *Religion and the Origins of the German Enlightenment*, p. 13.

welcomed them, in part because he believed that they would be useful allies against his territory's Lutheran church, with which his relationship was strained.<sup>11</sup> In 1690 Thomasius also left Saxony, having been forbidden to teach, publish, and conduct academic disputations, and moved across the border into the territories of the Elector of Brandenburg. There Thomasius first taught at an academy for noblemen in Halle. Very soon, however, he joined others in urging the foundation of a full university in Halle.<sup>12</sup> Their efforts were successful, and in 1694 the new University of Halle was opened, which soon became one of the leading academic institutions in the early German Enlightenment. Thomasius was appointed a professor in Halle and remained there until his death in 1728.

### *Institutes of Divine Jurisprudence* (1688)

Thomasius first published the *Institutes* in Leipzig in 1688 as a textbook to accompany his lecture course on natural law. At that time he did not hold a university post but taught students in private seminars, so-called *collegia*. The *Institutes* was intended as a vindication of the main principles of Pufendorf's natural jurisprudence against critics such as Valentin Alberti. Yet Thomasius's work was more than a repetition of Pufendorf's ideas. In Pufendorf's theory, for example, the notion of human weakness (*imbecillitas*) had played a central role, which it did not have in Thomasius's *Institutes*. Pufendorf argued that, unlike other animals, single humans in a state of nature were weak. They lacked teeth, claws, fur, speed, and the other natural attributes that allowed wild beasts to survive without assistance from others. This *imbecillitas*, according to Pufendorf, drove humans to form societies. It also made it clear that God must have wanted them to

11. On the relationship between the Hohenzollerns and Pietism, see the classic work by Carl Hinrichs, *Preußentum und Pietismus: Der Pietismus in Brandenburg-Preußen als religiös-soziale Reformbewegung* (Göttingen: Vandenhoeck & Ruprecht, 1971), and Mary Fulbrook, *Piety and Politics: Religion and the Rise of Absolutism in England, Württemberg and Prussia* (Cambridge: Cambridge University Press, 1983).

12. On Thomasius's proposal for a new university in Halle, see Friedrich de Boor, "Die ersten Vorschläge des Christian Thomasius 'wegen Aufrichtung einer Neuen Academie zu Halle' aus dem Jahre 1690," in *Europa in der Frühen Neuzeit: Festschrift für Günther Mühlplfordt*, ed. E. Donnert (Weimar: Böhlau, 1997), 4:57–84.

do so, because he would not have created humankind only for it to perish immediately.<sup>13</sup> The argument from *imbecillitas*, however, was susceptible to accusations of “Hobbesianism,” because it seemed to turn individual necessity into the foundation of natural law.<sup>14</sup> It is perhaps for this reason that Thomasius did not emphasize the argument from *imbecillitas* in his natural law theory but replaced it with another that relied on less selfish grounds to account for the origins of society. Humans, Thomasius wrote, had been created capable of reasoning. That was a fact of which each individual was aware. Reasoning, however, was impossible without words, and words were terms imposed on the world by mutual agreement among several humans. The use of words and language, therefore, depended on the existence of human society and relationships, and the rational nature of humans was thus evidence that God had intended them to live in societies together.<sup>15</sup>

In most other respects Thomasius’s argument was similar to Pufendorf’s. The laws of nature were divine commands that could be known from the observation of human nature and reflection on it. They were grounded in the divine will, just as laws in general were based on the will of a superior, that is, someone who had the right to impose an obligation on others. Without these commands, physical nature had no intrinsic moral value, either good or bad. All moral values were impositions on a morally indifferent, physical nature by a superior. Moral and physical qualities, therefore, were strictly distinct from each other.<sup>16</sup> Thomasius also argued, like Pufendorf, that the human will was free in the sense of being “indifferent”; that is, it was able to choose freely between any of the

13. Samuel Pufendorf, *On the Duty of Man and Citizen*, ed. J. Tully, trans. M. Silverthorne (Cambridge: Cambridge University Press, 1991), bk. 1, chap. 3, §11, p. 36; see also Pufendorf, *The Whole Duty of Man, According to the Law of Nature*, trans. Andrew Tooke, ed. Ian Hunter and David Saunders, with *Two Discourses and a Commentary by Jean Barbeyrac*, trans. David Saunders (Indianapolis: Liberty Fund, 2003), bk. I, chap. 3, §11, p. 57. On Pufendorf’s natural law theory, see Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996), pp. 35–43.

14. See Alberti, *Eros Lipsicus*, p. 13.

15. Thomasius, *Institutes*, bk. I, chap. iv, §§51–55.

16. *Ibid.*, chap. i, §85.

various courses of action that presented themselves to it at a particular time. If that were not the case, the will could not be held morally responsible for its decisions. This freedom of the will was a key difference between humans and beasts. It meant that the former were moral agents, while the latter were not, though Thomasius also believed that following the fall from grace the human will was not always able to exercise its freedom unimpeded. Ever since original sin, the human passions interfered with the operations of the will and distorted its choices. But this interference was never so strong that humans ceased to be responsible for their actions.<sup>17</sup>

God's commands in natural law were not arbitrary, but his reasons were not fully evident to humans. It was only clear that, having created human nature as it was, God must have wanted humans to act according to the principles of natural law, as they were known from the empirical observation of humankind. Thomasius placed great emphasis on the inscrutability of God's mind to human understanding. This was one important respect in which he distinguished his natural law theory from that of opponents such as Valentin Alberti. Alberti believed that the content of natural law was not the product of divine commands but founded on eternal truths in the mind of God.<sup>18</sup> The moral principles of natural law were not identical to these truths, but they were derived directly from them and, therefore, were just. They were not known to humans on the basis of empirical observation and reflection but were innate and part of the so-called *imago divina*, the divine image that God had implanted in humans when he created the world.<sup>19</sup> Yet Alberti also said that these moral principles had been present in their full strength and clarity only in the state of innocence, before original sin. Following the fall from grace, they were blurred and obscured, and humans depended on divine revelation to supplement their imperfect knowledge and understanding of them. In particular, it was the Decalogue, given by God to the Israelites after their exodus from Egypt, that summarized the central precepts of natural law.<sup>20</sup>

The first of Thomasius's main objections was that Alberti's theory of

17. *Ibid.*, chap. ii, §§39 and 42.

18. See Alberti, *Eros Lipsicus*, p. 67.

19. *Ibid.*, p. 14.

20. *Ibid.*, p. 284; see also Exodus 20:1–17; Deuteronomy 5:6–21.

the *imago divina* and the derivation of natural law from eternal truths implied a continuity, which did not exist, between human understanding and the mind of God. The two differed in kind, not just in degree, and the distance between them was insuperable.<sup>21</sup> Humans should therefore not dare to speculate about the ideas in God's mind. The grounds for God's decisions are inscrutable, and humans must not assume that their moral reasoning and that of God's are comparable and based on similar principles. The precepts of natural law were binding because they were known to be the commands of God, who was the rightful superior of humankind, not because they conformed to particular eternal truths. Thomasius also argued that Alberti's theory of eternal rational truths appeared to subordinate God's will to an external standard of morality: it implied that there were rules independent of and superior to God, which God had to adhere to, thus restricting his freedom and power.<sup>22</sup> Alberti replied that this standard according to which God acted was part of his own intellect, and thus it constituted no external restriction on him. To say that God acted according to principles that were part of himself, and not arbitrarily, did not imply that his freedom or his power was limited.<sup>23</sup>

Thomasius's natural jurisprudence in the *Institutes* was thus largely, if not completely, Pufendorfian. Yet natural law formed only one-half of the "divine jurisprudence" referred to in the full title of his work. The other half was divine positive law, and one of Thomasius's main concerns in the *Institutes* was to clarify the relationship between natural and positive divine law. As we have seen, Valentin Alberti argued that the main example of divine positive law, the Decalogue, was a republication of the laws of nature, which had been erased or at least obscured by the effects of original sin. Thomasius's view in the *Institutes* was that divine positive law was not needed to reconstruct and understand the main principles of natural

21. Thomasius, *Institutes*, bk. I, chap. iii, §§49–62.

22. *Ibid.*, chap. ii, §72.

23. See Alberti, *Compendium*, 2nd ed. (Leipzig, 1696), p. 197. The debates between Thomasius and Pufendorf on the one hand and Alberti on the other were, to some extent, a continuation of the earlier controversies between realists and nominalists. On Pufendorf's relationship to realism and nominalism, see Alfred Dufour, "Pufendorf," in *The Cambridge History of Political Thought, 1450–1700*, ed. J. H. Burns with the assistance of Mark Goldie (Cambridge: Cambridge University Press, 1991), p. 567.

law. It was, however, important for other reasons, in particular because it provided guidance on certain temporal matters on which natural law was silent.

The most significant temporal matter, judging by the space devoted to it in the *Institutes*, was marriage.<sup>24</sup> Thomasius had examined the relevance of natural law for marriage in his disputation *De crimine bigamiae* of 1685, where he had concluded that the prohibition of bigamy had to be based on divine positive law because natural law did not offer any clear arguments against it.<sup>25</sup> In the *Institutes* Thomasius discussed at length the laws banning the different forms of polygamy and limiting marriages between relatives. Thomasius's conclusion there, too, is that these restrictions rest on divine positive law, not natural law, which is insufficient to explain them.<sup>26</sup> To the extent that divine positive laws are directed toward the affairs of temporal society, they stand in no need of interpretation by theologians. Jurists are capable of understanding and applying them, like the precepts of natural law or human positive law, and in so doing do not need to seek the advice of theologians.<sup>27</sup> This right of jurists to interpret Scripture on matters relevant to temporal law was part of Thomasius's argument against clerical authority more generally, which he continued and expanded in the following years, especially after he moved to the territories of the Elector of Brandenburg and began to teach at the University of Halle.<sup>28</sup> Here Thomasius also began to rethink his natural jurisprudence, a process that led to his second main work on natural law, the *Foundations of the Law of Nature and Nations*, published in 1705.

### *Foundations of the Law of Nature and Nations* (1705)

An important change in Thomasius's natural jurisprudence concerned the relationship between moral and physical qualities. In the *Institutes* he

24. See Thomasius, *Institutes*, bk. III, chaps. ii and iii.

25. Christian Thomasius, *De crimine bigamiae* (Leipzig, 1685).

26. See Thomasius, *Institutes*, bk. III, chap. iii, §1.

27. *Ibid.*, bk. II, chap. xi, §3.

28. See the collection of writings by Thomasius in *Christian Thomasius: Essays on Church and State*, ed. Ian Hunter, Thomas Ahnert, and Frank Grunert (Indianapolis: Liberty Fund, 2007).

had argued that these two types of qualities were distinct and separate: whether a particular action or condition was deemed morally good or evil depended on the moral value imposed on it by a superior, not on its physical attributes. In the three books of the *Foundations* Thomasius changed his mind and argued that moral value was not something that was attached by an act of will to a morally indifferent nature. Instead, moral qualities were a species of natural qualities, and moral philosophy itself formed part of natural philosophy, or “physics.”<sup>29</sup> In particular, actions were morally good or bad, depending on their natural effects. Moral actions tended naturally to further the well-being and happiness of the agent and others, while immoral actions caused infelicity and ill health. This was so because God had created nature in such a way that its ordinary course reinforced moral conduct.<sup>30</sup>

These natural advantages and disadvantages in temporal life could be considered a form of divine rewards and punishments, though Thomasius said that they were not comparable to the sanctions threatened by a human legislator.<sup>31</sup> In particular, they were not sufficiently obvious to deter humans from breaking the law of nature, because “every [human] punishment must be inflicted visibly, but the evils which God has ordained for the transgressors of natural law come secretly, in such a way, that the connection of the evil with the sin is not evident, even if the evil itself is evident.”<sup>32</sup> The natural consequences of moral and immoral actions were thus more similar to advice than to coercion.<sup>33</sup> God had no reason to compel humans to act morally by threatening them with punishments, because he derived no advantage from their obedience. Also, if the disadvantages of immorality were so clear and powerful that they deterred everyone from violating natural law, there would be no merit in being virtuous. A human legislator, on the other hand, had a clear interest in forcing his subjects

29. Thomasius, *Foundations*, bk. I, chap. i, §§59–60.

30. *Ibid.*, chap. v, §§33–40.

31. On the question of punishments in natural law theory, see Thomas Ahnert, “Pleasure, Pain and Punishment in the Early Enlightenment: German and Scottish Debates,” in *The Development of Moral First Principles in the Enlightenment*, ed. S. Byrd, J. Hruschka, and Jan C. Joerden, *Jahrbuch für Recht und Ethik* 12 (Berlin: Duncker und Humblot, 2004), pp. 173–87.

32. *Foundations*, bk. I, chap. v, §39.

33. *Ibid.*, §34.

to be obedient, regardless of whether they did so only out of fear. Related to this new idea of punishments was another change in the *Foundations*, Thomasius's rejection of the notion of a divine positive law: because God was not comparable to a human legislator, who enforced his laws with punishments, the concept of a divine positive law, which was analogous to human positive law, made little sense. Divine positive law, according to Thomasius, had been the invention of self-interested clergymen, who had tried to use their authority in questions of scriptural interpretation to exercise influence on temporal matters, such as legal cases concerning marriage.<sup>34</sup>

Thomasius also completely changed his notion of the freedom of the human will and its relationship to the human intellect. His previous idea of an "indifferent" will, he now argued, was wrong, for if the will was equally indifferent to all available courses of action, it was impossible to explain why it chose one rather than the other.<sup>35</sup> The human will was free, but not in the sense of being "indifferent." It was free insofar as it was "spontaneous," that is, insofar as the external actions of the agent corresponded to the intentions of his or her will and were not frustrated by external circumstances and accidents.<sup>36</sup>

The degree of this "spontaneity" also determined the extent of an agent's moral responsibility. A person, for example, who aimed a gun at a bird and shot a friend by mistake could not be said to have acted "spontaneously" and to be guilty of murder, since the person had not intended any harm to the other.<sup>37</sup> The choices of the will, however, were not free in the sense that the agent could have chosen to will something different. The will was not an ability to choose but was best described as a passion, desire, or love that provided the motive force and direction of human actions.

This love always had a determinate aim, though this aim could vary

34. Thomasius, *Foundations*, "Introductory Chapter," §§16–17. Thomasius's rejection of divine positive law then forced him to revise his explanation of the laws against polygamy and incest by referring to the rules of *honestum* and *decorum*. See Thomasius, *Fundamenta juris naturae et gentium*, reprint of 4th ed. [1718] (Aalen: Scientia, 1979), bk. III, chap. ii. The English title *Foundations* is used to refer only to that material from the *Fundamenta* included in this book.

35. Thomasius, *Foundations*, bk. I, chap. i, §56.

36. *Ibid.*, §§67–70.

37. For various examples, see Thomasius, *Fundamenta*, bk. I, chap. ii, §§112–14.

from person to person and according to external circumstances: some, for example, loved sensual pleasures; others, wealth or honors.<sup>38</sup> The direction of this will-as-love or will-as-passion could not, however, be influenced by the other main faculty in human nature, the intellect (or reason), because conclusions of the intellect did not have the power to motivate actions. They only informed the will how to achieve its ends, not which ends were or were not desirable. As David Hume would later put it, reason was the slave of the passions and ought to be nothing else.<sup>39</sup>

In defining the will as love or passion, Thomasius was drawing on a rich intellectual tradition to which he had been attracted since at least the late 1680s.<sup>40</sup> This was predominantly French and had emerged from the revival of interest in the thought of St. Augustine, following the posthumous publication of Bishop Jansen's *Augustinus* in 1640. Its central feature was a deeply Augustinian attempt to explain virtue and vice as the respective products of different varieties of love or desire.<sup>41</sup>

"Reasonable love" (*amour raisonnable*) described that form of desire directed toward virtuous ends. Opposed to it were various kinds of corrupt love that drove humans toward pursuing selfish and immoral ends. From the early 1690s Thomasius had similarly begun to explain moral and immoral action as the product of "reasonable" and "corrupt love," respectively.<sup>42</sup> He also began to argue that the change from "corrupt" to "reasonable" love could take place only as the result of religious and spiritual regeneration, an argument that subjected him to charges of religious "enthusiasm" and caused him to somewhat modify his views around 1700.<sup>43</sup>

38. The three main passions, according to Thomasius, were ambition, lust, and avarice, a triad that was derived from a combination of Aristotle's *Nicomachean Ethics* 1095a and 1 John 2:16. See Schneiders, *Naturrecht*, p. 212, and Thomasius, *Fundamenta*, bk. I, chap. ii, §§68–70.

39. David Hume, *Treatise of Human Nature* (Oxford: Oxford University Press, 1978), 2.3.3.4, p. 415.

40. See Schneiders, *Naturrecht*, p. 172.

41. Augustine, *The City of God Against the Pagans*, ed. and trans. R. W. Dyson (Cambridge: Cambridge University Press, 1998), bk. XIX, chap. xiv.

42. See Christian Thomasius, *Einleitung zur Sittenlehre*, "Unterthänigste Zuschrift" (Halle, 1692).

43. On this, see Thomas Ahnert, "Enthusiasm and Enlightenment: Faith and Philosophy in the Thought of Christian Thomasius," in *Modern Intellectual History* 2.2 (2005): 167–70.

Yet it is arguable that Thomasius's notion of "reasonable love" continued to be closely tied to a particular and rather heterodox form of Christianity, which I have discussed elsewhere.<sup>44</sup>

Thus, reasonable love was the foundation of true virtue and of a life fully conforming to natural law. Thomasius was, however, convinced that the majority of humans would never be guided by reasonable love but would continue to follow their corrupt desires. The human legislator was powerless to change them: threats of punishment could influence external actions but not turn corrupt into reasonable love, since sincere love could never be the product of coercion. Human society could nevertheless function tolerably well because it did not require the complete conformity of its members to natural law. In particular, Thomasius distinguished between three levels of natural law, not all of which depended on the presence of reasonable love.<sup>45</sup>

The first was the *iustum* (the just), which was summarized in the negative precept not to do to others what you would not have them do to you.<sup>46</sup> The *iustum* marked the lowest degree of conformity to natural law, but it was also the one most essential to human society, which would disintegrate without it. Obedience to the negative precepts of *iustum* did not require reasonable love in the agent but could be enforced through threats of punishment and fears of revenge.

The second level was the *decorum* (the decorous). Its main principle was the command to do to others what you would have them do to you.<sup>47</sup> It covered, for example, acts of benevolence or politeness toward others. Unlike the negative precept of the *iustum*, the main precept of *decorum* was positive and therefore could not be binding on everyone at all times. For, while it was possible to abstain from harming any other person at all times, one could not perform acts of benevolence or kindness toward all other people in every single moment. Some acts of *decorum* might be commanded by the legislator and enforced with threats of punishment, though they were then not usually the expression of reasonable love but of fear.

44. Ibid. and Ahnert, *Religion and the Origins of the German Enlightenment*.

45. Thomasius, *Fundamenta*, bk. I, chap. vi.

46. Ibid., §42.

47. Ibid., §41.