British Journal for the History of Philosophy

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/rbjh20

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To cite this article: Andreas Blank (19 Sep 2024): Simple esteem and the method of commonplaces in Pufendorf, British Journal for the History of Philosophy, DOI: 10.1080/09608788.2024.2392683

To link to this article: https://doi.org/10.1080/09608788.2024.2392683

Published online: 19 Sep 2024.

BRITISH JOURNAL FOR THE HISTORY OF PHILOSOPHY
https://doi.org/10.1080/09608788.2024.2392683

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ARTICLE

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Simple esteem and the method of commonplaces in Pufendorf

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ABSTRACT

In his discussion of simple esteem—one of the moral entities meant to regulate human actions—Pufendorf invokes a juridical commonplace: the rule that, before evidence to the contrary, we should presume others to be good. This argumentative strategy is an illuminating example for understanding his method of commonplaces. The present paper has three goals: (1) to analyze how Pufendorf adopted from legal humanism the view that presumptions should be based on considerations of what comes about most easily in nature; (2) to show that Pufendorf's inclusion of ethical aspects in the juridical presumption of goodness is an application of this view of forming presumptions; (3) to argue that Pufendorf did not regard juridical and philosophical commonplaces as expressions of a particular stage of intellectual history but rather as the result of reflection about human needs and abilities.

ARTICLE HISTORY Received 3 November 2023; Revised 6 August 2024; Accepted 8 August 2024

KEYWORDS Social esteem; moral entities; reflection; commonplaces; presumptions

1. Introduction

What we believe about others is inevitably fraught with uncertainty. The utterances and actions of others always need interpretation, which never leads to certainty. And often all we have is the absence of evidence for bad character traits without any evidence for good character traits. Nevertheless, we are bound to act based on our uncertain beliefs about others. How could our decisions in such circumstances be rational? In early modern natural law theories, the juridical concept of presumption was widely applied to this problem. Intuitively, a presumption is an assumption that is taken to be true until and unless contrary evidence becomes available. But the function of presumptions was never purely theoretical, which is why not every kind

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of hypothetical reasoning was counted as an argument from presumptions. One pragmatic function of presumptions consisted in shifting the burden of proof onto the adversary.[1] Another pragmatic function consisted in their relation to action: As long as they were not refuted by contrary evidence, they provided a rational foundation for acting as if they were true.[2] Particularly relevant to the question of what we should believe about others was a commonplace deriving from the Roman law traditions: the presumption of goodness (*praesumptio bonitatis*) according to which 'everyone is presumed to be good until the contrary is proven'. This presumption is as relevant for situations where evidence concerning the character traits of individuals is unavailable as it is relevant for the interpretation of ambiguous evidence. But it raises questions concerning the sense in which others should be held in good esteem (*existimatio bona*).

Samuel Pufendorf's natural law theory contains one of the most illuminating early modern discussions of these issues. Pufendorf developed the earliest and most comprehensive seventeenth-century analysis of the functions that the different varieties of esteem have in social life—varieties of esteem that are due to everyone (subsumed under the heading of 'simple esteem') and varieties that depend on comparison, competition, and political agency and are therefore not due to everyone (subsumed under the heading of 'intensive esteem'). Pufendorf distinguishes two senses of simple esteem. On the level of positive law, simple esteem consists in the belief that someone has not violated the laws and customs of a political community and is therefore "a sound Member of the State"[3] (*De jure naturae et gentium* [JNG], 8.4.6). On the level of natural law, simple esteem consists in the belief that someone "is ready to comply with the Laws of Humane Society" (JNG, 8.4.2). This belief takes the form of a presumption: "every Man is presumed to deserve this *Esteem*, till his own ill Actions deprive him of it" (JNG, 8.4.3). A series of recent commentaries is dedicated to Pufendorf's view of the various functions of esteem in social life. There are several detailed studies of the various aspects that 'intensive esteem'—the esteem deriving from comparison and competition with others—plays in Pufendorf's analysis of social and political life.[4] Also, the connection between simple esteem and Pufendorf's conception of the fulfilment of the duties arising from social roles has been the object of thought-provoking studies.[5]

[1]See Gaskins *Burden of Proof*; Walton, *Burden of Proof*.
[2]On late medieval and early modern arguments from presumption, see Giuliani, "Civilian Treatises"; Blank, *Arguing from Presumptions*.
[3]All translations from this work are Basil Kennett's. Other translations are my own.
[4]Haara, *Pufendorf's Theory of Sociability*, 99–137; Haara and Lahdenranta, "Smithian Sentimentalism Anticipated"; Haara and Stuart-Buttle, "Beyond Justice"; Seidler, "Economising Natural Law"; Haara and Saastamoinen, "Esteem and Sociality"; Mihaylova, "Free Will Ruled by Reason"; Blank, "Pufendorf and Leibniz".
[5]Hruschka, "Existimatio"; Haakonssen, "Civil Order".

However, what is missing from existing interpretations is an extended analysis of the connection between Pufendorf's concept of simple esteem and early modern accounts of arguing from presumptions. This is the lacuna that the present paper is meant to fill.

Legal humanists such as Andrea Alciato (1492–1550), Jacopo Menochio (1532–1607), and Antonius Matthaeus (1601–1654) maintain that person-related presumptions can be based on assumptions concerning causal powers inherent in human nature. Such presumptions include assumptions about beliefs, emotions, and inclinations and in this sense go beyond assumptions concerning the fulfilment of social roles. I will argue that the same view of forming presumptions is at work in Pufendorf (Section 2). Presumptions concerning ethically good character can be understood as an application of this view of how presumptions should be formed. I will argue that this can be seen in four thematic fields of Pufendorf's natural law theory: (1) the foundations of inheritance without a testament; (2) the obligations arising from so-called quasi-contracts; (3) the theory of rights in situations of extreme necessity; and (4) the regulation of social emotions such as fear and trust (Section 3).

One of the consequences that can be drawn from how Pufendorf includes ethical aspects in the presumption of goodness concerns the question of how using a method of commonplaces relates to the method of reflecting on human nature in Pufendorf's understanding of simple esteem as one of the so-called moral entities that regulate human actions. As it turns out, his use of commonplaces tells much about what kind of philosopher he is: not only a philosopher who only tries to transfer a legal status valid in a particular period of legal history into a modern context but also a philosopher who uses commonplaces that express insights that others have gained by reflecting upon their own needs and abilities (Section 4).

2. Simple esteem and forming presumptions

Invoking the concept of presumption may suggest that Pufendorf regarded simple esteem as a generalized version of the juridical presumption of innocence that does not make any assumptions about ethical goodness. Such a reading may be supported by the observation that the reputation of being a "good person" (*vir bonus*) consists in being attributed with a state of mind that is described as "honestus animus" (JNG, 8.4.3)—where the relevant concept of *honestas* denotes "what contributes to the preservation and augmentation of the honor, esteem, and dignity of a person" (JNG, 2.3.10). This is the starting point of an influential line of interpretation first developed by Joachim Hruschka. Hruschka holds that in Pufendorf, the Latin 'existimatio' does not have the sense of the German 'Schätzen' (something like the English 'holding in high regard') or 'Beurteilen' ('evaluating') but rather of the German 'Würde' ('dignity'), understood as denoting a particular social

status (''Existimatio'', 191). In the case of what Pufendorf calls ''intensive esteem'', the relevant status is a certain rank in a social hierarchy. In the case of simple esteem, the relevant status is the legal standing of not having lost any of the rights common to all non-delinquent members of society (''Existimatio'', 192). From this perspective, Hruschka understands Pufendorf's concept of simple esteem as an extrapolation from the Roman law concept of *existimatio*, defined in the *Digest* as ''the status of undiminished dignity, confirmed by the laws and customs, which is diminished or abolished through our delicts based on the authority of the laws'' (''Existimatio'', 192; see *Digest* 50.13.5.1).

This line of interpretation has been taken up by Knud Haakonssen and Ian Hunter. Haakonssen claims that, according to Pufendorf's moral entities doctrine, ''social esteem arises not from an intrinsic human nature or dignity, but from how someone fulfils the duties of an instituted office or persona. The most basic measure is a purely negative one, namely that of having done nothing wrong by transgressing the law of nature'' (''Civil Order,'' 230). This is why Haakonssen reads simple esteem as the presumption of innocence in the state of nature, thereby excluding any connotations concerning intrinsic personal qualities. As he argues, this must be so because the natural-law ''prescription of sociability would have been rather superfluous'' (''Natural Law and Personhood,'' 7). Hunter concurs when he writes that, for Pufendorf, individuals are unable to recognize their duties through ''reflection on principles of reason and goodness common to God and man or man and the cosmos'' (*Rival Enlightenments*, 177) and therefore ''must recognize their duties in the array of offices or personae imposed on them for civil governance'' (*Rival Enlightenments*, 167). Hunter maintains that Pufendorf has transformed the citizen ''from a person who accedes to his civil duties through insight into moral truth to one who does so through acceptance of his need for civil security'' (*Rival Enlightenments*, 162).

However, while it is uncontroversial that civil security is a central topic in Pufendorf's natural law theory (see, e.g. JNG, 1.6.12), I am not persuaded that, for Pufendorf, there is a dichotomy between rational insight into moral truth and the acceptance of the need for civil security. Why could the latter not form a part of the former? I am also not persuaded that, for Pufendorf, there is a dichotomy between reflecting on principles of goodness common to God and man and reflecting on offices in civil governance. Hunter acknowledges that ''Pufendorf accepts that there is such a thing as natural good, which consists in the naturally beneficial powers contained in man's physical nature, and, indeed, all moral goods are based in natural goods'' (*Rival Enlightenments*, 170). Why should these naturally beneficial powers not be an object of reflection? If so, then simple esteem could relate to personal qualities that could be the proper object of positive evaluations and thereby give rise to a concept of natural simple esteem that goes

beyond a status concept. Substantiating this suggestion will require a series of steps.

In the present section, I will focus on what Pufendorf's practice of arguing from presumptions has in common with the legal humanists' view of how person-related presumptions should be formed in the absence of case-related evidence. Taking such a comparative perspective may appear too far-fetched because, among the thousands of references that Pufendorf gives, there is a surprising lack of references to the work of sixteenth-century legal humanists. However, as more than forty references in widely diverging thematic areas document, Pufendorf has carefully worked through Antonius Matthaeus' monograph on Roman criminal law, *De criminibus* (1644). Matthaeus' use of presumptions shows how some commonplaces stemming from the sixteenth-century legal humanists were understood in Pufendorf's intellectual context.

Matthaeus refers to Menochio for the view that, unless there is evidence that the agent had been mentally ill before, everyone is presumed not to have been mentally ill when committing some crime because by nature everyone has a sane mind because mental illness is a sign of a natural defect, and "everyone is presumed to be as he should be by nature" (*De criminibus*, 26-27; see Menochio, *De praesumptionibus* 6.23). Matthaeus also refers to Alciato's first rule according to which "a quality that inheres naturally in a human being is always presumed to inhere" (*De criminibus*, 27; see Alciato, *De praesumptionibus*, 34). This rule is based on an understanding of the natural qualities of humans. Among these qualities, Alciato counts natural emotional reactions (*De praesumptionibus*, 34–42; 65–71; 103–8) and natural cognitive capacities (*De praesumptionibus*, 108). For instance, fathers are presumed to love their sons, and vice versa, and fathers are presumed to have more fear about their sons than about themselves (*De praesumptionibus*, 34). Likewise, "sense and natural reason are presumed in each human being unless the contrary is proven" (*De praesumptionibus*, 108).

This type of argument also allows deriving presumptions about states of mind from insights into natural duties. For instance, Matthaeus argues that one of the natural duties of friendship is expressed in the common precept according to which friends should share everything. Hence, when someone uses the belongings of a friend, this is presumed to happen neither against the will of the owner nor to commit any fraud on the side of the one who uses these goods (*De criminibus*, 69). This exemplifies a type of argument described by Alciato who held that "Since [everyone] is obliged to be good, [everyone] can legitimately be presumed to be so" (*De praesumptionibus*, 245). Menochio puts it as follows: "A presumption is derived from that nature of a person, of an action or a thing. For … it has to be presumed that each person and each thing and each action is according to its nature and as nature requires" (*De praesumptionibus*, 1: 23). The general idea

behind such arguments was brought into a succinct formula by Menochio: "Presumption and conjecture are derived from causal powers" (*De praesumptionibus*, 1: 20). Applying this type of argument to the case of using the belongings of a friend is highly relevant to the question of why there should be a presumption of innocence. As Matthaus explains, according to Roman law, theft presupposes a fraudulent intention, this example shows that the presumption of non-delinquency can depend on a presumption concerning ethically good states of mind (*De criminibus*, 69).

Likewise, Matthaeus argues that, unless there is evidence for personal animosities when a father kills a son, a teacher a pupil, or a friend a friend, there is a "person-related necessity" (*necessitas personarum*) that excludes the presumption of criminal intent. Here, Matthaeus invokes the consideration that there is no verisimilitude that people kill those with whom they are connected by feelings of love. Likewise, someone found drowned in a well is presumed to have fallen accidentally rather than to have committed suicide because people tend to love themselves more than they love others (*De criminibus*, 543). When a presumption against delinquency is grounded on considerations concerning emotions, it functions not only as a procedural rule that advises us to treat the accused as if they were innocent until they are convicted. Whereas the procedural rule can be contrary to actual belief, the presumption against delinquency mentioned by Matthaeus involves a belief against the probability of delinquency based on presumptions concerning states of mind—presumptions that are grounded in assumptions concerning the causal structure of our mental lives in cases where there is no distortion of our natural inclinations.

Similarly, Pufendorf grounds presumptions on assumptions concerning causal powers that are present as long as the natural inclinations of the human mind are not impaired. To give some examples: Liberty is so important for human life that no accurately informed person is presumed to have neglected a genuine opportunity to regain liberty (JNG, 4.12.2). A reluctance to admit actions and emotions in court is presumed for those actions and emotions that are commonly not spontaneously admitted (JNG, 1.4.10). A transaction is not presumed to be a gift because it is contrary to the common inclination of humans to give something away without expecting something in return (JNG, 3.5.8). The consent of minors to the acceptance of an inheritance is presumed because no one is supposed to reject something that is personally useful (JNG, 4.4.15). In contracts made in the name of a client, provisions that are extraneous to the transaction at hand are invalid because it is presumed that the client would not have consented to them (JNG, 3.9.2). Because the human condition brings with it that the will of others can be known only through signs, and mutual human duties can be fulfilled only if the will of others is known, everyone is presumed to have seriously wanted

what was expressed by signs (JNG, 4.1.5). No one is presumed to confer rights of usufruct under the condition that the other enjoys only the advantages without also accepting some burdens (JNG, 4.8.7)—unless where the advantages for the other are small compared with the advantages that the owner draws from the arrangement, in which case the contrary presumption is easily formed (JNG, 4.8.8).

These examples indicate that Pufendorf grounds presumptions concerning the mental states of others on general considerations concerning causal powers that human minds usually have. His arguments from presumptions share this with arguments from presumptions found in the legal humanists. Is this similarity in argumentative patterns relevant to how Pufendorf forms the presumption central to natural simple esteem?

3. Simple esteem and the presumption of goodness

Four thematic fields in his natural law theory indicate that Pufendorf includes ethical aspects in the presumption of goodness. In these fields, the presumption of goodness can fulfil its argumentative function only if it involves assumptions about mental states such as emotions, beliefs, intentions, and inclinations. Since natural simple esteem takes the form of a presumption that the other is a "good person" (JNG, 8.4.3), this is highly relevant to assessing the plausibility of Hruschka's and Haakonssen's interpretations of Pufendorf's natural simple esteem. If Pufendorf included assumptions about character traits in his arguments from the presumption of goodness, then it seems implausible to assume that he intended to exclude such assumptions from his natural law concept of simple esteem.

A first example can be found in Pufendorf's discussion of inheritance without testament (*successio ab intestato*), where he gives the following argument:

> [I]t did not seem probable that if a person was found to have made no settlement of his Goods whilst he lived, he was, therefore, willing they should after his Death become, as it were derelict, and lie free to any that would take possession of them. In this Case, then, Natural Reason suggested, That men ought to follow the Presum'd Will of the Deceas'd, or such a disposal as he might most probably be suppos'd to have design'd. Now in doubtful matters every one is supposed to have design'd that, which is most agreeable both to his Natural Inclination and to the Engagements of his Duty.
>
> (JNG, 4.11.1)

As to natural inclinations, Pufendorf points out that we are regularly led to wish that our work be profitable for our children because usually blood relations are connected with particular emotions (JNG, 4.11.2). Here, Pufendorf applies a presumption in favour of the presence of natural qualities. As to natural obligations, he holds that "nature has conferred upon us the particular care for our offspring" (JNG, 4.11.2). Thereby, he seems to

suggest that people usually have insight into their natural duties and therefore can be presumed to be inclined to fulfil such duties.

A second use that Pufendorf makes of the ethical aspects of the presumption of goodness occurs when he explains the binding nature of obligations arising from so-called quasi-contracts (*quasi contractus*) such as tutelage (*tutela*) and management without mandate (*negotiorum gestio*). He touches upon this issue when he considers the question of whether actions done in favour of someone unable to act in a given situation can be imputed to this person (JNG, 1.9.4). Pufendorf understands imputation as the ascription of the legal consequences of an action to the agent and takes free will to be a necessary condition for imputation.[6] Situations of tutelage and management without mandate raised the question of how the freedom of will necessary for the imputation could be brought into the picture in the absence of explicit or tacit consent. Tutelage and *negotiorum gestio* take place in circumstances where the one in whose favour the action is done cannot act out of his own free will due to a lack of information (as in the case of an absent person) or does not possess free will due to cognitive or emotional limitations (as in the case of minors or the mentally impaired). Pufendorf suggests that the imputation of actions done in favour of such persons depends on their *presumed* will (JNG, 1.9.4). This is a presumption concerning those mental states that will occur as soon as an absent person is informed about the event or as soon as the cognitive or emotional limitations are overcome.

What matters here is not only the assumption that everyone will want to receive an advantage but also the assumption that everyone wants to fulfil natural obligations arising from receiving these advantages: "For this imputation to be done rightly, there must be in the agent an intention to confer something good upon the other, in the recipient the explicit or presumed will to acknowledge this" (JNG, 1.9.4). Moreover, Pufendorf describes this presumption as being part of the motivation of the one who acts in the interest of someone else:

> When I do something in the interest of another, which I could have rightly or comfortably omitted, and when I omit what I could have comfortably done, I intend to impute it upon him, that is, I demand as a matter of my right that he recognizes that it has been done on my initiative and that he is obliged to me under this condition.
>
> (JNG, 1.9.4)

Thus, acknowledging that an action has been done in one's favour includes accepting the natural obligations that derive from it. In this sense, the binding character of quasi-contracts rests on a presumption of goodness that involves assumptions about ethically good character traits.

[6]For detailed analysis, see Aichele, "Zurechnungsmetaphysik?".

The third field where the ethical aspects of the presumption of goodness are essential is Pufendorf's discussion of the rights of extreme necessity. Here, the connection with legal humanism is less direct. Pufendorf sets his position apart from Matthaeus', who holds that using what others own without their consent constitutes genuine violations of the law even in situations of extreme necessity, but argues that such situations offer excuses that justify mitigation or suspension of punishment. To support this view, he invokes the general principle that punishments should be mitigated proportionally to how difficult it is to resist the emotional impulses that arise from certain circumstances and applies this to the case where someone is driven to an offense by hunger (*De criminibus*, 881). He also argues that a good person (*vir bonus*) will not want to injure anyone. Hence, there is the duty to suffer rather than to take anything away from others (*De criminibus*, 70). This conclusion is supported by the consideration that it is publicly useful if private persons build up reserves for times of need, whereas the distribution of stored goods is a public task. For this reason, Matthaeus denies that private citizens have the right to take something from the reserves of others (*De criminibus*, 71).

Pufendorf agrees that the rights and duties in situations of extreme necessity derive from presumptions concerning mental states. However, he objects that Matthaeus' account of the function of the public hand does not offer a solution to situations where public support is not expected. For such situations, a different argumentative strategy is needed. Pufendorf maintains that laws concerning theft do not apply to situations of extreme necessity. According to Roman law, theft presupposes the belief that one does not have the right to use the good owned by someone else. Hence, without making assumptions concerning mental states, it is impossible to decide whether or not a physical action such as using a good owned by someone else constitutes an act of theft (JNG, 2.6.7). As to the belief that one does not have any right to use the good in question, Pufendorf offers two complementary arguments. His first argument is based on the presumption concerning the intention of the owner whose possessions are made use of in situations of extreme necessity. Pufendorf here invokes the view of the dean of juridical faculty in Louvain, Antonio Perez (1583–1672), according to which "the owner is not presumed to be averse because he is obliged for the sake of humanity to support a needy person" (JNG, 2.6.7; Perez, *Praelectiones*, 7.1.10). This presumption about the state of mind of the owner also has consequences for the state of mind of the agent. Injury can be done only to the one who is probably believed to be unwilling. Hence, no fraudulent intention can be presumed if the person in extreme need has good reasons to believe that the owner is willing to provide support. This is why it cannot be a case of theft (Perez, *Praelectiones*, 7.1.7). In this sense, presumptions about states of mind (not presumptions about not having violated

norms of natural law) are crucial for whether or not an action falls under certain provisions of the law.

Pufendorf's second argument reinterprets the meaning of the laws in question. He argues that it is not easily presumed that the obligation is imposed that someone should give preferences over the natural obligation of self-preservation (JNG, 2.6.1). In his view, the assumption that laws have been promulgated to promote the well-being of humans has the consequence that assumptions about human nature must have been part of the deliberations leading up to them. From this perspective, we should not presume that the lawgivers intended to establish obligations that lead to self-destruction or that go beyond what the common constancy of the human mind is capable of bearing (JNG, 2.6.1). Hence, should lawgivers intend to establish such strict obligations, they should make them explicit. The absence of such provisions, "out of the benevolent mind of the lawgivers together with a consideration of human nature", leads to the contrary presumption (JNG, 2.6.2). For this reason, for the sake of specific juridical arguments the presumption of goodness includes the presumption of virtue—be it the virtue of the legislators or of those who have to fulfil the duties of humanity.

In these three fields—inheritance without testament, obligations under quasi-contracts, and situations of extreme necessity—including assumptions concerning ethically good character traits in the presumption of goodness forms an essential part of Pufendorf's arguments for the existence of various natural obligations and rights: The rights of the descendants of those who passed away, grounded on the natural obligations of their parents; the natural rights of those who manage the affairs of those who cannot do so themselves, grounded on the natural obligations of those who profit from tutelage, *negotiorum gestio,* and parenting; and the rights of those in extreme need, grounded on the natural obligations of lawgivers and the affluent. In each case, the transition from a natural obligation to a natural right is made possible by invoking a presumption concerning the will of those who have not expressed their intentions either explicitly or tacitly. This presumption is rational for three reasons: (1) it is grounded in assumptions concerning natural emotional and rational capacities; (2) it is revisable as soon as contrary evidence becomes available; and (3) it fulfils several functions that are good for human life, such as securing the economic well-being of descendants, preventing those who take care of the interests of others from loss and preserving their motivation for taking care of the interests of others, and securing the material basis for self-preservation of those in extreme need.

Of course, these functions could in principle be adequately fulfilled by positive law. If so, then Pufendorf's arguments from the presumption of goodness would offer independent criteria for what an adequate solution

in positive law would have to look like. But there is no guarantee that positive law fulfils these functions adequately—think of the iniquities of early modern inheritance law that often favoured the firstborn over other children, male descendants over female descendants, and 'legitimate' over 'spurious' offspring. Likewise, the extensive early modern debate about the rights and obligations connected with tutelage shows that the field of quasi-contracts was far from definitively settled.[7] Or think of the case mentioned by Pufendorf that the public hand does not fulfil all of its duties of assistance toward those in extreme need. In these cases, Pufendorf's arguments from the presumption of goodness offer the theoretical resources needed to take a critical perspective on actual legal practice.

A fourth field where it becomes clear that Pufendorf's treatment of the presumption of goodness involves a presumption of virtuous character traits is his critique of Hobbes' conception of social emotions in the state of nature. This question goes beyond what can be regulated by positive law. In Hobbes' view, the most important cause of the natural inclination to injure others is our inflated self-esteem (*De cive*, 1.12). For Hobbes, this leads to the presumption that we desire justice only accidentally, as a consequence of our interest in peace (*De cive*, 3.21). This is a presumption concerning mental states (inclinations deriving from our inflated self-esteem and controlled by our fears). Adducing a presumption concerning non-delinquency would not offer an informative response because, as to actual delinquency, Hobbes would not disagree with Pufendorf. Rather, Pufendorf objects to Hobbes that a different presumption concerning mental states should be formed.[8] He grounds his reply to Hobbes on the assumption that it is possible to have rational insight into the usefulness of peace and that this insight is reinforced by the bad experiences that people have had with breaking peace (JNG, 2.2.9). Moreover, common human nature justifies an assumption about the state of mind of others: "Everyone can experience within himself that it is good for himself if he interacts with others who are benevolent rather than insane; and due to the similarity of nature, it can easily be presumed that others have the same experience" (JNG, 2.2.9).

For Pufendorf, these experiences are relevant to forming presumptions concerning the insights that others have into their natural obligations. In his view, an insight into what is naturally useful for us is at the same time an insight into a natural obligation. This seems to be implied when he likens insight into a natural obligation to the motivation that arises from a counsel based on a consideration of the nature of things (JNG, 1.6.1). The only way of knowing natural obligations consists in reflecting upon what is naturally good for beings of our kind. From this perspective, insight into

[7]On some of these debates, see Blank, "Marquard Freher," Section 4.
[8]This is a topic not touched upon in Palladini's Hobbesian interpretation of Pufendorf; see Palladini, *Pufendorf Disciple of Hobbes*.

the natural usefulness of peace at the same time is insight into the natural obligation to keep peace; and the presumption that others have the same experiences concerning what is useful for them leads to the presumption that they have insight into their natural obligation to keep peace, as well. This is why Pufendorf treats the presumption in favour of the peaceful intentions of others as a special case of grounding a presumption of virtuous character traits in natural obligations: "Because we are obliged by nature to cultivate peace with others, everyone is presumed to be ready to fulfill such an obligation unless the contrary is demonstrated by clear indications" (JNG, 2.5.6).

4. Simple esteem, reflection, and commonplaces

Including some assumptions concerning ethically good character traits in the presumption of goodness shows that Pufendorf's concept of simple esteem does not reduce to a status concept but rather involves presumptions concerning character traits. This result raises interesting questions concerning the method of Pufendorf's natural law theory. His treatment of the presumption of goodness is a significant example of his adoption of juridical commonplaces from legal humanism. The question is whether he thereby did nothing more than import an element from the legal tradition that may be bound to a particular historical period—the legal thought of the Romans and its early modern reception—or whether he had a justification for including ethical aspects into the presumption of goodness. As his remarks about commonly shared insights into the value of peace and friendship indicate, in some way he connected his use of commonplaces with shared reflective capacities. This connection needs to be spelled out in greater detail because, at first sight, it may appear to be in tension with Pufendorf's concept of imposition (*impositio*).

Pufendorf understands simple esteem as one of the "moral entities" that are "imposed upon" the morally neutral physical qualities of natural objects to regulate human action (JNG, 1.1.4). Does Pufendorf thereby describe human nature as something morally neutral, so that values only can arise from a voluntary determination of a superior? Such a reading may be suggested by several passages:

> [S]ince Honesty (or Moral Necessity) and Turpitude are Affections of Human Deeds, arising from their agreeableness or disagreeableness to a Rule or a Law, and since a Law is the Command of a Superior, it do's not appear how we can conceive any Goodness or Turpitude before all Law, and without the Imposition of a Superior.
>
> (JNG, 1.2.6)

> [T]hat [reason] should be able to discover any Morality in Human Actions, without reflecting on some Law, is equally impossible as that a Man born Blind should make a Judgment on the distinction of Colours.
>
> (JNG, 1.2.6)

> Reason, properly speaking, is not the Law of Nature it self, but the Means, upon a right Application of which that Law is to be discover'd.
>
> (JNG, 2.3.20)

Do these passages imply that moral entities could not be understood to be an outcome of reflection on human nature? Pufendorf explains that naturally honourable or dishonorable actions are those "whose commission or omission most of all the condition of nature requires that the Creator freely attributed to humans" (JNG, 1.2.6). The relevant command of a superior thus has two aspects. (1) Human nature is the result of a divine act of creation, and the act of creation is free in the sense that there is no "Coëval Extrinsical Principle, which [God] was oblig'd to follow, in assigning the forms and essences of Things" (JNG, 1.2.6). (2) By freely creating beings with human essences, God has established a law that defines what is ethically good or bad. As Pufendorf explains, ethical goodness cannot be understood without referring to a law: "moral goodness and badness are to be defined through the agreement or disagreement with the law, as a norm of action" (*Specimen*, 185). However, the content of this law cannot be specified without reference to human nature: "The agreement or disagreement with rational nature … is precisely the quality of actions prescribed by natural law" (*Specimen*, 185). Consequently, there is no tension between the view that the rules of natural law are divine commands and the view that they derive from human nature.

This holds especially for the central norm of natural law, the duty of sociality. It would be misleading to claim, as Heikki Haara does, that "Pufendorf denies that men are by nature political and social creatures" ("Simple Esteem", 158). Rather, Pufendorf denies that the social nature of humans is the outcome of necessity: "Man obtain'd a Social Nature from the good Pleasure of GOD ALMIGHTY, not from any Immutable Necessity. And consequently the Morality of Actions agreeable or disagreeable to him as a Social Creature, must be deriv'd from the same Original and Spring" (JNG, 1.2.6). The contingent divine origin of human nature explains why Pufendorf takes the duty of sociality to be a duty "imposed by the Supreme Lawgiver" and at the same time holds "that the Obligation to a social Life equally binds all Men, in as much as it is the inseparable Companion of Human Nature, consider'd simply as such" (JNG 3.1.9).

Does this amount to the view that human nature is morally neutral and acquires a moral dimension through imposing a law independent of human nature? Not for Pufendorf, who explains that God has

> "so form'd and dispos'd the Nature of things and of Mankind, as to make a Sociable Life necessary to our Subsistence and Preservation, and having on this account indued us with a Mind capable of entertaining such Notions as conduce to this End, and having insinuated these Notions into our Understandings by the Movement of Natural things, deriv'd from him the first Mover … ".
>
> (JNG, 2.3.20)

Here, insights into the duties of sociality are described as belonging to the effects that natural objects have on beings of our kind. And because both the nature of things and the nature of humans originate from divine will, it is also the will of God that we should derive insight into natural law through the effects that natural objects have on our nature.

These aspects of Pufendorf's concept of imposition are missed in Ian Hunter's interpretation of the theory of moral entities. According to Hunter, Pufendorf's conception of natural law has taken "the form of a legal humanism that derives ethical and political norms by looking outward to the purposes for which they had been imposed, and hence towards historically existing juridical and political orders" ("Invention of Human Nature", 940). Hunter restricts the sense in which legal humanism involved a method of reflection to retrieving the norms built into "concrete cultures of the self, serving particular religious and political ends" ("Invention of Human Nature", 940). According to Hunter, "Pufendorf's *entia moralia* doctrine is designed to compel the learned to look outward to history: to derive the norms of natural law not from an inner normative nature, but from the juridical and political purposes for which such norms are imposed" ("Invention of Human Nature", 940). Drawing the contrast in this manner underlies Hunter's view that "Pufendorf … replaces the metaphysical conception of the person as the substantial origin of all its offices and conditions with an account of offices tied only to an instituted status or condition" (*Rival Enlightenments*, 165).

This interpretation certainly captures Pufendorf's views concerning those forms of "intensive esteem" that can be changed through the will of the sovereign (see JNG, 1.1.9; 8.4.11-22). Restrictions of simple esteem in civil law are another good example since the legal status of *infamia* was regulated by a complex set of rules concerning the loss of civil rights such as the right to testify and be elected (JNG, 1.6.14; 1.9.6). However, as to moral entities that belong to natural law, Thomas Ahnert has suggested an alternative interpretation. In his view, these moral entities are "moral rules which were demonstrably necessary for the particular physical nature God had given to human beings in creation. Acting contrary to these rules violated sociability and ultimately ran counter to the need for the self-preservation of individual human beings and the survival of humankind in general" ("The Metaphysics of Moral Entities", 103). I take the passages that Ahnert adduces in support of his reading to speak for themselves (if additional confirmation is needed, consider the passage from Pufendorf's *Specimen controversiarum* discussed below). Still, what is missing from Ahnert's interpretation of moral entities is any reference to the concept of reflection.[9] Would it be misguided to look in Pufendorf for a connection between moral entities and reflection about human nature?

[9]The same holds for Hruschka, "Existimatio", Haakonssen, "Natural Law and Personhood", and Haakonssen "Civil Order".

Some considerations presented by Heikki Haara and Kari Saastamoinen suggest it might be. In their view, Pufendorf's conception of human dignity does not "indicate any kind of moral autonomy, as only a small minority can reflect on moral matters independently, whereas the majority should adopt their moral views from their educators and prevailing customs" ("Esteem and Sociality in Pufendorf's Natural Law Theory", 11). To be sure, ascribing to Pufendorf the view that the majority cannot reflect on moral matters independently is not identical to ascribing to him the view that the majority cannot reflect on human nature. But the latter view seems to be implied by the former—after all, if common people can reflect on what is naturally good for them, they would seem to have some moral autonomy. Therefore, much depends on interpreting the two passages that Haara and Saastamoinen adduce in support of their interpretation. In the first of these passages, Pufendorf notes that common people protect themselves against a thief but not against someone who has committed homicide out of a strong affective reaction, adding that common people do not understand why they treat the two cases differently (thieves are a persistent risk, whereas someone who has acted out of strong emotions wanted to hurt only a particular person) (JNG, 2.3.13). Pufendorf here seems to deny ordinary people the rational capacities required for insight into the norms of natural law. This problem is aggravated through Pufendorf's readiness to concede that there are more foolish persons than wise ones (JNG, 2.3.7), that irrational passions often overcome reason (JNG, 7.1.12), that it is foolish to strive for imaginary goods, as many people do (JNG, 8.3.19), and that more frequently than not inconstancy and wickedness prevail over rational control of the passions (JNG, 1.6.12). Would these observations not support the presumption that others lack insight into the norms of natural law and, hence, should not be presumed to have morally good character traits?

When Pufendorf emphasizes the role of custom and education, his point may have been less general than Haara and Saastamoinen assume. Pufendorf explains that what common people lack is the ability to apply an "artificial Method of demonstrating these Natural Precepts" (JNG, 2.3.13). In his view, this makes them akin to artisans who use their instruments skilfully without knowing the mathematical proofs of the physical laws involved in their craft (JNG, 2.3.13).[10] In this sense, Pufendorf compares how common people learn the law of nature by custom with how artisans learn the use of instruments by imitation (JNG, 2.3.13). Learning the use of instruments by imitation does not seem to imply that artisans do not know how to use them well. But learning moral norms from custom does not imply that ordinary people have no insight into what is naturally good for them. This can be

[10]On Pufendorf's views concerning the demonstrative method and its relation to his eclecticism, see Seidler, "Pufendorf's Composite Method".

seen in the second passage adduced by Haara and Saastamoinen. Pufendorf holds that deciding matters of law cannot be based on the authority of a single person; however, his point is to criticize a reliance on authority that does not offer arguments and precludes the possibility of contestation (JNG, 1.3.5). This refusal of authority without rational discourse does not imply a denial of autonomy of judgement. Rather, a bit earlier in the same chapter, arguments in moral and legal matters are described as depending on insight into the most basic rules of natural law that are common to all (adult, healthy) persons:

> [W]e conceive that there's no Man of proper Years, and Master of his Reason, so desperately dull and stupid, as not to comprehend, at least, the most general Rules of Natural Law, and those which are of the greatest use in Common Life, and not to discern the agreement they bear to the Rational and the Social Condition of Mankind.
>
> (JNG, 1.3.3)

This insight is not peripheral to Pufendorf's natural law theory. Pufendorf takes this common ability to identify courses of action that are in agreement with human nature to be a requisite for our ability to act according to natural obligation. In his view, natural obligations "cannot be fulfill'd by him, without he understand his own Nature and the Ways of Working" (JNG, 1.1.7). This is a kind of reflective knowledge found not only in philosophers (even if only they can use it as the starting point of the 'art' of deductive reasoning) but also in common people since otherwise it would be impossible for common people to fulfil natural obligations. The same commonly shared reflective capacities are built into Pufendorf's notion of moral entities. The concept of moral entities is introduced in a paragraph that counts the capability of reflection among the capabilities essential to humans:

> [W]hatever is endu'd with Understanding, can from the reflex Knowledge of things, and from comparing them with one another, form such Notions as may prove very serviceable in the direction of an agreeable and consistent Faculty. Moral Entities are of this kind; the Original of which is justly to be referr'd to Almighty GOD, who would not that Men should pass their Life like Beasts, without Culture and without Rule; but that they and their Actions should be moderated by settled Maxims and Principles; which could not be effected without the Application of such Terms and Notions. But the greatest part of them were afterwards added at the pleasure of Men, as they found it expedient to bring them in, for the polishing and the methodizing of Common Life.
>
> (JNG, 1.1.3)

Thus, moral entities are not formed by the reflection of philosophers. Philosophers can only analyze the moral entities that shape social reality because these entities have already been formed by the reflective capacities common to all (grown-up, healthy) human beings. And while those entities that depend on the "pleasure of Men" can be plausibly known through

reflection on the social roles imposed on us, those moral entities imposed on us by God require reflection on human nature.

A passage from Pufendorf's *Specimen controversiarum* gives a hint at the structure of reflection involved in the human imposition of those moral entities that belong to natural law and clarifies how the human imposition of these moral entities depends on human nature. Pufendorf unambiguously rejects the idea that there could be standards of goodness common to humans and God (*Specimen*, 138). However, this does not imply that he rejects the idea that reflection about human nature could guide the imposition of moral entities:

> As to the term "imposition," it has to be noted that this is not taken as strictly by me as by most others, standing in such a way for a determination that arises alone from the liking of the one who does the imposition, without any foundation in the thing. But those are said by us to arise from imposition which cannot fail to follow from the given will and disposition of the author if he wants to remain consistent with himself.
>
> (*Specimen*, 139)

Pufendorf's idea seems to be that some moral entities have to be accepted to uphold consistency with antecedent acts of the will. The moral entities belonging to natural law are those required to remain consistent with acts of the will that arise from our natural needs. The relevant acts of the will occur "because God has freely assigned such a nature to a human being and such a goal that certain actions cannot fail to be appropriate or inappropriate for him" (*Specimen*, 139). This passage indicates that human imposition of moral entities belonging to natural law requires reflection to establish coherence between mental states. We start from what we already want or reject on the grounds of what we take to be appropriate or inappropriate for us. What is appropriate or inappropriate for us depends on our natural dispositions. Having insight into our dispositions requires reflective knowledge, and reflection tells us what ways of regulating our actions fit our natural desires and aversions.

Is there a tension between assigning to reflection a function in the human imposition of moral entities and the use of humanistic commonplaces in Pufendorf's treatment of simple esteem? I do not believe so. For Pufendorf, the ethical aspects of the presumption of goodness are the outcome of reflecting upon the natural capacity of reflecting common to all humans. Reflection upon this capacity leads to the presumption that others have the natural inclination to act according to what is naturally good for them, and due to the similarity between the needs of all human beings what is naturally good for others will tend to be the same as for ourselves. Reflection also tells us that holding others in simple esteem until and unless contrary evidence becomes available—is itself naturally good for us. What is naturally good about holding others in simple natural esteem can be seen in the

various functions that Pufendorf ascribes to the presumptions of goodness: It gives rise to natural obligations that secure rights—the rights of heirs of those who passed away intestate, the rights of those who provide administration of the affairs of those who cannot do so themselves, and the rights of those in extreme need—even when positive laws and public administration do not adequately secure these rights. It helps overcome negative social emotions such as fear and distrust and encourages positive social emotions such as trust and friendship. In this way, simple esteem is a moral entity that we impose upon physical nature because it regulates human action in a way coherent with human desires that arise from our natural dispositions. The legal commonplace that advises us to presume that others are good until and unless the contrary is proven can itself be understood as an outcome of reflection about what is naturally good for beings of our kind.

5. Concluding remarks: presumption, prudence, and trust

For Pufendorf, simple esteem on the level of natural law involves the presumption that others have ethically good character traits. The "honestus animus" that we presume to be present when we hold others in simple esteem (JNG, 8.4.3) goes beyond the intention to do whatever will procure honour and social esteem and also involves the intention to act according to what self-reflection tells us will be good for beings of our kind. This has illuminating consequences for interpreting Pufendorf's method of using humanist commonplaces. The aim of Pufendorf's conception of natural simple esteem is not only to provide historical insights into how certain social statuses have been invented in particular historical circumstances. Rather, as in the legal humanists, Pufendorf adopts an understanding of natural esteem grounded on assumptions concerning rational capacities essential for human beings. He uses a juridical commonplace such as the presumption of goodness to exemplify the insight that deciding rationally in situations of uncertainty requires reflection on human nature. This reflection is part of the activity of experts in the overlapping fields of humanist jurisprudence and natural law theory. The activity of experts has characteristics not found in the intellectual life of non-experts—such as the striving for conceptual clarity and argumentative order. But it could not get off the ground if it did not share something with the intellectual life of non-experts—namely, the very ability to reflect on what is naturally good for beings of our kind.

Pufendorf's natural simple esteem thus consists in the presumption that the other has the reflexive capacities required for understanding the basic norms of natural law and forming the desire to follow these norms. However, from the perspective of Pufendorf's insight into the foolishness and irrationality of many human actions, one might object that it would be

sensible to prepare for self-defense rather than trust other people's goodness.[11] Indeed, Pufendorf holds that "a thorough Knowledge of Human Malice and Fraud, in order to the avoiding and disappointing them, makes up a very considerable Part of Civil Prudence" (JNG, 7.1.4). However, he does not draw the Hobbesian conclusion that the relevant insight into human malice should take the form of a generalized presumption concerning natural inclinations to injure others. Rather, he analyses the need to take precautions against malice in terms of the juridical category of suspicion (JNG, 7.1.7). This is significant because suspicions are not generalized presumptions but evidence-based conjectures about particular cases. For instance, legitimate self-defense requires evidence that makes the suspicion that others intend to hurt us morally certain (JNG, 2.5.6; 8.6.5).

Again, Pufendorf's line of thought corresponds to legal humanism. For instance, in cases of homicide between closely related persons, the strength of the love and of the relations of mutual dependence presumed to bind these persons was taken to justify the presumption in favour of the absence of malicious intentions; however, signs indicating different personal relations were taken to support the contrary suspicion (Matthaeus, *De criminibus*, 543; 577). Likewise, Pufendorf restricts suspicions that could legitimately overturn simple natural esteem to evidence-based conjectures (JNG, 3.6.9; 7.8.6); and the same holds for suspicions that could legitimately overturn simple civil esteem (JNG, 8.4.6). This conception of suspicion suggests that prudence requires us to be attentive to evidence that may force us to revise the presumption of goodness in either the moral or the civil sense. But attention is not suspicion because, unlike suspicion, attention does not involve negative conjectures. Whereas suspicion is connected with diffidence (JNG, 7.1.7), attention isn't—at least not before evidence that supports suspicion becomes available. Neither evidence-based suspicion nor attention involves any generalized presumptions of badness. Being attentive to evidence fulfils the demands of prudence because it prepares for self-defense without undermining trust in the goodness of those who do not give troubling signs.

Giving up this trust would come at a considerable cost. Recall that Pufendorf assigns argumentative roles to the presumption of goodness that the presumption of civil dignity could not fulfil, as in the cases of inheritance without a testament, quasi-contracts, situations of extreme necessity, and the regulation of social emotions. A further positive function of the ethical aspects of the presumption of goodness derives from Pufendorf's view that civil simple esteem can be diminished through the legal status of *infamia* in two different ways. Certain offenses and professions can be punished by the loss of civic rights because the offenses and professions in

[11] I owe this objection to one of the anonymous referees.

question are commonly taken to be signs of vices (JNG, 8.4.6). Here, the impairment of civil simple esteem is accompanied by negative beliefs about character traits. In such cases, the qualities of the offenses and professions in question diminish not only civil but also natural simple esteem. In these cases, the presumption of ethical goodness is overturned.

By contrast, the *infamia* of slaves, children from non-marital relations, and the ones who live in exile derives only from civil law and should not involve any negative beliefs about character traits (JNG, 8.4.6; 8.11.7). Because these persons have not done anything intrinsically bad, their natural simple esteem remains intact. This difference has significant consequences for the treatment of those who lose civil simple esteem. First, Pufendorf notes that in antiquity it was taken to be unobjectionable to sanction such offenses that indicate vicious character traits with humiliating penalties, including public self-denigration (JNG, 8.4.7). Pufendorf does not protest, but he limits the realm of such punishments to crimes that carry with them infamy that arises from the act (*infamia facti*). This implies that similar punishments cannot apply to *infamia* that arises only from civil laws. Second, Pufendorf holds that the only persons who cannot make claims to the fulfilment of duties of humanity are those criminals who intend to injure others indiscriminately (as pirates do) (JNG, 8.4.5). This implies that those persons who have lost civil simple esteem without losing natural simple esteem retain a claim to the fulfilment of duties of humanity. In this way, upholding natural simple esteem sets substantial limits to treating persons who have lost civil simple esteem without committing any offense.

While the loss of simple civil esteem may occur relatively rarely, including ethical aspects in the presumption of goodness has far more general consequences for our attitudes toward others. Entertaining the presumption that others will be inclined to fulfil their natural obligation of cultivating peace has a naturally good function for human life. For Pufendorf, keeping in mind that the attitude toward others in the state of nature is not distrust and fear should remind us that we have a natural inclination and a natural obligation to cultivate friendship with others—an insight that Pufendorf also finds in a long series of commonplaces about civic friendship drawn from ancient thinkers such as Cicero, Seneca, Marcus Aurelius, and Quintilian (JNG, 2.3.15). In the sense that the ethical aspect of the presumption of goodness articulates the attitude toward others that Pufendorf regards to be natural, the presumption of goodness shapes our social emotions by directing us away from fear and distrust to a form of friendship and trust that is rational (because founded upon considerations concerning human nature) but not naïve (because revisable in the light of contrary evidence).

Disclosure statement

No potential conflict of interest was reported by the author(s).

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